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.

Cum in aliquâ causâ sententia manifesta est, is qui jurisdictioni præest, ad similia procedere, atque ita jus dicere debet. ff. 1, 3, 12.

VOL. III.

BEING VOL. V. OF THIS REPORTER.

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1819.

CHRONOLOGICAL

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

EASTERN DISTRICT, JUNE TERM, 1817.

East'n District.
June 1817.

BAYON vs. *TRICOU & AL.*

Bayon
vs.
Tricou & al.

APPEAL from the court of the second district.

This case turns upon a mere question of fact.

DERBIGNY, J. delivered the opinion of the court. The defendants sold to the plaintiff and appellant, some time ago, a plantation and negroes, on which the latter made some improvements. During the time he remained in possession he made several payments, and at times had recourse to them for aid in the payment of part of these improvements. Reciprocal accounts ensued between the parties, for the settlement of which the plaintiff and appellant instituted the present suit. By this time, the present defend-

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BAYON vs. TRICOU & AL.

ants and appellee had instituted a suit for the rescission of the sale. In that state of things the parties entered into a compromise, by which it was agreed to put an end to both suits; and, by consent, a judgment was entered, by which the sale was rescinded, and a sum of money, and a few slaves, adjudged to the present plaintiff and appellant, in full of all demands.

The items claimed from the appellees in the present suit bear date during the time he possessed the plantation, and are evidently part of the funds which were laid out on the plantation, or on its account; and even if all of them were not of that nature, they could not but be considered as included in the settlement which has taken place: a settlement which, to this court, appears to have contained all the respective claims of the parties, and by the result whereof the plaintiff and appellant has been paid by the appellees a balance in full of all demands.

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

Davesac for the plaintiff, *Morel* for the defendants.

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June 1817.

RALSTON
vs.
PAMAR.

RALSTON vs. *PAMAR.*

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

He who contracts to import goods for another, must strictly comply with the orders he receives.

This was an action for goods, wares and merchandize sold and delivered by the plaintiff to the defendant, and the general issue was pleaded.

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

By the statement of facts, it was admitted that the defendant received the property, which the bill of lading, annexed to the record, calls for, entered the same and secured the duties—that on opening the crates he called a survey and procured the report annexed to the record—that one witness, (Harrison) declared it was almost impossible to cause an order to be executed, so as to comply in all respects with the wishes of the purchaser—that the prices and qualities would frequently vary a little—that the goods were yet unsold, and in the state in which they were received.

It was agreed that the documents accompanying the record, should be read in the supreme court.

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These were a protest made by the defendant, before a notary public, and the report of the gentlemen called upon to view the goods.

The notary, in his protest, stated that, having called upon the plaintiff, he declared to him that certain goods, wares and merchandize, which he had caused to be shipped from Liverpool, in Great-Britain, in the ship Eliza, by order and for the account of the defendant, were not conformable to said order, being of much higher prices, and yet the quality of the goods of a very inferior degree, the price considered; and that the defendant had, as is customary, given bond for the said duties at the custom-house, and required the plaintiff to take back the said goods and merchandize, and to pay, or give counter sureties for the payment of the bonds signed by the defendant for the duties thereof: for and because the said goods, in their quality and price, were not what the defendant had ordered him to cause to be shipped: and also, that, as the defendant was willing to do, in this business, all that a reasonable dealer could do, upon the loss and inconveniences resulting from the premises, he was willing the whole affair should be left to the arbitration of two discreet merchants of the city, to be chosen, one by the plaintiff and the other by the defendant, and to be wholly

governed by their decision and award. To which the plaintiff answered, he had forwarded the order given him by the defendant, as he received it, and if it had not been executed, he was not to be blamed, nor would he have any thing to do or say further in the business.

By the report of the merchants, called by the defendant to view the goods, it appeared that they were of much higher prices than those ordered.

MATHEWS, J. delivered the opinion of the court. From the documents, accompanying the statement of facts, agreed upon by the parties, it appears that the plaintiff claims the value of certain china and glass ware, procured and purchased by him for the appellee, at the request and in pursuance of orders, given by the latter, which were not punctually executed. On account of the variance between the articles ordered by the appellee, and those procured and sent to him, both as to the things and their prices, he protested against receiving them on his own account, and refused to pay for them.

It is true he had them in possession, so far as was necessary for the purpose of entering them at the custom-house, and securing the duties. But, this act, as the goods were to be landed,

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RALSTON *vs.* PAMAR.

being equally beneficial to all who might be interested in the property, ought not to be prejudicial to him. It cannot alter the nature of the contract between the appellant and appellee. The former, as factor, or attorney, could only bind the latter to the extent of the authority given, which, if not exactly attended to, must free him from every obligation arising out of the agreement.

The evidence shews, that the orders of the principal were not executed by the agent, as they ought to have been.

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

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

FOSTER & AL. vs. *DUPRE.*

Interest cannot be allowed by the court on an unliquidated claim.

APPEAL from the court of the first district.

The petition contained two counts: the first for money laid out and expended by the plaintiffs for the use of the defendant, the other for money

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had and received by the latter from the former. Reference was had in the petition to an account annexed thereto, composed of several items, for lawyers, marshal, clerk and notary's fees, with the expenses of an express to Washington, amounting together to $1599 75: to which was added the sum of $896, for eight years interest. The charges appeared to have been incurred in defending the plaintiffs' ship, in a suit brought by the United States, for the breach of an act of congress, by the defendant, in putting several negroes on board. The defendant pleaded the general issue.

An action for money laid out and expended, or for money had & received, cannot lie against a wrong-doer by the party injured, to recover his consequent disbursements, on an implied promise of the defendant.

The district court gave judgment in favor of the plaintiffs for $2495 75, the sum claimed, with interest from the date of the petition, being of opinion, that "from the manner, time and place of putting the negroes on board, both the captain and shipper knew it to be contrary to law, and having combined in the transaction, they were both bound to make good the losses resulting from it."

The defendant appealed.

The statement of facts is subscribed by the counsel of each of the parties. It relates, that

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FOSTER & AL. *vs.* DUPRE.

the plaintiffs, in the year 1809, were owners of the ship Clara, which sailed from the port of New-York, on the 8th of January of that year, A. Tanal, master, bound for New-Orleans, on board of which the defendant was a passenger. When the ship had proceeded as far down as Governor's Island, or perhaps a little below, a boat came along side, from which two negro women, the property of the defendant, were received on board. The negro women were immediately put under the hatches, and there detained till the ship got to sea, when they were released and permitted to come upon deck. When the ship arrived at the mouth of the Mississippi, they were again put under the hatches until they were landed. At or after the arrival of the ship in New-Orleans, the consignees did not see the negro women on board. Information was lodged with the collector, that they had been brought on board of the ship, and she was seized and libelled in the district court of the United States, and condemned as forfeited to the United States. The plaintiffs spent in defending the suit $1449 75, and $150 in sending an express to the city of Washington, to obtain a remission of the forfeiture, as stated in the account annexed to the petition. The captain received the freight of said negroes and

the passage of the defendant: and about the time the ship was seized, several others were so, for the same cause, having come to New-Orleans from Baltimore and Charleston.

Clark for the plaintiffs. There cannot be any doubt of the plaintiffs' right of recovery on the merits. As to the form of the action, that of assumpsit has been resorted to, because it is, in its nature, always an equitable one. It is a general description of all the cases in which it lies, that the defendant is bound by ties of natural justice and equity, to reimburse monies which have been paid for his benefit. Indeed, it is considered in the books as a *generic* action, applying to almost every possible description of cases, resulting from the dealings and transactions of men, in this age of commerce; *comprehensive* in its meaning, *efficacious* in its remedy. It has its origin in contracts, either express or implied, for the purpose of affording a remedy, whenever an injury has been received, either through mistake, deceit, misrepresentation, imposition or oppression. Courts of justice will lend a ready ear to the suggestion of an implied promise.

Assumpsit lies to recover back money paid under a mistake, or through the fraud of the party. *Beze* vs. *Dickson*, 1 *T. R.* 281, *Hassar*

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vs. *Wallis*, 1 *Salk.* 28. To recover money of a consideration which happens to fail. 2 *Burr.* 1012, 1 *T. R.* 732, 2 *id.* 365, *Shelton* vs. *Rastal.* To recover money paid to any person acting under a void authority, *Robertson* vs. *Eaton*, 1 *T. R.* 59, *Jacob* vs. *Allen*, 1 *Salk.* 26. *Allen* vs. *Dundas*, 3 *T. R.* 125, or money obtained by fraud, extortion, imposition, oppression, or taking an undue advantage of the situation of another. 1 *Burr.* 1012, *Arlly* vs. *Reynolds*, 2 *Strange* 915, *Smith* vs. *Brownley*, *Douglas* 671 *Crockehst* vs. *Bennet & al.* 2 *T. R.* 763—or money that has been embezzled, or which any person has been defrauded of by cheating, or otherwise. *Whip* vs. *Thomas*, *Bulier's N. P.* 130.

Injuries received from any circumstance, originating in *mala fide*, the general current of authorities say may be reached by the *action for money had received*. *Clark* vs. *Shee & al. Cowp.* 197. *Trelhane* vs. *Terry*, *Bull. N. P.* 131, *Moses* vs. *M'Farlane*, 2 *Burr.* 1005. 2 *Black. rep.* 219, *Jaques* vs. *Goulingsly*, 2 *Black.* 1073, *Jacques* vs. *Wethy*, *H. Bl.* 65 *Browning* vs. *Thomas*, *Cowp.* 79.

As a general rule, I may say that *indebitatus assumpsit* will lie in every case, when the law or the circumstances of the case give a claim to the plaintiff.

Porter for the defendant. The plaintiffs must fail, for the evidence, which they have introced, does not support the facts alleged in the petition. There is no evidence of any promise on the part of the defendant, who therefore has only to answer *non in hœc fœdera veni.*

Besides, the plaintiffs cannot complain that the defendant put on board of their ship, slaves, which they, through the master of her, willingly received.

Finally, the judgment must be reversed, at least for the interest which has been allowed before the beginning of the suit: for there was no demand, and the claim was unliquidated.

MARTIN, J. delivered the opinion of the court. The judgment of the district court is certainly erroneous in the allowance of the sum of 896 dollars, for interest during eight years, preceding the inception of the suit. There is not any stipulation for conventional interest: the sum claimed is an unliquidated one. We are at a loss to see on what ground any interest was allowed for any period antecedent to the suit: no other demand of the money claimed appearing to have been made. For this reason, the judgment must be, and is annulled, avoided and reversed.

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Proceeding to inquire what judgment the district court ought to have given, we find the action brought on an illegal contract, and we seek in vain for any agreement, to which the defendant gave any express or implied assent.

The facts are, that the defendant came out a passenger in the plaintiffs' ship from New-York —that in the narrows a boat approached the ship, and put aboard two slaves, the defendant's property, who were concealed under the hatches, so long as the ship was within the reach of officers of the customs, both in New-York and in the Mississippi—that the ship was seized on account of these slaves, and that the plaintiffs incurred the expenses, stated in their account, in order to procure her to be restored.

The case is that of a tort or injury, from which may result an obligation to pay damages: but, the plaintiffs have chosen to turn it into a promise to pay certain costs, which they have incurred, and which they allege were paid at the request of the defendant. If he promised to pay these costs, an action certainly lies on his promise. If they were paid for him, and at his request, an action equally lies on the promise, which the law raises. In neither case will he with success, contend that he committed no tortious act.

The plaintiffs' counsel has cited a number of authorities from English books, tending to shew the extension given to the action for money had and received. But they are all cases of money received by the defendant. Neither in Great-Britain, the United States, nor in any country in which the distinction between actions grounded on contracts is known, was it ever successfully alleged that the commission of a tortious act is evidence of a promise to repair the injury done, by yielding damages.

The plaintiffs, by the nature of their action, have alleged a promise as the basis of their claim.

The defendant has put this promise in issue—there is not any evidence of an express promise, and the law does not warrant us in declaring that there is an implied one. It is true, a tort is set forth in evidence, but as the nature of the pleadings did not authorise the defendant to defend himself against this charge—as the promise, if really made, admitted it, or waved the right of offering any thing in opposition to the charge, we cannot consider the question how far the plaintiffs have a right to indemnification.

It is therefore ordered, adjudged and decreed, that judgment be entered for the defendant, with

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costs of suit in both courts, without any prejudice to the plaintiffs' claim for damages, if any they have.

ST. AVID vs. *WELMPRENDER.*

APPEAL from the court of the first district.

Acts of the legislature are not in force immediately after they receive the governor's signature, but after promulgation.

MARTIN, J. delivered the opinion of the court. The plaintiff moved the court of the first district to dissolve an injunction, which the defendant, without giving any security had obtained on the 12th of February last. He shewed that, on the same day, there was lodged, by order of the governor, in the office of the clerk of that court, the copy of a law, approved on the 20th of January, which inhibits the grant of an injunction, without taking security.

The defendant resisted the dissolution, shewing that the injunction could well be granted, without taking surety, as acts of the legislature are not in force in the parish of Orleans, in which the court of the first district sits, till three days after their promulgation.

The court below overruled the objection, considering that "acts of the legislature are in force, in the parish of Orleans, three days after the approbation of the governor, and, in the other

parishes, a certain number of days, according to the distance, is allowed, before the law is considered as promulgated in each of them. This seems to be the only act of the governor in promulgating the laws. The act of transmitting copies of them to the different authorities is not a promulgation of them to the people: but merely that the authorities may havethe earliest possible information of what the laws are, and this is not the act of the governor."

To this opinion the defendant excepted and the present appeal is taken on the bill of exceptions.

Before the civil code, the precise time, on which the laws of the state were to begin to have effect, not being determined by any positive law, it was holden that their effect began as soon as they had received the governor's signature. The code tells us, that as the laws cannot be obligatory without being known, they shall be promulgated by the governor. *Civil Code* 2, *art.* 4.

The promulgation here spoken of is a means of making the laws known—the subscription of the governor's name to an act goes but a very little way towards making it known. Its object is to sanction it, and it would be vain to order, as an act of promulgation, one which was indispensable to the confection of the law. The con-

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clusion is forcibly impressed on the mind, that as the governor is directed to promulgate, and the law cannot be obligatory without being known, the promulgation must be a means of making public what has been sanctioned as a law—it would have been absurd to have said, as the laws cannot be obligatory without being known, the governor shall sign them, while the ordinance of 1787, the then constitution of the country, required this very signature, for the existence of the law.

After directing the promulgation, we are to expect that the code should inform us of the mode of promulgating; and in the same article, immediately after the injunction to promulgate, we find it said that the laws shall be directed to the authorities, in the form and manner which is or may be prescribed, to insure their utmost publicity. This was to be effected by sending manuscript or printed copies to the officers, or by publication through the news papers—in neither case is the governor's personal agency absolutely required. He may direct the sending or publishing the copies, and the code imposes no other obligation but that of seeing it done. If the legislature appointed a printer and made it his duty to print and send copies, or directed any officer to transmit the laws, the governor is

still bound to see the injunction obeyed. If, without his act, the laws be promulgated and become known, the execution is not to take place till the directions of the code be complied with, though without any interference on his part.

To interpret the code, so as to render the signature of the governor a sufficient promulgation would be to adopt the cursed exposition which corrodes the viscera of the text.

With regard to the law alluded to in the bill of exceptions, we notice, annexed to the copy sent by the governor, a resolution of the legislature, bearing date of the 1st. of February, when three full days had passed since the law was signed by the governor, (and when, according to the construction of the district court, it was not only promulgated but already in full force in the parish) requesting him to have printed in the shortest possible delay 150 copies of it, and to promulgate the same by forwarding immediately to each of the clerks a copy of said law.

We therefore conclude that the district court erred, in considering the law as in force in the parish of Orleans, three days after the governor's approval of it, and as there is no evidence before us of any other promulgation, than the transmission of the copy, to the clerk of the

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court on the 12th of February, eleven days after the resolution ordering the printing, we conclude there was no promulgation before that day. As it is not alleged, we cannot presume that the promulgation was made on that day, before the grant of the injunction, in which case, it would be proper to consider whether, as the code requires that the laws should be executed through every part of the territory from the moment the promulgation shall be known, and declares that the promulgation shall be supposed to be known three days after, &c.—the law would not be in immediate operation at the time of granting the injunction, if a copy was before that time in the possession of the court.

It is ordered, adjudged and decreed, that the order of the district court dissolving the injunction, be annulled, avoided and reversed, and that the court be directed to reinstate it and grant a new writ of injunction, if needed, and proceed in the cause as if the injunction had not been dissolved, and it is further ordered that the plaintiff and appellee pay costs in this court.

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

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PETIT vs. *GILLET.*

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

A judgment of discontinuance cannot be pleaded in bar to another suit brought for the same cause of action.

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellee instituted this suit for the recovery of a negro woman and child.

The defendant pleaded in abatement, in bar, and the general issue. In abatement another suit pending between the parties for the same cause of action: in bar, a final judgment in his favour in a former action, and title by prescription.

The only evidence offered in support of these pleas is the record of a suit heretofore instituted, between the same parties, and for the same cause of action. It is clear that this evidence does not support all the pleas, and it is believed that it is not sufficient to support any one of them.

The former action could not be finally adjudged, and still pending at the time that the defendant filed his answer in the present, and although it does not clearly appear from the record of the present suit, that the judgment of discontinuance pronounced in the other, was already given at

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the time of filing the answer, yet as the first suit is pleaded as *res judicata*, and as the time allowed to the defendant to answer, after he was cited comes down to a date later than that on which the judgment of discountenance seems to have been pronounced, we assume it as a fact that the judgment was prior to the answer and consequently the plea in abatement is not well sustained.

The record of the former suit shews that, after the trial had been proceeded in, so far as to examine several witnesses, the plaintiff moved the court for leave to discontinue, and a judgment of discontinuance was accordingly entered, the effect of which it now becomes necessary to examine.

It is a general rule of proceeding, in courts of justice, that a plaintiff may discontinue his suit at any time before entering on the trial of it. Such a discontinuance subjects him to the payment of costs, but does not hinder him from supporting a new suit for the same cause of action. We are of opinion that it comes within the legal discretion of a court, before which a suit is pending, to permit the plaintiff to discontinue even after entering on the trial: and there cannot be any doubt of the effect of the discontinuance being the same in both instances—leaving to the

party the right of renewing his suit. If we are correct in laying down these rules the plaintiff and appellee is not bound by the judgment of discontinuance.

The defendant and appellant claims title to the slaves, who are the subject of this suit by prescription. Without entering into an examination of the various periods and different durations of time, necessary to create a title to property, according to our laws of prescription, it suffices, in the present case to observe that there is no evidence which fully supports the defendant's claim, under a prescription of twenty years, on which he seems to rely.

In relation to the original title, as contested between the parties, it is true that a contrariety of testimony is exhibited. By witnesses on different sides, facts directly opposite are sworn to. Here is evidently false swearing, it is hoped, through mistake. This court is not in possession of any better means of ascertaining the truth, by weighing the testimony, than those which were in the power of the parish court. It is thought that the conclusions, as to the facts then made, are as correct as any that could be here formed.

Thus far, we discover nothing erroneous in the judgment of the inferior court. But in

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awarding damages to the plaintiff, for the detention of the slaves, it is believed that the court erred. They were sequestered ever since the commencement of the suit. In all probability they have been saved to the plaintiff by the act of the defendant, in bringing the mother from St. Domingo, when the fortune of all the inhabitants of that place had been destroyed by the revolution. The defendant had a right to hold them in possession, without being answerable in damages, till the title of the plaintiff should be fully established by a competent tribunal. It appears also, from the contrariety of the testimony, that he held the slaves in good faith, believing them to be his own property.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed: and, proceeding to give here such a judgment as in our opinion the justice of the case requires, it is further ordered, adjudged and decreed, that the plaintiff do recover from the defendant the negro woman sued for, and her children, with costs in the parish court, and that he pay the costs of the appeal.

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JULY TERM, 1817.

RAMSEY vs. *STEVENSON.*

APPEAL from the court of the first district.

If a debtor assigns all his estate to trustees, for the benefit of his creditors, any part of it may be attached before they obtain the possession of it.

On the 3d of October, 1816, Stevenson, being in embarrassed circumstances, assigned over all his estate to M'Culloch and Holmes, his trustees, for the benefit of all his creditors. The parties are all citizens and residents of the state of Maryland, where the assignment was executed. This instrument is made according to the forms in use in that state, mentioning particularly a large amount of property, worth, probably, half a million of dollars, and, generally, all the estate, real and personal, of the assignor.

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After this assignment had been made, Ramsey, one of the creditors, sent here, and attached goods belonging to the estate, to the amount of his debt, (which is admitted to be due) in the hands of the garnishee.

The assignees in the district court below, interposed their claim, as possessed of the property under the assignment, and pleaded it in bar of this attachment; but the court declared the assignment void—that it did not vest the property assigned in the assignee, and gave judgment for the attaching creditor.

From this decision, the present plaintiff appealed to this court.

Stannard, for the assignees. There are two principal points to be decided. We contend

1. That the assignment of Stevenson, of all his estate, to the assignees, vested in them the right which he had in the property assigned.

2. Supposing the assignment to have had that effect, the property ought to be restored to the assignees, notwithstanding the proceedings in the court below.

I. It is a clear proposition, that every man has a right to dispose of his property as he pleases. Exceptions to this rule are admitted

to exist—they will be all noticed. The question is, whether or not the property in New-Orleans passed by the assignment—and that it does so pass, cannot be doubted, unless there were some positive law of this state to prohibit it—we know of no such impolitic law, and believe it cannot be found in the statute book. If there is such a law, let it be produced. Will it be contended that this assignment is not good by the laws of Maryland? Such an argument must completely fail—the citizens of that state, by its constitution and bill of rights, are governed by the English common law. The proceedings of their courts are according to the course of the common law. It is unnecessary to inquire whether the general system of those laws be wise or not. The court do not require to be informed of this—we will not attempt to give information on this subject—but we do call on the counsel to say, whether any statute of Maryland forbids the assignment. If they cannot do this, the court will presume that what has been done, has been done correctly; since, as to this particular, nothing to the contrary is shown. Now, as all the parties are citizens of Maryland, they are bound by its laws. This rule will not be controverted. Then the true question is, what would the courts of that state

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say of this assignment? If the conveyance is in compliance with the laws of a sister state, and all the parties are citizens of the place where the assignment was made, will this court interfere, and in effect declare those laws a nullity? This would go but a little way to preserve the independence of states and the harmony of their laws. Is there not a certain respect due fro one country to another, which has ever induced courts to recognize the laws and the rights of citizens and subjects, even of a foreign country? The reason of the law is much stronger with citizens all of the same republic. This too is a necessary co ity, a necessary courtesy, observed in every court. It is not a matter of speculation—it is not theory alone—it is a practical principle, and grounded on the laws of nations—and it is on wise principles, that foreign states acknowledge and act according to the different civil relations which subsist between men in their own country. 2 *Hen. Black.* 469. It is unnecessary to cite jurists on this subject. The most industrious research might be defied to produce an authority to the contrary. The practice prevails in every government. What was said by Lord Loughborough, in the case of *Hill vs. Warswick*, *Hen. Black.* 630—1, which was a proceeding very similar to the pre-

sent, is peculiarly applicable. "If the bankrupt happens to have property which lies out of the jurisdiction of the laws of England, if the country in which it lies, proceeds according to the principles of well regulated justice, there is no doubt but it will give effect to the title of the assignees. The determinations of the courts of this country [England] have been uniform to admit the title of assignees." We believe this court has never been censured for a want of due respect to the laws of a sister state: on the contrary, the most liberal views have guided its decisions. In this case there is not—there cannot be—any imputation of fraud.

But we are now to investigate the question, how far this assignment operates? To make the way as clear as possible for the decision of this court, let us see whether this actual or voluntary assignment does not vest the property in the assignees, to the same extent as an assignment would do under insolvent or bankrupt laws? We make this inquiry as, if the effect is the same, the cases heretofore decided upon both species of assignments, may be safely relied on, because analogous to the laws of the state of Maryland. A voluntary assignment, and an assignment under laws, are frequently spoken of in the books (when the subject of property

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in the assignees is agitated) as synonymous—and there are many decisions to this point. Thus, in the case of *Cleve* vs. *Mills*, *Cooke's Bank. Laws*, 370, *last edit.* Lord Mansfield decided, that "assignments under commissions of bankruptcy, are considered as voluntary assignments." So in another case, *id.* 372, that same judge decided, that a debt might be recovered in England, due to a bankrupt in a foreign country, where the law obtains analogous to the English bankrupt laws, which other countries will take notice of, and consider in the same light as if the bankrupt law made an actual assignment." By actual assignment, his Lordship must undoubtedly have meant, a voluntary assignment, agreeably to his own, and other opinions, expressed in former cases. The same decision was also made so long ago as the case of *Captain Wilson*, *id.* 373, decided by Lord Hardwick, in 1752—6. And, with a view to the same principle, Lord Kenyon, in delivering the opinion of the court, in *Hunter* vs. *Potts*, *Term rep.* 193, which involved an inquiry into the effect of an assignment, in a foreign country, made under the British bankrupt laws, proceeds to state the question to be, "whether or not the property passed by the assignment in the same manner as if the bankrupt had assigned it by

his voluntary deed." And here it may be proper to notice particularly the opinion of the court of king's bench, in the case just cited. The decision went upon the ground, that an assignment under the bankrupt laws, and an assignment voluntarily made, *i. e.* without the coercion of the law, were the same. Erroneous opinions have been entertained with respect to the true meaning of the word "voluntary." It has been contended, that this word, (frequently used in the books) means without a valuable consideration; but it is impossible to consider it in that light—when Lord Kenyon says, that it means a voluntary act, as contradistinguished from a compulsory act by law. Now, it is impossible for the gentleman on the other side to shew that the assignment of Stevenson, as respects the property assigned, operates in England, in the state of Maryland, and, with respect to citizens of that state, in this state, differently: the effect is the same.

If what has already been said be correct, there is nothing now to embarrass an investigation of the truth of the first proposition.

It is material to observe, that this controversy relates to *personal* property. It is assumed as a correct position, that by the law of na-

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tions, (and it is not known that the municipal laws of any country forbid the principle) *personal* property is subject to that law which governs the *person* of the owner, *Vattel, b. 2. c. 7 s.* 85. *c.* 8. *s.* 109-10. The *Lex Domicilii* always prevails, *Huberus*, 3 *Dall. Rep.* 370, *note*, thus states the rule in his *third maxim.* "By the courtesy of nations, whatever laws are carried into execution within the limits of any government, are considered as having the same effect every where," and in the case of *Sill* vs. *Warswick*, the court says, "It is a clear proposition, not only of the law of *England*, but of every country in the world, where law has the semblance of science"—and the court will not at this late day, overturn an ancient and well settled principle of jurisprudence. What then can be more evident, than that the assignment having been executed according to the laws of the place which govern the property and persons of the assignor, assignees, and the attaching creditor, this court will give the same effect to it, as would be given in the place where it was executed? If this court were left to make a rule upon the subject, would a different one be established? We think not. There is much good sense and justice in the principle—it gives to every man his right—Every one is

supposed to know the laws of his own government, but who is bound to know the laws of another? No one, unless he resides and trades there. It has been before observed that the British and Maryland laws are analogous.—Let us advert to the cases of *Sill* vs. *Warswick*, and *Hunter* vs. *Potts*, already cited upon this subject of dispute, between as ignees and attaching creditors. They put the question, in whom does the property assigned vest, at rest. These cases were decided upon great deliberation, in favor of the title of the assignees—In both of them a particular creditor had attached the property assigned. The question was whether he might lawfully do so? This was solved by enquiring into the title of the assignees, for if the property vested in them, it was needless to go any further. The creditor would have no right to attach.—But the assignments were made in England, and the property attached was, in both cases in America. There the courts were called on to say, whether the assignments conveyed those goods, and it was held that they did. Is there any thing in the case at bar, which will except it from the same rules as governed in these just mentioned? But possibly a nearer view of this case may be taken. *Ex parte Stewart*, 2 *Am. Law journal* 181, was decided by

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a very able judge, in one of the courts of Maryland. The case is interesting, for the very points now in controversy, were involved in its decision. Stewart had made an assignment of all his estate in trust for the benefit of two creditors only; and then applied for the benefit of the insolvent law of that state; but the court could not give him any relief under the insolvent law, because *p.* 187-8. "the act of the legislature was intended to confer a benefit on the debtor, and the ground-work of that benefit was, a surrender of all his property for the benefit of all his creditors." The learned judge then commen's upon the validity of a bona fide assignment, at common law, in Maryland, and declares it to be good there—but that the asignor is also subject to the com non law consequences of such an assignment, viz. that his person and future property are alwa s liable. This case is in poi t, and throws great light on the subject, Now Stevenson's assignment is made not under the insolvent laws of Maryland, but accordi g to the common law of that state, which according to Stewart's case is a good conveyance. It may be unfortunate for him, that he made this assignment, since himself and his future property are hereafter subject to the claims of his creditors, should the property assigned nap-

pen to be insufficient to meet them all: But this cannot alter the effect of the deed, or destroy the rights of creditors at large, to have an equal distribution of the property assigned, which it was the object of the assignment to give them.

II. As to the second proposition, whether the attachment here, will prevent the restoration of the property to the assignees, must depend on this, namely, whether it was the property of Stevenson or of the assignees, at the time of the issuing out the attachment. Has it already appeared satisfactory to the court, that the property belonged to the assignees? The gentleman opposed, will not say, that there was any fraud in this transaction; every one knows the contrary—well, if all this be so, what right had the defendant to attach? A man cannot seize my property, for a debt due from another—In *Lewis & Wallace, Sir T. Jones' Rep.* 223, it was decided, that when a debtor had assigned to a creditor property in payment of his debt, the assignor had no control over it; and that it was not subject to attachment by another creditor: Now what is the nature of this transaction of Stevenson and all his creditors upon the face of it? "I am embarassed," says the former "some of my creditors are harassing me with

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suits; they will sweep all my property away; I will assign it over for the benefit of you all." What court on earth, will not uphold so correct and honest a transaction, so just a distribution?

Again, we have not here to contend with a judgment in favor of an attaching creditor, in a court of the last resort, where it might be argued, that a court of competent jurisdiction having decided the question in whom the property was vested, that could not again be gone into; This is a splendid proposition, to be sure; a very general rule. But there is an exception in this very case, which shews the great length to which courts will go in protecting the property, (for all concerned) in the assignees. The exception governs the case at bar, and here it will be seen that courts have broken through that general rule, for the very purpose of giving effect to the laws of countries which recognize the rights of assignees. Thus in the case in 4 *Term Reports*, before cited, Blanchard had become insolvent, in England, at which time he had property in the hands of J. and W. Russel of the state of Rhode Island, and which one of the creditors attached after Blanchard had assigned his estate to assignees. The creditor received his debt under the attachment, the assignees not having time to interpose their claims, but going

over to England, they sued him there for the money, as having been received in contemplation of law, to their use. The court of king's bench, upon great consideration, gave judgment for the plaintiffs, because the property attached, by the assignment was vested in them, notwithstanding the conclusiveness of the judgment which had been given for the attaching creditor (the defendan) was strongly insisted on—such have been the uniform decisions of the courts of law, and courts of chancery proceeding upon the same equitable principles, have all along made the same determinations. In *McIntosh* vs. *Ogilvie*, cited in 4 *Term Rep.* 193 *note*, Lord Hardwick, on being told that the defendant, in that case, had not obtained judgment before the bankruptcy, said "then it is like a foreign attachment, by which this court will not suffer one creditor to gain priority, if no sentence were pronounced before the bankruptcy." Again, in *Solomons* vs. *Ross*, in chancery, 1764, cited in *Folliot* vs. *Ogden*, 1 *Hen. Black. Rep.* 131-2, *note*, *a*. the money which had been paid into court, by the garnishee, on a bill of interpleader, and which had been invested in stock, was ordered to be transferred to the assignees, and a note which the garnishee had given to the attaching creditor, to

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be delivered up and cancelled. In *Jollet* vs. *Duponthiew*, *ib.* before Lord chancellor Camden in 1769, where pending the attachment levied by English merchants in England, upon the property of the bankrupt of Amsterdam, and which he had assigned there—upon the prayer of the assignees, perpetual injunction was granted against proceeding in the attachment, and in the case of *Neill* vs. *Cottingham*, in chancery, in Ireland; there the garnishee had been taken in execution, and paid the money in his own discharge: the Lord Chancellor called in the assistance of several of the judges, and after great deliberation, compelled the attaching creditor to pay the money which he had received, over to the assignees. From these cases it appears, that however the question might be, between subjects of different countries, the policy of the law has been uniform with respect to assignees and attaching creditors, subjects of the same government, in giving full effect to the title of the former. It is unnecessary to repeat, that in the present case the creditor and assignees are citizens of Maryland, they are bound by the laws of their own state, which are the same, as governed the decisions just cited. "The consent of every subject is virtually included in the laws of England, and he is bound

by them accordingly."—*Lord Coke.* Now, it is no answer to these authorities to say, (if the fact were so) that by the laws of this state, such an assignment, entered into here, is not good. Such a law does not, in the nature of things, cannot affect this case. The gentleman must shew a law of this state declaring an assignment void, though all the parties are citizens of the state of Maryland, where it was executed. He must be prepared to go to this extent; for any thing short of it, we maintain, proves nothing against the rights of foreign citizens: but, as this cannot be done, the court will feel itself bound to protect the rights of the parties, be them who they may. In *Robinson* vs. *Bland*, 1 *Black. Rep.* 262, this doctrine is recognized and confirmed. A singular case is there put by Mr. Justice Wilmot:—"There are many contracts not good by the laws of England, yet good in other countries, as a contract for prostitution." It is not necessary to discuss the question, whether such a contract would be good here. The rule of law briefly is—in a controversy between citizens of any country or state, concerning personal property, the laws of the place where they reside must govern the decision of every court, wherever the contest may be carried on,

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But there are two cases which we are given to understand will be relied on by the defendant's counsel, *Le Chevalier* vs. *Lynch*, 1 *Douglas*, 170—and *Simonton's case*, 2 *Martin*, 102. The case in Douglass by no means contradicts the principles contended for. The action there was brought by the assignees of a bankrupt, against a foreign garnishee, who had been compelled to pay the money, by a judgment of a court of competent jurisdiction, the assignees not having interfered. The court very properly gave judgment for the defendant—for what could be more clear, than that a debtor, having been compelled by a court of competent power once to pay the money, should not be compelled to pay it again. It would have been manifestly most unjust to have compelled him to a second payment. But the assignees might have recovered the money back from the attaching creditor, as was done in the case of *Hunter* vs. *Potts*, and *Folliott* vs. *Ogden*. Nor does the case of *Simonton* in the least impugn the authorities cited for the plaintiffs. It is understood, however, that a very general idea has been countenanced in the inferior courts, that assignments, made in a sister state, although according to the laws of the place where executed, are a perfect nullity here—and that idea is said principally to

be grounded on this case: but would the learned judges who pronounced the decision be willing to say, that they intended to declare such to be the law? The case does not at all warrant the idea attempted to be drawn from it—on the contrary, when examined, the truth is the direct reverse. But if errors have gone abroad, it is due to the character of the bench to have it explained. Now, what is the case when fairly considered? No more than this—that a defendant in gaol could not make a cession under the laws of this state—nothing more. The counsel, to be sure, went widely into the validity of the assignment. The court, however, thought it unnecessary to decide upon the character of the transfer; but said, admitting the fairness and legality of it, it is perhaps, an obstacle to the *cessio bonorum;* for, by this transfer, the debtor has deprived himself of the means of complying with the requisites of our law. How deprived himself?—because he had made an assignment for the benefit of a few creditors only; and his estate being then vested in the assignees, put it out of his power to assign his estate here, as required by the laws of this state. The case of *Simonton,* then, is not a case against the present plaintiffs, but rather against the defendant—for the court goes upon the ground that the transfer

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vested the property in the assignees at Philadelphia. If the court had not considered, that such was the effect of the assignment, the property must have remained in the insolvent, who then might well have assigned it here, and had the benefit of the insolvent laws of this state.

Duncan, for the attaching creditor. The principles laid down in the case of *Hunter* vs. *Potts*, relied upon by the counsel of the assignees, are not applicable to the present. The two cases are absolutely dissimilar. The discharge in that case was under an act of bankruptcy—all the property was, agreeably to bankrupt laws, to be fairly and equitably distributed amongst the creditors. Any thing like preference—any thing like advantage taken of the debtor or creditor—is destroyed by such laws. But in this Stevenson assigns his property to whom he pleases; he names his own trustees; he prescribes his own terms; he gives his trustees the power of paying themselves in preference to any other creditor; and the residue then goes to whom? To those creditors who will sign a release within a certain period. In the first place, the assignees do in fact take all the property; for they must pay themselves first—and then, and only then, the other creditors come in.

If no property remains, the excluded creditors are deprived of all remedy. Here is downright and unjustifiable preference. In *Hunter* vs. *Potts*, no such preference existed, or could exist. Every thing was distributed as the law commanded. Here every thing must be done at the will of Stevenson. Besides, after pouring out nearly all his favors on the assignees, if any thing remains to evince a fondness for any others, it is only to those who will discharge him within a certain time. Here are terms most positively imposed upon legal, honorable creditors. This court will consider the arrangement of Stevenson as it merits; and will then say whether *Hunter* vs. *Potts*, can assist the plaintiffs in their unwarrantable demands.

It is unnecessary to argue, whether an assignment under an insolvent or bankrupt law would include the property attached; which ever way that question is decided, will not affect the present case. This is a voluntary assignment of Stevenson—and we contended that in principle, and upon authority, the creditor had a right to attach the property in dispute.

The principles of law prevent the property in New-Orleans from being comprehended in this assignment. Admit, for argument's sake, the validity of this instrument, we then say, that

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all voluntary assignments made by the debtor are, when accepted by the creditor, in the nature of a contract between them. Those creditors who accept it are bound by its terms; and unless a special law of Maryland exists, which makes it, when agreed to by a majority, binding on all the creditors, there is no contract between the debtor and those who do not accede to the instrument. Ramsey never agreed to this assignment—he had a right to do so, if he pleased —by not doing so, he is not bound by any stipulation contained in it. The very act of creditors accepting payment under it, proves that some agreement must be necessary to make it binding on them; this is exactly a contract. By not acceding to the contract, they may use all legal remedy to obtain payment; because, when they consent to receive payment from the assignees, they agree to take part for the whole of their debts; when they do not consent, their debts remain in the same state, undiminished and in full force against the debtor. Now, apply this principle to the present case: the property of Stevenson, he assigns over for the benefit of those creditors who will sign the release. Those who accept this condition are bound. Ramsey would not; of course the contract did not extend to him: the law will then give him the

power to obtain satisfaction in the best manner. Besides, because a creditor refuses to accede to an instrument, made according to the mere will and disposition of the debtor, because some of the creditors think it better at once to accept part of their debts than to incur the danger of losing all, is an honest *bona fide,* vigilant creditor, as Ramsey unquestionably is, to be deprived of his right? This court will never sanction such a principle.

Again: in voluntary assignments, a debtor can only assign property within his controul, without violating any law of the country where some of the property assigned may be stipulated. We assume this as a correct principle, that though an assignment may be good in the country where made, and it is to be partly executed in another, where the law is different, no court of that country would give such part their sanction, otherwise they would violate those oaths which impose upon them the necessity of administering justice according to the laws of their own state. In Louisiana, its laws are paramount; none others dare come in competition with them; if not, we are without law, and, of course, without justice. A statutory provision enacts, that unless three-fourths of the creditors are willing to discharge the debtor, he still remains bound.

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Another law of this state declares, that no preference shall be given to any creditor. Now, part of this assignment is to be executed in New-Orleans; that part is in direct contradiction to its laws, and cannot, surely, be enforced. Now, to this it is no objection to say, that it is personal property in dispute, and, therefore, must be governed by the laws of the country where the owner is domiciliated. This is a correct principle when it does not countervail any law of that country where the property is situated. We call to our assistance the so much boasted case of 4 *Term Rep.* 193, for a positive confirmation of this principle---Lord Kenyon's opinion beginning with "and that it does so pass," &c. We, therefore, contend that, from this undeniable authority in our favor, the rules regulating this property in dispute, must be according to the laws of Louisiana and not of Maryland.

We still go upon principle, and further contend, that there is a great difference between an assignment made under an insolvent or bankrupt law, and a mere voluntary one of the debtor. The word voluntary means, without a valuable consideration. This is the word, and meaning given to it as used in English statutes, contradistinguished from a valuable consideration; as an example, the statute 27 *Eliz. c. p. 4th*, is parti-

cularly referred to, and 1 *Atk.* 94, gives the same meaning, 2 *Vezey* 11, is an authority completely in support of our position. Hardwick there held that a voluntary conveyance, though without fraud, is void against creditors, if indebted at the time. Even a good consideration, one depending upon the relationship of the deb or, is not sufficient or able to divest the property so as to cut out the rights of a creditor. In all cases where assignments for the benefit of creditors, made in another country, have been ratified by courts, those assignments have been made under insolvent or bankrupt laws, and were not the voluntary ones of the debtor. We are not disposed to question the validity of these decisions, because they do not affect the present case. But no case can be produced ratifying, in the same extensive manner, an assignment made according to the mere will of the debtor alone, who may prescribe his own terms: these terms, when accepted by the creditors, are then binding, and only then, agreeably to the principles before laid down, that it is but a contract. Besides, if a voluntary assignment were as effectual as one executed according to the provisions of a bankrupt or insolvent law, where would be the necessity of calling it a voluntary one? The term must certainly be employed for distinction's sake; if not,

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there is, then, no difference in these species of assignments. The word "voluntary," must mean something or nothing. If it have any meaning at all, it would evidently convey an idea of distinction, that the law and the courts did not give it the same interpretation or effect; that, in fact, it must be viewed as a conveyance totally different from one executed according to a law: if it can convey no meaning at all, the word is unnecessarily employed, and only produces error and confusion.

Another principle of law, on which we rest this case, will easily present itself to the attention of this court. This property cannot be comprehended in the assignment of Stevenson, unless the assignees had a delivery of it. The assignment itself did not give them this delivery, and we venture to say that no decision can be produced which would support such an argument. A delivery must be actual or legal: no actual one was given in the present case, and we conclude there was no legal. This assignment is to be considered in the same light with a transfer of the property of the debtor to his assignees. Taking the opposite side on their own ground, we must suppose it to have a valuable consideration, and therefore very much bearing the features of a sale. To effectuate a transfer

there must be a tradition of the thing transferred—a legal *bona fide* tradition. The will of the debtor alone will not give the delivery. If the property was corporeal, it should, to have given the title to the assignee, so as to cut out this attachment, have been absolutely put into the possession of the assignees or some agent in this city for their use; if incorporeal, the titles or the documents necessary to constitute the title, should have been received by him for their benefit. In support of these principles we cite the important case of *Dumford* vs. *Brooks' Syndics*, 3 *Martin*, 222—where the point for which we are contending is luminously handled in the opinion of the court. We refer the court with great pleasure to this decision, as containing all the doctrine on this subject. But one citation we will make, it is this: the court are speaking of the requisites of a good delivery, and in arguing on this point they say that "delivery may take place by the actual consent of the parties," this principle with redoubled force applies to this case; none of the other requisites of a delivery are complied with by Stevenson's assignees:—Ramsey refuses to consent to the transfer of the property, which is one of the requisites laid down by the court, and of course as regards Ramsey, there is no delivery:—

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It will therefore follow that, as to him or any other creditor who refuses to subscribe to the assignment, the property of Stevenson is open to an attachment. This is our case exactly; on this principle we attach the property: and on this principle we claim it at the hands of the court.

We will now present the court with a few cases, and will premise that so many have come up in examining this subject, that it would tax their attention to submit them all. The most prominent will be produced.

Kirby 313. *Taylor & al.* vs. *Glary & al.*—We think it a strong case in support of our claim; we merely quote the books for the court, without relating the points on which these cases turned, or the principles decided. In support of the point settled in Kirby, we agree that, in these American states, there is no difference between them, as considered among themselves and any foreign country. Each state is independent; its laws are not extra-territorial; in all their proceedings they consider each other as a foreign state. The constitution of the United States views them in the same light, each governing itself, without the interference of any other. The opposite side in their argument admits the independence of the states. If so,

the case in Kirby completely applies. The court there held that a commission of bankruptcy in England did not comprehend the debtor's effects in Connecticut. England and Connecticut were foreign and independent countries. If the principle above laid down is true that each state is foreign as regards the others, this court agreeably to the "*stare decisis*," will hold that this property would not pass under an assignment, executed according to an insolvent or bankrupt law, much less under the present voluntary, objectionable, and unjust one. 2 *Johns. Rep.* 198. *Smith* vs. *Spinola*, the court laid down a rule which we contend applies irresistibly to the present case. "The *lex loci* must govern in the construction of contracts, and the remedy on them must be prosecuted according to the laws of the country in which the action is brought." 7 *Johns. Rep.* 117, *White* vs. *Canfield*, confirms this doctrine. The remedy, in this action, is sought for in this court; that remedy must according to the laws of this state. 3 *Dallas* 369, *Emory* vs. *Greenough*, decided by judge Iredell, will shew the court the opinion entertained by that able judge, of the nature and extent of discharges under insolvent or bankrupt laws. In 1 *Washington's Rep.* 199 *Payne* vs. *Dudley*, the court in speak-

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ing of an insolvent's discharge, says "that courts of equity never interfere to deprive the plaintiff at law of any legal advantage which he might have gained, unless the party seeking relief will do complete justice, by paying what is really due." By plaintiff at law, the court meant a creditor who had resorted to the law for the satisfaction of his debt.

Lord Hardwick, in 1 *Atkins* 153, *ex parte* Ward, evinces his partiality to honest, *bona fide*, creditors. One of the principles in that case is that a creditor may either prove his debt under the commission, or pursue his debtor at law. This is our case, Ramsey would not accept of a share under Stevenson's assignment, and had pursued his debtor at law. *Dougl.* 160, The assignment of a bankrupt's estate is binding only in the state in which it issues. 2 *Beawes Lex Merca.* 516, 6 *edition*, contains an opinion given by Lord Chancellor Talbot, when at the bar. That opinion was, that a certificate confirmed in England would be no discharge to the person sued, if a suit had been brought against him in Virginia, on his going into that country. But an English case on which we strongly rely, and which never has since been overruled or even questioned, is to be found in *Dougl.* 169 *Chevalier* vs. *Lynch*: in that case

the money was attached according to the law of the place. The assignees claimed it, Lord Mansfield held that the assignees could not recover the debt. This court will, when considering that this was a decision of Lord Mansfield, who seldom erred, whose determinations were always, except when prohibited by positive law, upon the plain and infallible rules of natural justice, surely give this case all the weight and importance it so justly merits.

But one other authority upon which we rely with the utmost confidence, and then we will relieve your honors from so tedious a research upon a point which we believe to be so plain, and so well settled as we conceive. It is in Simonton's case, 2 *Martin* 102, which must be so well remembered by your honors, that we will not detain you by relating the principles therein decided, but content ourselves by a reference to the book, and though the idea may possess the gentleman that it is not in opposition with the principles contended for by him, we will leave the examination of the similitude of the two cases to the better judgment of this honorable court, as we admit the principle that every man has a right to dispose of his property as he pleases; the opposite counsel have granted that there are exceptions. This case is one of those

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exceptions, that a debtor cannot convey property to the prejudice of his creditors. We contend that if the claim of the assignees is allowed, this right will be given by the court: and more, will it not also deprive us of all remedy? where is the recourse left, should the appellants succeed? They, no doubt, from the anxiety shewn in this case, are not yet paid, and the property now claimed will enure to their individual benefit: the balance if any to be distributed to those who have acceeded to the will of the debtor, while we who thought that by the laws of civilized nations it required more than the will of one to bind, and resorted to a plain remedy, sanctioned not only by the principles of law, but the principles of equity and justice, will be debarred all rights, unless this court interposes its authority and protection in our behalf, and closes the door against the unjustifiable pretensions of the assignees. It is unnecessary, as the counsel contend to supœna any statute of Maryland, to give us its testimony in our favour; but if we should quote them as binding authority, we would refer to the 2 *American law journ l*, 184, wherein it will be seen, that by the act of 1805, and the supplemental act of 1807, of that state, such an assignment as this would not avail against creditors, being in our opinion in every

respect similar to the case of *Steuart & alii*, who were refused relief by chief justice Nicholson; "the legislature certainly intended" says the learned judge, "to place all creditors on an equal footing by providing for an equal distribution of the debtor's effects, in proportion to his debts. It could not be their intention to allow him to give a prei rence to one, and to destroy at the same time his liability over to the others, such a provision would be iniquitous in the extreme;" if we are correct in the analogy of the two cases, the above quotation will suffice for the many enquiries of the learned gentle.an, and will obviate the necessity of answering to the distinction where the parties litigant are citizens of the same state, and where the attaching creditor is of a different state.—This court is not bound to presume "*omnia recte acta esse*:" The presumption one way or the other will not decide this case, the court is called upon to say, how far they will give effect to an assignment, when part of the instrument is to be executed in New-Orleans, and is against a direct provision of its laws, in favour of attaching creditors. The courts have always looked upon these voluntary assignments with peculiar jealousy—great power is given to the debtor; every feature should be critically examined,

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and unless the most exact and scrupulously impartial justice is rendered, the courts should destroy them; they ought not in any form to injure the rights of creditors; no preference should be given among those who relied on the honor and credit of the debtor; every thing should be as fair and as legal as the most rigid justice could demand.

The opposite counsel have asserted, that this assignment will be executed by this court, upon the principles of comity; we ask if this is one, to the execution of which, the comity of law can be properly called? Is there in it that fairness, equity and equality of distribution of all the property among all the creditors, as to justify this court in forcing it to the prejudice of an honest creditor, who refuses to be thus deprived of a just debt, and resorts to a right recognized by our laws?—a right which must be sustained gainst so partial an instrument. Or rather does not the very face of the deed shew the preference given the trustees—one not authorized by the laws of any country, but made valid only by the consent of those who accede to its terms. Is not this preference in fraud of creditors?—What court will so proceed against law, reason and justice, as to give its sanction to so fraudulent an attempt at the overthrow of right?

We now leave the case to the court. These are the principles and authorities upon which we ground our claims; we call on this court at once to say, whether a debtor can have the sanction of the law, in doing that which reason and the common sense of the world disown.—We wait to know whether a debtor can say to one creditor, take all my property to pay your debt: to another, I will deprive you of all satisfaction, you shall have nothing to which you can resort, you have confided in my honor and in my integrity, the law will authorise me to violate these sacred ties, your debt is now a nullity. These are the principles, advocated by the assignees, they demand the protection of this court to support them in a claim, bottomed on a violation of the eternal principles of equity, and impartial justice; with the vigilance and integrity of Ramsey on our side, with the hardiness and the avarice of the assignees, that grasp at all, to promote the interest of self on the other,—this court will not long hesitate in their decision.

Dick, United States' attorney, in reply. The original parties to this action, as well as those intervening—the present appellants—are all citizens of Maryland; and it is not denied, that,

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by the laws of that state, the assignment in question would be held good. Here, then, the question would, seemingly, be at rest. But, on the other side, loud and reiterated charges are rung on the odious epithets "fraud," "preference," &c. With respect to the first, there is no proof, nor ought there to be any suggestion. As regards the other, let it be admitted, and what is the consequence? Simply, at most, to deprive the assignor of some privilege he might seek under the laws of Maryland; but in no manner operating the avoidance of the assignment. That was *bona fide*, upon sufficient consideration, and by no means novel or extraordinary. But, says our learned opponent, it was voluntary, and, therefore, fraudulent! "The word voluntary means, without a valuable consideration." This is a definition promulgated for the first time; and, like many others of the propositions in the same argument, advanced with a boldness proportionate to its insufficiency, and relied on with security in proportion to its weakness. The term voluntary, as it relates to conveyances of this nature, is peculiarly significant, and, it was supposed, could not easily have been misunderstood: a voluntary conveyance is one originating in the will of the party, and is used in opposition to forced. An illus-

tration of this signification is very familiar, from the use made of these terms in our law regulating the *cessio bonorum:* there the distinction is forcibly given, when speaking of voluntary and forced surrenders. Voluntary conveyances, under the rigid principles of the bankrupt law of England, are never avoided as such: it is only where they are attended with circumstances of legal or actual fraud, that they are declared void, as when made in contemplation of bankruptcy, and giving an undue preference. The nullity, of the latter description, is the effect of the positive law, and in relation to a particular system —the principle was unknown to the common law, and it is unknown to the institutions of most of the states of the union, and, amongst others, to those of Maryland.

The insolvent law of Maryland has a clause denying the benefit of the law to persons who give an undue preference to their creditors; but this law by no means declares the act giving such undue preference null and void. The expression of the law is as follows: "hath assigned or conveyed any of his property with an intent to give an undue and improper preference;" and "any deed, conveyance, transfer, assignment or delivery of any property, real, personal or mixed, of any debts, rights or claims,

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to any creditor or security, made by any person with a view or under an expectation of being or becoming an insolvent debtor, is such an improper preference as is here intended." 1 *Law Journal*, 100. Here the provisions are very strong, and doubtless very proper. But their very strength and positive enactment shew, that, while they apply to the cases of persons applying for the benefit of the insolvent law, they do not apply to any other. Nor, in that case already stated, is the transfer declared null and void.

Herein they differ from the bankrupt law of England and the late bankrupt law of the United States, and, indeed, upon principles which distinguish bankrupt from insolvent laws. By those laws, such an assignment or transfer would be held to be an act of bankruptcy in a trader, and would be declared void. But, under the laws of this country, generally, no such rule prevails. Here the debtor is permitted to choose his creditor, and, if there be no fraud; if the payment, transfer or conveyance be *bona fide*, the creditor or transferee is entitled to the benefit of the preference he has received. It is, when the debtor comes forward to ask the benefit of the law, discharging him from custody or from his debts, that the subject is canvassed, and it is upon him that the consequences fall.

In this case, if Stevenson were to demand the benefit of the insolvent law, the transfer or conveyance to the appellants might be objected to him: but it does not appear that Stevenson has made such application, or that he ever will, or if he had or did, that it would affect this subject. The assignment in Baltimore, has invested the assignees with all the property described in the deed; and the appellee knew too well the operation of the instrument to attempt disturbing it. The counsel for the appellee have fallen into an extraordinary error in relation to the principles just considered, when noticing the decision of chief justice Nicholson, in the matter of D. C. Stewart and others, petitioners for the benefit of the insolvent laws of Maryland. 2 *Law Journal*, 184. That was a proceeding under the Maryland insolvent act, analogous to the issue directed by our insolvent act of 1808, "where fraud is presumed or charged by any of the creditors." The parties in that case having assigned all their property for the benefit of a few creditors, applied for the benefit of the insolvent law. "The question for the decision of the court is," says Judge Nicholson, "whether this is 'an undue and improper preference of one creditor or security,' in contemplation of the act of 1805, to deprive the parties of the

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benefit of that act." The whole reasoning, and the decision of the case, turn upon the subject of applications for the benefit of the insolvent laws—the title of the assignees, or preferred creditors, in the property or credits transferred to them by the debtor, is never once questioned. Such an enquiry, indeed, could not have arisen under the laws of that state, nor could it, I humbly conceive, under the laws of this, have arisen, until the act of the 20th February, 1817, relative to voluntary surrender, &c. By the 24th section of that act, it is provided—"that any debtor who shall have sold, engaged or mortgaged any of his goods and effects, or having disposed of the same, or confessed judgment, in order to give an unjust preference, &c. shall be debarred from the benefit of this act, and the said deeds or acts shall be declared null and void."

It may be proper further to remark, as strongly illustrative of the truth of this reasoning, that Judge Nicholson, in denying the benefit of the act to Stewart and others, goes chiefly upon the ground, that they had already divested themselves of their property. "How," says he, "is the spirit of the act complied with, when a man assigns the whole of his property to-day

to one creditor, and comes in to-morrow, offering to surrender that which he has before disposed of, and which he has not, for the benefit of the others?" 2 *Law Journal*, 188.

The paragraph following the sentence last quoted, and upon the same page, is, I conceive, conclusive—its direct bearing upon the subject at bar will, I hope, be a sufficient apology for citing it at some length:—"It is," says the authority, "agreed that, at common law, a man may pay all his property to one creditor, in discharge of a *bona fide* debt, to the exclusion of all the others, and that this act of 1805 does not take away his right of giving a preference. Of this there can be no doubt. It is a right with which the act does not interfere. It only declares, in substance, that if a debtor does insist on and exercise his common law right of prefering one creditor to the exclusion of all the rest, he must take the common law consequences. His person and his subsequently acquired property must remain liable to the claims of his excluded debtors," &c.

Simonton's case was that of a debtor in confinement applying for the benefit of the *cessio bonorum*.

It was considered by the court in two points

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of view: 1, "whether a debtor in prison could make a cession under the civil code? and 2, Having assigned his property for the benefit of a few creditors, and having nothing left, whether he was entitled to the benefit of the law? The decision was against the application, on the first ground; and the reasoning of the court alike against it, on the second. But the decision here was purely personal to the applicant, and did not, in the most remote degree, question the validity of the assignment made by him. The assignment made by Simonton was fully discussed, and considered with very great attention at the time, as well by the superiour court of the territory, as by the district court of the United States: in neither, was the deed declared invalid or irregular, so far as it respected the assignees, or the property preconveyed by it. On the contrary, Simonton, who acted as attorney in fact, for Williamson and Stephens, his assignees, brought suits in the district court of the United States, in their names, for property and credits conveyed in his schedule, and in which the assignees recovered. One case was *Williamson* and *Stephens* vs. *Lee* and *Clague*, syndics of William Brown, deceased, and his estate insolvent.—Brown had purchased goods of Simonton (pre-

vious to his assignment,) which remained unchanged in his (B's.) possession at the time of his insolvency, which took place shortly before his death. The claim upon Brown was assigned amongst the general debts of Simonton. Simonton, it is well known, was followed here by a creditor named Muirhead, who imprisoned him and proved his debt to a large amount. The total inability of Simonton to discharge the judgment in Muirhead's case was ascertained before the recovery from the Syndics of Brown, and Muirhead's counsel interposed in the United States court, alledging the insufficiency of the assignment to carry the property there recovered. This interposition was at the time, considered an experiment, and proved an unsuccessful one. The counsel of Muirhead never thought, indeed, that they had any other recourse than against the person of Simonton :— at the time of commencing their action against him, they knew of the claim on Brown's estate, and of other claims to the amount of upwards of $50,000 in Louisiana, which had been transferred by Simonton, to Williamson and Stephens, but they never, except in the instance I have stated, looked to this fund for the discharge of their judgment, or attempted to question the assignment.—Surely every feature of

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this case, and its incidents, are powerfully in aid of the appellants. In Simonton's case, 2 *Martin*, 104, a citation is made from judge Nicholson's decision, 2 *Law Jour.* 189, which, as it is there given by the counsel, lays down principles by no means warranted by that authority, or, as far as I know, by any authority. I will not trouble the court by citing the passage at large: but it will be discovered that if the counsel had given the whole sentence, instead of the last member, the doctrines would apply, not generally, but exclusively to "authorities under the bankrupt system."

It is said that Morrison's assignment was voluntary, and that therefore, the creditor might attach. But how does a voluntary assignment give any more right to attach, than a forced assignment (as one under insolvent or bankrupt laws is considered to be) would do? We had thought and believe we have shown, that the effect of both classes of assignments is, in this respect, the same. No argument is used to destroy the reasoning, or weaken the decisions employed by the gentleman, my colleague, to prove this position.

But it is said that this assignment cannot bind the appellee, inasmuch as he is not a party to it. Now, it may be true that he is not a party,

and yet that fact not affect this cause, as in truth it does not; because, if the property, by the assignment, was vested in the assignees, there is an end of the question. The counsel opposed, have not even attempted to say that this is not so, and they could not, for it is submitted that this has been clearly proved. Then what right had this creditor to attach property belonging to the assignees, to obtain payment of a debt due from another? We must be now living in times, such as never before existed, since civil society began. The gentleman must fancy us returning back to that state of existence, in which we found the aborigines of the soil. But, it is said, the assignment was voluntary, and therefore, not binding; because a voluntary assignment means, "without a valuable consideration." But he is mistaken in this point, as has already been shewn. The authority of the counsel, and of courts are voluntarily arrayed. Without further examination, we are content that this court decide between them. Then, he says, no authority can be shewn, where a voluntary assignment would operate, to transfer property situated as that in dispute, now is. Many authorities have been already cited to this very point. If this had been recollected, probably this assertion would

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not have been made. Two more however, are recollected. They are cited; *Newland on Cont.* 374-5—one of them, particularly, was like the case at bar, in all respects. A person in failing circumstances, assigned over all his estate to a creditor, in trust, to sell it, and raise money for the payment of all his debts—held that the assignment was good, and operated to transfer all the debtor's estate.

But, it is further urged, that a voluntary assignment can only transfer property situated in the place where the assignment is made. Now, this is a great mistake—1. Because personal property is always governed by the *lex loci* of the country where the owner has his *domicil.* 2. Personal property always draws to its owner the possession. 3. Where, from the nature of the assignment, actual possession cannot accompany the deed, it is dispensed with—as, the sale of a ship at sea, conveyance of personal property in another country, &c. *Newland on Cont.* 375-7—*Term Rep.* 72.

There it is said, that the assignment is good in the place where it was executed; yet, if it is partly to be executed in another place, where the law is different, the law of the latter place must govern. Now, it is, perhaps, impossible for such a case to exist. The question always

is, what is the law of the country where the contract is to be executed and consummated? Indeed there can be no such thing as a contract partly to be executed in two countries. But, suppose there is any thing in this idea, in point of fact, what has this court to do with it, inasmuch as no part of this contract between Stevenson and his assignees was to be executed in New-Orleans. The assignment says nothing about paying the appellee in New-Orleans. It is useless, therefore, to say any thing about it. This court will decide according to the law of the state of Maryland, where the contract was to be executed, of which all the parties are citizens, and of course subject to its laws. This is the true rule. The counsel have evaded this settled principle of law, and talk about this court's violating its oath; if it were to decide that this assignment is good; because, say they, the statute of this state requires that three-fourths of the creditors shall sign off their claims, in order to discharge the debtor. Well, this may all be true enough in the abstract; but the gentleman forgets that the assignment in question was not made under the insolvent laws of this state, but under the common law of Maryland. Let it be shewn that the instrument is not good according to that law. But it has not been, it

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cannot be shewn, that any law of this state declares this transfer, or one made in Maryland, under the same circumstances, void. Let us pursue the counsel, however, in their course.

They have embarrassed the cause with much matter totally irrelevant; and the confusion which they create almost defies an attempt to answer them—but respectful considerations induce this reply. What then is next urged by the appellee? Why, in substance, what has been before observed on, admitting that personal property is governed by the domicil of the owner; they contend, however, that the laws of this state, being about to be violated, the assignment is not good, though they do not shew us how the law is infringed.

Now, the gentleman again talks about a voluntary conveyance, and asserts that it means "something or nothing." That we admit. Then it is alleged, that it means "without a valuable consideration." That we deny; and we have shewn that it means no such thing. But how are we to get over the statute of 27 *Eliz.* referred to in 1 *Atk.* 94? There, it is said, a full exposition may be found. Let us see whether that case has any thing to do with this. The question there was, whether a conveyance of a large estate, made by a father to his child, was

good, it having been done on the eve of his bankruptcy, and the statute of *Eliz.* having enacted, that no such conveyance should prevail, unless made with a good and valuable consideration, and it was expressed in the assignment that the consideration was five shillings, which the court said was an insufficient consideration, and ordered the property to be conveyed to the bankrupt's assignees. But it is no where said that a voluntary conveyance means without consideration. Here again the counsel have mistaken their own authority; and really what has this court here, to do with the construction of a British statute?

Pursuing the learned counsel, the next step we are met with more of the history of *Eliz.* 2 *Vezey*—great fondness is discovered for the reign of this virgin princess—again, this court is required to construe an act passed at an earlier period of her life—the 13th year of her reign. That too, was a statute made to prevent fraudulent conveyances; and the question in the case in *Vezey* was, whether an assignment made without any consideration, other than love and affection, was good? Lord Hardwicke very properly held it was not. Though his lordship does not say, (as we might be led to conclude from what fell from the opposite counsel,

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he had said) that a voluntary conveyance means without consideration. But, although the case has nothing to do with the one at bar, it may gratify the counsel, who have taken care to cite it, to be informed that it has been overruled in *Cowper's Rep.* 710–11, 1 *Atk.* 265, 2 *Browne* 90.

Again: it is argued that in this case, there was no delivery of the property assigned; that in law there can be but two species, one legal, the other actual. This is good law, it is admitted; but can it be said of the property in question, that there was not a constructive and legal delivery? Enough of this has been said already. The argument of the opposite counsel is as good for the assignees as though we had made it for them. It is unnecessary to make any observation upon the particular objection, that there was no delivery of this property to Ramsey, though it is singular, to be sure, that Stevenson should be censured for not delivering property to that gentleman after he had assigned it over to others.

As to the case in 3 *Martin* 222, that case is not denied; it is admitted to be good law, and we had intended to cite it, as very much to the present argument. We think the counsel was unfortunate in selecting this case. Let the question now be, whether there has been a sufficient

delivery? "Delivery may take place by the mere consent of the parties." says the court. We can assure the counsel, that both Stevenson and the assignees consented to this assignment. This expressly appears from the instrument itself, under their hands and seals. What more is required? Nothing, according to their own authority.

Kirby, 313, a Connecticut reporter, is next relied on; for what purpose the counsel have not exactly informed us; but they have informed us of what is not to be found in that authority, viz. that the debtor's effects in Connecticut did not pass by an assignment under a commission of bankruptcy in England. The question was, whether defendants, who had been discharged under the bankrupt laws of England, could be sued in Connecticut. Held that they might, because the plaintiffs had not accepted of a dividend of the bankrupt's estate.

We thank our adversary for the three cases next cited, in 2 *Johns.* 198, 7 *ib.* 117, and 3 *Dall.* 369. As to the first case, the *lex loci* must govern in the construction of contracts, and the remedy on them must be according to the law of the country in which the action is brought. We only ask the court to adopt this rule. "The *lex loci* must govern in the con-

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struction," &c.—that is, in this case, the laws of Maryland must govern. Next, the remedy, that is, whether the party may be held to bail—whether a *capias* or summons—whether a declaration or petition, &c. &c. must be according to the place where the suit is brought. The gentleman has chosen the form of attachment—to this we have not objected. As to the second case, that is to the same point, and exactly proves that the rule is universal, that the law of the country, where the contract is to be performed, must govern. As to the third case, although it has been admitted, whether it be good law, yet, as the gentleman has introduced it, he cannot object to the doctrines it contains; it recognizes the principle, that the law of the place where the contract is to be executed, must govern. Thus the defendant there, who had contracted a debt in Massachusetts, but who was discharged under the insolvent laws of Pennsylvania, was not allowed to set up his discharge in bar of the action. We believe this decision was right. The supreme court of this state has ruled the same point; but there are contrary decisions, as in *Miller* vs. *Hall*, 1 *Dall.* 229.

The case in *Washington*, 199, is not in point, or rather it proves nothing to the present case.

There it is said, "courts will not deprive a party of a legal right;" we say so too; they cannot, (excepting always the ordinary common law and equity distinctions in England)—and we believe it will not be done by the court in this case. But what are "legal rights?—that's the question. What was said by Lord Hardwicke, in 1 *Atk.* 153, has still less to do with the case now before the court; there the question was, whether a creditor, who could not prove his debt under a commission of bankruptcy, might not still sue—and it was held that he might, of course. But the lord chancellor does not say that a creditor might attach goods which the debtor had assigned over to others—no such thing. The goods being vested by the assignment in the assignees, puts it out of his power; he must come in with the rest of the creditors. But if the counsel for the appellee had looked to the next page of the book just cited, he would have seen a case directly opposite to his opinion of the necessity of an actual delivery of the thing assigned. It is the case of *Brown* vs. *Dodson*, and determines, that a sale of a personal chattel, as a ship at sea, is good, though no actual possession was given; for the rule is, that, where the property lies out of the place where the assignment is made, then, by opera-

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tion of law, the delivery takes effect by construction. What cannot be done in the nature of the thing, shall not be required.

The case in *Douglass* 160, does not prove that an assignment is binding only in the state where it is executed. The counsel altogether mistake the true state of the question. *Le Chevalier* vs. *Synet* has already been shewn not to affect the present case. The question there was, whether a party, who had been once compelled to pay money by the judgment of a court of competent jurisdiction, should be compelled to pay it over again. That is not the question before this court. The court is requested to decide this cause between citizens of Maryland, according to the laws of their own state.

Fraud, it is admitted, vitiates in every country the contract to which it attaches—that is, where the fraud is actual or inherent, as contradistinguished from legal: the first is positive, the other varies with the varying institutions of different communities, and is constructive. For example, in the case in question, if Stevenson, who has conveyed property to the amount of nearly half a million, and purporting to be all he possessed, had concealed any portion of his effects, the fraud would have been positive, as respected that portion; and any of his creditors

might have resorted to it, as they can to his person, or property acquired after the assignment. Again, by the laws of this state, a debtor is incapacitated from making "any alteration in the situation of his creditors, by acts of security or preference, as much to the period of his being able to pay his debts, as to the time of his committing such acts as would, by the bankrupt laws of England, amount to acts of bankruptcy." 3 *Martin*, 275-6, *Brown* vs. *Kenner & al.*— Therefore, "acts of security or preference," of this description, would be considered fraudulent, under our laws. But this is constructive fraud; because, as has been shewn. 2 *Law Jour.* 188, "there can be no doubt," that at common law, and in Maryland, "a man may pay all his property to one creditor, in discharge of a *bona fide* debt to the exclusion of all the others;" and this principle, as prevailing in other countries, is recognized in the case of *Brown* vs. *Kenner & al.* just cited, where it is said, that "the circumstance of insolvency alone," under the bankrupt laws of England and the United States, "is not held sufficient to invalidate the transactions of a debtor with any of his creditors."

MATHEWS, J. delivered the opinion of the court. On the part of the assignees, it is con-

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tended, that the deed of assignment is good and valid, according to the laws of Maryland, under which it was executed and the contract was made, and it ought to be enforced by the court of this state. To this end, they liken it to an assignment, made under the bankrupt laws of England, and cite adjudged cases from the courts of justice of that country, shewing how strictly and extensively they are carried into effect.

Were it necessary to a proper decision of this case, we are of opinion that it would not be difficult to shew such a difference between assignments, made at the mere will and pleasure of debtors, in which they attempt to lay down rules for the payment of their debts, and the distribution of their estates, and those, which are fairly executed under a commission of bankruptcy, as would require the application of principles almost totally different in different cases.

In assignments under a commission of bankruptcy, great pains are taken to discover and collect all the debtor's property. The assignees are chosen by the mass of his creditors, and the effect of the assignment is fixed by law. The proceeds of the estate are to be paid and distributed, according to established and known rules. But, in voluntary assignments by debtors, they chuse their own trustees, determine the manner

in which their debts are to be paid, and too often attempt to give illegal and unjust preferences.

These points we deem it useless now to discuss; and it is believed that our decision must be directed by the principles of law recognized in the case of *Dumford* vs. *Brooks' syndics*, 3 *Martin*, 222, 269.

The instrument by which the debtor undertakes to transfer his property to the trustees, must be considered as a contract between him and the persons entrusted with the execution of his intentions, in regard to the payment of his debts, and the distribution of his estate. If his conduct has been fair, and his intention honest, in this transaction, (which we do not undertake to decide) perhaps they have a right to hold the property, as far as it has been actually delivered to them, until they shall have fully executed the trust reposed in them, and creditors who may have assented to the terms of the cession would probably be bound by it. But the assignment can certainly have no greater effect, in relation to creditors not parties thereto, than a sale to a *bona fide* purchaser, which, unless accompanied by delivery, does not fully divest the seller of his property, and leaves it subject to be seiz-

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ed by his creditors, according to the principles laid down in the above case.

The parties to the deed of assignment appear to have been aware of the impossibility of transferring by it, a complete dominion over such things as *choses in action*, according to the common law of England; for we find in it a power granted to them to use the assignor's name, if necessary.

Upon the whole, we are of opinion, that the property attached, not having been delivered to the trustees, has been regularly subjected to the payment of the debt of the attaching creditor.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs. See *Norris* vs. *Mumford*, 4 *Martin*, 20.

W. & L. CROMMELIN vs. *THEIR CREDITORS.*

If the creditors refuse the cession of the debtor's goods on allegation of fraud, though the court direct an assignment to be made to the sheriff, in trust, the insolvent is not entitled to his discharge.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The insolvents, being confined for debts, presented a schedule of their estate, and prayed for a meeting of their creditors, for the purpose of tendering to them a surrender of their pro-

perty; that surrender was refused, upon an allegation that it was a fraudulent one. The counsel for the insolvents then took a rule on the creditors to shew cause why a syndic should not be appointed by the court; and on their not shewing cause, the court appointed for syndic the sheriff of the parish of New-Orleans, and ordered the insolvents to make an assignment of their property to him, in trust, for their creditors. The assignment was accordingly made, and the insolvents then prayed to be discharged from imprisonment. From a refusal to discharge them, they appealed.

We think that the judge of the district court did not err in refusing the application of the appellants. Pending the accusation of fraud, it was not known whether they would be entitled to the benefits of the cession, one, and the most important of which is, the release of the debtor's body, and his future exemption from arrest for the debts heretofore contracted; that benefit is the effect of a cession *bona fide* made. Here that good faith was in question; and while it remained undecided, the appellants could not claim the benefits which were to arise from it, when proved.

But the appellants thought that, since the judge had deemed it proper to appoint a syndic

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ex officio, "with a view to the interest of all concerned," and to order an assignment of the debtors' property to be made to that syndic; therefore, the business of the cession was at an end, and they might go at large. If such was to be the result of the appointment here made by the judge, there would be no hesitation in saying that it was an improper decree to be rendered under the circumstances of the case, because the effect of it would be to force the cession upon the creditors, a measure which is authorized by law only in cases of *bona fide* cessions. But we do not view that nomination as a step so decisive. It is evidently no more than a conservatory act pending the suit on the question of fraud, and is well authorized by the sections 26 and 29 of the late law on voluntary surrenders.

As to the assignment which was ordered to be made, and was accordingly made, to the syndic by the appellants, it is an act unknown to our laws in matters of cessions, and, as such, may be deemed a nullity in point of form; but as the power of syndics over the estate of the debtor, as they exist by law, are fully as ample as those which may be exercised under an express transfer of the property by the debtor, and produce the same consequences, we do not

deem it equitable to disturb the present state of this case on account of a mere irregularity of form.

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

Livingston for the insolvents, *Smith* for the creditors.

DUBREUIL vs. *DUBREUIL.*

APPEAL from the court of the first district.

The appellant must in all cases give security for costs.
A statement of facts must be signed by both parties, or persons authorized by them.

DERBIGNY, J. delivered the opinion of the court. In this case the appellee objects to the appeal as irregularly brought—1. Because no security for the costs was given by the appellant—2. Because the statement of facts, which purports to be agreed upon between the parties, was not assented to by him.

In all cases of appeals, whether execution be stayed or not, the law makes it the duty of the appellant to furnish security to answer the costs. This is a condition without which he has no right to call his adverse party before the

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appellate court. If he does, the appeal is irregularly brought, and ought not to be heard.

But, independently of that circumstance, there is one feature in this record, which must decide the court to dismiss this appeal. The statement of facts is not signed by the appellee, nor for aught that appears, by any person for him. The counsel appointed *ex officio* to the absent heirs of John Dubreuil, part of whose estate is disputed by the appellee as his brother, has signed that statement; but nothing shews that he signed or had any right to sign in any other capacity.

When the appellee's power of attorney was received, his present attorney in fact signed, himself the petition, which he presented in his name to the court of probates, thereby evincing the intention of prosecuting his claim in person. It does not appear that he employed any attorney in the probate court. The statement of facts ought certainly to have been communicated to him, and is a nullity without his assent.

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

Carleton for the appellant, *Seghers* for the appellee.

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MURPHY'S HEIRS vs. *MURPHY.*

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

If two persons, married in Hispaniola, and in community of goods, remove to Charleston, and the wife dies, the community will not continue between the husband & the children.

A sum reckoned in *livres*, in a contract entered into at Hispaniola, is not to be paid in *livres tournois*.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs and appellants are the legitimate children of the late Don Diego Murphy, consul of Spain at New-Orleans, and of Mary Creagh, his first wife, between whom there existed a community of goods. They pretend that, no steps having been taken since the death of their mother to cause that community to cease, it has continued between them, their father and the defendant, his second wife; and that the estate left at the death of their father ought to be divided accordingly.

The material facts in the case are these. In the year 1789, Don Diego Murphy, being then at Cape Francois, in the island of Hispaniol, married the mother of the appellants, Mary Creagh. The contract of marriage stipulates a community of acquests and gains between the parties, to be regulated by the custom of Paris, even though they should afterwards reside in countries where different laws should prevail. Some years after, they came to live at Charles-

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ton, in South-Carolina, where Mary Creagh died, leaving three infant children, the present appellants. Don Diego Murphy afterwards married Louise Peyre, the present defendant. In their contract of marriage a community of goods is also stipulated, and a clause is introduced, whereby Don Diego Murphy binds himself to fulfil the necessary formalities to put an end to the community, which he acknowledges has continued to subsist between him and his children of the first marriage. It appears by oral testimony that, shortly after this second contract had been celebrated, he caused an inventory of his estate to be made, the legality of which is disputed.

The first and most important question which presents itself here is, whether the community which existed between Don Diego Murphy and his first wife did really continue after her death between him and his children.

The better to understand the principle on which turns the decision of this point, we shall first consider what would have been the situation of Don Diego Murphy and his first wife, if they had married without any contract. It has already been made a question in this court in the case of *Gale* vs. *Davis's heirs*, 4 *Martin*, 645, whether the law of the place where a mar-

riage is celebrated is to follow the married couple wherever they go, and to regulate their respective interest every where; and it was decided upon the authorities there cited, that "when a married couple emigrate from the country where their marriage took place, 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." Hence, if Don Diego Murphy and his first wife had married, without contract, at Cape Francois, and afterwards transferred their *domicil* to Charleston, we would have no hesitation to say, that the community would have ceased from the moment of their arrival at Charleston; and that the property thereafter acquired would have belonged to the husband alone.

But the parties had entered into a contract by which it was stipulated, that there should be between them, a community of goods, to be regulated by the custom of Paris, wherever they should go That contract was their law; and provided it was not to cause any prejudice to the citizens of the country where they went to reside, and its execution was not incompatible with the laws of that country, it was to be maintained. By virtue of that contract therefore, the community of goods stipulated by the parties, subsist-

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ed at Charleston, until the death of the wife. Did it survive her, and continue to have effect, between the husband and his children?

To put this question in a clear point of view, we must distinguish between the rights which derive from the contract of marriage, in favor of the heirs of the wife, and the rights which are granted by law to the heirs of either party.—The rights which derive from the contract, are those of accepting or refusing the community, as it stood at the dissolution of the marriage, and in case of renunciation to retake all the property of the wife free from debts. The right granted by law to the heirs of either the wife or the husband, is that of continuing to be in partnership with the survivor, if they please, in case he or she should neglect to make an inventory of the property left at the death of his or her partner. This right, so far from being the consequence of a contract, is given by the custom of Paris to the children, whether there be a contract or not. Let us apply this distinction to the present case. Murphy and his first wife, by virtue of their contract of marriage, continued to be in community of goods, even after their removal to a country where a different law prevailed: that stipulated partnership between them lasted as long as their marriage; upon the dissolu-

tion of the marriage there was an end to the community by contract. What could make that community continue between her children and their father? The law. But that law does not prevail in the country which the parties then inhabited. The forcible consequence is that the community did not survive the mother of the appellants.

The belief which Don Diego Murphy and his second wife, the defendant, seem to have entertained that the community was continuing between him and his children at the time of their marriage, does not alter the situation of the case. If under that belief they had done some act, if, for example, they had allowed to the plaintiffs more than they were entitled to, perhaps they could not even recover it back, according to the maxim that no relief is granted against an error of law. But here things are entire. The mere expression of their belief cannot be deemed of any account.

The situation in which the community stood, at the time of Mary Creagh's death, is left in the dark, the plaintiffs having made no effort to adduce any evidence on the subject. From the testimony produced by the defendant, it appears that, at the epoch of her marriage, Don Diego Murphy possessed no real estate, and hardly

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personal estate enough to pay to his children the dowry of their mother. We must take the evidence as it is, and conclude that the community between him and Mary Creagh, had made no gains.

The claim of the appellants, must therefore be reduced to the dowry, or marriage portion of their mother, and their share in their father's succession, which is to be composed of his half of the property, inventoried and collected, according to the account rendered by his testamentary executors; deduction being first made of the marriage portion of Mary Creagh, and of the marriage portion, *douaire et preciput* of the defendant.

A difficulty has occurred, as to the manner of calculating the marriage portion of Mary Creagh. It is called ten thousand livres, and the appellants contend, that these are *livres tournois* of the currency of France, the mother kingdom of the then colony of St. Domingo, where the contract was celebrated. We are however satisfied from what has been shewn to the court, that the livres must be understood according to the St. Domingo currency.

Upon the whole, we have found nothing to redress in the judgment appealed from.

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

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Rodriguez for the plaintiffs, *Moreau* for the defendants.

RUST vs. *RANDOLPH.*

APPEAL from the court of the first district.

If before the appointment, one of the applicants for the curatorship of a vacant estate, receives his debt, he thereby destroys his claim as a creditor.

A person not repelled by the law, from the curatorship, cannot be excluded on suspicion of his intention to abuse the trust.

MATHEWS, J. delivered the opinion of the court. The parties contend for the curatorship of the vacant estate of Solomon Sterns, who died intestate. The suit originated in the court of probates, of the parish of Orleans, where Ruts, the first applicant, and present appellant prevailed. Randolph appealed to the district court, upon which the cause came up to this court, and was here heard, on a bill of exceptions to the opinion of the district court, in refusing to hear testimony, as on a trial *de novo*, 4 *Martin*, 370. The cause (having been remanded with directions to the judge, to permit Randolph, the then appellant, to prove certain facts, tending to shew that he was entitled to a preference over Rust) has since been heard on the merit, and the curatorship was decreed to Randolph.

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From this judgment, Rust appealed.

When the case was first before us, we declared it to be our opinion, that in a contest for the curatorship of a vacant estate, between a citizen of the state, having property in it, and a person having neither domicil nor property therein; if the claims of the parties, as authorised by law, are in other respects nearly equal, the former ought to be preferred: his property affording an additional security for the faithful discharge of his trust, as it is by law tacitly bound therefor.

The pretentions of the present suitors, to the curatorship of the estate of the deceased, were originally founded, on credits so inconsiderable, in proportion to the value of the estate, and so little different in their amount or nature, that they may fairly be classed among those small matters, not legally worthy of notice, as *de minimis non curat lex.*

In this view of the subject, Randolph, the present appellee, is clearly entitled to the preference given him by the judgment of the district court; but, we are of opinion that, by accepting the payment of his claim against the estate of the intestate from Rust, the present appellant, he destroyed his right to the curatorship. He is now no longer a creditor, nor was

he, at the time the judgment appealed from was given by the district court. The latter is the period to which we are to look, in pronouncing upon his claim.

On the appeal from the court of probates, a trial *de novo* was had in the district court; and we are not bound to consider the situation of the parties at the time of the judgment in the first court.

According to our law, in the appointment of the curator of a vacant estate, creditors are to be preferred to strangers and persons not interested in the estate. *Civ. Code*, 176, *art.* 132. Now, Randolph was not a creditor, when judgment was given for him in the court below, and he had no longer a right of contending for the curatorship of the estate, being, in the words of the code, *a stranger, and a person not interested in the estate.* Yet, it is contended by his counsel, that, admitting that he has no claim to the curatorship of the estate, as a creditor of the intestate, the appellant, Rust, ought not to be trusted therewith, because it appears, from the evidence in the cause, that his views with regard to the property are dishonest—that the motives which influenced him to solicit the curatorship are unjust and corrupt; his object being to obtain possession of the estate, and to make it his own, by cheating the heirs.

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The testimony shews clearly that Rust expressed a wish to obtain the property from the heirs, at a price far below its value; but there is no express proof of an intention on his part to effect the purchase by means absolutely unfair. He seems to have relied more on their ignorance and poverty, and great the distance at which the property is placed from them.

The rule of law, on the subject of the exclusion from the appointment of a tutor or curator, as it relates to the moral character of an applicant, extends only to those whom the law declares infamous. On the ground of general character, perhaps none ought to be rejected, except those who come within this definition. If the person applying be not a citizen of the state, and has no property in it; if he be of a bad character and low standing in society, &c. these are circumstances which ought to influence the judge in requiring better security.

We are of opinion that the district court erred in giving judgment for the appellee.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the appellant be placed in his situation of curator, as it existed before the appeal from the court of probates.

Livingston for the appellant, *Smith* for the appellee.

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COTTIN vs. *COTTIN.*

APPEAL from the court of the first district.

The previous laws of this state, as are not contrary to the civil code, are not repealed thereby.

The law of *Recopilacion* requiring as a legal presumption of a child's capacity to live, that he should live twenty-four hours, is still in force.

DERBIGNY, J. delivered the opinion of the court. The plaintiff's son died, leaving his wife, the defendant, in a state of pregnancy.—Some weeks after, she was delivered of a child, who lived a few hours and died. The question is: did this child inherit?

Notwithstanding the shocking contradictions which fill the depositions, given at different times by the same witnesses, it may be considered as proved, that the child was born after the period, posterior to which children are deemed capable of living, that he was born alive, without any apparent defect of conformation, and that he lived seven or eight hours.

There is, therefore no doubt, that according to the Roman law, and to the laws of many modern nations, this child would be deemed capable of inheriting.

In Spain, however, the laws of which were, and have continued to be ours, where not repealed, there exists a particular disposition, by which it is further required, that the child, in or-

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der to be considered as naturally born, and not abortive, should live twenty-four hours. Is that law still in force among us, or is it virtually repealed by the expressions used in our civil code, in relation to this subject?

Of the different articles, in which our code has occasion to touch upon, two may be selected as bearing more directly upon the question before us. The first is the definition of what is an abortive child: the second is that which declares, that the child born incapable of living, is incapable of inheriting.

"Abortive children, according to that definition, are such as by an untimely birth, are either born dead, or incapable of living." No such thing is required here, as their living twenty-four hours. Hence it is argued that the Spanish law, which made that circumstance necessary, is impliedly repealed. *Civ. Code* 8, *act.* 6.

It must not be lost sight of, that our civil code is a digest of the civil laws, which were in force in this country, when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.

Is the definition given of abortive children in the code, incompatible with the disposition of the law 2, *tit.* 8, *book* 5, of the *Recopilacion de Castilla*, which declares that those will be deemed abortive, who shall not live twenty-four hours? We think not. The definition given in the code, must hold as good in Spain as any where else, for it is dictated by nature itself: "the abortive child is that, which from an untimely birth, is born incapable of living."—But how shall that be ascertained? The law above cited says that, to remove doubts on the subject, the child shall be reputed abortive, if he has not lived twenty-four hours.—So our civil code provides that, in order to inherit, the child must be born capable of living *(viable;)* and the *Recopilacion de Castilla*, requires a legal presumption, that he was capable of living—that he shall have lived twenty-four hours.

Again, it is said that living twenty-four hours is no proof of the capacity to live; for that children, after an untimely birth, will sometimes live several days and more.—That is very true. But as the time of conception is uncertain, and great doubts must often exist, as to the length of gestation, when a child is brought into the world, a general rule is provided, by which the capability of the child to live, is so far tested.

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At the same time, where, from the recentness of the marriage, or the absence of the husband, it can be ascertained, that the child was born before the epoch, after which he may live, he is declared abortive, though he should have lived twenty-four hours. This law might certainly be known to be founded on very good reasons. But we are not here deliberating on its adoption. Wise or absurd, it exists, and must be obeyed.

It has been observed, that living twenty-four hours cannot be deemed required, as a proof of the capability to live, for that baptism is also made a requisite, without which the child is reputed abortive, a circumstance which has surely nothing to do with the constitution of the infant. We do not see the necessity of the conclusion. Baptism is required from motives of religion, totally unconnected with the reasons which may have induced the legislator, to establish the other condition.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court, be reversed; and that judgment be entered in favor of the plaintiff, for two-thirds of the neat amount of the estate of his deceased son.

Livingston, on a motion for a rehearing. By the reasons alledged, for the decree of reversal in this cause, it is admitted, "that the child was born after the period posterior to which, children are deemed capable of living, that he was born alive, without any apparent defect of conformation, and that he lived seven or eight hours;" and the cause is decided simply on the ground, that the law of the *Recopilacion*, 8, 2, is in force in this state.

It is proposed respectfully to controvert this position.

It is true, that the civil code of this state, purports to be a digest of the civil laws previously in force—but it is also to be observed, that even in the title, (from whence this definition is drawn) it is added, "with alterations and amendments, adapted to the present system of government." And in the law of the 31 *March*, 1808, promulgating that code, this title is recited *verbatim*, the code is declared to be in force in the territory, and it is ordered to have "full execution," and the 2d. section repeals all former laws inconsistent with it.

The law, thus declared and ordered to be carried into full execution, contains two provisions only, applicable to this discussion.

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I. The first, which defines abortive children, to be such as by an untimely birth, are either born dead, or incapable of living. What was the definition of an abortive child, by the pre-existing law? Was it the same given by the code, or different? And in the latter case, which definition must the court adopt? The pre-existent definition, is contained in the law above referred to, 5 *Rec.* 8, 2. Like the code, it purports to give a definition.

"To avoid doubts on the question, whether a child is abortive or naturally born," it proceeds to define, that those children shall be considered as abortive, who are not born entirely alive, who do not live 24 hours, and who were not baptised. By comparing these definitions, it will be found, that of the three requisites contained in the Spanish law, not one is contained in the code. But that this latter requires three things, totally distinct from the former, to constitute abortion: 1 being born dead: 2 being born incapable of living: 3 that the death or incapacity to live, are the effects of an untimely birth. But not one word of the "*todo vivo*" of the twenty-four hours, or the baptism. The definitions of an abortive child, as drawn from the spanish law, and from our code, are not the same. Which are we to adopt?

There can be but one answer to this; we must adopt the last: but can we superadd the former? Can we ask as well the requisites of the definition, in the law of the *Recopilacion* as those demanded by the code? I think not.

A definition is *ex vi termini* an exclusion of every thing not expressed. The law therefore which defines a right; a crime, or incapacity, excludes every thing, not contained in the definition, as completely as if it had used regular words, and said, that nothing should confer the right, incur the guilt of the crime, or make one subject to the incapacity, but the circumstances contained in the definition. A posterior act therefore giving a different definition, from the pre-existent law, necessarily repeals it. Let us exemplify each of these.

1. A right. Suppose by the laws of a state, defining the right to vote, it should be declared that, "every free white man, who had lived twenty-four months in the country, should have this right," and that by a subsequent law, purporting to have the same object, it should be enacted—that voters shall be "such free persons as live in the country." Omitting the word white, and saying nothing of the term of residence. Can there be a doubt, that in such case, the man of colour, who had gained a residence

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by being domiciliated for twelve months, would have the right to vote?

2. The definition of a crime. Suppose by the present laws, that arson shall be defined. "The wilful burning of a dwelling house, which had been inhabited within twenty-four hours previous to the fact, or the burning as aforesaid of any barn or cotton gin."—And that an act should afterwards pass, purporting to be a digest of the penal code now in force, with alterations and amendments, in which arson should be described to be the "wilful burning of a dwelling house or barn," can there be a doubt, that a person under this act, would be guilty, if he were to burn a dwelling house, although it had not been inhabited for twenty-four hours, and would not be guilty, if he were to burn a cotton gin.

3. A disability. Suppose the law under the head of "those who are incapable of making wills" should be, that those only are incapable, who are not 20 years of age, and are not emancipated, and that a subsequent law should say, "those alone are incapable of making a will, who are under 20, without saying any thing of emancipation. In this case, who would say that the emancipated minor, between 20 and

21, could make a will under the first law, or could not under the second.

In all these cases, then we find that the subsequent legislative definition, corrects the former; and if the reasoning be good, we must conclude that the laws in which an abortive child is defined, must be taken from our civil code, not from the laws of the *Recopilacion*.

II. The second provision in the code, and the one most applicable to our argument, is *page* 150, *art.* 64 and 65.

Our question is, whether a child born alive, within the legal period, and without any defect of conformation (I state the facts as agreed to by the court) be capable of inheriting. Let us consult our text. The chapter treats "of the incapacity or unworthiness of the heirs" and the title is "of successions" and the work itself is a "Digest of the laws in force, with alteration and amendments" whatever general rules are laid down there, on the subject, must exclude every former provision, inconsistent with the chapter. It proceeds to give us those rules.

The first, *art.* 64, we may suppose to be an answer to the question—Who have the capacity to inherit? The response is clear and explicit. All free persons, with the single excep-

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tion, of the child who is born not capable of living. I say the single exception, for the other of the "child not conceived" is one only in terms, because the "child not conceived" at the death of the father, is not his child, and therefore, not coming within the rule, cannot be made an exception.

Then follow the answers to the other question, who are unworthy to inherit? With which we have nothing to do, except for illustration.

Here then, is a general rule laid down, in a digest which was intended, (according to the preamble to the law of 1808) to make known the laws which have been preserved after the abrogation of those &c. "and to collect them in a single work, which might serve as a guide for the decision of the courts and juries"—and which the same law declares "shall have complete execution."

This rule declares that, "all free persons are capable of inheriting, who are born capable of living." If we ask something else, to complete this capacity, whether that something else existed in a former law or not, do we not add another exception, to the only one contained in the rule, and what else is this, but altering the law, or in other words, acting contrary to it.

If we say, that a free person born capable of

living, shall not inherit, because he died twenty-three hours after he was born: is it not most clear, that we break the rule which says, that all free persons capable of living, have the capacity to inherit?

The law of the *Recopilacion*, establishes one rule on this subject, the code establishes another. The one requires more, the other requires less. If to inherit under the first, three be required; and under the second, only one; is it not mathematically demonstrable, that you cannot give effect to the last law, if you insist on the requisites demanded by the first; and if you do not give effect to a law, do you not break it?

These principles may, I think, receive some illustration from that part of the same chapter, which relates to unworthiness to inherit.

By the Spanish law, *Part.* 6, 3, 4, a person banished; one condemned to the mines, (leaving apostates and heretics out of the question) a person born of an incestuous connexion, were deemed unworthy to inherit, as instituted heirs, and by *Part.* 6, 7, 13, six other causes of unworthiness to succeed, are enumerated. Of all these, our code contains but three, and those all different in form, some in substance, from any of the causes of unworthiness contained in the *Partidas*. Now would it not be somewhat like

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a solecism to say, that the law which prescribes nine cases of unworthiness, is consistent with the law which says, there shall be only three? Would not this construction lead to the evil "of recurring to a multiplicity of books, which being for the most part, written in foreign languages, offer in their interpretation inexhaustible sources of litigation?" How far this evil would extend, it is difficult to foresee, if the general rules laid down by the code, are not to exclude the former provisions on the same subjects, in the existent law.

If these general rules do exclude them, the question is at an end; because the living twenty-four hours, is not given by the *Recopilation* as a definition or explanation of the word *viable*, or the phrase, capable of living, but as a new and distinct condition of succeeding, and an explanation of what shall be deemed an abortive birth, of both of which, we find our law has given other conditions, and different explanations.

The court, MARTIN J. dissenting, denied the rehearing.

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

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M'BRIDE vs. CROCHERONS.

A creditor who has given a respite, may sue before the expiration of it, if the debtor becomes insolvent.

M'BRIDE vs. *D. & N. CROCHERON.*

APPEAL from the court of the first district.

In the month of February, 1816, the defendants contracted a debt with the plaintiff, (all merchants of New-York) to the amount of about twelve hundred dollars, for which the latter received their promissory notes, payable at a future day. Before, however, those notes became due, the defendants represented themselves in embarrassed circumstances, and obtained from the plaintiff and their other principal creditors, a letter of license, dated 19th June, 1816, to enable them to continue in business; each creditor giving in extension of the terms of payment, six, nine and twelve months. Accordingly, on the 14th of September, 1816, the plaintiff renewed those notes, which were then actually due, enlarging the credit, as just mentioned. But, a few days after their renewal, the defendants stopped payment, and altogether failed in business; and on the 26th of September, 1816, assigned their estate to J. E. Haight, D. L. Haight, H. E. Haight, and E. Power, junior.

The letter of license sets forth the embarrassment of the defendants; that if their pay-

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ments are extended, they will be able to continue in business, and promptly pay their debts. It then stipulates, that if any creditor shall sue the defendants, or attach their property, "contrary to the true intent and meaning" of that instrument, such creditor shall forever lose his debt.

The assignment arranges the creditors in four distinct classes, making it the duty of the assignees to pay them in that order. The assignees are of the first class—the plaintiff is one of the fourth and last class of creditors, and to which the property of the assignors will not reach. After the above mentioned extension of credit, and shortly before the making of the assignment, the defendants shipped goods to the value of fourteen or fifteen thousand dollars, to New-Orleans, on their own account, consigned to Flower and Findley, the garnishees in this action.

The plaintiff, not choosing to come in under the terms of the assignment, which he was regularly notified to do by the assignees, followed the goods here; and on the 13th of November, 1816, attached them in the hands of the garnishees, for the whole amount of his debt—at which time, however, the renewed notes were not payable, although the terms of credit spe-

cified in all the old notes, which were so renewed, had, for some time, expired.

The district court sustained the attachment, and gave judgment for the plaintiff for twelve hundred and nineteen dollars, sixty-two cents, the amount of the renewed notes; and the defendants appealed.

Duncan, for the defendants. This attachment was brought in violation of the agreement entered into by M'Bride, in the letter of license. We will endeavor to shew, that the assignment by the Crocherons did not destroy the letter of license, and that, therefore, the agreement of M'Bride is still in force. The counsel adduced, in the lower court, many cases to prove that, because one of the contracting parties is unable to fulfil his part of the agreement, the other is, to all intents and purposes, discharged. Admitting, for argument's sake, that all these authorities are law, we contend they are not in the least applicable to our case. In those cases the party was completely and absolutely unable to perform his part of the contract—in our case it was not known whether the debtors could or not. This is the grand distinction, and which we submit with confidence to the court. At the time of this attachment being issued, it was im-

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possible to say whether the Crocherons could pay their debts or not. The notes were not to be finally paid until twelve months had elapsed from September. In November this attachment was laid—after an interval of only two months. At that short period of time, it was impossible to determine whether there was such a disability on the part of the Crocherons as to exonerate M'Bride from his engagement under the letter of licence. To this day. this question cannot be settled; for not quite nine months have expired. But, in answer to this, we will be told that, though it was not certain at the time of the attachment whether these debtors could perform their contract; yet they made an assignment, which is proof of their insolvency. We deny that this is an infallible proof. We admit that a presumption of insolvency arises against the debtor; yet, on the other hand. with confidence we can assert, that a man may be declared insolvent, or a bankrupt, and yet, under all circumstances, not be one: for, at the time of being declared an insolvent or bankrupt, under a law, the debtor may be so situated as not to have his property under his controul. It may be in different parts of the world, shipped on mercantile adventures. He is then obliged to have his situation known, and undergo a tem-

porary bankruptcy. This certainly will not appear to the court; a strange and unauthorized doctrine. Lord Mansfield declared in *Rex* vs. *Town of Liverpool*, 1 *Burrows* 732—"That a man may be able to pay above 20 shillings, notwithstanding his being in strictness a bankrupt"—That great man advanced a similar assertion in *Dassel* vs. *Simpson*, *Dougl.* 92—"a man may become a bankrupt, and yet be able to pay 25 shillings in the pound." On these authorities, and on the principle of the thing, we say, that because a man may make an assignment of his property, he is not to be considered as absolutely unable to execute his part of a contract. Our case is still stronger. We are not declared insolvent under any law; we made a voluntary transfer of our property, for the benefit of our creditors. It is a mere arrangement between ourselves and creditors, to relieve us from the many embarrassments in which we were involved: it is altogether a contract. We confidently say, that no case can be produced, which goes so far as to declare a man absolutely incompetent of fulfilling his engagements, because he assigns his property over to his creditors. On the contrary, we assert it to be but an arrangement for the benefit of the debtor, to enable him to discharge his debts, at a more auspicious time. It

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is made to assist us in our embarrassments, without exonerating him in the least from his engagements, unless the creditors have released the debtor altogether. We consequently say, that this assignment did not prove, that the Crocherons were in such reduced circumstances, as to render them wholly unable to satisfy their creditors; and that therefore, our position will not be affected by it, when we said that this attachment was brought without knowing, that the Crocherons could liquidate their debts.

"If a contract be fair in its creation, it shall not be affected by a subsequent event, which has thrown the advantage greatly or wholly on one side," is a position which has been most strenuously, and ably held by the most learned judges of England. In 1 *Brown Chanc. Rep.* 157, *Mortenier* vs. *Capper*, to the utmost extent, this principle of law is recognized. "Sale of an estate for a certain sum of money, and an annuity for life. The agreement being fair, a court of equity will decree a specific performance; though the party die before any payment of the annuity." 3 *Brown's Chanc. Rep.* 605, *Jackson* vs. *Lever & al.* presents the same doctrine. "A contract, that the one party shall convey an estate, and the other shall grant an annuity, shall be carried into effect, though the

vendor died previous to any payment of the annuity." 2 *Brown's C. Rep.* 17, *Henley* vs. *Acton*, supports similar principles. To shew that the same doctrine has been held by other judges, we call the attention of the court, to 1 *Atkins*, 12, *Gibson* vs. *Patterson & al.* "Though the vendor of an estate, does not produce his deeds, or tender a conveyance within the time limited by the articles, the court does not regard this neglect, but will decree a sale notwithstanding."—Lord Macclesfield has said in 1 *Peere Will.* 728, *Cann* vs. *Cann*, "that solemn conveyances, releases and agreements, made by the parties, are not slightly to be blown off and set aside." In later times—only a few years past, the court of Chancery in England, has most unequivocally upheld a similar position. More particularly we refer this court, to 6 *Vezey Jr.* 340 *Paine* vs. *Miller*, and 9 *Vezey Jr.* 246.—These authorities, go to the full lengths, which we stated in the commencement; that a fair contract shall not be overturned by a subsequent event, which has given the one of the parties, even all the advantage. Apply this principle to our case, and it will be immediately seen, that the subsequent assignment by the Crocherons, did not destroy the letter of license. The letter of license, was an instrument of wri-

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ting under hand and seal—entered in the most solemn manner, between the creditors and the debtor To set aside such an instrument, says Lord Macclesfield, is not to be easily done. It grants to the Crocherons, an extension of time, to enable them to discharge their debts. It contains the important proviso, that no creditor shall sue for his debt, under the penalty of losing it. This was then, a fair contract, for the advantage of each party. It in course of time, turns out that the Crocherons become too embarrassed, to proceed in business; and they make an assignment of their property, for the benefit of their creditors. Now here the advantage of the contract is not wholly on the part of the debtors; nor is it in strictness greatly so. They give up their property, and expect no benefit from it. But they ask from the creditors, the execution of their part of the agreement. Now will not this case be brought completely within the spirit, even the very letters of the authorities, we have quoted in our favor? Shall this "subsequent event" overturn this contract, fair in its creation, even when the advantage is not wholly on the side of the Crocherons? We ask the court, if these cases will not completely bear us out, in saying that the letter of license is still

in operation; and that consequently, M'Bride is bound by his own agreement?

But on the reason of the thing, why should the assignment overturn the letter of license? M'Bride, and the other creditors, must have known all the risks which they would have to run, in granting an extension of credit. Many accidents and misfortunes might happen, before the twelve months could have expired. Of this M'Bride must have been aware: yet he signs the instrument. In the letter of license, nothing is hinted about its revocation, in case of an assignment of property. M'Bride could not have supposed, that the law would authorize him to say that it was, when that law is undetermined. Every danger which a man in business could encounter, must have been in the mind of M'Bride, at the execution of this instrument. The Crocherons could not guarantee their solvency—this the creditors could not exact of them; for it would be in the highest degree unreasonable. But they would do every thing which could be done, to extricate themselves from their difficulties—all that industry and honesty could effect, would be performed by the Crocherons. If they must sink beneath their embarrassments, it was a misfortune which they must encounter. But if any injury could

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arise, it must be sustained by their creditors.—They had all these in consideration, when giving the letter of license. These dangers and these accidents have occurred; and upon them the loss, if any, must be thrown.

Our first point was, that this attachment was issued in violation of the agreement of M'Bride. This difficulty will attack the counsel in the commencement of their agreement. How to prove that a man can break his contract when he pleases, and thus render his engagements a nullity, requires all their learning and ingenuity. But the assignment is pleaded in bar. To this M'Bride is a perfect stranger. He disdainfully refused to accede to its laws. He alone wishes to overturn it. M'Bride alone steps forward; tenders in bar of the execution of his solemn agreement, an instrument with which he never had any thing to do—but which was an arrangement with other creditors, to his entire exclusion. To assit him in breach of duty—to support him in a most unwarrantable claim, he asks the interference of this court.

A question may be started respecting the validity of the assignment of the Crocherons. The decision of this is not necessarily involved in the main question. We are not afraid to meet it; and will endeavor to shew that it is

perfectly good. Many cases have decided, in direct contradiction to our opponent, that a man may, even in insolvent circumstances, give a preference to his creditors. We deny that the Crocherons were completely insolvent. But, admitting they were, we will exhibit to the court three cases which authorized them to make an assignment, granting a preference. In *Small* vs. *Oudley*, 2 *Peere Will.* 430; the court there held, that a debtor may prefer one creditor to another; nor is the time when the assignment is made material. This is the basis of all the decisions on that subject. In 8 *Term Rep.* 528, Lord Kenyon says that, "putting the bankrupt laws out of the case, a debtor may assign his effects for the benefit of particular creditors." But, what we most rely upon are two cases in this country—one in New-York, and the other in Connecticut. 5 *Johns. Rep.* 412. "A debtor may, in insolvent circumstances, *bona fide*, give a preference to one creditor to the exclusion of others, and such preference, though voluntary, is valid, unless done in contemplation of an act of bankruptcy; and even if an act of bankruptcy be contemplated by the debtor, yet, if at the instance and application of a particular creditor, he pays such creditor, or assigns him property, such payment or assignment will be

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valid as against the assignees of the bankrupt." This point is strongly laid down in 3 *Day*, 340, *Hempstead* vs. *Starr*. "A, on the eve of failure, made a general assignment of his effects, and gave immediate possession to B, one of his creditors, in trust, to satisfy the debts due to B and certain other meritorious creditors specified, and to pay over the surplus, if there should be any, to the creditors generally. C and D, creditors, not specially named, soon afterwards attached these effects in the hands of B, as the property of A, held that this conveyance was not by law fraudulent against the attachment of creditors." These cases completely nullify the assertion, that a man, in insolvent circumstances, cannot make a preference of his creditors. Now, let us see if this assignment was "wholly bottomed on fraud." Nothing can give a more satisfactory answer to this question than the evidence. Fraud must mean, cheating the creditors: it must be most positively proved, and never, in any case, presumed. Haight, a witness—a man entitled to the utmost credit, whose veracity has not been questioned by our antagonist—indeed his own witness solemnly deposes, that he was informed by the debtors of their intentions to ship these goods to New-Orleans—that they were not to be included in the assignment

—and that the Crocherons declared at the time, the creditors should not lose a cent, even if it took up all the proceeds. Now, this evidence is uncontradicted, and we must therefore believe it. Is there then any thing bearing the appearance of fraud in this? "The creditors should not lose a cent," is the strongest proof of the honesty of these unfortunate men—"even if it took up all the proceeds,"—shews that they expected their shipment to this place would be more than sufficient to discharge their debts—if not, all should go to satisfy their creditors. So anxious were the Crocherons to do themselves and their creditors the fullest justice, that one of them comes to New-Orleans expressly to take care of the property, that every thing which could be, should be done to vend it to the greatest advantage, in order to relieve themselves from their embarrassments. If there is any thing like fraud in this, it must exist in the most religious transaction. But, to rake out fraud, subterfuge must be resorted to. Brewster, the clerk, swears that he never saw any entry of this shipment in the books of the Crocherons. He does not swear there is no entry; but Haight swears most positively there is one. Which will the court believe? And will they believe the assertion of counsel, that this entry

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might have been made just before Haight gave his deposition? Is there any thing through the whole evidence to authorize such an insinuation against Haight? The imagination of our opponent is too rich—it destroys his judgment.—If there is nothing in the least resembling fraud in this transaction—if the law will permit the Crocherons to give a preference—the court will then say this assignment is valid. The opposite side have denied the validity of this assignment. So much the better for us. Then the letter of license is still in complete force. An invalid instrument cannot affect a valid one. M,Bride admits the validity of the letter of license. If so, it cannot in the least be touched by an instrument, void *ab initio*. Which ever way the case is put, the letter of license must be considered by this court as still in operation against M'Bride and the other creditors.

Our second point is this, that this attachment was laid before the debts were due, and, therefore, prematurely brought. It will be recollected, that the notes of the Crocherons were renewed six, nine and twelve months; only two months had expired when M'Bride commenced his action; he sued on the renewed notes, not pretending to have a right of action on the old ones, well knowing how shameful his

conduct would appear in the eyes of the world. We admit the principle of law laid down by our antagonist, that on the debtor's insolvency all his debts are due *in presenti*, though the contract makes them payable *in futuro*. This rule of law is not applicable to our case. Those debts are proved under a commission of bankruptcy, or when the debtor is discharged under an insolvent act. Ours is neither—we make a voluntary assignment—we do not ask to be discharged under any law—we give up our property from our own will, and enter into this arrangement with our creditors, without being compelled by any law whatever. In the former case, the debtor is forced to do what the statute prescribes—he must give up every thing in the order fixed to his creditors—they are also compelled to come in and receive what is parcelled out for them. This is the distinction. In our case every thing is voluntary—no compulsion is or can be used on either side. Under such an assignment, these debts are not *debita in presenti*—because there is no bankruptcy, no insolvency, but an arrangement between the debtor and his creditors. Were it necessary, we could refer the court to our statutes in relation to attachments; and, upon a comparison of the facts as sworn to by the plaintiff, and those ad-

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mitted by him in this appeal, we doubt not that the contradiction evident in the two would destroy the application to uphold their demand in this court.

We do not want the court to notice the "supposed title of the assignees," it was unnecessary for them to defend this action. The Crocherons not the assignees, are the defendants, and therefore the principle stated in *Chitty's Pleading*, 1 *vol.* 505, has nothing to do with our case. This property, it is in evidence, was never to be included in the assignment; but to be left at the disposal of the Crocherons. All the Haights positively swear that this was the understanding of the parties, nor was there in this any thing illegal or morally incorrect. It was to be under the controul of the debtors that they might make sufficient out of it to enable them to liquidate their debts. Neither was it necessary to forward any documents to their consignee in this city. The very act of one of the Crocherons coming with the property superseded the necessity of this. It was under his direction—he was the agent of the house, and he could deliver it to any person in this place whom he thought most entitled to confidence. The delivery of it by him would be a sufficient authority for the agent in this place to sell it and render the pro-

ceeds to the Crocherons. It was not then the apprehension of any fraud—if fraud could possibly exist—being detected, that no papers were transmitted to the garnishees, but the bare simple act of one of the debtors arriving here with it, rendered it wholly useless.

From what has been said, the court will immediately perceive the difference between our case and that reported in 3 *John.* 125, which the plaintiff has brought to his assistance. Here the concealment by the debtor was fraudulent, and nobody knew it but himself. In our case, the evidence will, we trust, satisfy the court that there was no fraud. Our assignees were creditors, and the legal guardians of the property of their debtors. They knew every thing that was done by the Crocherons, relative to the shipment of their goods to New-Orleans. They certainly would have done nothing which could have had a tendency to deprive them, of the payment of their debts. The facts in the two cases are different *toto cælo*, and no inference can be drawn by the court, from that in *Johnson* to the prejudice of ours.

We have thus given the two points, on which we rely for our defence. Many others could have been presented the court. We resist the demand of M'Bride, because we say, that his

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attachment was brought in contravention of a solemn agreement, and before the notes—the foundation of the action, were due. This court will, we have no doubt, well consider the nature and extent of M'Bride's demand. They will in their decision in this suit perceive, that an important principle is involved. We ask for nothing but justice, and we do say, that the demands of the creditor in this case, are not consistent with justice.

Stannard for the plaintiff. The letter of license became inoperative, by the subsequent insolvency of the Crocherons, and the assignment of their estate, and so was no bar to this attachment.

The assignment does not affect the rights of M'Bride, to receive payment out of the property attached.

I. It is a very general rule, that on the debtor's insolvency, all his debts are due presently, although by the contract they are payable *in futuro*. This is an acknowledged principle. Now, the Crocherons became insolvent, and assigned over their estate, in September, 1816, which had the effect of making M'Bride's debt

due at that period. The attachment was issued in November following.

But, again: "according to the true intent and meaning" of the letter of license, the creditors, who had not accepted of the assignment, might well attach. What was that license? To enable the Crocherons to continue in business and pay their debts. Had they done so, the creditor could not have attached: but the moment they became insolvent, and assigned over all their estate, they put it out of their power to pay—they broke the conditions upon which the license was granted to them, and the creditor was no longer bound by it. And what is the legal construction of the license? The Crocherons represent themselves embarrassed. The creditors say to them, "if you will continue in business, and fairly and honestly pay your debts, we will give you further time to pay us." Upon these conditions they received the letter. Now, can it be contended, that they have complied with those conditions? If not, and they are not bound, and cannot be made to comply with their part of the agreement, shall the creditor be compelled to observe his? Was not their insolvency and assignment a complete destruction of their power, and a declaration of their intentions not to comply? Clearly so. In the courts of com-

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mon law, this has been repeatedly so decided; and in 1 *Pothier on ob. p.* 2, *ch.* 3, *art.* 3, *sec.* 3, there is an authority in point. "The term granted by the creditor to his debtor, is founded on a confidence of his solvency—when that foundation fails, the effect of the term ceases;" and goes on to say that, in such case, the debt is immediately due. No principle can be more just as respects all concerned. It is the change of the condition of one of the parties, that releases the other: for when one of the contracting parties has put it out of his power to observe that part of an agreement to which he is bound, it would be extremely hard to compel the other party, to his certain ruin, to perform his. Something of this principle is found in every code of laws—in courts of equity too, it is fully established—as in the case of *Drake* vs. *Mayor of Exeter*, 1 *Chancery Cases*, 71, where the lessor covenanted with his lessee and his assigns, that upon the payment of certain rents quarter-yearly, he would renew the lease. But the lessee became insolvent, and assigned over his property to assignees. The lessor was called on to fulfil his part of the agreement, viz. to renew the lease, but which he refused to do, because the lessee, by his insolvency and the assignment of his estate, had

put it out of his power to fulfil his part of the agreement—that is, to pay the rent; and the court of chancery ruled, that the refusal was properly made; and, as the lessee could not comply with his part of the agreement, would not compel the lessor to renew the lease. This case is certainly very much to the present argument. So in *Willingham* vs *Joyce, 3 Vezey's Chan. Rep* 168—bill for a specific performance of an agreement to grant a lease to the plaintiff —on evidence of his insolvency, the court would have dismissed the bill with costs, unless the matter had been compromised, on the ground that the plaintiff had put it out of his power to observe his part of the agreement, to pay rent, by becoming insolvent; and so the parties were discharged. And going upon the same reasoning, it has ever been held, in equity, that a failure of the consideration of a contract, by a subsequent contingent event, to which the agreement, from its nature, was subject, is a good reason for not compelling the party not in fault, to comply with his part of it; as in *Stent* vs. *Bailies, 2 Peere Williams' Rep.* 217, where the contract was for the sale of shares in the Lustring Company. Afterwards, before the transfer was made, a *scire facias* issued to repeal the patent granted to this company; and,

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at the same time, a proclamation was published, forbidding transfers. The company never afterwards opened their books, nor was there any prospect of their doing so. The seller brought an action on the articles in a court of law, and obtained a verdict; upon which the purchaser filed a bill in equity, for an injunction. *Sir J. Jekyl, master of the rolls.* "It is against natural justice, that any one should pay for a bargain which he cannot have; there ought to be a *quid pro quo*—but, in this case, the defendant has sold the plaintiff a bubble, a moonshine:—and a perpetual injunction was decreed, on the ground that, it being out of the defendant's power to afford the plaintiff that benefit which the contract was intended to secure, the plaintiff should not be compelled to perform his part alone. There was an appeal from this decision; but the lord chancellor confirmed the decree. The case of *Pope* vs. *Roots*, 1 *Bro. P. C.* 370, is also full to the same purpose. There J. S. in perfect health, agreed to sell his estate to B. in consideration of an annuity for life; before the conveyance, however, but after it ought, by agreement, to have been executed, J. S. died. On a bill brought by B. for a specific performance of this agreement, the court dismissed it, because it was impossible for J. S.

(being dead) to have the benefit of the annuity. B. would have nothing to pay, and yet would get the whole estate, which would be unjust; and the court said it was a clear rule, that where one party, by the conduct or misfortunes of the other, could not have the benefit of his part of the agreement, he shall be put in as good a condition as the other, and law and equity will take care that neither party shall suffer by the misfortunes or frauds of the other. Now, it must gratify the court to be able to apply those very just and equitable principles to this case, particularly as it appears that there is only property sufficient to pay the first and second classes of creditors; and M'Bride being one of the fourth, will lose his claim entirely, unless he is paid out of the property attached.

Thus much being advanced in support of the first proposition, before reasons are attempted to prove that the assignment of the Crocherons cannot affect M'Bride in the present action, a preliminary question arises, whether the supposed title of the assignees under the assignment, will be noticed by this court, inasmuch as it is not pleaded, and the assignees are not before this court as parties to the suit? Now, it appears by the affidavits only, that an assignment has been made. By the plea, the letter of

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license alone is relied on, in bar of the attachment. Will this court notice the alleged title of the assignees, inasmuch as they have not pleaded? It is believed not. Matter of defence going to avoid the action, ought to be pleaded. 1 *Chitty on Pleading*, 505. But why? That the opposite party may know to what he is required to answer. Is not the civil law the same? Here the pleadings do not inform the attaching creditor that the assignment will be relied on in defence against the attachment; and his counsel cannot know any thing of it—as between the creditor and the assignees there is no contestation, and the court cannot decide the disputes of persons not regularly litigating in a suit in court But if the court overrules this objection, which is made only because it may lessen the labors of the court, let us see whether it can make any difference in the ultimate decision of the cause. We are willing to investigate to the utmost stretch of the defence. Then,

II. Good faith is the basis of all mercantile dealings—but it is due to the character of this transaction to say, that it was bottomed in fraud, fraudulent from beginning to end. And what effect does fraud produce? It vitiates all con-

tracts, all proceedings—it destroys the most solemn judgment of a court of competent jurisdiction. The *Dutchess of Kingston's case, Hale's Hist. of the Com. Law*, 39, *note* 31.

We must look to the character of this assignment, which we are now supposing duly pleaded; for it is admitted, that if it was a *bona fide* transfer of the property attached, the attachment ought to be dismissed. The rule undeniably is, that where personal property is assigned in a sister state, or elsewhere, according to the laws of the place where the transfer is made, a creditor cannot afterwards attach that property. The rule with respect to real property is directly opposite; but we have no concern with that.

Now, whether the assignment be good or not, as affecting the claims of creditors, will depend principally on the laws of New-York, and the motives of the party making the deed.

A recurrence to the evidence is necessary. Fraud is discoverable throughout.

The assignment purports to convey all the personal estate of the Crocherons. They do not say in the body of that instrument, that any thing is reserved. The creditors too are to be paid according to the good will and pleasure of the Crocherons. Who are they who endeavor to destroy the rights of others, the rights of their

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own creditors, all of whom have equal rights? But they presume to say, unless there is property more than enough to pay the first class, (most favored) the second shall have nothing—and so on. The evidence shews that there is barely enough to pay the first and second classes. Have insolvents, even honest insolvents, a right to make this discrimination? A debtor may, to be sure, in the ordinary course of trade, when solvent, and not in contemplation of bankruptcy, pay one creditor in preference to another; but in no other situation—never has he that right in contemplation of, or after insolvency. Here the Crocherons completely failed, and then assigned their property to some creditors, in preference, and to the exclusion of others. Will the law uphold such a conveyance? "It never entered into the mind of a judge to say, that a man in contemplation of bankruptcy, and more especially after complete insolvency, could sit down and dispose of his goods to particular creditors." *Lord Mansfield.* Thus, in the case of *Ogden & Thomas, assignees of Cummings* vs. *Jackson*, 1 *Johns. N. York Rep.* 373–3: Cummings, having become insolvent, assigned to Jackson, a creditor, certain goods in payment of his debt. The assignees, however, afterwards brought this action

of trover, to get back the goods. The court gave judgment for the plaintiffs, on the ground of fraud, against the other creditors, saying that "it would not be permitted that a person insolvent at the time, should parcel out his estate to such creditors as he may see fit to prefer." And the court added, that to do so, was contrary to the genius of the law, which required an equal distribution. A great number of cases have been decided in other states, and in England, where the common and bankrupt law obtained, analogous to the laws of New-York. It is thought sufficient to notice one or two leading cases on the subject, decided in Great-Britain. *Harman* vs. *Fisher*, 1 *Cowper's Rep.* 126, is one of them. There the question was, whether an insolvent might lawfully give preference to some of his creditors? and it was held by the whole court, that a person in insolvent circumstances, or absolutely insolvent, could not do so; that it could only be done in the ordinary course of business, where the party was solvent at the time, or thought himself so, and not in contemplation of bankruptcy. "What," said Lord Mansfield, "is the nature of the transaction upon the face of it?—it is in terms, that he, (the insolvent) means to give a preference. This the law does not allow." So in the case

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of *Linton, assignee of a bankrupt*, vs. *Bartlet*, 3 *Wilson*, 47–8. The bankrupt, being in insolvent circumstances, assigned over his estate in preference to some of his creditors. This was held to be fraudulent and void—"that it was partial and unjust to all the other creditors"—and the court declared the assignment void. And, again, in the case of *Rust, assignee, &c.* vs. *Cooper*, 2 *Cowper*, 635. This is cited particularly, because the object and motives of the party making the assignment, were very similar to those of the Crocherons. The bankrupt had made an assignment to his creditors; but so that a part of them only could take any benefit under the assignment. He was insolvent at the time. The court looked into the motives of the insolvent, and said—"In the present case there is not a single thing but what is a step towards fraud, and a proof of an intended preference; and to support it, would be to overturn the whole system of the bankrupt laws. The present, therefore, is a fraudulent assignment upon all the other creditors, and all the laws concerning bankrupts." Let the learned counsel say, how this case and the one before the court differ.

But, in truth, what are the pretensions for shutting M'Bride forever out of payment? Is it the honorable conduct of the Crocherons and

the Haights, their assignees? Let us see. The whole transaction shews that the object was to defraud the creditors out of the goods shipped to New-Orleans. It was never intended that they, or the assignees, should have any control over those goods. It was never intended that the general creditors should have any of the avails of that very heavy shipment. Every thing was transacted in the dark. Three Haights are made assignees, adding Potter, a very correct young man, by way of giving false colors to the business. He was to be made the dupe. These conscientious Haights all swear that the goods in question were not intended to be included in the assignment, but that the Crocherons intended to keep them under their own control—and one of the Haights confesses that he was promised payment out of the proceeds. But Potter, and all the other creditors, supposed that the assignment covered all the property of the insolvents. Now, was there ever a more gross fraud? The combination is too apparent to be passed unnoticed. "Make us your assignees; and, that your creditors may be satisfied, and suppose all is fair and honest, let the assignment appear to convey all your property; but you must keep the shipment to New-Orleans a perfect secret, and pay us out of the proceeds

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—then the surplus you may have; but take care that the creditors know nothing of it." Accordingly, no entry whatever was made in the books of the Crocherons of this very heavy shipment—all is done behind the backs of the creditors—even their confidential clerk, then book-keeper, (Brewster) who did their business, was kept ignorant of this meritorious transaction. What does he swear? "He never made, or saw any entry made, of the shipment to New-Orleans." This is not counteracted by the evidence of one of the Haights, who swears that the books are in his possession, and that "there is an entry." Very true—it was easy to have the entry made but a moment before he took the oath—so he says, there "is" an entry: but the artifice is too shallow to impose upon this court. This is not all—the insurance offices of New-York refused to insure. Why? Because they dare not write to the offices for insurance. This would be making the matter too public—and no bill of lading could be shewn, as the goods were shipped in such private silence that the captain of the vessel must not be trusted with the secret, and so was not required to sign bills of lading. One of the Haights acknowledges that he cautioned the Crocherons, that the creditors would find it out—*i. e.* find out the ship-

ment to New-Orleans: and it turns out in evidence, that some of the goods of the Haights accompanied this very shipment, and were embarked in the same enterprize. As they could not trust to the captain to sign bills of lading, they could send no document here to the garnishees to present to the captain on his arrival, to get possession of the goods; therefore it was found necessary to despatch one of the Crocherons with the goods on board.

Now, we think it does appear, that a more fraudulent, a more corrupt transaction never came before a court of justice—and will this court suffer the parties guilty of those frauds to take advantage of them to the injury of a *bona fide* creditor, who has parted with his goods in faith of the honesty of the purchasers, but who have combined to deceive him? Shall they be suffered to pocket fourteen or fifteen thousand dollars? The assignment purports to convey all their goods. Thus their creditors were to be quizzed out of this very considerable sum—go without a farthing. But this concealment operates very differently from what they contemplated. It is a fraud—and as to their creditors, makes the assignment absolutely void—as in the case of *Duncan* vs. *Dubois*, 3 *Johns. New-York Cases*, 125-6-7, where the insolvent

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kept back from the knowledge of his creditors a claim which he had on the United States for revolutionary services. It was held fraudulent, and the assignment and discharge of the insolvent void, because "it was a fraud upon the creditors to withhold that claim, so that he might afterwards appropriate the result of it to his own use."

Then it is submitted, that the subsequent insolvency and assignment of the Crocherons did away the letter of license, and restored the claims of M'Bride as they would have been, had that instrument not been made and his notes renewed—that supposing the court will recognize the claims of the assignees, the assignment under which they can alone claim, (supposing it to include the goods in question) is fraudulent and void—that if it did not convey those goods, it was a fraudulent concealment—and that makes the assignment void: and, what is very material in the latter case, these goods remained the property of the Crocherons, and of course subject to this attachment. But, if it be said that the goods in question were conveyed by the assignment to the assignees, a further answer is, that the subsequent possession and control of the Crocherons, independent of other frauds, makes the deed absolutely void as against cre-

ditors. The case of *Mace* vs. *Cadel*, 1 *Cowper's Rep.* 233, went upon this ground, and decided that, if a man convey his goods to a third person, yet keeps the possession or control, it is void, as being fraudulent, according to the doctrine in *Twine's case*, 3 *Coke*, 81.

We might here rest the case; but the counsel for the defendants having taken some different positions from those on which we have discussed the merits of this controversy, it is fit to notice them.

It is admitted, that if the property assigned by the Crocherons is insufficient to pay all their debts, that then the letter of license is destroyed by the assignment—and the force of the authorities proving that position, is not questioned. But, it is said, that this case may be distinguished from that class of cases—and how? Because, say the counsel, "in those cases the party was unable to perform his part of the contract; but that, in the case at bar, it is not known whether or not the property assigned by the Crocherons is sufficient to pay all their debts." That the law is as admitted and proved from authority, there is no doubt; but the gentleman is mistaken in point of fact. The court will see from the testimony, that three witnesses expressly swear, that there is not property more than suf-

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licient to pay the first and second classes of creditors—and there are no less than four classes, and M'Bride is one of the fourth. How, then, could it be said, that it does not appear that the estate will not pay all the debts of the Crocherons? The evidence was not recollected. If M'Bride does not get payment here, of course he never can hope for it.

Then authorities are cited which, it is said, prove that, "if a contract be fair in its creation, it shall not be affected by a subsequent event, which has thrown the advantage greatly, or wholly, on one side." Now, if any judge had ever said so, it would prove nothing here; for there is evidence enough to shew, that the letter of license was not fair in its creation. Perhaps no court exists that would not say, that this instrument was procured from the creditors with a view to the fraudulent transfer, concealment, &c. which so rapidly followed the date of the letter of license, and have been proven. But, in truth, these authorities do not support the counsel's position—far from it. They prove a contrary doctrine—for, in a note to the case of *Mortimer* vs. *Copper*, 1 *Brown's Chan. Rep.* 257, it is declared by the court, that the case of *Cass* vs. *Randall*, 2 *Vernon's Rep.* is badly reported, and is not law; and, it is added, that

that case is the only one which supports the position taken by the opposite counsel; but that, as the reporter mistook the decision, it is not an authority. And, as to the case in *Brown's Rep.* the counsel have not fairly cited it. The court will discover that it is not an authority to the extent they suppose. It is opposite to their principles—for the chancellor ordered an inquiry into the value of the estate, and put the party in the same situation as he would have been, had not the old man died. So that there is no authority—there can be none—shewing that, if the debtor become insolvent, he may still compel his creditors to observe their part of a contract which, from its terms, they only stipulated to perform on condition, that the insolvent would perform his. The decisions, and the reason of the thing, are conclusive against it.

The expression of judges in *Brown*, 733, and *Douglass*, 92, that a man may become insolvent, and yet his estate pay twenty shillings in the pound, may be true, yet has nothing to do with this case—for here the evidence is positive, that the estate of the Crocherons is insufficient to pay more than the first and second classes of creditors.

As to the authorities cited to shew that an insolvent may legally prefer one creditor to

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another, there are cases in which it may be done, but not to the extent to which the counsel suppose.

It is said that we admit the validity of the letter of license, and that if we destroy the assignment, the license precludes M'Bride from recovery. Let us see if this is so. 1. Too much is taken for fact, because we do not admit the validity of that instrument. 2. But, if we did, would that have the supposed effect? By no means; because, by reason of the fraudulent concealment of this property, &c. as to the Crocherons, the assignment is a nullity, with respect to creditors who dissent from it. It is upon this principle, that the Crocherons shall not be allowed to avail themselves of their own wrongs —and we did not suppose that the gentleman would anticipate what was never intended, and could not be argued with safety in a court of law. But the assignees have got possession of the estate; and, by this time, have paid away all the proceeds, though nothing has been received by M'Bride.

It is next advanced, that M'Bride attached, on the renewed notes, before they were due: But this is not so—he attached for his debt, under all the circumstances of the case, disclosed in evidence to this court.

The opposite counsel admit, that on the debtor's insolvency, all his debts are due presently: indeed, that principle of law, is too well tested to be denied; but how do they attempt to get over it;—why say the counsel, "here the Crocherons, have not taken the benefit of any bankrupt, or insolvent law; therefore we do not know that they are insolvent. Again, they forget, that their witnesses swear, that the estate will only pay the 1st and 2d classes of creditors. Are they then not insolvent?

To recapitulate.—1. The letter of license was granted by the creditors of the Crocherons, upon the condition, that they should continue in business, and pay all their debts. This condition they have broken, by making a general assignment of their property; which shews their inability to pay, or why make the assignment? But the concurrent testimony of all the witnesses is, that they are only able to pay the first and second, out of four classes of creditors—of which last, M'Bride is one, and of course can get nothing but from this attachment. 2. The property in question was excepted out of the assignment, and was not transferred to the assignees; but still continues to be the property of the Crocherons. This concealment of a large portion of their property, was a fraud up-

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on the creditors. The Crocherons shall not be allowed to avail themselve of, or benefit by their own wrongs In truth, this was the very reason why M'Bride, after the transaction came to light, would not accede to the terms of the assignment. Had he not done so, he could never hope for payment. 3. As that property still belongs to the Crocherons, the letter of license being a nullity, has not M'Bride a right to recover payment of his debt, out of the property attached?

Mathews, J. delivered the opinion of the court. This case is in many respects, similar to that of *Ramsey* vs. *Stephenson*, lately decided in this court, *ante* 23. The debtors, in both cases appear to be insolvent, and attempted to assign their property to trustees, for the payment of their debts. The deeds of cession, in both instances, contain stipulations, by virtue of which the creditors are classed, and a preference is given to some, in exclusion of the rights of others. In the case alluded to, the assignment is of all the property of the debtor, without limitation. In the one under consideration, although from the evidence, it would seem that the defendants and appellants expressed, in their deed of assignment, an intention to con-

vey all their property; yet, it is stated by the assignees, who are witnesses in the case, that the deed, having reference to a schedule annexed thereto, nothing passed by it, except what is designated in the schedule; so that the property here attached by the plaintiff and appellee, was left under the dominion and control of the defendants and appellants.

The plaintiff's claim is opposed on the ground, that the respite granted by him, jointly with several others, who executed a letter of license, as it is termed, had not expired at the inception of the present suit: and further, that according to the stipulations of that instrument, he has forfeited every claim to payment, by an improper and premature prosecution.

The letter of license, was executed on the 19th of June 1816. On the part of the creditors, it purports to grant an indulgence to the debtors, by allowing them a term of payment, for debts then due, in consideration of their inability to pay immediately. On the 20th of September of the same year, the defendants stopped payment, and assigned their property to some of their creditors, for the purpose already stated. It appears from the testimony of these assignees, that the amount of the property ceded, is not sufficient to discharge the debts, due

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to those whom the debtors thought proper to class as privileged creditors.

No claim to the property attached having been put in, under the assignment, there is but one question to be decided. Is the plaintiff and appellee exonerated from the obligation imposed upon him by the letter of license, in consequence of the subsequent conduct of the defendants and appellants, and was he so, at the inception of this suit?

The defendants may justly be considered, as having been insolvent, at the time of executing the deed of assignment, and even so at the inception of the suit: and from the evidence, we believe that they were in insolvent circumstances at both these periods. The principles of law, cited from *Pothier* and other authors, on which the district court, seems to have founded its judgment, are strictly applicable to this case, and no doubt can be entertained of their soundness They are common to every question of bankruptcy, or insolvency. In cases of failure, creditors, even when the time of payment has not yet expired, are entitled to receive dividends of the insolvent's estate. In other words, the debt becomes payable, by the insolvency of the debtor. The debt being thus payable, the creditor has a right to pursue all legal remedies

in his power, for the recovery of it; and may, in case of a voluntary assignment by the debtor, to some of his creditors, if he be not a party to such an agreement, seize on any property not actually delivered, under such an assignment, as we have already determined in *Ramsey* vs. *Stephenson*; and certainly with equal, or greater propriety, may he proceed against any property not claimed by the assignee, or pretended to be conveyed by the deed of assignment. This being the situation of the property, attached in the present suit, there is no error in the decision appealed from.

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

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The apparent vendee, in a simulated sale, will be decreed to recovery.

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

The petition stated, that the plaintiff's testator, finding himself in difficulties, thought proper to place a part of his property out of the

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reach of certain enemies, who menaced him with unjust law suits and prosecutions: whereupon he determined to provide a friend, who might cover it. He therefore agreed with the defendant, to give her a bill of sale of four houses and lots, apparently for the consideration of fourteen thousand dollars, of which eleven thousand eight hundred were to be paid down, and two thousand two hundred in one year—that, with a view to remove every appearance or suspicion of fraud and simulation, he should procure eleven thousand eight hundred dollars, and place them in the hands of the defendant, in order that she might pay it to him, in the presence of the notary—that this was accordingly done, and a deed of sale executed, with the only view of covering, by a simulated sale, the premises for the testator, who in reality received no consideration therefor—that the defendant, at the same time, by a private instrument, acknowledged that she had no right to the property sold, and would at any time re-convey it, on request—that the testator, some time after fell sick, and, being attended by the defendant, the private instrument was got out of his, and came into her, hands, some time before his death—that the defendant, at times, pretended to be the true, lawful and absolute owner of the property conveyed, and at

others admitted that she was only a trustee for it—but, finally, declared her determination not to restore it. The petition concluded with a prayer that the notarial deed of sale be declared null and void, and the defendant decreed to account for such part of the rent as she had received.

The answer denied all the material facts stated in the petition, and averred the notarial deed of sale to be real and not feigned, that the consideration was actually and *bona fide* paid, out of the defendant's money. It admitted that the defendant, by a private instrument, bound herself to re-convey the property, but not till after a repayment of the sum advanced—that the testator finding it inconvenient to refund, returned this private instrument to her, to be cancelled, and she accordingly destroyed it.

Although the principal facts in the case, were differently sworn to by the witnesses, produced by the parties, and manifest perjury seemed to have been committed, the evidence preponderated on the side of the plaintiff.

There was judgment for him in the parish court, and the defendant appealed.

Moreau, for the defendant. The plaintiff's testator could not have been admitted to alledge

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the simulation of the deed of sale, executed by him, in favor of the defendant. The pretended simulation is immoral and illegal, and no one ought to be allowed to alledge his own turpetude. *Nemo allegans suam turpitudinem est audiendus.*

This is an invariable principle of jurisprudence, 4 *Denisart's decisions de jurisprudence* 570, *verbo* turpitude.

A convention may be immoral, in regard to either, or both the parties, *ff.* 12, 5, 1. If it be immoral in regard to him who receives, the law grants an action for repetition. If you prove evidently before the competent judge, that you gave to him of whom you complain, a sum of money, to be protected from militia duty. he will order him to refund. *Code* 4, 7, 3. It is meet, that he who has received a sum of money to restore what he had stolen, be compelled to refund, as all the turpitude is on his side. *Id.* 4. 7. 6. It is meet, that he who in consideration of the restitution of the sheep which he had stolen, has received a sum of money, should restore it as well as the sheep, or their value. *Id.* 4. 7. 7.

But when the consideration is immoral, in regard to both parties, there is no action of restitution in favor of either. *ff.* 12, 5, 3. In such

a case, the condition of him who has received, is better than that of him who claims.

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Admitting that you have given *ob turpem causam*, and in contempt of the laws of my kingdom, a house to your adversary, it is in vain that you ask that it be restored to you; for both parties, in this case, being in the same predicament, the condition of the possessor is better than that of the claimant, *cum in pari casu, possessoris conditio melior habetur. Code* 4, 7, 2.

Whenever there is turpitude, not only on the side of him who receives, but also on that of him who gives, there is no restitution, although the obligation has been performed, and the sum paid. *Code* 4, 7, 4.

If both parties be *mala fide*, neither shall have an action against the other. *ff.* 4, 3, 36.

Every disposition, in this respect, of the Spanish law, is founded on these principles. We allow the proof of the simulation of a contract, even by mere presumptions, whenever its object is to discover the fraud of him who receives. *Partida* 5, 11, 40.

Evidence of the simulation of a contract is admitted, where the lender, in order to obtain usurious interest, requires from the borrower a simulated sale, of a property yielding fruits, in

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order to enjoy these, in lieu of interest, without accounting for them. 3 *Febrero, Juicios*, 3, 2, 4 *n.* 205—207.

It is evident that in every case, in which the fraud is only on the side of him who receives a house, under a lease, in order to cover an usurious loan, nothing can be reproached to the debtor, who is compelled, in his distressed condition, to accede to every proposition of the lender. There is then nothing contrary in the disposition of the Spanish law, which admits the borrower or seller to prove the simulation, in order to obtain relief, with the above principles of the Roman law.

But can the same be said, when a convention has no other object than a fraud, meditated against the rights of a third party? Certainly no. For in such case, there is turpitude on both sides: which ought to exclude either party from relief against the other—for neither can alledge the simulation of the contract, without manifesting his own turpitude.

It is undoubtedly for this reason, that after having shewn that the simulation of a contract may be given in evidence, Febrero states that an action is however denied, when the simulation is in fraud of the fisc or of a third party. 3 *Cinco Juicios* 3. 2 & 4, *n.* 209.

The connection is evident, between this opinion of Febrero and the principle of the Roman law, which denies an action, whenever both parties share in the turpitude, and directs, that in such a case, the possession of him who holds the property shall prevail over the claim of the other. If the plaintiff's testator, and the defendant, as the petition alledges, colluded in order to cover the property of the former, and protect it from the claim of the United States, or his creditors—neither can stand in court against the other.

Mazureau, for the plaintiff. The defendant's counsel contends, that he who alledges his own turpitude, ought not to be heard—and consequently, the plaintiff cannot claim the benefit of an act, executed with a view of destroying the rights of others. This mode of reasoning is at once false and immoral. False; because if, as it often may happen, the knowledge of the simulation be confined to the contracting parties, the simulated transaction would have the effect of a real one, *plus valet quod agitur, quam quod simulate concipitur. Code* 4, 22. The first law of this title says expressly, *in contractibus rei veritas, potius quam scriptura percipi debet:* and the second: *acta simu-*

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lata, velut not ipse, sed ejus uxor comparaverit, veritatis substantiam mutare non possunt. Questio itaque facti per judicem vel per presidem provinciæ examinabitur. Such acts are not susceptible of any effect. *Colorem habent,* says D'Argentre, *substantiam verò nullam; nulla quippe conventio initur, nullus contractus agitur, sed fingitur. Quod hujusmodi contractus est tamquam corpus sine anima,* says, Baldus, *et dicitur coloratus, depictus, extrinsecus, apparens: intrinsecus nihil habens.* Immoral; because one of the contracting parties, guilty from the very act of contracting, would benefit by the simulation, to the injury of the other, and of third persons.

Will this court permit the defendant to say: the contract is a fictitious one; we entered into it, with the view of defrauding the United States, or the plaintiff's creditors; but the court must enforce it, to punish the dishonest man, who sought to cover his property, and reward me, who cunningly deceived him, and betrayed the confidence he reposed in me, that I may enrich myself at his expense and that of his creditors? Will not the court, on the contrary, compel her to empty her impure hands? *Jure naturæ equum est neminem cum alterius damno locupletari.*

If two persons have entered into a partnership of crimes, if they have agreed to rob on the highway, to coin false money, to sell copper for gold, and to divide the profits resulting therefrom, and one of them possesses himself of the whole spoil, the other will not be aided by a court of justice—the maxim *propriam turpidinem allegans non est audiendus* will apply. So if a witness has sold his testimony, and claims the stipulated price—so if a judge has pronounced upon a stipulated reward.

But the case is altogether in a simulated contract. A simulated deed, is not a deed. *Instrumentum simulatum non est instrumentum*, says Parexa, *et exceptio simulationis nurquam censetrua a statuto exclusa*, so the action is not denied. Hence nothing prevents him who asks relief against a simulated act from being heard; no matter whether he have been a party thereto or not—whether the object of it was injurious to third persons.

Dominguez says, that the only difference which exists between a case in which the party, who claims relief against a simulated contract, was a party thereto, and one in which he was not, is that, in the first case, he ought to be holden to strict proof, while in the other presumptions will suffice. *Discursos Juridicos*, 472.

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Febrero, speaking of the exceptions which may be opposed to the *via executiva*, says that simulation is one of them; and concludes that, although the party injured manifest his turpitude and his offence, which lies in making a simulated contract, he may alledge it, because he seeks to avoid his ruin and prevent his accomplice from enriching himself at his expense.

This author is in perfect accordance with Parexa—for he admits, that the plea of simulation may always be opposed, *exceptio simulationis nunquam censetur a statuto exclusa.* So he is with Dominguez, who holds that the party injured may plead the simulation, even where he was a party to the contract. But, he adds, *y lo mismo puede hacer su heredero, ental que el contracto no sea en fraude del fisco o de otro tercero, sobre lo qual vease el titulo Code, plus valet quod agitur, quam quod simulate concipitur*—and the same may be said of the heir.

Febrero terminates his phrase, "provided, that the contract be not in fraud of the fisc, or of a third party. On this see the title of the Code, *plus valet quod agitur*, &c."

Let us inquire into the foundation and application of this proviso.

The preceding phrase concludes—*perque trata de evitar su dano, y este de lucrarse in su de-*

trimiento, because he, (the accomplice) seeks to avoid his ruin, and the other to enrich himself at his expense. This refers clearly to the party who alledges the simulation of his own deed, notwithstanding that he thereby manifests his turpitude and offence, *aunque manifesta su torpeza y delito*—and the proviso seems only to relate to the heir. There cannot be any dishonest simulation, except that which is committed against third persons, or the fisc. Every other is innocent, and free from turpitude or offence. I manifest my turpitude in the only case in which I oppose to my own act a simulation in fraud of a third person. Febrero declaring in clear and precise terms, that in the cases of which he speaks I may avail myself of the plea of simulation, although in doing so, I manifest my own turpitude and offence, must be understood to say, that I may avail myself of that plea, even when the simulation was in fraud of a third party.

It will be asked whether, admitting that the party may then plead the simulation, the heir has the same right? We must distinguish. Either, after the death of the party, the third party may have his claim against the heir, after he shall have taken possession of the estate, or from the nature of the claim or cause of action

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death has destroyed the demand. In the first case, I do not think that the distinction made by Febrero be applicable to the heir: for every thing is entire; the fraud is not yet consummated, and neither justice nor morality forbid that the heir should be enabled to satisfy the third party, whose demand continues to exist. In the other case, the fraud is consummated, and justice and morality forbid that the heir should recover, at the expense of a third person, that property which his ancestor removed from his reach by a fraudulent simulation.

Let us examine what are the circumstances in which a third person, from the nature of his claim, may cease to have a right on the property of his debtor, by the death of the latter.

A little reflection will convince us, that these are many: one, however, will suffice. An architect undertakes to erect a vast edifice on a given plan, within a certain time, under pain of very heavy damages. In the mean while, he discovers his to have been a rash undertaking. He makes a simulated sale of his property to remove it from the reach of the person he contracted with, who, the edifice being yet unfinished at the expiration of the period fixed, neglects to prosecute the architect, deeming him insolvent. On the death of the latter, leaving for

his heir an only daughter, not skilled in architecture, it is clear that she cannot be compelled either to continue the work begun by her father, nor to pay the damage ; for she is not an architect, and her father was not put *in morâ*, nor were any damages awarded against him. It is clear, that in this case the claim is extinguished by the death of the architect. 2 *Febrero de escrituras, part.* 6, 6, *art* 23.

Let us suppose that an individual, having defrauded the fisc, covers his property to avert its pursuit—that having no visible property, he be not prosecuted. It is clear that in this case his heir cannot be prosecuted, and that the claim of the fisc died with its debtor. *Partida*, 7, 9, 23.

This is the only manner in which Febrero's distinction, or rather restriction, can be interpreted. He cites the maxim of the Roman code, *plus valet quod agitur, quam quod simulate concipitur*—according to which every simulated instrument is null and void.

If, according to the Spanish jurists, it appeared doubtful whether, even where the simulation is made for the purpose of defrauding creditors, the party may plead it, in order to regain his property, it would suffice to consult French jurists, equally skilled in the interpre-

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tation of the Roman law, and the decisions of the French tribunals.

Simulation, either in the consent of the parties or in the tradition of the thing in contracts, which *re proficiuntur*, constitute a vice which prevents the engagement to take place, so that the party may alledge it as well as any other person. *Ferriere, Dict. de droit et de prat. verbo Acte authentique.*

The court of cassation of France, which must be supposed to be composed of enlightened jurists, has always decided this question in the affirmative, whether the suit was instituted by the party or his heir. 2 *Sirey*, 24, 140. *Denever's cases of* 1808, 580.

The court of appeal of Treves, in a case between the parties to a simulated contract, decided that the action of nullity, on a simulated contract, made to the injury of a third party, may be brought by one who was a party thereto —that the simulation of an authentic act may be proved by witnesses—that the party who enters into a simulated contract, with the view of insisting on the execution of it for his benefit, is guilty of a fraud towards the other. 18 *Jurisp. du Code Civ.* 152.

The court held that the maxim, *allegans propriam turpitudinem non est audiendus*, is not

applicable to cases of simulated contracts. The suitor who opposed it, contended that testimonial proof of the simulation of the contract was inadmissible. The court said, "the dispositions of the article 1341, of the Code Napoleon, which exclude testimonial proof against or beyond what is contained in acts, are not applicable to simulated contracts. This principle is in conformity with the ancient jurisprudence, and is confirmed by several judgments of the court of cassation, under the present legislation, and supported by the art. 1353 of the Code Napoleon, which admits testimonial proof in cases of an allegation of fraud; and by the articles 1109, 1116, 1131 and 1133, which admit it in case of allegations of want of consent, or of a false or illegal consideration—hence it cannot be said that there was an assent in a simulated instrument—nor that in a simulated contract, made with the intent of defrauding a third person, there is a consideration, much less a just and lawful consideration, and there would be manifest fault and injustice in him, who would leave the party with whom he was contracting in the belief that he would never make any use of the simulated contract, and would after claim the execution of it—whence we conclude, that tes-

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timonial proof of the simulation of the contract ought to be received."

This decision shews that, in France, where the Roman law, the source and origin of the Spanish and French laws, was generally taught and observed, the question under consideration admitted of no difficulty—and when we consider that the articles 1341, 1108, 1106, 1181, and 1133, of the Code Napoleon, on which this decision is grounded, are the same as the articles 241 of page 311, 9 and 16 page 263, 31 and 33 page 265, of our Civil Code, may we not conclude that it cannot be said that, in the act under consideration, there has been either an assent or a lawful consideration?

Farther, the question appears to be decided in another part of our statute book, in which it is declared, that counter letters have their effect between the contracting parties. *Code Civ.* 305, *art.* 221. It is clear, that counter letters are never used, except in simulated contracts—*ergo* the party must have his action to cause the nullity of the contract to be declared, otherwise in what case can a counter letter be of any avail? Let it not be said, that this must be with the distinction in Febrero. The Code has made no distinction, and *ubi lex non distinguit, nec nos distinguere debemus.*

In civil cases, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent. *Code Civ.* 6, *art.* 21. Have we any precise law on the subject under consideration? None can be produced. It is then to equity, to natural law, to reason, that we are to resort. Equity, natural law and reason forbid that the defendant should retain the property of the plaintiff's testator—they do not forbid that a man, who has given a simulated bill of sale of his property, should cause it to be annulled, in order that he may be enabled to pay his creditors, whom he may once have had the intention of defrauding.

But a simulated sale, made with the view of covering the property sold, is not necessarily fraudulent.

Judicial proceedings may be just or unjust. They are just where the sums claimed are justly due—they are surely unjust, where chicanery, or the absence of the proof of the payment, may cause a decision contrary to the merits of the case. In the first case, the simulation by which the debtor seeks to render the proceedings vain and useless, by removing his

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property from the reach of his creditors, is certainly fraudulent. It is certainly otherwise in the second.

Now, there is not any evidence of the intention of the plaintiff's testator, in covering his property, except that which results from the petition. Nothing therein shews that his views were dishonest, that he had in view to defraud any of his creditors, and that he meant to resist any, but unjust prosecutions.

There cannot be any doubt that the executor of a party to a simulated contract may exercise the action, which the law might refuse to his testator, to have it rescinded.

If he was only the mandatary of the deceased, he could not; but he acts for the creditors. It is his duty to collect all the debts and effects of his testator to pay them.

MARTIN, J. delivered the opinion of the court, MATHEWS, J. dissenting. The defendant's counsel contends, that the present case is not one in which a court of justice is to yield its aid to the plaintiff. *Nemo allegans suam turpitudinem est audiendus*—that the right of the plaintiff, admitting that he has any, arose *ex turpi causâ, ex dolo malo*—that her possession ought to be protected: courts of justice always

assisting a party to whom an estate has been voluntarily conveyed, in retaining and sometimes in obtaining it.

A majority of this court is of opinion that, however conducive to the extirpation of fraud, a decision in favor of the defendant might be, it would be contrary to the principles which have hitherto prevailed, and which they do not deem themselves at liberty to disregard.

The maxims *allegans suam turpitudinem non est audiendus—ex dolo malo, ex turpi causâ non oritur actio—in pari delicto melior est conditio possidentis,* appear indeed to have been applied where a plaintiff sought the price or reward stipulated in an illegal or immoral agreement *e. g.* if any thing be given to a judge to corrupt him, or even to induce him to decide in favor of the giver, even in a good cause : *ut male judicetur, ff.* 12, 63—*ut secundum me in bonâ causâ. Cod. tit.* 3—or, in a similar case, to a witness : *dic idem in teste, eod. loc. n.* 7. In such cases the plaintiff is not allowed an action to recover what he has *absolutely* given ; neither could any thing thus stipulated for and not paid, be recovered ; but no where do we find that any thing parted with *temporarily, ob turpem causam,* is not to be recovered.

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In the French tribunals, property avowedly transferred, for the purpose of being kept from the reach of creditors, is allowed to be recovered by judicial process, if the transferee refuses to re-convey *See the cases, cited by the plaintiff's counsel, ante* 158.

Under the late territory of Orleans, the principal and legal interest was allowed to be recovered on a contract, on which illegal interest had been stipulated—an illegal contract, *ex turpi causâ*. *Caisergues* vs. *Dujarreau*, 1 *Martin*, 7.

Courts of chancery, in England, allow the lender, on an usurious contract, his principal and legal interest, when the borrower brings him before them.

Money paid to obtain a place is allowed to be recovered. *Douglas*, 471. So the premium in the case of an illegal insurance, before the event on which the suit depends. *Tenant* vs. *Elliott*, 1 *Bos. & Puller*, 3. So the money staked on an illegal wager, before the contingency happens. *Lacaussade* vs. *White*, 7 *T. R.* 535. *Cotton* vs. *Thurland*, 5 *T. R.* 405.

In all these cases, the court lent their aid to the plaintiff, who sought to extricate himself from difficulties in which he found himself, in consequence of his violation of the law—of his having entered into a forbidden contract. We

are unable to discover any distinction between these and the case before us. But the counsel of the defendant further contends, that courts of justice never yield their aid to those who seek to prevent the execution of the law, or, which is the same thing, to prevent the execution of the judgment of a competent tribunal.

The case of *Holway* vs. *Eve*, 3 *Cranch*, goes as far as any to establish this position. But there again the plaintiff sought to recover that which could never have been obtained, without a violation of an act of congress.

In all the cases we have cited, the plaintiff sought to countervail and violate the law, and had actually violated it. It forbids stipulating for interest above the legal rate—the party who had done so, had violated it, and was relieved. It forbids the purchase of offices and to give or receive money to be appointed or to appoint thereto: in the case cited from *Douglas*, the plaintiff, having given money to obtain a place, had violated the law; but, having failed to obtain it, was relieved. It forbids illegal wagers and insurances; and in the cases cited from the English term reports, plaintiffs who had paid money on such illegal contracts, broke the law, and were heard in court.

In the present case, the plaintiff sought to

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avert the consequences of threatened or impending prosecutions, covered his property, and *re integrâ* died. His case is perfectly similar to those we have just cited.

We find no instance in which a plaintiff similarly situated was denied relief, except under the common law of England, and the statute of Elizabeth, which declare fraudulent conveyances binding on the parties. But neither the principle of the common law of England, nor the disposition of the statute of Elizabeth, are known to the laws of this state, and we are bound to disregard them.

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

CHAPILLON & WIFE vs. *ST. MAXENT'S HEIRS.*

When the wife expressly renounces the benefit of the laws in her favor—when she binds herself with her husband, she cannot demand proof of the

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The ancestor of the defendants bound herself jointly with her husband, and mortgaged her property for the payment of a debt due by him

to the ancestor of the plaintiff, (Madame Chapillon) and the claim is now resisted on the pleas of prescription, payment and the nullity of the obligation, with regard to the ancestor of the defendants, (Madame St. Maxent.) There was judgment for the plaintiffs, and the defendants appealed.

debt having been created for her benefit.

There is no evidence of a payment, and the plea of payment is repelled by the institution of a suit against Madame St. Maxent's co-debtor.

The act is said to be null as to her, because it cannot create an obligation on the wife, who bound herself with her husband, unless it be shewn, that the debt was created for her advantage, or extinguished one which she was bound to pay. But, there is a complete renunciation of the law under which advantage could be taken of this matter, and the case cannot be distinguished from that of *Brognier* vs. *Forstall and wife*, 3 *Martin*, 577.

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

Livingston for the plaintiffs, *Morel* for the defendants.

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JOHNSON
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DUNCAN & AL.
SYNDICS.

JOHNSON vs. *DUNCAN* & *AL.'S SYNDICS.*

APPEAL from the court of the first district.

A bill of exceptions to the admission of a witness will not be noticed, if the fact proved by him, be proved by other legal testimony.

DERBIGNY, J. delivered the opinion of the court. The plaintiff brought this suit, to compel the defendants to admit him amongst the co-sharers of the proceeds of the estate, as bearer of several notes of hand subscribed by said bankrupts.

The indorser of those notes being produced, to prove the signature of the subscribers, objection was made to his competency, and a bill of exceptions was filed, on which the present appeal is grounded.

But as it appears on the record, that the same fact was also sworn to by an irreproachable witness: no notice need be taken of the bill of exceptions.

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

*** On the motion of the appellants, a rehearing was granted. See *February term*, 1818.

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

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JOHNSON *vs.* DUNCAN & AL. SYNDICS.

BROUTIN & AL. vs. *VASSANT.*

APPEAL from the court of the first district.

A will, attended with all the formalities required by law for an olographic will, is good as such, although it may appear that a mystic will was intended.

The superscription is not an essential requisite of a sealed olographic will.

Marie J. Broutin, wife of the defendant, made her last will and testament, entirely written, signed and dated with her own hand, enclosed it under a sealed cover, and in the presence of the number of witnesses required by law, presented the packet to a notary, who drew up thereon an act of superscription, as in the case of a mystic will; but omitted to insert therein, that the testatrix had declared, that the will was written by herself, or by another by her direction, and that it was signed, or not signed by her. After her death, the will having been admitted in the court of probates, the plaintiffs, heirs at law of the deceased, brought the present suit, to have the will set aside.

There was judgment in their favour, and the defendant appealed.

Livingston for the plaintiffs. The decision of the district court is perfectly correct. It clear-

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ly appears, that the testatrix intended to make a mystic will. Hers cannot be valid as such, on account of the omission in the act of superscription of her declaration, that the will was written by her, or by another by her direction, and that it was signed by her or not, as the case may be. This is expressly required by our statute, *Civ. Code* 230, *art.* 99 In the case of *Pizerot* vs. *Meuillon's heirs*, this court recognized the principle, that all the solemnities required, in the execution of testaments are matters of strict law, and ought to be observed, 3 *Martin* 114, and in *Knight* vs. *Smith*, held that a testament, being the solemn declaration of the testator's will, according to positive law, every formality required by law for the enacting of it, may be considered as a condition, without which, the instrument is not complete—That it is on the compliance of these formalities alone, that the law is willing to recognize the testament as legal, and to suffer the established order of succession to yield to the will of the testator. *Id.* 163.

But, it was contended in the district court, that although the will is invalid in the form of a mystic will, which the testatrix intended to give it, yet it is good as an olographic will, it being entirely written, signed and dated, in the handwriting of the testatrix, which it is said.

is every thing which the law requires for the perfection of an olographic will. *Code Civ.* 230, *art.* 103.

This is true, with regard to open olographic wills; but the code informs us, that the olographic will is either open or sealed; and that when it is sealed, it needs no other superscription than this, or words equivalent, *this is my olographic will. Id. loc. cit.* This is certainly a negative pregnant with an affirmative. If it need no other superscription, it needs that. If it need that and has it not, it lacks one of the formalities required for its perfection, and it is therefore invalid.

But we contend that it is necessary, that the will be perfect, in the form which the testator began to dispose of his property. Although the will have all the formalities which the law requires for its perfection, in any of the other forms, which the law recognizes, if it wants any of those which are required in a will, of the form which the testator adopted, it is invalid. Such was the jurisprudence of the Parliaments of France, before the revolution; such is the opinion of the celebrated *Ricard, part* 1. *n* 1609.

It is true some cases may be found, in which some of these tribunals supported a will, deficient in some of the formalities required for those

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of the particular kind, which it was the intention of the testator to follow; but this was in consequence of a special clause contained in the wills so supported, that the intention of the testator was, that "the will might be valid, in the best possible form, or without any other formality." But the will, which the testator intended to make, was one that bore some relation to the kind of will, in which the court declared it perfect, for could the court declare a will, evidently intended to be olographic, to be valid as a nuncupative one? Certainly not.

How can it be contended, that a will intended to be olographic, will be good as a nuncupative one; while these two kinds of wills have opposite characters? In the one, the testator conceals the objects of his liberality from the eyes of the whole world, he does not even call a single witness; in the other he openly declares his last intentions to a public officer, attended by a number of witnesses.

Moreau, for the defendant. If the will is not good as a mystic one, it is so at least as an olographic one. The testatrix clearly intended to make a will of the latter kind, although from surabundant caution, she caused it to be enclosed as a mystic one.

The will is wholly [redacted] signed and dated in her handwriting, [redacted] red to have been done double-distinct[redacted] ristics of an olographic will. The m[redacted] may indeed be written and signed, in t[redacted] writing of the testator; but the date is n[redacted] essential requisite of it. *Code Civil* 28, *ar*[redacted]9.

The mystic will, ought to [redacted] elivered to the notary, and remain in his ha[redacted]: it needs not then, to be made double. The [redacted]ographic will requires no such a deposit; and it is prudent that it be double, to guard against the loss of one of the originals.

Even if the testatrix had declared her intention to make a mystic will, her will would have been good, if it was in the olographic or any other legal form.

The question, whether a will irregular in the form, which the testator meant to give it, might be good if made in any other legal form, was often agitated in France, but always decided in the affirmative before the revolution. Since the promulgation of the Napoleon code, it has been agitated in the court of cassation, of which the celebrated Merlin was Attorney-General. It is known that this officer, always a jurist of the highest standing, gives his opinion to the court, after the arguments of counsel, and that such

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opinions have th[redacted] weight. We may judge of this by [redacted]ity which the conclusions of the cele[redacted]Aguessau, while Attorney General [redacted] parliament of Paris, maintain to thi[redacted]

Dominique [redacted]bon, had made a will, which was fou[redacted] a packet, sealed but without any super[redacted]ion. It was wholly written, signed and d[redacted] the testator's handwriting, in which was [redacted]ollowing clause. "I charge my heirs, he[redacted]af er named, to pay annually the expenses of two funeral services, which it is my intention to establish this moment, for ever, as I establish them by this *closed and secret* will, wholly in my handwriting, without the necessity of any other formality."

On this, two questions arose, which are important in the present case. Whether a will wholly written, dated and signed, in the testator's handwriting, might be rejected as an olographic will, because the testator had called it a closed and secret will, and had enclosed it in a sealed cover? Whether a mystic will, invalid as such, for want of the proper act of superscription, might be valid as an olographic will, being written, signed and dated in the handwriting of the testator?

On the first, the case being less favorable than

did not use the words *closed and secret*, Merlin was of opinion that, whatever might have been the intention of the testator, as to the form he meant to give to his will, it was valid, if attended with all the requisites of the law, in wills of any other form. The law *de testamento militari*, in the digest, says Merlin, establishes it as a principle, not only in the wills of soldiers, but in those of all other persons, that it never can be presumed, that in chusing the particular form of his will, the testator intended so to confine himself thereto, that in case he omitted any formality therein, his will should remain without execution. *Nec credendus est quisquam genus testamenti eligere ad impugnanda judicia sua.* Natural justice and the law, require that validity should be given to a will, in which the testator has complied with every formality established by law, in some of the forms which it authorizes, although the testator, when he began his will, intended to give it some other form, but omitted some of the formalities it requires." 5 *Questions de droit*, 225.

On the second question, Merlin, after citing the opinion of Ricard, quoted by the plaintiffs' counsel, shews its opposition to the law *de testamento militari*. He proves that Ricard has

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been led into an error by the law 19, *Cod. de Codicillis;* and concludes—"can it be presumed, that a testator, in chusing a particular form for his will, intended to make a parade of his learning and skill, and render the execution of his last intentions dependent on the exact fulfilment of every requisite formality? The choice of the form must be, to him, a matter of perfect indifference—and he cannot be supposed to have had any other thing in view, but the disposition of his property in a mode that may be effectual." He next cites four decisions of the parliaments of Bordeaux, and of Toulouse, declaring valid as nuncupative, wills, which were null as mystic wills, and two other of the parliaments of Metz and Dijon, who declare valid as olographic, wills closed and sealed in the form of mystic ones: the first with the requisite act of subscription, but which had not been deposited: the last without any such an act, but styled a mystic will, in the body of it. *Id.* 227. The last judgment, that of the parliament of Dijon, was confirmed in the king's council.

We cannot doubt that these principles would have been recognized by the court of cassation, in the case of the will of Dominique Casaubon, had not Merlin, himself, declared his opinion

that it could not be valid, as an olographic one, because wills of this kind were not admitted in Bayonne, where it was made.

The plaintiffs' counsel has contended, that one of the grounds of these decisions is, that the mystic wills thus held valid, as olographic, contained the clause that the testator *desired that they might be valid in the best possible form, or without any other formality.* Casaubon's will had this clause—yet it was declared invalid for the reasons we have given; but the clause does not appear to have been in the wills declared valid, by the decisions of the parliaments of Metz and Dijon, which I have cited.

But, why should we resort to foreign jurisprudence, while our own statute book contains a provision, that testaments and codicils, which the testator may please to cover and seal, will still be valid, as nuncupative testaments and codicils, if they be clothed with the formalities prescribed for the validity of these kinds of acts respectively? *Code Civ.* 231, *art.* 104.

In vain will it be contended from the words *shall be valid, as nuncupative testaments,* that wills of the latter kind only are to be understood, and that the provision does not reach olographic wills. This objection is equally contrary to the letter and spirit of the law. The legisla-

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tor had not in mind nuncupative wills alone here—he says, "*testaments and codicils*, which the testator may please to cover," &c.

But, it is asked, how can it be contended, that an olographic will shall be valid as a nuncupative, when these kinds of wills have by law, opposite characters? We answer that, in Spanish law books, the words nuncupative and open are indiscriminately used.

The solemn will is of two kinds, *written* and *nuncupative*—the written commonly called closed *cerrado*—the nuncupative, commonly called open. 1 *Febrero Contractos*, 1 § 1, *n.* 4.

Taking then the words open and nuncupative as synonimous, it will follow, that any kind of will, which the testator may put under cover and seal, may be valid as an open one, if it be besides clothed with every other requisite formality: and olographic wills, which are open wills, will be necessarily included.

That this is not a forced construction, and that no difference ought to exist, between olographic and nuncupative wills, which have been put under cover and sealed, will be apparent, if we reflect, that the same rule which induced the parliaments of Toulouse and Bordeaux to give validity to mystic wills, not attended with all the formalities which this kind of will re-

quires, as nuncupative, induced those of Metz and Dijon to support, as olographic, wills which were irregular in the mystic form, which the testator intended to give them.

The disposition of the Civil Code, which relates to the superscription of olographic wills, put under cover and sealed, is not imperative.

It is true, the object of the law is, principally, to command, to forbid, to permit and punish; but some times it only recommends and advises. The statute says, it is prudent to deposit it (an olographic will) with a notary, to prevent its being purloined, though not being deposited will not make it void, if it be acknowledged and proved in the manner hereafter directed. *Code Civ.* 230, *art.* 103. It is then clear, that the object of the law is sometimes to advise. Many other instances of this might be cited.

The law did not speak in more imperative terms of the superscription of an olographic will, put under cover and sealed. "When it is sealed, it needs no other superscription than this, or words equivalent, *this is my olographic will or codicil*—which superscription must be signed by the testator." *Id.*

If the legislator had intended to render this superscription essential, a *sine quâ non*, would he have used such loose expressions? What is

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meant by equivalent words? Were they not intended to signify that the testator should sufficiently designate the packet as containing his will, lest an indiscreet hand should open it, and in order that after his death it might be presented to the judge, to be by him opened?

Admitting that the superscription is a *sine quâ non*, was not in the present case the intention of the legislator fully complied with by the testatrix, by the act drawn by the notary, in which she declares that the packet contains her will, which she has presented to the notary; an act which she subscribed?

If the exemption from the pain of nullity in respect to the form of the act of superscription has not been as formally pronounced, in the article of the Code cited, as in the case of the want of the deposit of an olographic will, it may be said to have been as strongly, though impliedly, pronounced, if the whole article be read, and each part compared with the others.

After giving the form of the superscription, the Code proceeds—"an olographic testament or codicil shall not be valid, unless it be entirely written, signed and dated with the testator's hand. It is subject to no other form. *Id. art.* 103.

The plaintiff's counsel contends, that these words, *it is subject to no other form*, refer to

every thing that is required in the article, and not to what is stated in the phrase only. But a close examination of the article will convince the court, that the legislator had not in view what had before been stated—for, in that case, the plural would have been used—*it is subject to no other forms.*

It is not reasonable to conclude, that the legislator would give more effect to an open olographic will, than to one which, clothed with the same formality, would have been put by the testator, under a sealed cover. What end could the legislator promise to himself? An olographic will, put under a cover and sealed, may be taken out of the cover, and then cannot be distinguished from one which never was sealed up. How easy would it be to cure the defect in the superscription, by taking out the will and destroying the cover?

Another reason to conclude that the superscription of the cover of an olographic will is not an essential requisite is, that no evidence is required of it, at the opening of the cover, and it suffices that the will be proved to be wholly written, signed and dated in the hand of the testator. *Code Civ.* 214, *art.* 160. When we contrast this with the solicitude of the legislator, in requiring proof of the act of superscription

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of a mystic will, we must conclude that the superscription of an olographic will is of little importance. The reason is, that there is no danger of the alteration of an olographic will, which must be wholly written by the testator—while the mystic will, not being necessarily written by him, must be connected with the act of superscription, to be identified.

MATHEWS, J. delivered the opinion of the court. Considering, as we do, the formalities prescribed by law, for testaments to be of such solemnity and substance, that they must punctually and entirely be fulfilled, we are of opinion that the will, under consideration, cannot be supported as a mystic one: although it was closed, sealed and delivered to the notary, in presence of a sufficient number of witnesses, and the act of superscription drawn up by him, (in a style, indeed, confuse and indefinite, but perhaps sufficiently intelligible, to give validity to the instrument, were it perfect in other respects,) is deficient in a material formality: the testatrix not having declared, at the time of handing the will to the notary, whether it was written by herself, or by another by her directions, and whether she signed it or not. This is a defect, which destroys the validity of the

will, as a mystic one. It remains to be examined, whether it be valid as an olographic will.

The question, whether a will which, on account of informality in its execution, is void in the form intended to be used by the testator, can and ought to be supported in another, provided it be clothed with all the requisite formalities, seems, from the authorities produced, to have been agitated in France, before the introduction of the Napoleon code. In its solution, a contrariety is found, both in the determination of courts of justice, and in the opinions of jurists. Under the operation of the code, this question, although raised in several instances, does not appear to have been formally decided.

Merlin, in his *Collection de questions de droit*, in the case of a contested will, discusses extensively the question now under consideration—Whether a mystic will, not valid on account of imperfections in the act of superscription, can be valid as an olographic will, when wholly written, dated and subscribed, in the handwriting of the testator? The general maxim, as laid down by Ricard, in his *Traite des donations*, much relied on by the counsel for the plaintiffs, is cited and commented upon by Merlin. It refuses validity to a will, imperfect in the form, which the testator adopted for ma-

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king it, notwithstanding it may be attended with all legal formalities, necessary, to give it effect in another form. But Ricard's doctrine, says Merlin, is contrary to a general principle, *ff.* 29, 1, 3, not only for the wills of soldiers, but for those of other persons. It ought not to be presumed that, in choosing one form of making a will, a testator intends so to bind himself to it, that, on the omission of any formality required for the perfection of his will, in such a form, it should remain without effect in any other. *Nec credendus est quisquam genus testandi eligere, ad impugnanda judicia sua.* According to this principle, which we believe to be sound and rational, when a testament is perfect, in either the forms, in which it may lawfully be made, although not complete, in the one apparently intended to be used, it ought to be considered as valid and effectual. Ricard himself, *n.* 1617, acknowledges that his opinion is founded only in conjectures, with regard to the wishes of the testator, who, it is presumed, had no intention of disposing of his estate in any other form, than that which he had chosen, yet, when the contrary is expressed by him, in declaring that his will should have effect, in any other in which it may avail, it is

good and valid, if attended with all the formalities required by law for any form of testament.

It is really difficult to perceive, why an expression of this kind should be received, as giving additional force to a belief, that the testator in making his will, is desirous that its dispositions should be carried into effect. On the contrary, can any thing be more absurd, than to suppose that a man, in the solemn act of making his will, should ever intend so to shackle himself with any particular form, as to preclude the possibility of his will prevailing in any other allowed by law, in which it might be good, although invalid in that which he seems to have chosen?

The formalities, prescribed by law for the perfection of wills, are intended to prevent forgery and perjury—to give confidence to every citizen, that his real wishes, with regard to the disposition of his property, after his death, will be honestly carried into effect, without fear of injustice from forgery and falsehood. This wise purpose of law is certainly fully complied with, whenever it can be made appear, that a will is valid in any of the forms prescribed. But admitting that on general principles of law, the will in contest ought to prevail, say the plaintiffs' counsel, it is null and void, according to

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the dispositions of our civil code. Wills are divided into three principal classes, nuncupative or open, mystic or closed and olographic: each of which require particular formalities.

The will, being declared null and void as a mystic one, it is not pretended that it is attended with the formalities required, to give it effect as a nuncupative will. It only remains for us to give a just and fair construction to the provisions of the civil code, on which the plaintiffs' counsel relies, to shew the nulity of the will, as an olographic one. They are these:

An olographic testament may be either open or sealed: but, when it is sealed, it needs no other superscription than this, *this is my olographic will:* which superscription must be signed by the testator. An olographic testament shall not be valid, unless it be wholly written, signed and dated with the testator's hand. *Code Civ.* 230, *art.* 103. Testaments and codicils, which the testator may please to cover and seal, will still be valid, as nuncupative testaments and codicils, if they be clothed with all the formalities prescribed for the validity of these acts respectively. *Id.* 104.

Under these rules it is contended, that the present will cannot be supported as a sealed olographic will; because it has not the superscription required by law, nor any thing equiva-

lent: further, that, having been sealed by the testatrix, it can have no validity, as an open olographic will; because the last article cited from the code gives validity to such only, when they have the formalities prescribed for nuncupative wills.

It is clear, from every circumstance in the case, that it was not intended by the testatrix to make a sealed olographic will. The superscription on it was intended to be that of a mystic will, and has nothing equivalent to that of a sealed olographic will, and the will therefore cannot be valid as such. If, by a correct construction of the 104th article, it cannot avail as an open olographic will, we will have to lament the absurdity of a rule, which gives a preference to one form of wills over another, to which it is not rationally entitled. But, this we do not believe to be the case. From an examination of all the definitions and rules on the subject of wills, we are of opinion that it was not the intention of the legislature to confine this liberal provision of law to wills strictly and technically termed nuncupative. The definition of them is in the alternative, nuncupative and open, and gives them a character distinct and separate from the mystic or closed. Not so, in relation to wills, which have the olographic

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form—they may be either open or closed: and, notwithstanding it may have pleased a testator to cover and seal up his will, its validity shall not be destroyed; or, in the language of the code, it will be good as a nuncupative will, if it be attended by all the formalities prescribed for such acts respectively. This provision of the law is introduced after the classification of wills, and a minute description of all the formalities necessary to the perfection and validity of wills of each class. It is not expressly declared that a will, which may have been sealed up by the testator, shall not be good in any other form except the nuncupative, limitedly and technically so called—nor do we believe that the legislature, in using the word nuncupative, intended to exclude the olographic will from the same provision, provided it has the formalities required: because the one form is not entitled to any preference above the other, and if there be any difference, in favor of either, the olographic ought to have it—being equally or more secure against perjury or forgery—because the word nuncupative may be taken in the alternative, open, and would then be opposed, in the common acceptation of the word, to closed or sealed, and consequently the expression of the code will allow validity to any will perfect

in either of the open forms, although it may have been sealed up by the testator.

Upon the whole, we are of opinion that, notwithstanding the will under consideration is null and void, as a mystic will, which the testator seems to have intended to make, it may and ought to be valid, as an olographic will, should it be proven to have all the formalities required for a perfect olographic will. As it is declared, in the body of it, that it was made, written, signed and dated, in duplicate, in the handwriting of the testatrix, which seem to be all the formalities required for the perfection of an olographic will, we think that the district judge erred in refusing to permit the defendant to prove by witnesses the handwriting of the testatrix, in the manner prescribed by law.

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 to allow the defendant and appellant to prove, by legal testimony, all facts and formalities required by law, for the validity of olographic wills—particularly, that the will in the present case, is entirely written, signed and dated with the testatrix's hand.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, SEPTEMBER TERM, 1817.*

West. District.
Sept. 1817.

BARRABINE & AL. *vs.* BRADSHEARS.

BARRABINE & AL. vs. *BRADSHEARS.*

APPEAL from the court of the fifth district.

If a deed describes the land sold as of twenty arpens, with the ordinary depth, the interlineation of the words *in front*, does not vitiate it.

MATHEWS, J. delivered the opinion of the court. This case is before us, on a bill of exceptions, taken to the opinion of the district court, in rejecting a sheriff's deed, which was offered in evidence, by the defendant, to support his title to the land in dispute.

The deed thus rejected, describes the land seized and sold, as a tract of land of twenty arpens, more or less, in front, with the ordinary depth, on or near the bayou Yokely, in the pa-

* There was not any case determined during August term.

rish of St. Mary. The words *in front*, are interlined, and the interlineations is noted at the foot of the deed, as having been approved by the sheriff: but it does not appear whether this approbation was made before, or after, the execution of the deed.

The defendant and appellant insists, that this interlineation is not a material one, and that, if it be, it was noted as the law requires.

The opinion of the court being, with the defendant, on the first proposition, it will be unnecessary to examine the other.

The description of a tract of land in a deed of sale, is necessary to fix the local situation, and ascertain its contents.

The interlineation, in the deed under consideration, appears to have been intended for the latter purpose. A tract of twenty arpens, with the ordinary depth, situated on the bayou Yokely, is stated to have been seized and sold. Now, if, by this description, the number of superficial arpens, intended to be sold, may be correctly ascertained, without the words *in front*, these words are immaterial, and their interlineation ought not to vitiate the deed. The expression, *with the ordinary depth*, is a technical one, by which, when applied to a survey of land, is always understood in extent of forty

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arpens. A tract of land, described as containing twenty arpens on a water course, or any thing which may form a line for it, with the ordinary depth, conveys to those, in the least acquainted with the manner in which the Spanish government laid out the land of the public domain, the idea of the superficies produced by multiplying 20 by 40, which, in the present case, was the quantity of land intended to be sold.

If any uncertainty exists in the present case, in consequence of the description not fixing the survey absolutely on the bayou, this will not be removed by the addition of the words *in front.*

From this view of the subject, we are of opinion, the district court erred in rejecting the deed on account of this interlineation.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and the cause remanded, with directions to the district court to admit the deed in evidence, if there be no other objection.

Porter for the plaintiffs, *Brent* for the defendant.

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LARTIGUE vs. BALDWIN.

LARTIGUE vs. BALDWIN.

APPEAL from the court of the fifth district.

The surety in an attachment bond is bound, though, at the time of its execution, no such a bond was legally demandable.

The record of a suit, in which judgment was obtained against his principal, is not evidence against him.

DERBIGNY, J. delivered the opinion of the court. A bond was subscribed by the defendant, as surety for one Boudreaux, the object of which was to secure the present plaintiff against any loss which he might suffer, in consequence of an attachment sued out against him, in case that attachment should not be prosecuted to effect.

Boudreaux, having failed in that action, was sued for damages by the plaintiff, who obtained judgment against him; and, after a return of *nulla bona* on the writ of execution issued on said judgment, the present defendant is sued upon the bond.

It appears that, on the trial of the present case, no other evidence was offered by the plaintiff than the record of the suit in which he succeeded against Boudreaux—but that the district court thought that evidence sufficient to warrant a judgment against his surety.

Two principal grounds of defence are relied on by the appellant—1. That the bond is not a valid one—2. That, admitting it to be valid, no proof has been adduced against him of the

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amount of damages for which he may be liable, as surety for Boudreaux.

1. His first position is sub-divided into several points, most of which tend to shew that the bond is irregular; but such allegations from the mouth of an obligor ought not to be listened to: they are silenced by that law, already referred to by this court in other cases, which prescribe, "that in whatever manner a person shall appear to have deemed it proper to bind himself towards another, he shall remain bound." *Recop. de Cast.* 5, 16. One objection, however, is entitled to more attention than the others: it is that by which the defendant has endeavored to establish that, at the time this bond was subscribed, no such bond was required by law to obtain an attachment, and that this is consequently an obligation without cause. The premises may be true; but the consequence does not necessarily follow. A voluntary promise to indemnify another against any loss which he may suffer by an act of ours, is surely not an obligation without cause on the part of the principal obligor; and, if valid on his part, must be equally binding on the person who joins him in the obligation, and agrees to indemnify the obligee, if the principal obligor

does not. The bond, therefore, is viewed by this court as a valid obligation on the part of both the principal and his surety.

II. But the defendant objects that, if his obligation is binding, it is so only so far as the loss suffered by the plaintiff shall be proved to amount. The plaintiff has, indeed, made such proof in his suit against Boudreaux—but in that the defendant was no party. In the present action, he has produced no other testimony than the record of his suit against the principal obligor, and has relied on that to obtain judgment against his surety.

There is no rule of our laws better understood than that which allows to the surety the right of availing himself of the same means of defence (save those that are merely personal) which the principal debtor could resort to. That principle is founded on the sacred maxim, that no one ought to be condemned without being heard, and consequently that no person shall be bound by a judgment to which he was no party. We do not deem it necessary to adduce authorities in support of these truths.

But it has been suggested that, by suffering the testimony to be introduced, the defendant

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not only waived any objection to its legality, but must be considered as having actually acquiesced in its contents. The answer to that is, that the testimony was not improper, so far as it went to establish that Boudreaux had been sued—that judgment had been recovered against him—and that, on the execution, no property had been found to satisfy it. The defendant, therefore, acted consistently, when he made no objection to its introduction; but it does by no means follow, that he is to be viewed as having acquiesced in its contents, as settling the question of damages between him and the plaintiff.

Upon the whole, we are of opinion, that the district judge erred in considering the evidence produced in this case as proving against the defendant the amount of damages, which the defendant was liable to pay.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and this court, proceeding to give such judgment as, in in their opinion, ought to have given, does order, adjudge and decree, that the plaintiff, not having shewn the amount of the damages he has sustained, do recover one dollar, with the costs of the suit in the district court.

Brent for the plaintiff; the defendant *in propriâ personâ*.

KING & AL. vs. *MARTIN.*

Settlers, entitled to a grant, under the 2d section of the act of congress of March 2, 1805, may prescribe from that day.

APPEAL from the court of the fifth district.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs and appellants, claim a tract of land, which is in the possession of the defendant. Both parties have obtained certificates from the commissioners of the land office, confirming their claims, so far as the United States were concerned. These certificates should therefore be kept out of view, and the respective rights of the parties ascertained independently of them.

The plaintiffs, whose duty it is to make out a good title to the property in dispute, exhibit, as such, an order of survey, issued in favor of their ancestor by the Intendant of the province of Louisiana, under the government of Spain, and a plot of the survey, made in consequence of that order, by the surveyor general of that government. Here they stop; and here the question has been raised: Is this such a title as is required by law, to enable a plaintiff to oust a possessor; or in other words, did the order

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of survey, on which the plaintiffs rely, give to the applicant the ownership of the land, which they now claim?

This court is inclined to believe that an order of survey, though not amounting to an absolute and irrevocable grant, yet gave the grantee such an equitable title as to authorize him to maintain a petitory action against a possessor having no title at all. But, as the decision of this suit will turn upon a point totally unconnected with that consideration, we do not find it necessary to decide that question in this case.

Admitting, therefore, the title of the plaintiffs to be full and complete, it is alledged that they have lost it by suffering the defendant to remain in quiet possession of the land during more than ten years.

Nothing has become more familiar in our courts than the doctrine of prescription. The principal ingredients of the kind of prescription here claimed, are good faith and a just title on the part of the possessor; or in other words, it must appear that he had a just title, and believed, that by virtue of that title he was the owner of the thing.

It is objected by the plaintiffs, that the defendant was not possessed with a just title, nor indeed with any title at all, the length of time re-

quired by law. In support of that position they alledge, that the first settlement of the person, whose improvements the defendant's ancestor acquired by purchase, was made without any title, and that the defendant continued to hold it in the same manner until they obtained the certificate above mentioned, that is to say, until August 1811.—They maintain that the act of Congress of the 2d of March 1805, 1 *Martin's Digest* 240, under the second section of which that certificate was issued, gave them no title, but merely held out the promise that they might obtain one; and they rely on the principle that prescription does not run in favor of those, whose title depends on the accomplishment of some condition, because in such a situation the possessor, being uncertain whether that condition will take place, cannot in the meanwhile consider the thing as his own.

But this court is of opinion, that so soon as the law above mentioned made its appearance, the settlers, who were within the purview of it, were authorized to consider as theirs the land on which they were established, because their right to obtain a patent, did not depend on any contingency not within their controul, nor indeed on any contingency at all, but was to be delivered as a matter of course, on their showing

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that they were embraced by the dispositions of the law; to wit: that at the time of the enacting of it, they stood in the situation and had the qualifications required by law, to be considered as owners of the land on which they were settled. Nothing here depended on a condition to be accomplished *in futuro*. Their title was created by the law, not by the certificate which was nothing more than the acknowledgment, that the title existed.

It is in proof, that the defendant has been in peaceable possession of the land in dispute, more than ten years since the date of the act. We think that he ought not to be disturbed.

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

Porter for the plaintiffs, *M'Nutt* for the defendant.

T. & D. URQUHART, EX'RS &c. vs. *TAYLOR.*

When the judgment is reversed for want of reasons, the court may proceed and render such a judgment.

APPEAL from the court of the fifth district.

MARTIN, J. delivered the opinion of the court. The district judge did not give any rea-

son, nor cite any law, in giving judgment in this case, and the defendant and appellant, presenting this as an objection thereto, under the constitution of this state, *art.* 4, § 12, we are bound to sustain it, and the judgment is therefore annulled, avoided and reversed. *Laverty & al.* vs. *Gray & al.* 4 *Martin*, 463, *Sierra* vs. *Slort*, *id.* 316.

ment as ought to have been given below.

If an executor receives a note from his testator's debtor, he may sue thereon, after the expiration of the year.

Proceeding to examine the record, in order to ascertain what judgment the district court ought to have rendered, we find the suit brought on promissory notes given by the defendant and appellant, to the plaintiffs and appellees, as executors, &c.

The defendant pleaded the general issue, and alledged he owes nothing to the plaintiffs—that, if he signed the notes, he has paid them—that they were signed through mistake, and he owed nothing to the plaintiffs, or their testator, at the time the notes bear date.

He made an unsuccessful appeal to the conscience of the plaintiffs, whose answers, to his interrogatories, establish the fact of his being indebted to their testator, at the time of his death. The statement of facts admits the signature of the defendant, at the foot of the notes, and no evidence was offered on his part.

His counsel contends, that the plaintiffs have

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no right to sue, as it appears from the record, that the year allowed for the execution of the will, had elapsed before the inception of the suit.

We think that this exception cannot avail. The plaintiffs might have brought the suit, in their own names, as the promise was to them, though for the benefit of the estate, and the words *executors of &c.* are only a description of the persons of the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the plaintiffs recover from the defendant, the sum of $564 69, the amount of the two notes annexed to the petition, with interest at 6 per cent. from the 15th of November, 1804, on the sum of $547 69, and legal interest on the balance from the judicial demand till paid, with costs in the district court, and that the plaintiffs and appellees pay costs in this court.

Porter for the plaintiffs, *Brent* for the defendants.

FONTENEAU'S HEIRS vs. *PEROT.*

A question, the object of which is to obtain a general

APPEAL from the court of the sixth district.

In the year 1796, J. B. Piedferme presented

finding, both of the law and fact, cannot be especially submitted to the jury.

to the then commandant, at Natchitoches, his petition, asking permission to settle on a tract of land, which he describes as situated about nine leagues above that post, on the Red River, at a place called the Fayard, containing about eighty arpens, on the high land side of the river, unfit for cultivation, forming a *fer á cheval* from one high land to the other, and fit only for a cattle farm, for which he designed it. He prays a grant or concession of said land, together with fifteen arpens front on the opposite bank, for cultivation. This permission was given by the commandant—and in January, 1787, the governor-general of the province made an order of survey on the petition, directing the surveyor-general to lay out forty arpens only, in the place mentioned, with the ordinary depth, together with fifteen arpens on the opposite side of the river.

In the year 1795, Piedferme, the grantee, sold to Louis Fonteneau, the ancestor of the plaintiffs, the fifteen arpens on the cultivable side of the river, and on the opposite side on high land, at a place called the Fayard, a tract of land, bounded below by the landing of the vendor, and above by the bayou des carpes. In the deed of sale, he describes the land as having been acquired by concession from the Spanish

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government, under date of the 13th of January, 1787, *dont il transporte le titre au sr. acquereur.* After the purchase above recited, and during the lifetime of Fonteneau, the defendant, Perot, settled on the river, about forty arpens above the landing mentioned in the sale. Two or three arpens above his house is a bayou, now generally called the bayou des carpes, but said to have been known formerly by the name of the bayou du potraire. At the distance of about four or five arpens from the landing, near where the high lands recede from the river, is the bed of another bayou, said to have been known formerly by the name of the bayou des carpes. This suit was instituted to get possession of the land occupied by Perot, the defendant, as included in the purchase of their ancestor from Piedferme—before the trial in the court below, the parties submitted questions of fact to the jury, to have their special finding thereon, according to the statute of 1817.

The defendant, on his part, submitted the following questions, to wit:

1. How far is the bayou des carpes from the landing of Piedferme?

2. If there be several bayous des carpes, which is the one referred to in the plaintiffs' title?

3. Was not the upper bayou known by the name of the bayou du poiraire?

4. How far is it from the landing?

5. Were not the surveyors, under the Spanish government, bound, in case the commandants had not given sufficient room to place all the settlers with parallel lines and right-angled boundaries, to follow the course of the river, to establish the front of each, and divide the points, to apportion their respective depths?

6. Is the defendant on the land claimed by the plaintiffs?

7. Was the possession of the defendant in good faith, and what is the value of his improvements?

8. Where is the place called the *fer á cheval?*

9. Has the defendant any title to the land in dispute, and in what words is it expressed?

10. Does the plat of survey, marked B, correctly represent the bends of the river and the adjacent lake?

The facts submitted on the part of the plaintiffs, related solely to their written titles.

The defendant offered evidence to shew, that the bayou referred to in the plaintiffs' title is at the distance of only four or five arpens from the landing or lower boundary there described; that

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the upper bayou was known at that time by the name of the potraire, and generally to shew the local situation and extent of the plaintiffs' purchase. This evidence was rejected by the court, and all the facts submitted were stricken out, except the 9th and 10th, and the jury limited to a finding of the written titles. To this the defendant's counsel excepted, and judgment being entered in favor of the plaintiffs for the whole forty arpens, an appeal was taken to this court.

Baldwin, for the plaintiffs. The plaintiffs in the court below, now appellees, claim the whole extent of land granted to Piedferme, under the purchase of their ancestors. That grant was for forty arpens front on the river, with the ordinary depth at the Fayard. The deed from Piedferme to Fonteneau, to give a more clear description of the land, describes it as extending from the landing of the vendor, to the bayou des carpes, but does not specify the number of arpens. The bayou known by that name, at the distance of about forty arpens above, must be taken to be the one referred to in the deed. If the descriptive part of the deed leave any doubt as to the intention of the parties, and extent of the purchase, what follows,

fully explains it. It goes on to say, that the land thus sold, came to the vendor by concession from the Spanish government, dated the 13th January 1787 "*dont il transporte le titre au sr. acquereur*". This expression then clearly proves, that no reservation was made, and that it was the intention of the vendor to part with his whole interest in the forty arpens front, together with the fifteen on the other side. The court below, therefore, did right in rejecting parol evidence, which would go to vary or alter in any degree, the written title of the plaintiffs, and in striking out those facts which could only be established by a species of evidence, in its nature inadmissible.

But the defendant is forever estopped and precluded from contending, that the ancestor of the plaintiffs acquired less than forty arpens, by his own act. In 1807, the present defendant accepted a conveyance of a tract of land from Adley, which is by the deed, declared to be bounded below by the forty arpens of Fonteneau. Recitals in authentic instruments, are full and conclusive evidence between the parties, and cannot afterwards be denied or gainsaid by them, 2 *Poth.* 82.—The defendant having purchased lands, bounded below by the forty arpens of Fonteneau, shall not now be admitted

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to say, that he had less than that quantity, and thereby change the location of his own purchase. The judgment ought therefore to be affirmed.

Bullard and *Murray*, for the defendant.—This case comes up on two bills of exceptions, to the opinion of the court below. In rejecting parol evidence to shew the extent and boundaries of Fonteneau's purchase, and in striking out certain facts submitted to the jury by the defendant for a special verdict.

The only question for the consideration of this court appears to be, whether the facts thus stricken out or any of them, were pertinent and proper, if so, the court erred in striking them out, and in rejecting the only kind of evidence by which they could be ascertained or established. By reference to the deed from Piedferme, to Fonteneau, it appears that the land conveyed on the highland side of the river, is described as laying between the debarquement of the vendor, and the bayou des carpes. It is contended on the part of the defendant, that there is much less than forty arpens between these given points, and that it does not embrace the plantation of the defendant. It becomes therefore important, to ascertain the precise distance between these boundaries. The first fact there-

fore was material, pertinent and proper, and the court erred in rejecting it.

But it is said that there are two bayous, known by the name of the bayou des carpes, and the plaintiffs contend, that the upper one must be assumed to be the one referred to in the deed, in as much as it is at the distance of about forty arpens from the landing. To this it may be answered, that if there be two of the same name, it is an ambiguity in the deed, arising from facts or circumstances foreign to the deed, and may be explained by parol evidence. *Phillips*, 110. The court therefore erred in striking out those questions of fact which relate to that point, and generally in rejecting parol evidence to establish the extent, boundaries and local position of the purchase of Fonteneau.

It is further asserted by the plaintiffs' counsel, that their title papers contain intrinsic evidence, that their ancestor acquired by purchase from Piedferme, the whole of his original grant, and that the expression used in the deed, "*dont il transporte le titre*" necessarily, *ex vi termini* implies it. To this it is answered, that the delivery or transfer of the title papers, amounts to nothing more, than a species of tradition of the thing sold, and as furnishing to the vendee a proof of title in the vendor, but can never be

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construed to convey a greater interest than is clearly expressed and stipulated in the deed of sale, between the parties, by a legal construction of which, their intentions are to be ascertained. *Civ. Code*, 350, *art.* 29.

Nor ought the defendant to be precluded, or estopped from saying that Fonteneau acquired less than forty arpens, from the circumstance of having accepted a conveyance from Adley, by which it is recited or declared that the land sold, was bounded below by the forty arpens of Fonteneau. The authority cited from Pothier, declares, that recitals in deeds, are final and conclusive between the parties only, when the recitals have a reference to the disposition. It is difficult to conceive, what reference the recital above mentioned, has to the dispositions of the act of the parties. It relates neither to the quantity or extent of the land sold, nor to the chain of title, nor to the warranty; and neither of the parties at the time, had any interest in opposing a recital so totally irrelevant. It would appear extraordinary if the plaintiffs could patch up a defect in their own title, by relying on a deed to which neither they nor their ancestor were a party.

MARTIN, J. delivered the opinion of the court.

The first four questions, having the same object, viz. to ascertain the situation of the bayou, which is given by Piedferme in his deed of sale, to the plaintiffs' ancestor, as the upper limit of the land sold, may be considered together.

In the description of the land sold, with regard to its contents and situation, the defendant contends that two points only are mentioned: the landing and the bayou. The first is not disputed: nothing seems therefore to remain, but to ascertain the second. It cannot be denied, that the first four questions lead to the discovery of this *desideratum*. If so they must be pertinent to the issue, and the judge erred, in striking them out.

He assumed it as an uncontroverted fact, that Piedferme had transferred to the plaintiffs' ancestor, all his right and title to the whole of the land granted him by the Governor General: and this says the court "because the deed does not express it as part of his claim, or *part* of his grant, but generally and without limitation, the *claim or grant*, which he obtained from the Spanish government." The price or consideration is taken as conclusive evidence, that he did not purchase the small quantity of land only, which is included within the boundaries described in the deed. The transfer of the pa-

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per title, by Piedferme to his vendee, is taken also as conclusive evidence (at least with what precedes) of an intention of parting with the whole land granted.

Admitting the correctness of this mode of reasoning, which we are not prepared to, and which it is unnecessary that we should do, our inquiry will be materially aided, by a knowledge of the situation and relative distance of the only two points, by the aid of which, the vendor and vendee appear to fix the situation and contents of the land sold.

The fifth question appears to be a question of law, which the judge properly withdrew from the jury.

The sixth appears also to have been properly withdrawn, as the object of it was to obtain a general finding of the law and fact, which cannot be asked as a special one.

It may be important, in case the plaintiffs support their allegations, and damages be assessed, that the defendant should shew a *bona fide* possession, and as the value of his improvements may likewise, with propriety be considered, we therefore think the district judge erred in striking off the seventh question.

The place called *fer a cheval*, being referred to in the title papers, the defendant ought to be

indulged in the desire which he manifested, of having its situation correctly ascertained.

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It is, therefore, ordered, adjudged and decreed. that the judgment of the district court be annulled, avoided and reversed, and the cause be remanded for trial, with direction to the district judge, to reinstate and submit to the jury, all the questions of fact striken out, except the fifth and sixth.

Baldwin for the plaintiffs, *Porter* for the defendants.

DUNCAN & AL.'S SYNDICS vs. *MARTIN & AL.*

APPEAL from the court of the sixth district.

A bill of exceptions, to the opinion of the court in refusing a conditional verdict, will not be noticed if the whole evidence comes up, and the supreme court is enabled thereby finally to dispose of the case.

MATHEWS, J. delivered the opinion of the court. A bill of exceptions was taken to the opinion of the court *a quo*, in refusing to receive a conditional verdict presented by the jury, to whom the cause was submitted, and instructing them to reconsider the matter, and render such verdict as they thought proper, for the plaintiffs or defendants, without any qualification or condition annexed to their finding. As the whole

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evidence in the case comes up with the record, it is useless to give any opinion on the bill.—*Abat* vs. *Dolliole* 4 *Martin*, 316.

The question in the case, is one of fact, viz. whether J. Ryeson was the agent or attorney of the plaintiffs and appellees, and vested with power to compromise, settle and discharge their claim against the defendants, in any other manner than by receiving payment. From a view of all the evidence, this court is of opinion, that he had not authority to bind his constituents, in any other manner than by acquitances and receipts to their debtors, for payments actually received to their use, or acknowledged to have been received.

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

Porter for the plaintiffs, *Baldwin* for the defendants.

BREAUX vs. *MEAUX.*

If the proceedings on which a judgment pleaded in bar, be so confuse, that

APPEAL from the court of the fifth district.

MATHEWS, J. delivered the opinion of the court. This is an action of trespass, instituted

by the plaintiff to try the title to a tract of land claimed by both parties, and of which each states himself to be in possession, under a legal title.

The defendant further pleads the general issue, and *res judicata*, averring, that "all matters and things alledged against him have been finally and fully decided in the superior court of the late territory of Orleans."

the facts cannot be well ascertained, the case will be tried on its merits.

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

The correctness or error of the judgment of the district court depends on the pleadings and decision, in the case pleaded. On examining the judgment, it appears grounded on a petition of the heirs of the late R. Trahan and Firmin Breaux, admitted to be the ancestor of the plaintiff, in which they pray to have a decree of a Spanish tribunal, rendered whilst this country was under the dominion of Spain, executed. By the judgment of the superior court, we are referred to the Spanish decree, and consequently to the proceedings on which it is grounded. They exhibit such a confused mass, that it is almost impossible to discover what was the point in contest between the original parties. Confining ourselves to what is contained in the Spanish decree, and the judgment of the superior court, so far as they go to fix the limits of the

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land in dispute, nothing seems to have been expressly decided, except that the island of Copalm is the upper limit of forty arpens in front on the bayou Vermillion, granted to Rene Trahan, on the western side of said bayou, and a place, called the *Coulee des Porches*, its lower limit on the eastern side. Some grants are declared to be null and void, which have no relation to the dispute between the present parties. The judgment of the superior court then concludes, with an order to the sheriff to put the complainants in possession of their respective tracts, in conformity with a survey and establishment of limits, as decreed by the Spanish tribunal.

Now, the limits so established, from any thing that we have been able to find in the record, do not appear to have been clearly and definitively ascertained, except as to Trahan's land. It is possible that the adjoining tracts may, on investigation, be found to be governed, in their limits, by those fixed for Trahan's. But this, in our opinion, does not sufficiently appear, in the proceedings of the former suit, to preclude the plaintiff from an examination of his case on the merits.

It is, therefore, ordered, adjudged and de-

creed, that the judgment of the district court be annulled, avoided and reversed, and that the case be remanded for trial on the merits.

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BREAUX *vs.* MEAUX.

Baldwin for the plaintiff, *Porter* for the defendant.

RUTHERFORD vs. *COLE.*

APPEAL from the court of the sixth district.

A creditor of a party to a suit, who has not established his claim below, cannot exercise his debtor's right of appeal.

MARTIN, J. delivered the opinion of the court. The plaintiff, as mortgagee of a tract of land of the defendant, had it sold under an order of seizure. Donaldson, who states himself to be a posterior mortgagee of the same tract, presented a petition of appeal to the judge, who had granted the order, in his own and the defendant's name, before the payment of the money. The appeal was granted: but the defendant hearing of this forwarned the clerk of this court from receiving the record, as he wished no appeal, and had not authorized the use of his name. The clerk having accordingly declined to receive it, a motion is now made for our direction to him to receive and file it.

The attorney, whose name appears at the bottom of the petition of appeal, candidly admits,

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he was not authorized by Cole, to pray for the appeal, but that he asked it on behalf of Donaldson only.

He contends, that Donaldson is a creditor of Cole, and has a right to exercise all the rights and actions of his debtor, except those which are exclusively attached to his person. *Code Civ.* 262, *art.* 66.

On the part of the plaintiff and appellee, it is contended, that this court cannot receive any evidence, except that which comes up with the record—that the applicant does not thereby appear to be a creditor of Cole, except from his own naked assertion—that Cole, not being a party to the record, the pretentions of the appellant cannot be safely admitted or contested by the appellee.

We are of opinion, that it would be idle in us to look into any voucher, by which the applicant might endeavour to establish his claim on Cole, in whose absence, we cannot recognize him as a creditor.

The applicant cannot take any thing by his motion.

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The appellee cannot bring up the transcript of the record.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff obtained a judgment in the district court, and the defendant prayed an appeal, giving bond and security, in order to stay the execution. The appeal was made returnable to the first day of this term. The record was brought up, by the plaintiff and appellee, who had been cited to appear here.—The clerk deeming it improper to receive a record, which was not brought up by the appellant, this court is moved for an order, that it may be received and docketed.

The 10th section of the court law of 1813, makes it a duty of the appellant, to return the petition of appeal, and the transcript of the proceedings on the return day thereof, in the supreme court, and it provides that, on the filing of these papers, the adverse party may appear and answer.

The 9th makes it the duty of the clerk of the district court, to make a transcript, to be delivered to the appellant, and provides, that if the latter does not prosecute this appeal, (in

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the manner described by the act) the appeal bond may be delivered to the adverse party, to be put in suit.

The third section of the supplementary act directs, that where an appellant should not prosecute his appeal, within the delay fixed by law, the adverse party may, on proving the fact, obtain from the district court an order of execution of its judgment, without prejudice to his right on the bond.

It is clear from the above, that the appeal, after it has been granted, and the bond with security given, must be *prosecuted* by the appellant, and that the appellee is not to appear and answer, until the appellant so far prosecutes the appeal, as to file the transcript. For the appellant's failure to prosecute the appeal, the law at first provided no other penalty, than the forfeiture of the bond : but the supplementary act gives to the appellee, the faculty of taking out execution, on adducing proof of the neglect to prosecute.

But the appellee contends that, unless he be permitted to bring up and file the transcript, he cannot obtain from this court, the damages and interest, not exceeding ten per cent, which the court may think a sufficient compensation, for the loss and prejudice, which he may have

suffered, in consequence of the appeal. These damages cannot be given, except on an affirmance of the judgment, and this affirmance cannot take place, if the appeal be not presented.

In the western circuit, the defendant, by praying and failing to prosecute his appeal, may delay the payment of his debt, for nine or ten months, without the risk of the damages, which the court may allow, in affirming the judgment. This is certainly an evil, but it is such a one, to which the legislature alone is competent to apply a remedy. We are not authorized, in order to avoid it, to devise the means of prosecuting an appeal by the appellee—of directing the mode, time &c. of his bringing the appellant before us. The transcript of the record, being brought by the appellee, cannot be received.

PREVOT & WIFE vs. *HENNEN.*

APPEAL from the court of the fifth district.

The seizure of real estate, on a *fi' fa'*, divests the defendant from the legal possession of it.

In the year 1814, some person, not connected in the present cause, sued Prevost, the husband, recovered judgment, and obtained execution.

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The sheriff thereupon seized a house and piece of land, as the property of Prevost, and proceeded to make the appraisement. This being done, and no opposition whatever made to these proceedings, he sold the property seized to the present defendant. Henrietta Borel, wife of Prevot, however, obtained and kept possession of the premises—in consequence of which the defendant requested the sheriff to put him in possession, who thereupon summoned the *posse comitatus*, and did actually put him in possession. The house being of no use to the defendant, and the materials, in his estimation, not worth taking away, he caused it to be burnt. Henrietta Borel afterwards claimed the premises as her own private property; brought a petitory action, and recovered it by a judgment of the supreme court. 4 *Martin*, 506. And on the 18th of March, 1816, about eighteen months after the alledged trespass had been committed, she brought her action for damages, not against the sheriff, but against Hennen, and did in fact get a verdict for $2000. On a motion for a new trial, this verdict was affirmed, and judgment thereupon rendered: he appealed.

Workman and *Hennen*, for the defendant. The first circumstance that appears extraordi-

nary in the proceedings in this case, is the enormity of the damages. Two thousand dollars have been awarded as an indemnification for a trespass on a property which was sold for the sum of $333 67.

The jury, which could give such a verdict, must have been actuated by a spirit very different from that of justice.

It is equally remarkable, that during the whole of the proceedings, previous to the sale of the property, no claim was interposed, no opposition made by Madame Prevost, or by her husband, in her behalf. When a sheriff seizes property, by mistake or otherwise, which he has no right to take, common sense immediately suggests to the owner to make his claim without delay. If he neglects this obvious precaution, he virtually waves his right as to the injury, trespass or tort, and retains his right to the property only—for, in strictness, there is no tort or injury, unless where there is an intention of injuring. How can a sheriff be considered as a wrong doer, for taking property which he believes he has a right to take, and which the owner suffers him to seize and to appraise, without making any claim, complaint or expostulation?

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In England, and in the United States generally, when the sheriff makes an illegal or erroneous seizure of goods, the owner of them, if the sheriff persist in the seizure, has no other remedy but to bring his action of trespass. But in this state, the law has provided an immediate and summary remedy, which is very generally known and very frequently enforced. When property is seized for a debt, a third party who affirms that the property belongs to him, or that he has any right in it, may make opposition to the execution, and the judge shall take cognizance of this opposition, in a summary manner. *Part.* 3. 27. 3.

The mode of making, and the proceedings in, such opposition, are briefly stated in the *Curia Filippica, part.* 2, *Juicio executivo.—part.* 26, *tercero opositor.* From which the following extracts are submitted to the court.

No. 4. "*Esta oposicion se puede, y ha de hacer, y admitir en qualquier tiempo durante la causa executiva, aunque sea despues de la sentencia de remate, como sea antes de dada la possession, o hecha la paga.*"

The words of the law, be it remarked, are imperative as well as permissive. The intention of the legislator evidently being to prevent expensive, circuitous and unnecessary law suits.

The 7th number of this section provides for the very case in which Madame Prevot was placed: *Aunque la muger, durante el matrimonio, no puede pedir su dote y bienes al marido, que sin culpa suya viene en inopia, o pobreza,— empero puedelo pedir en esto caso, quando es executado a pedimento de otro acreedor, y opponerse a la execucion, &c. &c.*

The 12th number provides, that these oppositions, when necessary, shall be tried and determined by proofs in the ordinary mode of proceeding.

What is here quoted, is founded upon laws of the *Partidas*, and the *Recopilacions*, referred to in the book cited. Madame Prevot, having then neglected to use the means, and avail herself of the remedy given and prescribed by the law, what right has she afterwards to complain of an injury or trespass, which her neglect and silence alone occasioned? How was the sheriff to know, legally or officially, that the property in question did not belong to her husband, the defendant in the original suit? Did not the absence of any claim on the part of a third person, *tercero opositor*, justify him in presuming, that it really was the property of the debtor? Under such circumstances it is contended, that Madame Prevot can be entitled to no damages

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whatever, from any one, for the seizure of the premises; and that, having recovered back the property, she has got every thing which she can legally claim. If she had been refused her costs in the action, to which she had recourse for recovering it, that loss would have been only a just penalty, for having preferred a tedious and expensive litigation, to the cheap and summary process, which the law has provided, and which would have secured her from all inconvenience in the first instance.

This argument is strengthened, when the relation between Madame Prevot, and the defendant in the original suit is considered. He, as her husband, was the administrator and protector of her property. He might therefore very naturally be considered in the neighbourhood, as the owner of the estate. He was at least, the apparent owner of it. The sheriff, then was justified in taking it at first, and in proceeding to the sale of it, as long as no legal opposition thereto was made. The silence of the parties up to this stage of the proceedings, gives strong reason to suspect some collusion. They thought perhaps, that by allowing the seizure and sale to proceed thus far unopposed, the actual property of the debtor would be secure from seizure, and that in the mean time,

he might place it out of his creditors' reach, by some of those ingenious stratagems, of which debtors of a certain class so well know how to avail themselves.

How was the sheriff to act, the sale having been thus suffered to proceed, unopposed to its last stage? We maintain, that it was his duty to put the purchaser in the possession of the property; for, at any time previous to the possession being given, the third opposer may make his claim in due form of law. No such claim having been made, it was fairly presumable, that no right to it existed, and this being a case in which it appears that resistance was made, or threatened, it become the sheriffs' duty "to call for the aid, and command all the people of his country to attend him, and enable him to keep the peace, and execute the process of the court, that was directed to him." 1 *Bl. Com.* 362, *Dalt. Sher.* 5.

As to the notion entertained by the judge, and stated by him to the jury, that all those who assisted the sheriff in this proceeding, were trespassers, it seems to be quite erroneous. It was the duty of all those able bodied inhabitants of the country, whom the sheriff called to his aid, to obey his summons. The statute of 1805, for establishing the county courts, went

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so far as to declare, that "every person, so called, by any sheriff, who shall refuse to render such assistance, may be punished by fine, at the discretion of the court, not exceeding $25. 1. *Orl. Laws* 184," And it would have been a most absurd anomaly in our jurisprudence, if a man could be held liable as a trespasser, for doing that which by law he was bound to do, and for refusing to do which, he would be subject to a legal penalty. The provision just quoted of the county court act, has, it is true, been repealed; unintentionally or inadvertenly, as we apprehend:—for the duties of the sheriff continue the same as before. But though the specific penalty be in consequence abolished, we contend that the sheriff's authority, to call for the aid of the *posse comitatus*, still remains in full force. It is still made the duty of the sheriff of each parish "to execute all judgments and orders of the district court &c,—and to discharge all the duties which were incumbent on the sheriff of the parish, and superior court." (see act to organize the supreme court, *s.* 23.) It is enacted in the 16th sect. of the same statute, that the proceedings of the district courts, shall be governed by the acts of the territorial legislature, regulating the proceedings of the late supreme (superior) court

of the territory of Orleans. Now, by the 14th and subsequent sections of the act, regulating the practice of the said superior court, *Orl. Laws*, 1. 236, the sheriff's duties in making seizures and sales, are the same, and prescribed nearly in the same words, as they were under the county court act. His powers, therefore, so far as they are requisite for the execution of those duties, must continue—for it is a well known, undoubted principle of law, that whenever any duty is imposed, or any authority given, the means necessary to the performance of the one, or the execution of the other, are impliedly, if not expressly, accorded. What these means are, in cases like that under consideration, must be found in that system of jurisprudence, conformably to which the office of sheriff was created. Under the free system of the common law, the sheriff would naturally have recourse for aid to the good people of his county, in the same manner as the Spanish alguazil mayor would demand assistance from the military power. The office of sheriff is provided for, and the mode of appointment to it regulated by the constitution of this state—whence it may be inferred, that the nature, the duties and power of that office were generally recognized and understood as they are, and al-

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ways have been, from similar provisions in the constitutions of several of the other states of the union; that is, according to the principles and usages of the common law. Repeated adjudications of the supreme courts of Massachusetts and Connecticut authorize this presumption. *Backus' Sheriff Adv.*

With the legality of the process, or proceeding of the sheriff, in such a case as the present, the *posse comitatus* have nothing to do. It is quite enough for them to know that he is the sheriff, and that what he is doing is apparently just: otherwise who would ever venture to obey the sheriff, when called upon to execute the law? The following authorities on this point go very far beyond what we require:—"If J. S. be compelled by J. N. to commit a trespass, the latter only is liable—for no person can be guilty of a trespass, unless he act voluntarily." 6 *Bac. Ab.* 589. "If a stranger have officiously assisted a sheriff or his officer in the execution of a writ of *fi' fa'*, which issued upon a regular judgment, he is not liable to an action of trespass—for it is not only lawful, but it is the duty of every man to assist in the execution of such a writ." 6 *Bac. Ab.* 590.

These considerations would serve to exonerate the appellant and protect him against this

action, if it were even in proof that he had personally assisted the sheriff, as one of the *posse comitatus*, or even as a stranger. But the statement of facts does not go that length. It is there declared that the defendant was asked to join the *posse*—but he objected to going with them, giving as his reason that, as he was the purchaser, it would be improper in him to do so.

Much stress appears to be laid by the judge below, in the bill of exceptions, on the circumstance that the sheriff put Hennen into possession of the premises—which, it appears from the said bill of exceptions, he had before seized and sold to him, without any warrant or authority, save only the writ of *fi' fa'* aforesaid. And what other authority or warrant, we ask, was requisite? In fact, our laws have provided no other. That writ enables the sheriff to seize the property—and having so seized, and being in lawful possession of it, he sells it and delivers it up to the purchaser. What need of a writ of seizure, or of possession, when the sheriff himself is already in possession of the property? This throws a new light on the affair, and clears up all difficulties. It was Madame Prevot who was the transgressor in this case. She, it seems, obtained possession, by some means or other, of that property, which the

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sheriff had seized and sold, as the record itself states—and it was only in consequence of this unlawful possession acquired by her, that the sheriff was obliged to have recourse to legal violence to eject her from the premises. Had she, when the property was first seized, previous to the sale, made the legal opposition of a third party, she would of course have recovered the possession. But, having neglected to do so, she was to be considered an intruder and trespasser.

The sheriff having sold the property, as the statute directs, made the tradition and delivery of it in the manner prescribed by law. Tradition, or delivery of immovables, is made by the seller, when he leaves to the purchaser the possession of the same, by dispossessing himself, &c. or by putting the buyer on the premises. *Civ. Code*, 351, *art.* 28.

Hitherto our argument goes to the complete exculpation of all the parties concerned in this supposed trespass of the sheriff as well as the defendant. But, whatever may be the liability of the former in this transaction, it is clear, beyond all doubt, that the latter must be regarded as a peaceable, legal, *bona fide* possessor. His case comes exactly within the definition of the *bona fide* possessor, as given by our statute.

The possessor, in good faith, is he who is, in fact, the master of the thing which he possesses, or who has a just cause to believe that he is so, although it may happen that he is not; as it happens to him who buys a thing which he thinks belongs to the seller, and which yet belongs to another. *Civ. Code*, 478, *art.* 21.

The sale of the property by an officer authorized by the state to make such sales, was quite enough to justify the defendant in believing that the title was a good one—that the property did in fact belong to the debtor, and, by operation of law, to the sheriff who had seized and sold it. If any thing more was necessary to confirm him in this belief, it would be found abundantly in the absence of all legal opposition to the sale. Such a possession as this would serve as a foundation for the prescription of ten or twenty years.

It is, therefore, sufficient to defeat this action of trespass, or any other action, founded on a supposed tort or injury. In such cases, the maxim of our law is, that "good faith is always presumed, and that it is for him who alledges bad faith to prove it." *Civ. Code*, 489, *art.* 71.

Bonæ fidei emptor (says the Roman law) *esse videtur qui ignoravit rem alienam esse,*

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aut putavit eum qui vendidit, jus vendendi habere. ff. de verb. significatione.

Con buéna fé, (says the Spanish legislator) *recibe el que succede a otro, o' cree que el que le entrega la cosa tiene potestad de entregarla*, &c. *Part.* 7, 33, 9 *Compendio por Perez*, 41.

But, if the seizure made by the sheriff, were wholly illegal and without any colour of justice, still this action could not be maintained against the defendant. The sheriff alone would be liable to it. On this point, the authorities are very full and decisive. *Celui qui a été dépossedé par violence, n'ést pas fondé à exercer cette action de reintegrande, contre celui qu'il trouve en possession de la chose dont il a été dépossedé par violence, si ce possesseur n'y a aucune part.*" *Poth. Poss. n.* 122.

Cum a te vi dejectus sim, si Titius eandem rem possidere cæperit, non possum cum alio quam tecum interdicto experiri. If you have dispossessed me by violence, and if another, *(Titius)* have began to possess the same property, I cannot obtain the same interdict *unde vi*, except against you alone. *ff.* 43, 16, 7.

The interdict *unde vi* is here spoken of: *Istud interdictum unde vi non datur contra particularem successorem; unde si ille qui commisit violentiam, vendidit vel donavit alteri illam*

rem, vel quovis alio titulo oneroso, vel lucrativo, per contractum inter vivos, vel per ultimam voluntatem, aliænavit, non poterit primus possessor expulsus agere hoc interdicto contra illum tertium particularem successorem, sed tantum contra expulsorem qui violentiam commisit, licet rem ipsam non possideat. Gomez. Comment. in leg. 45, Tauri, n. 186. Cujus ratio est, (he adds) *quia regulariter interdicta sunt remedia personalia. ff. 43, 1.*

The plaintiff having brought her action of trespass, in the common law form, it may be proper to shew, that the principles of that system of jurisprudence, are as little favorable to her claim, as those of the Roman or Spanish laws. To be able to maintain an action of trespass, says *Blackstone, 3 Com.* 210; one must have a property (either absolute or temporary) in the soil, and actual possession by entry.

If the sheriff, or a stranger illegally take the goods of another in execution, and sell and deliver them to a third person, trespass cannot be supported against the latter, because they came to him without fault on his part. 1 *Chitty's pleading,* 170. The *gist* of this action is the injury to the possession; and unless at the time the injury was committed, the plaintiff was in ac-

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tual possession, trespass cannot be supported. *Idem.* 175.

There is a material distinction between personal and real property, as to the right of the owner. In the first case we have seen, that the general property draws to it the possession, sufficient to enable the owner to support trespass, though he has never been in possession; but in the case of land and other real property, there is no such constructive possession: and unless the plaintiff had the actual possession, at the time when the injury was committed, he cannot support this action." *Idem*, 176.

"Thus, before entry and actual possession, a person cannot maintain trespass, though he hath the freehold in law, &c. But a disseisee may have it against a disseisor, for the disseision itself, because he was then in possession; but not for an injury after disseisin, until he hath gained possession by re-entry," &c. *Idem*, 177.

There must be a possession in fact, of the real property to which an injury is done, in order to entitle a party to maintain trespass, *quare clausum fregit.*" 6 *Wilson's Bac. Abr.* 566, 1 *John. Rep.* 511. 9 *John. Rep.* 61.

These authorities, which might be multiplied without end, 6 *Bac. Abr.* 593, 3 *Caines*, 261,

Buller's, N. P. 87, 1 *Lord Raym.* 692, 2 *Salk.* 639, *Co. Litt.* 257, 13 *Coke*, 500, 2 *Lord Raym*, 975, 1 *Leon.* 302, 319, 1 *Gould. Esp. N. P.* *part.* 2, 256, 9 *John. Rep.* 61, &c. &c. all prove that, if Madame Prevot had an action of trespass, it was against the sheriff, and not against the defendant. But, setting aside the name, and particular form of the action, his substantial and irrefragable defence, in law and in natural equity, is that, as he entered into the possession of the property in perfect good faith, having nothing whatever to do with the original suit, he cannot be liable to any manner of suit or prosecution as a wrongdoer.

There is yet another legal defence, of which he can avail himself, and which, independent of all others, would be sufficient to defeat this action, now and forever, as against the defendant and all other persons. It is the plea of prescription—a plea or exception which our law permits to be offered in every stage of a cause, even on the appeal. *Code Civ.* 483, *art.* 36. Such is the Roman, Spanish and French law. *Prescriptionem peremptoriam, quam ante contestare sufficit, omissam priusquam sententia feratur, objicere quandoque licet.* The peremptory exception, which might be well pleaded previous to the contestation of suit, may, al-

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though it should have been then omitted, be afterwards opposed, at any time before the sentence or decision of the cause is given. *Cod.* 8, 36, 5.

Cum nundum finitam sententiam, sed dilatam allegatis; non est dubium omnes integras defensiones vobis esse.

When the cause has not been decided by a final sentence, but continued, there is no doubt but that all kinds of defence remain to you in their integrity. *Cod.* 8, 36, 4.

Il est de la nature de l' exception peremptoire, de pouvoir être opposée en tout ètat de cause; et telle est la prescription. 8 *Droit Romain de Le Clerq*, 63.

On ne donte pas que la prescription ne puisse être proposée en tout ètat de cause. C'ést une exception peremptoire, et cela dit tout. Aussi trouvons nous dans le Journal du Palais de Toulouse, 2 tom. 552, deux arrêts de cette cour qui jugent que le possesseur est tenu â prouver la possession du tems legitime pour la prescription, quoiqu'il ait commencé â se defendre contre l'ancien proprietaire, qu'il ait d'ábord pretendu simplement que la chose lui appartenait independamment de la prescription, et sans l'avoir proposée au commencement de l'instance. 9 *Merlin*, 489. See also 8 *Le Clerq*,

Droit Remain, 63, *Cod.* 8, 36, 8, 2 *Domat*, 236, *F. Ed.*

The period of prescribing against this action remains to be shewn.

The wrong complained of by the plaintiffs, is called, in our technical law language, an injury. This word includes not only every species of libel, slander and calumny, but all acts of violence for which damages may be recovered in a civil action. It comprises all those torts which the common law designates by the names assault, battery and trespass, *vi & armis*. *Generaliter injuria dicitur omne, quod non jure fit. Inst.* 4, 4, *pro.*

Injuria ex eo dicta est, quod non jure fiat; omne enim quod non jure fit, injuria fieri dicitur. 1 *Lict. Dr. Rom.* 395.

Injuria autem committitur, non solum cum quis pugno pulsatus, aut fustibus cæsus, vel etiam verberatus erit; sed it si cum convitium factum fuerit; sive cujus bona, quasi debitoris, qui nihil deberet, possessa fuerint, ab eo qui intelligebat nihil eum sibi debere. Inst. 4, 4, 1.

An injury is committed, not only by beating, scourging or whipping, but also by using slanderous language; or by seizing the goods of another, as if he were a debtor, when the per-

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son seizing them knew that nothing was due to him. *Inst.* 4, 4, 1.

The punishment of an injury was by retaliation, according to the law of the twelve tables, when a limb was broken; but, in lighter cases, the punishment was pecuniary. Afterwards, the prætors allowed the parties injured to lay their damages at a certain sum, which might serve as a guide to the judge in estimating them according to his discretion. And this was the mode universally resorted to when the civil action of injury was brought. *Inst.* 4, 4, 7. This action corresponds, in the present case, with the common law action of trespass *vi & armis*, as the action of trespass on the case corresponds with many of the actions given by the Aquilian law. But the right to bring the former (the action of injury) is limited to one year. *Hæc actio dissimulatione aboletur; & ideo, si quis injuriam dereliquerit, hoc est, statim passus ad animum suum nori revocaverit, postea ex pœnitentiâ remissam injuriam non poterit recolere. Inst.* 4, 4, 12. *Injuriarum actio annuo tempore præscripta sit. Cod.* 5.

This provision is adopted by the Spanish law. *Hasta un ano puede todo ome demandar emienda de la deshonra, o' del tuerto que recibió; e si un ano passasse desde el dia que le*

fuesse facha la deshonra, que non demandasse en juizio emienda della, de alli adelante non la podria fazer: porque pode omè asmar que se non tuvo por deshonrado pues que tanto tiempo se calló, que non fizo ende querella en juyzio; ó que perdonó ó acquel que gela fizó. Part. 7, 9, 22.

During the period of a year, every man may demand compensation or satisfaction for the injury or wrong which he has received. But if a year have passed from the day when the injury was done to him, without his having demanded, judicially, satisfaction therefore, from thenceforth he may not make such demand; for it may be considered that a man does not hold himself to be injured, who has been so long silent, and has made no complaint thereof in justice; or that he has forgiven the person who has done him the injury.

Gregorio Lopez, in his glossary on this law, notices the opinion of some doctors, who maintained that a man was bound conscientiously to make reparation for injuries committed by him, even though the injured person should not bring an action within the year—and that, if he failed to make such reparation, he was liable to be excommunicated. But the best casuists, it seems, decided, *quod per lapsum anni est sublata actio*

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injuriarum, et obligatio civilis & naturalis ; adeo quod tacendo per annum, videtur injuriatus remisisse omnem injuriam.

Our statute prescribes the same period for the action of one who has been disturbed in his possession. He, who pretends to have been interrupted in his possession, ought to make his demand or complain thereof within a year, to be reckoned from the day of his being turned out of possession. For, if he leaves his adversary in possession for the space of a year, he has lost his own possession, whatever apparent right he may have had to it : but he retains his action for the property. *Code Civ.* 481, *art.* 27.

L'action de reintegrande, lorsqu'elle est poursuivie au civil, doit, de même que la complainte, être intentée dans l'année, laquelle se compte du jour que la violence a cessé et que le spolié a été en pouvoir de l'intenter. Cela est conforme aux principes du droit romain. Dig. 43, *t.* 16. *Si donc on a laissé passer l'année sans intenter cette action il resulte de ce laps une fin de non recevoir contre cette action qúon vondroit intenter après l'année. Pothier. L'action n complainte est egalement annale.* 9 *Merlin,* 5.0.

The lapse of time, then would have converted the appellant's possession of the premises,

had it been even at first obtained by violence on his part, into a legal possession; and therefore the action grounded on that violence could no longer be maintained.

If it be attempted to distinguish the action for recovering possession, from the action of injury for the disseisin, then we rely on the law already quoted of *Partidas*. A law not repealed, altered or modified,—as respects civil suits, by any statute of this state. Our civil code is silent on this particular subject: it regulates the periods of prescription in various cases, leaving the others as before its promulgation. The 65 *art. p.* 186, provides, that after thirty years, all actions, either personal or real are prescribed against. But this provision is evidently intended to apply to actions only, for which, the period of prescription is not otherwise fixed. In other parts of the same code, different times of prescription are specified. In an antecedent part of that code, *sec.* 2, *ch.* 5, of the title of sale, it is enacted (367, *art.* 115) that, "*l'action pour se faire restituer pour lesion d'outre moitie, doit etre exercée dans les quatre ans.*" This provision, it is well known, has not been affected by the subsequent clause, declaring that all actions are prescribed against after 30 years. But the law of the *Partidas*

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stands in the same degree of authority, as if it had been ordained on the day before the civil code was promulgated, or, as if it were found in that code itself, immediately preceding the article of the thirty years prescription. And it has been already determined, after many solemn arguments, that the provisions of that code or digest, are to be taken, and construed along with the previously existing laws on the same subjects, as statutes made *in pari materia*, the whole to remain in force, if not incompatible with each other. In an action for slander, the prescription, here contended for, was admitted by the superior court, of the late Territory of Orleans;—subsequently to the promulgation of the civil code. In the action now before the court, the term of prescription is precisely the same, viz. one year from the day when the injury, or trespass, was committed. If this prescription were considered repealed, as incompatible with the above mentioned 65*th art.* of the *civ. code, p.* 486, so must every other prescription, provided for by the preceding titles of that code, or by any antecedent law; a construction too absurd and mischievous, to be for a moment supported.

Now it will appear, from a reference to the record, that the disseisin or forcible entry com-

plained of, took place some time in the year 1814, and that the present action of injury, to recover compensation for the alledged wrong, was brought on the 18th day of March, in the year 1816, leaving an interval between the supposed injurious act, and the complaint, of at least fourteen months and seventeen days.—And thus, by the plea of prescription, this action is overthrown.

Brent for the plaintiffs. I will first reply to the plea of prescription set up by the defendant, and then shew, that the merits of the case are with us.

This plea of prescription, was not made in the court below, and cannot be made now.

All pleas or, in the technical language of the civil law, exceptions must be set forth by the party, wishing to avail himself of them, and they cannot be supplied by the court. *ff.* 44, *tit.* 1. § 1, 2 and 3. 8 *Le Clerq, Droit Romain* 63. No new pleadings can be made, nor new evidence given in this court, which is to judge according to the record, and give that judgment which the court below should have given. But it is clear that the court below could not have supplied this exception; and, therefore, that it cannot be noticed here. *See act of* 1813.

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On the merits, the defendant must be equally unsuccessful. From the statement of facts, it appears the defendant requested the sheriff to put him in possession of the premises which he had previously purchased. Now the sheriff, agreeably to the duties of his office, as known at common law, is not bound to deliver to the vendee possession of real estate sold under a *fi' fa'*. 1 *Haywood*, 495. This principle is uncontrovertible. We can go to no other system than the common law to learn the duties and powers of the sheriff; the civil law can give us no light on the subject; for such office was unknown to it. If then the sheriff was not bound to deliver possession of the real estate sold, and he undertook to do it at the request of the vendee, both were trespassers and jointly and severally responsible in damages to the plaintiffs. The common law doctrine is well stated in 6 *Wilson's Bac. Abridg.* 589. Every party to a trespass is liable to an action of trespass; for there can be no accessary in trespass." So "if A command or request B to take the goods of C. and B does it, this action lies as well against A as against B. And, "if J. S. agree to a trespass which has been committed by J. N. for his benefit, this action lies against J. S. although it was not done in obedience to his command, or at his request."

"If divers persons have been guilty of a trespass, the party injured may bring an action of trespass against them all, or against any one or more of them." These principles might be proved by reference to every elementary book as well as to innumerable adjudged cases. Such also is the doctrine of the civil law. "*Je suis censè avoir fait moi-meme ce que quelqu'un a fait en mon nom, quoique sans aucun ordre, lorsque j'y ai donné depuis mon approbation.*" *Pothier, Traité de possession, no. 23, L. 152, § 2. ff, de reg. jur. l. 1, § 14, ff. de vi & vi arm.*

The evidence, exhibited in the statement of facts, shews that the defendant, not only consented to the trespass after it was done, by taking possession of the estate; but that he requested to be put in possession thereof.—It was committed not only at his request, but for his benefit; thus bringing the case directly within the authority cited.

The charge of the judge, to the jury, was in conformity with these principles; and the jury, the sole judge of the damages, have fixed the amount for which the plaintiffs should have the judgment of this court.

DERBIGNY, J. delivered the opinion of the court. The first question which presents itself

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here is, whether any trespass has been committed—if decided in the affirmative, the second will be, whether, from the conduct of the defendant, he ought to be considered as one of the trespassers, and, as such, liable to indemnify the plaintiffs.

To come to a clear understanding of the first question, the previous inquiry must be, who was in possession of the plantation, when the sheriff came there, with the *posse comitatus?* The plaintiff, to be sure, was in the actual occupation of the house; but we are not to conclude from that circumstance, that she was the possessor. The plantation had been previously seized. What is the effect of a legal seizure? Surely it is to place the property under the custody of the law, until it is disposed of according to law. Formerly, under the government of Spain, the property seized, whether real or personal, was deposited in the hands of some person of solvent fortune: "*Los bienes executados, ora sean muebles ò raices, se han de sequestrar, inventoriar y depositar en persona abonada, sin llevarlos nin tenerlos en su poder el alguacil.*" *Curia Philipica, tit. Execucion no.* 19. This has been altered into a deposit into the hands of the sheriff himself: "after such seizure, the sheriff shall keep the property

so seized at his risk &c. (see page 172 and 242, of the first volume of the acts of our legislature.) The moment then, that a seizure is regularly made, (and we are bound to presume that this is, nothing being shewn to the contrary) the thing ceases to be possessed, by the person in whose possession it was found, and is placed under the custody of the sheriff. A practice, introduced for the mutual convenience of the party and of the sheriff, is to leave the possessor on the property seized; but that does not change the situation of the thing; the occupier is there, by permission of the sheriff, and is supposed to keep the property for him.

In this case, however, it is said, that the property seized continued to be legally possessed by the plaintiff, because her husband, the debtor against whom the execution went, being not the owner of the premises, the seizure was illegal. We do not think that this circumstance made any difference, as to the actual possession of the thing by the sheriff. The plaintiff might indeed have caused that possession to cease, on making known that the property was hers; but, so long as she thought fit, to acquiesce by her silence in the possession of the sheriff, that possession continued. It had not yet ceased, when the sheriff transferred it to the appellant;

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that transfer therefore cannot be viewed as a trespass. If a trespass was committed, it took place when the sheriff seized the property, and the sheriff alone can be answerable for it.

Should we admit, that the possession of the plantation was retained by the plaintiff, notwithstanding the seizure, and that the forcible entry of the sheriff on it was a trespass, the claim of the plaintiff would still be unsupported by the evidence. The appellant did not aid the sheriff in taking possession by force; he simply received from him, the transfer of that possession, after it had been taken. He was a *bona fide* purchaser, and became a *bona fide* possessor. Far from being answerable in damages towards the plaintiff, he had a right to enjoy whatever the plantation produced, with or without culture, and was not even liable for the loss of the property. *Code Civ.* 480 *art.* 30.

From this view of the subject, it becomes unnecessary to examine the other questions, which were raised in this case.

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

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STATE vs. DUNLAP & AL.

STATE vs. *DUNLAP & AL.*

The supreme court will not issue a *mandamus* to restore the clerk of a district court, to his office.

MARTIN, J. delivered the opinion of the court. On the affidavit of Samuel Thornberry, that he was duly appointed clerk of the parish of Concordia, and has ever fulfilled all the duties of the office with care and fidelity, and yet the judge of the seventh district has removed him therefrom, and appointed Edmund Randolph, the other defendant, in his stead, and compelled, by force, a surrender of the records and papers of the office from the deponent to said Randolph, a rule was granted to shew cause why a *mandamus* should not issue for the restoration of the defendant in his said office, and the return of the records and papers thereof to him.

After hearing an argument, this court is of opinion that the *mandamus* cannot issue.

The clerk cannot be considered as removed: for this court alone has the power of removing him. The facts sworn to present only the case of a disturbance. If it does really exist, the deponent has his remedy in the ordinary course of justice, by an action for damages, and the intruder may be ousted by a writ of *quo warranto*. It is true, in a case like the present, an

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officer is commonly reinstated by a writ of *mandamus*. But, it cannot be believed that, if the present incumbent be declared by a proper judgment to have been illegally placed in an office, which was not vacant, the court of the seventh district will prevent the defendant from acting.

Were we to proceed, in a summary mode, by the process of *mandamus*, we would take original cognizance in an extraordinary manner, of a right to an office, contested by two persons—a right which may effectually, though less speedily, be asserted in the ordinary course of justice.

The rule must be discharged.

POSTON vs. *ADAMS*.

When the judgment contains not the reasons, on which it is grounded, it will be set aside but if the record contains the whole evidence, the supreme court, will give such a judgment as ought to have been given below.

APPEAL from the court of the fifth district.

MARTIN, J. delivered the opinion of the court. In this case there was a judgment for the defendant and appellee.

The appellant shews that the judgment ought to be reversed, because it contains the citation of no law, nor any reasons, and therefore is void, under the law and the constitution.

This point has been frequently determined, and lately in the case of *Urquhart* vs. *Taylor*, in this court, during this term, *ante* 200.

The judgment is therefore annulled, avoided and reversed. *Laverty & al.* vs. *Gray & al.* 4 *Martin*, 463. *Sierra* vs. *Slort*, *id.* 316.

Although an answer to interrogatories be excepted to, and the exception sustained, the party has no right to take it away.

Proceeding to inquire what judgment the court below ought to have given, we are arrested by a bill of exceptions of the defendant.

The court below, having pronounced the answers of the plaintiff to the defendant's interrogatories not properly sworn to; and the plaintiff having filed a second answer, his attorney took out the first. At the trial, the defendant, stating that the first answer was necessary to him in lessening the credit which was to be given to the second, moved the court to order the attorney to replace it on the files; and the court refusing to do so, on the ground that the defendant, having once objected to the reading of the paper, was not entitled to demand it, the defendant excepted to the opinion of the court.

We think that the court ought to have ordered the attorney to replace the answer on the files. A paper once put on record, or on the files of the court, ought not to be withdrawn without leave. Each party has a right to the proper use of it. Although the defendant had

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refused to allow the reading of the paper by the plaintiff, yet he had the right of using it *against* him. If the answer had not been sworn at all, surely the defendant might have opposed the reading of it till it was sworn to—yet this would not deprive him from the benefit of any admission therein made by the plaintiff, which, though not evidence for the plaintiff, without being sworn to, was evidence against him without. It cannot be denied, that the defendant might oppose to the answer, in order to diminish the force of it, any contrary declaration orally made by the plaintiff—the same declarations could not be refused to be given in evidence, because they were *written*—nor because they were contained in a paper which had once been tendered by the plaintiff, and the illegal introduction of which by the plaintiff the defendant had resisted. A party may offer his antagonist's declaration to derogate from the credit of his answer on oath, without being compelled to present that declaration as absolute evidence.

The whole evidence to which the parties are entitled, not being before us, we are unable to pronounce a final judgment—the cause is therefore remanded for trial, with directions to the district court to order the attorney of the plain-

tiff to return the fact answer to the files of the court.

But the appeal being taken from an erroneous judgment, the costs of the appeal must be borne by the appellee.

Baldwin for the plaintiff, *Porter* for the defendant.

SEVILLE vs. *CHRETIEN*.

APPEAL from the court of the fifth district.

Under the territorial government, the nonsuit of an appellee, who was plaintiff below, did not revive his judgment.

Under the French government in Louisiana, some Indians were held in slavery, and the freedom of such was not acquired by the establishment of the Spanish government.

MATHEWS, J. delivered the opinion of the court.* The plaintiff and appellants sues, *in forma pauperis*, to recover his liberty, and judgment having been given against him, he appealed.

The evidence, which is all written in the form of depositions, and other documents, comes up with the record, and a statement of the case is made by the counsel.

Several exceptions, to the admission of testimony, appear to have been taken, during the course of the trial, in the district court, by each of the parties, and although not regularly re-

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

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duced to writing, and signed by the judge, might be noticed, under the circumstances of the case and the agreement of the counsel, were it necessary for the purpose of obtaining a knowledge of any fact, important to a correct decision of the suit. The district judge having admitted all the testimony offered, we deem it useless to enter into a formal investigation and decision of each exception: but will proceed to state the facts as drawn from the evidence, which was properly received. A summary of such of them as are necessary, to arrive at proper legal conclusions, may be laid down as follows:

In the year 1765 or 1766, Duchene, an Indian trader, brought an Indian woman to Opelousas, whom he sold to Chretien, the father of the defendant and appellee: she died not long after, leaving a female child, who remained peaceably with Chretien, as his slave, until some time during the period in which the Baron de Carondelet was governor of the province of Louisiana: when she went to New-Orleans, with her master, for the purpose of claiming her freedom before the proper tribunal. It appears from a certificate of Peter Pedesclaux, a notary, that a suit was commenced, but no record remains, or can be found, of the manner

in which it terminated. She returned with Chretien, and remained with him as his slave, until his death, which happened after the United States took possession of the country, under the treaty, made with the French government, in the year 1803; she was called Agnes, and brought several children, while held in a state of slavery, by Chretien, of whom the plaintiff and appellant is heir. After the death of the ancestor of the defendant, and the distribution of his estate, Agnes and some of her children, all descended from the Indian woman sold by Duchene, as above stated, brought suit in the parish court of St. Landry against their owners, among whom, was the present defendant, to recover their freedom. From a judgment by default, which afterwards became final, an appeal was taken to the superior court, of the late territory of Orleans, where the cause was tried by a jury, and a verdict rendered in favour of the then plaintiffs and appellees, which was set aside, by the court, on account of some misconduct in the jury, and a new trial ordered. The case remained in this situation, until the change in the country, from a territorial to a state government, and was then transferred with others to the fifth district, under the new system. As the person, who became judge of that

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district, had been engaged as counsel in the cause, it was transferred for trial to the second district; and the then appellee, who was the original plaintiff, not appearing to prosecute his suit, was declared by the court to be nonsuited, and judgment was accordingly entered.

It appears from the depositions of a number of witnesses, (admitted by the parties to have been correctly taken, and to be proper evidence in the cause,) that at the time the Spanish government took possession of the country, viz. in 1769, under the secret treaty of cession, made between France and Spain in 1763, many of the inhabitants of the colony, which had been established and settled under the authority of the French government, held and possessed Indians as slaves, and it seems to have been a belief pretty general among them, that the practice of holding Indians in slavery was tolerated and authorized by that government. The fact that a considerable number of Indians and their descendants were held in slavery, at the period alluded to, is clearly proven.

These being all the important facts in the case, we will proceed to examine the plaintiff and appellant's claim to freedom, on the ground taken by his counsel.

It is grounded on a judgment of the parish court of St Landry, as being *res judicata*, by a competent tribunal. But, if it be determined that it be not conclusively supported and established by the judgment, it is contended that the plaintiff and appellant is free by birth, being the lineal descendant of an Indian woman.

I. Having already given a concise history of the suit, (to its final decision) in virtue of which the plaintiff and appellant claims his freedom as a *res judicata*, it remains only for us to ascertain the just and legal effects of the judgment of nonsuit obtained against him, in the court of the second district.

It is contended, that this judgment, given at the instance of the then appellant, amounts, on his part, to a desertion of the appeal; because, although defendant, in the inferior tribunal, in appeals according to the judicial system of the late territory of Orleans, the appellant assumed the place of plaintiff.

It is true, the appellant, even when he had been the original defendant, became actor, after having obtained the appeal. It became his duty to bring up the record, to cite his adversary, who was bound to answer on the appeal. But, after the appellee had appeared, and filed

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the answer required of him by law, viz. that there was no error in the proceedings, it became the duty of the superior court not to proceed to hear the appeal, on the issue there joined, *error vel non*, but to hear and determine the cause on the pleadings transmitted. For this purpose, a trial *de novo* took place, uninfluenced by any thing that had been done below. The evidence was not confined to what had been there offered; and, to bring the merits completely before the court, the very pleadings were allowed to be amended. 1807, 1. If a jury had been prayed for below, it was above a matter of course, without being demanded anew. *Bayon* vs. *Rivet*, 2 *Martin*, 148. Whether the trial was before a jury or the court, no judgment of affirmance or reversal was pronounced, but the verdict or judgment was always as on an original suit.

Being acted *de novo*, after the answer of the appellee, the cause was before the supreme court in nearly the same state as it would have been in the court below, after a new trial had been granted. The plaintiff was required by law to make out his case, unaided by the previous judgment, if it was in his favor, disembarrassed from it, if it was adverse, and the consequences of his failure to produce proof in support of his action, were necessarily the same in both courts.

The answer, that there was no error, amounted to nothing more than an admission that the appeal was properly before the court. It was a plea to the merits, which precluded, after it, any allegation against the propriety of sustaining the appeal. This clearly results from the absence of any provision in the act, by which the whole evidence given below might have been transmitted to the court above, without which the judgment of the inferior court cannot be examined: and when we consider that other proof than that which was given below, was received at the trial above, and that the superior court was directed to hear and determine on the pleadings transmitted, not on the issue joined above, *error vel non*, that no direction was given to affirm or reverse, but to hear the cause *ex parte*, in the absence of the appellee, and to give such a judgment as the nature of the case might require, and issue execution thereon, the conclusion is irresistible, that there was to be a trial and judgment *de novo*. Indeed, any person the least conversant with the practice of the superior court, under the late territorial government, knows that appeal cases were tried as original ones. If, as already stated, a jury had already been prayed for below, it was had as a matter of right above. If the cause had been

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tried, in the first instance, by the judge, on the appeal, the superior court heard the evidence; and the original defendant, even when he was the appellant, always had the benefit of the rule *actore non probante absolvitur reus.* When the trial was by jury, the cause was submitted to them on the original issue, unless, on an amendment of the pleadings, a new one was joined. Being charged to try the same issue, it follows, as a consequence, that the pleadings, not being directed by law to be different, were necessarily to be the same, on both trials. If the law required the plaintiff below to be present, at the delivery of the verdict; if it would not allow his final condemnation when he did not appear and offer evidence, in the inferior court, nothing could authorize the superior to deviate from the usual mode of proceeding—any other would be arbitrary.

We have already traced the progress of the first suit instituted by the appellee, for the recovery of his freedom, down to the judgment of non-suit rendered in the district court, which, in the present action, he insists, is a dereliction of the appeal from the judgment originally given in his favor, in the parish court; this court is of a different opinion.

It is believed that, according to the practice

of tribunals governed by the general principles of the civil law, in cases of appeal, it is necessary, before a judgment can have the force and effect of the thing judged, that certain measures should be pursued by the party claiming the benefit of it, to have the appeal declared to be abandoned by the appellant. Far from any step of this nature having been taken in this case, it is seen that the appellant was present, urging the trial of his cause, and that the judgment of the district court was the consequence of the latches of the appellee, who, as has been already shewn, was bound to prosecute and make out his case, as upon a new trial. The judgment of non-suit was given in favor of the appellant, the original defendant, and now so to construe it, as to make it destructive of his right, would certainly be absurd and unjust.

Being of opinion that the claim of the present plaintiff and appellant to freedom is not supported by the judgment of the parish court as *res judicata*, it remains for us to examine his pretentions to it by birth.

II. His counsel contends that the decision of the cause must be according to the rules of the Spanish system of laws. According to these laws, it is clear that since the famous regulations

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of Charles V. made about the middle of the fifteenth century, Indians could not be reduced to slavery, and if the case was to be decided by them, he would certainly be entitled to his freedom. But on the other side, it is contended that this court ought to be governed in the determination of this suit, by the municipal laws and usages of France, by which her American colonies were ruled. On this previous question, our opinion is in favor of the defendant and appellee. It is true that the province of Louisiana was ceded by France, to Spain in 1763, by a secret treaty, but no effectual possession of the country was taken, until the arrival of governor O'Reilly in 1769. Now, it is an incontrovertible principle of the laws of nations, that in cases of the cession of any part of the dominions of one sovereign power to another, the inhabitants of the part ceded, retain their ancient municipal regulations, until they are abrogated by some act of their new sovereign. In relation to the colony of Louisiana, nothing tending to repeal its former laws, such as they were under the French government, took place till the year 1769, and we have already seen, that the Indian woman, the ancestor of the plaintiff, was brought into the country, and sold as a slave in the year 1765 or 1766.

Slavery, notwithstanding all that may have been said and written against it, as being unjust, arbitrary and contrary to the laws of human nature, we find in history, to have existed from the earliest ages of the world, down to the present day.

In investigating the rights of the parties, now before the court, it is deemed unnecessary to inquire into the different means, by which one part of the human race have, in all ages, become the bondsmen of the other, such as captivity, being the offspring of those already enslaved, &c. However, we are of opinion, that it may be laid down as a legal axiom, that in all governments, in which the municipal regulations are not absolutely opposed to slavery, persons, already reduced to that state, may be held in it, and we also assume it, as a first principle, that slavery has been permitted and tolerated, in all the colonies established in America, by European powers—most clearly as relates to the blacks or Africans, and also in relation to Indians, in the first periods of conquest and colonization. Taking this principle for granted, it accounts in some measure, for the absence of any legislative act of the European powers, for the introduction of slavery into their American dominions. If the record of any such act ex-

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ist, we have not been able to find any trace of it. It is true that Charles the fifth, in the first part of the sixteenth century, granted a patent, to one of his Flemish favourites, for the exclusive right of importing four thousand negroes into America, which was purchased by some Genoese merchants, who were the first, who brought into a regular form, the commerce for slaves between Africa and America. A few years before, a small number of negroes had been introduced by the permission of Ferdinand. But the priviledge, granted by the Emperor, so far from being the first introduction of slavery into the new world, was intended as a means of enabling the planters to dispense with the slavery of the Indians, who had been reduced to a state of bondage, by their European conquerors. A full account of these transactions may be seen in Robertson's history of America.

On turning our attention to the first settlement of the British colonies in America, we find that the introduction of negro slaves, into one of the most important, was accidental. In the year 1616, as stated by Robertson, and 1620, by Judge Marshal, in his life of Washington, a Dutch ship from the coast of Guinea, sold a part of her cargo of negroes to the planters on James river. This is the first origin of

the slavery of the blacks, in the British American provinces. About twenty years after, slaves were introduced into New-England. All this took place, without any previous legislative act on the subject: and it is believed that Indians were at the same time, and before, held in bondage. The absence of any act, or instrument of government, under which their slavery originated, is not a matter of greater surprise, than that there should be none found, authorizing the slavery of the blacks.

The first act of the legislature of the province of Virginia, on the subject of the slavery of the Indians, was passed in 1670, and one of its provisions, as we are informed by Judge Tucker, prohibits free or manumitted Indians from purchasing christian servants.—The words, *free or manumitted*, are useless and absurd, if there did not exist Indians in slavery, and Indians who had been slaves, and had been manumitted, before and at the time this act was passed. Indeed from the history, and legislative proceedings of the British colonies, both in the West India islands and in North America, it clearly appears, that in most, if not in all of them, the slavery of the Indians was tolerated by government, in the early peri-

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ods of their settlement, without any specific legislation on that subject.

The French government was later, in establishing colonies in America, than the British and Spanish. In our researches, on the subject under consideration, we have not been able to discover any legislative act of it, by which the colonies were authorized to hold Indians in bondage, but that it was customary to purchase and hold some classes of them in slavery cannot be doubted. This cannot have been without the permission, or at least the toleration of government. Moreau de St. Mery, speaking of the black population of St. Domingo, observes, that among it are the descendants of some Indians from Guiana, Louisiana, &c. whom government and individuals, in violation of the law of nature, deemed it profitable to reduce to slavery. 1 *Hist. St. Dom.* 67. In the beginning of the eighteenth century, he adds, there were upwards of three hundred Indian slaves, in the French part of St. Domingo. In 1730, the governor of Louisiana, sent three hundred of the Natchez tribe to be sold. Several arrived after that period from Canada and Louisiana.

Here, we have historical facts, establishing beyond contradiction, the holding of Indians

as slaves in one of the French colonies, many of whom were transported from the very colony, in which the ancestor of the plaintiff and appellant were held in bondage. Were it necessary to prove that they were legally held so, the evidence of it would be found, in their being taxed as slaves, 2 *St. Domingo laws*, 541; a circumstance, which creates at least a very violent presumption, that the municipal regulations of the French colonies, did not prohibit the slavery of the Indians. This appears to have been the opinion of the Spanish government, which we have seen succeeded to the French in Louisiana. Governor O'Reilly, in 1769, on taking possession of the colony, discovered that a considerable number of Indians, were held in slavery, by the French colonists. This he declared, by a proclamation, to be contrary to the wise and pious laws of Spain: but by the same instrument, he confirmed the inhabitants in their possession of such Indian slaves, until the pleasure of the king, in this respect, could be known. Here is then a recognition of the right of the possessors, to hold their Indian slaves, until the legislative will of the monarch should deprive them of it. This never did happen. In conformity with this opinion, is a decree of the Baron de Carondelet, twenty five

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years after, in 1794, by which he orders two Indians, Alexis and David, to return to, and abide with their owners, until the royal will was expressed to the contrary.

The inhabitants of the colony of Louisiana, while under the government and dominion of France, held Indians in slavery. The Spanish government, under which they passed, recognized their right to hold them, until it should be altered by a declaration of the king's will. It never was declared. The colony, without any change in the condition of the original population, is receded to the French nation, and by it transferred to the United States, under a treaty securing to its inhabitants, their rights to property, as they stood under the former government. Throughout these political changes, the ancestor of the defendant and appellee, remained undisturbed in his possession, of the plaintiff and appellant's mother, as his slave, and of him since his birth. It is true that, during the government of the Baron de Carondelet, the plaintiff's mother, as has been stated, made an attempt to obtain her freedom: what proceedings took place before that governor, whether any, or what judgment was rendered, cannot now be ascertained. The only thing clear is, that she returned with the defen-

dant's father from New-Orleans, and remained with him as his slave, until his death. This certainly raises a presumption, that the suit terminated in a manner unfavourable to her claim. If this is to have any weight on the determination of the present case, it must certainly be placed against the plaintiff.

Upon the whole, we are of opinion, that neither from a view of the political changes in the country, nor a fair examination of the subject, is the plaintiff and appellant entitled to his freedom.

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

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

*** There was no case determined during the months of October and November.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

5m 292
115 960
5m 292
125 680

East'n District. *Dec.* 1817.

POYDRAS *vs.* LIVINGSTON & AL.

EASTERN DISTRICT, DECEMBER TERM, 1817.

POYDRAS vs. *LIVINGSTON & AL.*

An appeal lies, if a recusation of the judge be improperly sustained.

Affinity is not a ground of recusation.

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

MATHEWS, J. delivered the opinion of the court. This is an appeal from a decision of the parish judge, in sustaining an exception or challenge to his competency, made by one of the defendants, on account of his relationship to him.

It presents two questions for our solution. The first is a preliminary one, viz. whether the decision is so far final, as to be appealable from? The second brings us directly to the merits of

the case, viz. does any relationship exist between the judge and the party, as legally to authorize a recusation of the former?

I. A correct decision of the first question depends entirely on the just construction of the eleventh section of the act of 1813, to organize the supreme court, and establish courts of inferior jurisdiction.

The jurisdiction of this court, being appellate only, and extending only to civil cases, is, according to the law, under consideration, to be exercised on final decisions and judgments only. As to what is to be considered as such, it has been repeatedly declared, that each case must speak for itself. If, then, no general rule can be safely laid down, on the subject, which would be applicable to all cases, perhaps the best way of coming to a just conclusion on the nature of the judgment in each case, whether final or interlocutory, is to examine its effect on the rights of the parties—and whenever it decides on them finally, in any manner, or has a tendency to work an irreparable injury, the judgment must be considered as final.

With this principle in view, we proceed to the examination of the question. In places where distinct courts of justice exist, having

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competent jurisdiction, a suitor has a right to bring his suit before any of them—and, if there be no legal impediment, the tribunal in which he brings his action is bound to proceed to final judgment. A refusal thus to proceed, in consequence of an erroneous opinion and misconstruction of the law, on the part of the judge, is a neglect of duty and a violation of the rights of the suitor, in which he would be without a remedy, except by appeal. In the case of *Agnes* vs. *Judice*, 3 *Martin*, 171, much relied on by the appellees, the right of removing the suit was not contested: it was a dispute relating solely to the propriety of sending it to one or the other of two neighboring districts, and the conduct of the court was considered rather as a ministerial than a judicial act. But, in the present case, the right of the plaintiff to have the cause tried before a competent tribunal of the state in which he has chosen to bring it, was clearly put at issue; and the decision being against him, we are of opinion that he had a right to appeal, and that this court is bound to decide on the correctness or error of the judgment of the parish court, and order such relief as the case may require.

II. In considering the second question, the decision, which also depends principally on the

provisions of the 24th section of the act of 1817, amendatory of the several judiciary laws of the state, it is thought unnecessary to give any opinion, as to its applic bility to the situation of the court *â quo*, which has, in civil cases, concurrent jurisdiction with the district court of the first district, believing that no relation exists between the judge, and the defendant to sustain the exception to the competency of the former.

The law authorizes the recusation of a judge, who is related to either of the parties, in the fourth degree of the collateral line. This rule, it might be supposed, is intended for the benefit of the party not related, and if he waves it, the reason why the other should be permitted to avail himself of it, is not very evident. But, as the expression is general, of a relation to either party, and as there may be good reason for the unwillingness of a person to submit his case to the judgment of a kinsman, perhaps it was the intention of the legislature to give the right of challenge to either party. It might also be questioned, whether this right extends to any relation except such as exists by consanguinity, which we do not decide, being of opinion that there is no relation, even by affinity, between the judge and the defendant.

It appears that their wives, are related col-

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laterally by consanguinity in the fourth degree. Are the husbands related by affinity in the same degree? To solve this question, it is proper to resort to the rules and definitions of the civil law: and it is there found, that the only kind of affinity, known to the Roman law, is that which exists between one of the parties joined by marriage, and the relations of the other, and this alone, properly speaking, is affinity. *Necssitudo inter unum e conjugibus, & alterius* COGNATOS, 1 *Pothier, Marriage n.* 161.

From this view of the case, it is believed, that no relation exists, between the judge and the defendant, which ought to hinder the former, from proceeding to adjudge the cause finally.

It is, therefore, ordered, adjudged and decreed, that this cause be sent back to the parish court, and that said court, do proceed to hear and decide it, in the ordinary manner, and it is further ordered, that the appellees pay costs.

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

East'n. District.
Dec. 1817.

VIDAL vs. *RUSSEL & AL.*

VIDAL
vs.
RUSSEL & AL.

APPEAL from the court of the first district.

If A. gives the management of his ship's affairs to B. he will not, on that account, be bound by a purchase of cotton made by him long after the ship sailed.

DERRIGNY, J. delivered the opinion of the court. The plaintiff and appellee, sold to Robert Carter, supposed to be the agent of the appellants, his crop of cotton, at the rate of 30 cents per pound: when the cotton was tendered, it was refused under pretence, that R. Carter acted without authority; and it being afterwards sold for less, the plaintiff brought this action against the appellants for the balance.

The question is one of fact, and a very simple one. Was or was not R. Carter the agent of the appellants, for the purpose of this purchase?

It is not pretended, that Carter had any general authority, to act as the agent of the appellants. What appears in evidence, is that he was sent by them, from Havre de Grace to this port, in the capacity of supercargo, on board of the ship Favourite. The expressions used by the appellants, in a letter addressed by them on that occasion, to J. C. Wederstrandt & co. their correspondents here, are as follows: "The entire management of the Favou-

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rite's affairs, is in the hands of Mr. Carter." The entire management of the affairs of a vessel, which is to take in a return freight, surely includes the authority, to invest the proceeds of the cargo, in such return articles, as the agent may think most advantageous to his constituent; and as the cargo can rarely be disposed of for cash immediately, the purchase of return articles, payable on the proceeds of the cargo when sold, would not seem to exceed the limits of the agency. Thus, if it had been proved in this case, that the cotton was bought for the return cargo of the Favourite, or at least that the Favourite was still in this port, when the cotton was ready for delivery, the purchase might be viewed as made by Carter, under his agency; but nothing of the kind having been done, and the evidence showing on the contrary, that the Favourite arrived here in the spring, and that the cotton was tendered in October, so that there is not even a probability, that it was ever intended to be shipped in that vessel, we cannot but say that the plaintiff has failed to support his claim.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court, be

annulled, avoided and reversed, and that judgment be entered for the appellants with costs.

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VIDAL *vs.* RUSSEL & AL.

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

GENERAL RULE.

The meeting of this court, in the month of November next, shall be on the fourth Monday, and so, on the fourth Monday of November, in every year thereafter.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n. District. *Jan.* 1818.

DECUIR *vs.* PACKWOOD.

EASTERN DISTRICT, JANUARY TERM, 1817.

DECUIR vs. *PACKWOOD.*

If one purchases a crop of sugar, after viewing it, he cannot claim any abatement on account of its inferior quality.

Interest is not to be given on the amount adjudged by the jury, from the judicial demand, when the purchase was in notes at two, three and four months.

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

The plaintiff, claimed the payment of a crop of sugar, sold and delivered to the defendant. The answer admitted the sale and delivery, but stated that, after the shipment of the crop, it was discovered, that the sugar was of an inferior quality, and different from what it had been represented to be: wherefore the defendant claimed an abatement.

Before the trial in the parish court, the defendant prayed for a commission, for the exam-

ination of witnesses in Savannah, in order to have the sugar viewed and its quality ascertained. He admitted that the sugar had been bought through the agency of his own broker, who went up to the plaintiff's plantation to see it, and on whose report the bargain was concluded, and the discovery of the quality of the sugar was made, before the ship sailed from New-Orleans. The parish court refused the commission, whereupon the defendant took his bill of exceptions.

The sugar was to be paid in the defendant's notes, at two, three and four months. The price was not contested. There was judgment for the plaintiff, for the amount of the sugar, with interest from the day of the judicial demand. The defendant appealed.

Moreau, for the plaintiff. The parish court acted correctly, and within its powers in denying the commission. The grant and denial of it, was a matter perfectly in the discretion of the court, whose duty it was to refuse it, if the testimony, intended to be obtained, was not pertinent to the cause, or might have been procured here. *Phillips* 11. It is admitted, that before the sailing of the ship, the pretended bad quality of the sugar was discovered. It was

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then in the defendant's power to have it ascertained on the spot, and in the presence of the vendor. Having suffered the ship to sail, it is now too late to demand, that witnesses may view the sugar in Savannah, and depose as to its quality.

It is in evidence, that the defendant purchased from the plaintiff 162 hogsheads of sugar, viz. 140 at 10 cents per pound, the rest at 9. If he has a right to any abatement, it must be because the sugar was represented as of a better quality than it was, or on account of some deceitful practice, by the defendant. *Code Civil* 381, *art.* 61.

Now it is in evidence, that when the defendant's broker applied to the plaintiff's agent, he informed him, he knew nothing of the quality of the sugar, and advised him to go up and view it—that twenty-two of the hogsheads being of an inferior kind, one cent per pound was abated thereon.

Inferiority in the quality of goods sold is not a redhibitory vice. The law gives the redhibitory action, only in cases in which goods are sold, which are of no use: as linen which is rotten, barrels which have so bad a smell, as to spoil any liquor put therein. 1 *Pothier*,

Vente, n. 205 *&* 206. *Ferriere, verbo Redhibition.*

A difference in the quality of the goods, when the quality was not declared and warranted, does not give rise to the redhibitory action, because every one may sell as dearly as he can, provided he uses no deceit. But, if the vendee be deceived in the quality of the thing, which it is customary to examine before the sale, he cannot avail himself of his neglect, in order to have the sale rescinded, or the price diminished. *Pothier, id. n* 207. *2 D'Aubenton's Obligations,* 27, 28. *Abrege des lois civiles de France,* 550.

Hennen, for the defendant. The judge below erred in refusing the commission to examine witnesses, because the affidavit, on which the application was made, brings the defendant's case within the rules of the court, and the spirit as well as letter of the former decisions. The question is not whether, by putting himself to great expense, the defendant might not have obtained the same evidence, he now wishes to reach; whether he might not have delayed the sailing of the vessel, and had the examination of the sugar made here; nor, whether the evidence, if produced, would avail him

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completely in his defence. Has he disclosed in his affidavit, such facts as entitled him to a commission? I think he has.

As to the merits of the case, it is in evidence that the defendant paid the highest price for sugar of prime quality. And I maintain it to be the doctrine of our civil code, derived from the Roman law, and sanctioned by the principles of morality and honest dealing, that a sound price warrants a sound commodity. 1 *Domat* 80. *Whitfield* vs. *M'Cleod*, 2 *Bay* 380, *Cooper's Institutes*, 609, *ff.* 19, 1, 13, *id.* 45, 1 36, 1 *Pothier's Pand.* 71, *n* 13.

Our own statute sanctions this principle, and binds the vendor to a warranty of hidden defects, *Civ. Code* 357, *art.* 68. Sugar is an article, as liable to such defects as cotton, or any other species of produce. Notwithstanding the purchaser used all care to avoid imposition, if in fact he has been deceived, the vendor is liable. The defendant, therefore in this case, is entitled to an abatement, a diminition in the price agreeably to the deficiency in value, ascertained by several witnesses, whose depositions form part of the record, if this court be not of opinion with us, that the case ought to be remanded, with directions to the judge, to

order the commission to issue, as it was prayed for.

Lastly, the court *â quo* erred in giving judgment, for the sum assessed by the jury, in their verdict, with interest from the date of the petition. It is in evidence, that the sugar was to be paid for, not in cash on delivery, but in the defendant's notes a sixty, ninety and one hundred and twenty days. If interest was to be allowed at all, it could not be made to run before the expiration of these periods. Indeed no interest ought to be allowed at all: for the plaintiff's claim was liquidated by the verdict only.

DERBIGNY, J. delivered the opinion of the court. The commission, we think, was rightfully refused. Supposing that the proof of the inferior quality of the sugar could avail the defendant any thing, its quality at the time of delivery was to be shown, not the condition in which it might be, after remaining in the possession of the defendant, and travelling over the seas. But, it is evident, that such proof could not be received, or that, if received, it could not avail the defendant.

This leads us into an examination of the merits.

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One only question here seems to be worth inquiring into. Was or was not the defendant induced by false representations from the plaintiff to buy his sugar, without looking at it? The evidence abundantly proves this not to be the fact. The defendant, through his agent, saw the sugar, agreed to give the price which the plaintiff asked for it, and actually received it, hogshead by hogshead, on board of his vessel. Whether it proved afterwards not to be as good as he thought, is not a subject for judicial inquiry. The law gives no remedy against a want of discernment in judging the quality of things; provided there has been no concealment, or deceit on the part of the seller, the contract cannot be attacked.

In a case which is so plain, and in which the defendant could expect so little from an appeal, we would have felt bound to give to the plaintiff the damages which the law grants in cases where the appeal is taken for the sake of delay, were it not that the parish judge has committed an error to the prejudice of the appellant, by allowing to the appellee interest on the amount found by the jury, and also by making that interest run from the date of the judicial demand, while, from the conditions of the purchase, the appellant was to give in payment of

the sugar his notes, at two, three and four months, of which terms but a few days had elapsed when this suit was instituted.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed; and that judgment be entered for the plaintiff and appellee for eighteen thousand and seventy-two dollars, with legal interest thereon from the following dates, until payment—to wit: on one-third of that sum from the twentieth day of April, 1817; on one other third from the twentieth May following; and on the other third from the twentieth June following: and it is further ordered, that the costs in the parish court be paid by the appellant, and those in this court, by the appellee.

DUTILLET & AL. vs. *CHARDON.*

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

If property be leased by auction, the auctioneer is to be allowed for his trouble on *quantum meruit.*

DERBIGNY, J. delivered the opinion of the court. When this case first came up before this court, it appearing that the judgment rendered

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DUTILLET & AL. vs. CHARDON.

in favor of the appellees, was grounded on the act of the legislative council, allowing to auctioneers a certain commission on sales of real property, while the adjudication made in this instance by the plaintiffs, was that of a lease for years, for which no commission is fixed by law, the case was remanded to be again tried on its merits, with instructions to the judge to cause it to be considered as an action requiring payment and compensation for services rendered by the appellees, without reference to any commission allowed by law to auctioneers on the amount of sales by them made. 4 *Martin*, 611. The case has been tried according to those instructions, and the jury have assessed the services done by the plaintiffs at the sum for which the judgment complained of has been rendered. No cause being shown why this court should disturb that decision,

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

Morel for the plaintiffs, *Esnault* for the defendant.

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vs.
DUPLESSIS.

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MAYOR, &c. vs. *DUPLESSIS.*

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

If a lot be aliened for a sum which is to remain with the vendee, he paying the interest yearly, and it be stipulated that in case of insolvency he shall be considered as a lessee; till then the contract is a sale.

If the vendee be restrained from aliening, without binding his vendee to the payment of the original vendor, and he so binds him, he remains liable and is not released by the acceptance of interest from his own vendee by his vendor, nor by the latter suing the last vendee.

MARTIN, J. delivered the opinion of the court. The plaintiffs claim several arrearages of an annuity, which they alledge, was constituted to them by the defendant, for the price of a lot of ground sold to him.

The defendant resists this claim, alledging that the arrearages, mentioned in the petition, are not those of an annuity, by him constituted to the plaintiffs, but those of a rent reserved on a lease, which he once owed to the plaintiffs, and which he paid as long as he possessed the premises, but of which he discharged himself, by an alienation of the lot, to one Thomas Bailey, under certain terms which were stipulated for, by the plaintiff, in their deed to him.—*See the next case.*

It is not denied, that the arrearages claimed accrued after the alienation, and this alienation is admitted to have been made, according to the terms prescribed by the plaintiffs, to the defendant, in their deed for the premises. It is further admitted, that Thomas Bailey, after the

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alienation of the premises to him by the defendant, entered and paid the arrearages that accrued, after the alienation, for some time, and that on his failing to pay, the plaintiffs instituted a suit, without success, against him, to recover the arrearages which afterwards accrued, and which they now claim from the defendant, so that the only question for the solution of this court is, whether under all these circumstances, the defendant be discharged from the payment of arrearages, becoming due after his alienation.

The defendant contends, he is discharged therefrom—1, from the nature of the contract, 2, by his compliance with the terms on which alone it was stipulated, that it should be lawful for him to alien—3, by the receipt of arrearages, paid by Thomas Bailey, to the plaintiffs—4, and their acceptance of him for their debtor, resulting from the receipt of these arrearages, and from the institution of a suit against him, to recover the arrearages now demanded of the defendant.

I. The defendant contends, that his liability ceased on his alienation of the premises, from the nature of the contract.

He contends that the contract, which has in-

tervened between him and the plaintiffs, is a contract of lease, and that the arrearages claimed, are those of a rent reserved on a lease, demandable of the lessee or occupant only; that consequently as he fairly ceased, according to one of the stipulations of his lease, to occupy and possess the premises, he is no longer liable to pay the rent.

The plaintiffs on the contrary contend, that the contract, between the parties to this suit, was a contract of sale, accompanied by a contract of annuity, whereby, in consideration of the plaintiffs assent, that the price at which the lot was sold should remain in the defendant's hands, for twenty-nine years, and as long thereafter as the defendant should desire to retain it, the defendant did constitute an annuity to the plaintiffs, equal to the legal interest of the price, to be paid them quarterly, till the price was actually paid.

The defendant replies, that the contract was not a sale, but a lease, and calls the attention of the court to a clause in his deed, whereby it is declared, that the premises and buildings that may be erected thereon shall remain especially mortgaged for the payment of the sum, and the performance of the covenants stipulated for, and that these buildings shall form no obstacle

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to the removal of the defendant, his heirs and assigns from the premises, in case two quarters of the annual sum to be paid, should be in arrear. Lastly, that in case he should make a cession of his goods to his creditors, or obtain any respite or delay from them, the plaintiffs shall not be considered as having transferred to him the absolute ownership and dominion of the premises, the consideration money not having been received; but the defendant shall be considered as a precarious possessor, farmer or lessee, and the plaintiffs shall be preferred to all other creditors on the premises, and shall be able to regain possession thereof.

This court is of opinion, that a real sale of the premises has intervened, between the parties, and that the price and consideration money was left in the defendant's hands, as the principal of an annuity, or *rente constituee*, which he undertook to pay to the plaintiffs, until he exercised his right of redemption, which is of the essence of the contract; a right, the exercise of which was, under the civil code, postponed for twenty-nine years—that the arrearages claimed, are those of an annuity or *rente constituee*, and not of a rent reserved on a lease, *a rente fonciere*.

The annuity, *rente constituee*, says Ferriere,

is that which is due to him who has paid a sum of money, for a lawful interest, to be paid by him who received the money, till he chooses to discharge himself therefrom, by reimbursing the principal. *Verbo Rente.*

When the person who constitutes the annuity, is debtor of him to whom it is constituted, the discharge given by the latter, is equivalent to the actual payment of the money. It matters not whether the debt, in discharge of which the annuity is constituted, be anterior to, or simultaneous with the constitution of the annuity; as when the vendor of an estate causes, in the deed of sale thereof, an annuity to be constituted to himself, in payment of the consideration money of the sale. *Pothier, Traite de constitution de rente, n.* 34.

The rent reserved on a lease, *rente fonciere*, is constituted to result out of an estate, the place of which it takes, as being substituted thereto. It has with regard to the lessor, the same quality as the estate, is *proper* or *acquet*. It is called *fonciere* because it is due by the estate, *le fonds*. It differs from the annuity, *rente constituee*, which is merely personal, and is not due by the estate affected by, or hypothecated for it. So the debtor is bound to pay the annuity, *rente constituee*, though he has

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ceased to possess the estate mortgaged therefor, while the debtor of the *rente fonciere*, is no longer liable to pay it, after he has abandoned the estate by which the rent is due. *Ferriere, verbis rente constituee, rente fonciere.*

Although by a clause of the deed, the sale of the premises was to resolve itself into a lease, on the happening of a contingency, not within the power or control of the plaintiffs—a contingency which did not happen, it is clear that an absolute sale was effected by the plaintiffs, who divested themselves of their property, with the sole stipulation of their privilege; a right of re-entry, if needful, in case of non-payment of the price. This cautionary stipulation, does not alter the character of the contract, which both parties had the intention of effecting—a contract of sale.

We therefore conclude, that under the circumstances of this case, the defendant is not discharged from his liability to pay the annuity, which became due after his alienation of the premises, by the nature of the contract.

II. It is contended that he became so, by his compliance with the terms, on which alone it was stipulated it should be lawful for him to alienate.

The clause which contains the stipulation here alluded to provides, that it shall not be lawful for the defendant to alien the premises, except on the terms on which they were sold to him, and that in case of such alienation, he should within a fixed time furnish the treasurer of the corporation, with a copy of the deed of alienation.

The object of this stipulation, was to restrict the power to alien, which the defendant could have exercised, in the absence of the stipulation. By complying with the terms it imposed, the defendant acquired the absolute power of aliening, and when an alienation was accordingly effected, its effect and consequences were precisely the same, as those of an alienation, without a compliance with the terms imposed, if such a compliance had not been stipulated for. We have seen that such an alienation would not have discharged the defendant: he cannot be so, by a compliance with the terms on which alone it was stipulated, that it should be lawful for him to alien.

III. The receipt, by the plaintiffs, of arrearages (accrued after the alienation) from Thomas Bailey, is presented to us as a circumstance which operated a dissolution of the obligation of the defendant.

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MAYOR &c. vs. DUPLESSIS.

One of the terms on which it became lawful for the defendant to alien was, that he should bind his vendee to pay the arrearages that would become due to the plaintiffs after the alienation. It is clear, that this was a stipulation in favor of the plaintiffs, since it derogated from the power which the defendant would otherwise have had of alienating without any restriction. When we are asked, what advantage did the plaintiff acquire thereby, the answer presents itself—a greater security for the payment of their debt, by the cumulation at every alienation, of the accessory obligation of the alienee to the primary and principal obligation of the immediate vendee of the plaintiffs, the defendant.

He, however, contends that the obligation of every alienee was not an accessory one, but a principal one, which dissolved that of his antecessor.

The clause does not lead us, by any express words, to this conclusion—it stipulates for the creation of a new obligation, which cannot be said to destroy the original one, unless it be shewn to be inconsistent, incompatible or manifestly incongruous therewith.

When a man purchases an estate, without the actual payment of any thing, merely by incurring an obligation to pay the price, he has no

right to expect an extinguishment of his obligation by any act of his, without the concurrence of the vendor's assent. He cannot expect to discharge his obligation by pointing out to his vendor an individual, who is willing to assume the payment of his debt. He may, however, stipulate with any of his debtors, even with his alienee, that such a debtor or alienee shall pay for him the debt, which he himself owes to his own vendor. In such a case, a partial payment received by the latter from the debtor or alienee of the former, will discharge the original debt, *pro tanto*, and will leave it in vigor for the balance. If the vendee may do this of his own accord, the vendor may lawfully stipulate for its being done. In this case, the delegation thus obtained by the vendor will strengthen, instead of dissolving, his right—consequently, the corresponding obligation of his vendee will neither be weakened nor dissolved thereby. A complete payment will absolutely discharge the vendee and debtor or alienee—a partial one will work a partial discharge only. If this debtor or alienee, in consequence of the stipulation of his creditor or alienor, promise to his vendee to pay the debt he owes to such a creditor or alienor, in discharge of what he owes to his own vendor, his obligation will be an acces-

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sory one, the existence of which will neither be inconsistent, incompatible or incongruous with the continuation of the principal one.

It appears to us, that the object of the clause, under consideration, was to acquire to the plaintiffs such an accessory obligation.

They were selling the property of the city, as appears from the deed, at public auction, without requiring any payment or security. They had no opportunity of selecting the persons with whom they were to contract. They were bound to accept, without any inquiry, any person making the highest bid. Are we not, therefore, to expect that the means, by which the payment of the sums stipulated might be secured, should be cumulated? Would it have been safe, would it have been correct, in the plaintiffs to assume it as a certain fact, that the land would have, at all times, been sufficient to secure the payment of the rent due—that it would never be against the interest of the city to have the contract they were about to make thrown back on the hands of the plaintiffs? If so, as they were in no case to have the option of resuming the land, a sale was a most injurious contract—why was it made? Thus we find a clause evidently inserted by the plaintiffs, and which must therefore be supposed to secure

some advantage to them, destructive in its effects of their interest.

On the other hand, if the stipulation receives the construction contended for by the plaintiffs, they receive indeed an additional security for the payment of the price of their lots; but the defendant can in no case be injured, or pay more than he engaged, and, like other vendees, he will only be submitted to the inconveniency of remaining bound for the payment of the price of the thing bought, till it be paid.

We conclude that the receipt of some of the arrearages by the plaintiffs from Thomas Bailey, was only the receipt from one of the debtors of the defendant of money which the defendant had stipulated he should pay the plaintiffs in discharge of the money due them by the defendant, who is thereby liberated *pro tanto*, but not discharged from his obligation of paying the remainder.

IV. Lastly, the defendant contends that he is discharged, because the plaintiffs have accepted Thomas Bailey, as their debtor, and this acceptance is said to be evidenced, not only by the receipt of some arrearages, but also by the institution of a suit for the recovery of others.

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We have seen that the receipt of some of the arrearages by the plaintiffs from Bailey cannot have the effect contended for. The institution of a suit for other arrearages, if this court be of opinion as the inferior one, that the suit cannot be maintained, will only shew that the plaintiffs mistook their remedy, and their error cannot dissolve the obligation of the person who contracted with them—and the plaintiffs contend that a recovery against Bailey, as long as it was not followed by the payment of the sum recovered, would be no obstacle to their obtaining judgment against the present defendant.

The arrearages claimed, they contend, are a personal debt of the defendant, for which, it is true, they have a privilege on the premises sold. It is not due by the lot. If the holder of the lot was compelled to pay it, without having stipulated to do so, he would have his claim on the defendant to be reimbursed. Had the defendant died, the arrearages would be the debt of all his heirs, not of the particular heir to whose portion of his estate the lot might fall. Thomas Bailey may perhaps, be sued by the plaintiffs, on a *contract* or a *quasi contract*, for the payment of these arrearages—and may certainly be compelled to allow the lot to be sold, that the plaintiffs may have the benefit of the

privilege, which they have reserved to themselves on the lot. But in the two first instances, the obligation of Bailey, whether it arises on a contract or *quasi contract*. is only an accessory obligation, which the plaintiffs may inforce by suit, without impairing their right on their principal debtor.

The judgment of the parish court, which rejects the claim of the plaintiffs, is erroneous, and is accordingly annulled and reversed, and it is ordered, adjudged and decreed, that they recover from the defendant, the sum of one thousand, one hundred and thirteen dollars, for the arrearages of their annuity, with costs in both courts.

Moreau for the plaintiffs, *Duncan* for the defendant.

MAYOR, &c. vs. *BAILEY.*

APPEAL from the court of the first district.

One may have a direct action, on a stipulation in his favor, in a deed to which he was not a party.

MARTIN, J. delivered the opinion of the court. The plaintiffs had sold a lot of ground, on an annuity, to Duplessis, who by a clause in his deed of sale, was restrained from alienating the premises, unless on the terms on which he had acquired them, and was bound to furnish a

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copy of the deed of sale, he might then give, to the plaintiffs within a fixed time, after his alienation. He accordingly sold the premises to the defendant, who by a clause in his deed, covenanted to pay the plaintiffs the annuity, and to perform towards them all the covenants, entered into by Duplessis.

The plaintiffs received two instalments of the annuity, as they became due; afterwards he neglected to pay, and the plaintiffs brought the present suit, to recover the arrearages accrued, since the sale from Duplessis to the defendant.

The district court gave judgment for the defendant, and the plaintiffs appealed.

The demand of the plaintiffs, is resisted on the ground, that, as the plaintiffs were not a party to the deed which contains the covenant, on the breach of which the suit is brought, they cannot have any action thereon—that the defendant may be liable to the person with whom he contracted, and the plaintiffs may finally compel the defendant to suffer the sale of the premises, which are hypothecated for the payment of the annuity, constituted to him by Duplessis, but they have no right to a direct action against the defendant.

According to the principles of the Roman law, a third person, not a party to a contract,

had no action to compel the performance of any stipulation in his favor therein: and these principles were adopted in Spain. *Part.* 5, 5, 48. But by the laws of the *Ordinamiento real*, 3, 8, 3, these principles are abrogated, and a direct action is given to the third party. 2 *Gomez*, 700, *n.* 18. In the English common law books, decisions are to be found, to support both sides of this question, but those in which the action was denied to the third party, seem to preponderate. 1 *Comyns on contracts*, 26.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that judgment be entered for the plaintiffs, for the sum of eleven hundred and thirteen dollars, the amount of the arrearages due, with costs of suit in both courts.

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

D'APREMONT vs. *PEYTAVIN*.

APPEAL from the court of the second district.

If the evidence be not positive, the supreme court will not disturb the finding of the jury.

MARTIN, J. delivered the opinion of the court. The plaintiff claims a sum of money, for

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work and labour done as an overseer, for a fixed price, and as a carpenter or wheelright on a *quantum meruit.* The answer denies that the defendant is in any manner indebted to the plaintiff, and alleges the want of an amicable demand.

There was a verdict for the plaintiff, and judgment was given accordingly, whereupon the defendant appealed, and the case is submitted to us without any argument.

There is not any statement of facts, but the depositions of the witnesses heard at the trial, come up in writing. From these it appears, the defendant relied on supporting, what he must have considered as an implied allegation, that the plaintiff did the defendant's work in so bad and unskilful a manner, that the defendant's crop of sugar, was injured in quality and quantity, chiefly by an excessive use of lime.

The testimony on the whole does not establish the fact contended for—and is on the main point contradictory—one of the witnesses deposing that good sugar is made, using only one barrel of lime for thirty hogsheads, 4 1-2 barrels for 130 hogsheads, while another says, that twelve or thirteen barrels are used for ninety hogsheads of sugar, which is one barrel of lime for seven hogsheads—we are unable to say

that the jury erred, in weighing the evidence before them, and judgment was correctly given thereon since the verdict was not complained of. But as there was an allegation in the answer, that no amicable demand was made, and the plaintiff did offer no evidence on this head, the court erred in giving judgment for costs.

The judgment is therefore annulled, avoided and reversed, and judgment is here given, for the sum of six hundred and fifty dollars, without any costs to the plaintiff, the costs of the defendants in both courts to be deducted out of the judgment.

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

LAS CAYGAS vs. *LARIONDA'S SYNDICS.*

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

A witness may prove the signature of a person whose hand-writing is familiar to him, although he never saw him write.

MARTIN, J. delivered the opinion of the court. The only point in issue in this case is, whether a certain power of attorney mentioned in the petition, be legally proven, so as to be ad-

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mitted in evidence. The suit was before this court in February, 1816, and was remanded with directions to the judge, to receive testimonial proof of the genuineness of the signatures, and of the official character of the person, who appears to have received the instrument, as a notary public. 4 *Martin*, 283, 605.

In compliance with these directions, the evidence was received. A witness has sworn, that he knows the person, who appears to have received the instrument, to be a notary public—that he has never seen him write, but he has seen several instruments executed before him, (the witness having been an attorney, in the place in which the notary lives) and verily believes, that the power of attorney is subscribed by the person, before whom it purports to have been executed.

Another witness deposes, that he knows the two persons, who (as members of the cabildo) have certified the genuineness of the notary's signature and his character, that he has seen them write, and verily believes that the signatures at the foot of their certificate, are genuine ones.

The sum claimed being under $500, we are of opinion, that the parish judge erred in rejecting the instrument, as not sufficiently prov-

en. One witness having sworn that he has often seen the signature of the notary, and believe the one at the bottom of the power of attorney to be genuine, there was a sufficient legal presumption of the fact, to allow the admission of the power, if no circumstance was offered to lessen the presumption. None was offered, and the proof of the signatures of the members of the cabildo strongly corroborated it.

The judgment of the parish court is therefore, annulled, avoided and reversed, and it is ordered, adjudged and decreed, that the plaintiff recover from the defendants, the two dividends declared on the sum of three hundred and forty dollars, with costs of suit in both courts.

Cauchoix for the plaintiff, *Morel* for the defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

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EASTERN DISTRICT, FEBRUARY TERM, 1818.

CHABOT & AL. *vs.* BLANC.

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Parol evidence cannot be received to shew that a grant to A. was made in lieu of, and intended to annul, a grant to B.

APPEAL from the court of the first district.

The petition stated that the plaintiffs are proprietors of certain lots, lying on Levee street, in the city of New-Orleans, which they hold as they were originally granted, with the same boundaries, and subject to the same limitations and restrictions of length and depth, front to the river or quay—that a certain space of ground, lying between their lots, the quay, levee or bank of the river, is a public common, and was thus assured to the original grantees, under whom they claim—that a part of this space was granted by the Baron de Carondelet, and under the

pretext of this grant, several persons, attempted to improve and build upon it, but these works were abated as a public nuisance, by the corporation of this city, and proceedings were had thereon in the court of the first district, and a judgment rendered, by which the grantee, or those who claim under him, were quieted, in the possession or enjoyment of the said ground or common, in consequence of no defence having been made by the mayor, &c. which judgment is complained of as doing great and manifest injury to the plaintiffs, by depriving them of their several and proper rights—that the defendant had, in consequence of said judgment, again commenced the inclosure of said ground, for the purpose of building thereon, to the injury, damage and total destruction of their fair and equitable title and rights.

On this petition an injunction was granted, which was afterwards dissolved and the suit dismissed.

The plaintiffs appealed, and the record came up without any statement of facts, or any record of the evidence adduced below.

A bill of exceptions appeared on the record. It was taken to the opinion of the district court, in refusing parol evidence to be given by the

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plaintiffs' counsel to shew, that a grant to Louis Lioteau, was intended and understood at the time, to be in lieu of, and to operate an extinguishment of the grant to Francis Lioteau, under whom the premises are claimed by the defendant.

Besides the error in the bill of exceptions, the plaintiffs alledged the following:

The indistinctness, indeterminateness and insufficiency of the judgment as a final judgment of the cause.

The erroneous legal inferences drawn from the facts, which the judgment itself takes for granted or proven.

Workman, for the plaintiffs. With regard to the admissibility of parol testimony in this case, I refer the court to 1 *Henning and Mumford*, 420, 2 *Willes*, 108, *Powell on contracts*, 420, 1 *Day*, 139, 1 *Johns.* 22, 3 *Johns.* 520, 6 *Term Rep.* 388 and 398, 2 *Evans' Pothier*, *n.* 16, *sec.* 8, *Phillips' law of evidence, from* 410 *to* 443, and the authorities he there cites.

The error of the district judge, in deciding this point of the cause, has probably arisen from the opinion stated in his judgment, that "none have a right to ask a rescission [of a grant] but those who are parties to it"—where-

as, in truth, every person is authorized to oppose and ask the rescission of any deed whatever, by which his property or any other right is ceded, or in any wise disposed of, without his consent, or by valid, legal proceedings. The objections of the plaintiffs to the grant under which the defendant claims, and which they would endeavor to support by competent testimony, are these:

1. That the said grant is of a thing which is not in commerce—to wit, of a piece of land which, conformably to the authentic plans of this city, and to uninterrupted usage, ought to be open and free for the use of the public.

2. That the said grant was either not accepted, or, if accepted, was afterwards abandoned and relinquished by the original grantee.

I am well aware of the doctrine of our civil code respecting parol testimony in the case of deeds. "No parol evidence is admissible against or beyond what is contained in the acts." But this rule, I contend, is applicable only to lawful acts, to deeds clothed with every character which the law requires. One of the indispensable requisites of such a deed is, that the thing which is the object of it be a lawful object of commerce. Without this requisite, it is no deed at all. It is, from the beginning,

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null and void. Pothier, in his treatise on obligations, speaking of testimonial proofs, 2 *Newbern edition*, 222, observes, that "the rejection of testimonial proof against or besides the contents of the instrument, applies only to those who were parties," &c.

The principle that two persons shall not, by any colorable proceedings, affect the consequential rights of a third, may be confidently stated as an invariable rule of law. 2 *Evans' Pothier*, 223.

II. It is abundantly evident, from the first principles of jurisprudence, that a definitive judgment, in order to be valid in law, should be certain, complete, full and conclusive—such a judgment, in a word, as would support the plea, or peremptory exception, of *res judicata*, if a new suit were instituted for the same thing, or on the same cause of action: otherwise, there would be no end to litigation. This doctrine requires no argument or authority in its support.

The judgment, in the present case, is null upon this ground. It does not decide the point put in issue by the plaintiffs—to wit, that they have a right to the use or enjoyment of the land or space in front of their homes, as of a com-

mon or public property—and, while the judgment leaves this principal point, the only one of importance in the cause, undecided, it proceeds to determine a point which is not put in issue—a right which is not claimed. This error is founded on a mistake as to the nature of the plaintiffs' demand. The judgment states—"in this case, the petitioners' claim rests upon two grounds—1. that the words in the deed, *face au fleuve*, convey a title to all the intermediate grounds, from the front of their buildings to the river;"—on which it is decided, that "the words *face au fleuve*, are words of description merely, and convey no interest whatever."

The word interest here must, we contend, be construed according to the supposed claim or title to which it refers—namely, a title to all the intermediate ground, &c. a title to which, in fact, the petitioners have laid no claim in their petition. Were the court now to confirm this judgment, would they not thereby pre-judge a most important question, in which many of the riparian proprietors of this commonwealth are deeply interested? Would they not finally decide a point which had not been, and which, in this cause, could not, from the nature of the pleadings, have been argued before them?

This judgment must be pronounced null, on

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the authority of the following law: "The judgment or sentence that is given of or concerning a thing which is not demanded, is not valid." *Part.* 3, 22, 16. Among the instances of this rule is this, to wit—"as if the action be for the property of a thing, and judgment be pronounced for the possession." And so, no doubt, the judgment would be null, if the supposed case were reversed—and so, of course, must the judgment in question be null, inasmuch as it decides on a right of property, which has not been demanded.

Let us hear what Pothier says upon these points—that admirable jurisconsult, whose universally respected decisions are drawn from the sources of our own civil jurisprudence, as well as from the principles of immutable justice. "A judgment," says this author, "is null when the object of the condemnation which it pronounces is uncertain. *Sententia debet esse certa.*" 2 *Pothier on obligations, n.* 18. And farther—"a judgment is null, when it has pronounced upon what has not been demanded; or when it has condemned a party to more than what has been demanded from him; for the judge is appointed only to resolve upon the demands which are brought before him, and he cannot, consequently, render the judgment, ex-

cept upon what is the object of the demand." *Ib. n. 24.*

From the peculiar constitution of our tribunals of the first instance, and the introduction of the mode of trial by jury in civil cases, we may with propriety refer, in such a case as the present, to the common law authorities. The finding of the court below may be considered, in some respects, as if it were the verdict of a jury—But a verdict must "comprehend the whole issue, if it does not, a judgment entered thereon will be erroneous," *Miller* vs. *Tret, Exchequer.* 1 *L. Raymond*—A new trial was granted, the question never having been fully before the jury. *Rex* vs. *Malden,* 4 *Burrows,* 2135.

A verdict was held bad, because it did not find the issue joined. *Brown* vs. *Chare,* 4 *Mass. T. R.* 436.

The supreme court of the United States, decided, in the case of *Patterson* vs. *the United States,* 2 *Wheaton,* 225, that "the rule of law is precise upon this point. A verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious; it results from the nature and end of the pleading. Whether the jury find a general or a spe-

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cial verdict, it is their duty to decide the very point in issue; and although the court, in which the cause is tried, may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to that court, or to the appellate court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict."

These decisions are all drawn from the principles of common sense, which I set out with establishing;—namely, that a judgment to be valid. must be certain, full, and decisive.

If it should appear to this honorable court, that the nullity of this judgment has, in any degree, been occasioned by the indistinctness, or want of precision in the plaintiffs' petition, then, I beg leave to suggest, that the cause may be remanded, with instructions to the district judge, to allow the plaintiffs to amend their petition, on such conditions as this court may deem reasonable, such a proceeding would be perfectly conformable to the liberal provision in the 13th section of the act to organize this court, which enables them to give judgment according as the rights of the cause, and the matter in law shall appear. Such a proceeding is also authorized by the practice of the supreme court

of the United States, when deciding on Admiralty causes;—in which the rules of procedure are as liberal as those of our own tribunals—being founded, indeed, upon the same excellent system of jurisprudence.

In the case of the *Brig Caroline* vs. *the United States*, 7 *Cranch*, 500, the supreme court gave the following sentence:

"This cause came on to be heard on the transcript of the record, and was argued by counsel; on consideration whereof, it is the opinion of the court, that the libel is too imperfectly drawn, to found a sentence of condemnation thereon. The sentence of the said circuit court is, therefore reversed, and the cause remanded to the said circuit court, with directions to admit the libel to be amended." The libel in this case did not state any certain specific offence. It was altogether in the alternative; vague, uncertain, and informal. The same point was also decided by the same tribunal, in the cases of the *Enterprize*, the *Purity*, and the *Ann*. 7 *Cranch* 572, 1 *Gallison* 22.

III. The want of the formality of a statement of facts, distinct from the opinion and judgment of the court below, precludes the appellants, according to the rules of this court, from urg-

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ing, with effect, the objection set forth in the last error. This circumstance will, no doubt, furnish an additional inducement to this court, to remand the cause, in order that it may be fully investigated and instructed; and again brought before them, if necessary, in such a manner as will enable them to decide it finally, on its substantial merits, and set the very important question on which it depends, at rest for ever.

Mazureau, for the defendant. We have nothing to do with the authorities cited from *Henning* and *Mumford, Willes, Powell, Day, Johnson, Evans, Phillips*, &c. Every person whose property or rights have been affected by a deed to which he was not a party, has certainly the right of opposing the execution of it, by this old maxim, "*il quod nostrum est, sine facto nostro ad alium transferri non potest*; but I deny him the right of asking the rescision of the deed. The deed, though not binding upon him, is good between the parties, and may forever exist, without depriving him of his rights or property, unless he gives his consent to it—*quod ab initio vitiosum este non potest tractu temporis convalescere.* The judge was, therefore, very correct in that position.

As to the first objection of the plaintiffs to

our grant, I refer the court to the pleadings they will see there—that nothing of the kind was at issue—that the question of a public common was finally decided and settled in the negative, by a solemn judgment of a court of the last resort, rendered between the parties in another suit, and which has acquired the force of *res judicata*.

As to the second, I refer the court to the judgment of the district court, in which they will see that the only object of the oral testimony, which has been rejected, was to shew that "a grant made to Louis Lioteau was intended and so understood at the time to be in lieu and place, and to operate as an extinguishment of the grant made to François Lioteau."

Now, that these facts are incontrovertibly established, I will ask this court if the judge below could admit the evidence offered? Could he do it, when he saw the grant made to François in the hands of his representives? If the grant made to Louis had been made to be in lieu and place, and to operate as an extinguishment of the grant made to François, would not that grant, made to François, have been withdrawn and annihilated? Does not its existence at this time shew, most conclusively, the falsity of the story made by the plaintiffs?

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Could the judge below admit oral testimony, to prove the abandonment or extinguishment of a most solemn and authentic deed, a public grant, when our statute says, "neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making the said acts, or since." *Civ. Code*, 310, *art.* 242.

"But," says the counsel for the plaintiffs, "this rule is applicable only to lawful acts, to deeds clothed with every character which the law requires. One of the indispensable requisites of such a deed is, that the thing which is the object of it be a lawful object of commerce." Admit this to be true—who told the plaintiffs' counsel that the grant is not clothed with every character which the law requires? How does he shew that it is not? Is there any such thing in the record? Is it even alledged in the plaintiffs' petition? No.

Again, who told the plaintiffs' counsel that the land, which is the object of our solemn grant, is not a lawful object of commerce? Have not his clients shewn in their petition that a final judgment, rendered between mine and the public, has decided that this land is a private, and not a public property?

What then becomes of the pretended rule of our code?

But, this rule is applicable to all contracts, except those in which fraud is committed against third persons, no matter whether the thing contracted for be in commerce or not—for in both cases written testimony alone can be admitted.

Nothing can be said to belong to a city or corporation, or destined for public use, unless there be a title from the sovereign. The law declares that those things, *que son establecidos e ortogadas para pro communal de cada ciudad o villa &c.* are the only things that belong to the community. *Part.* 3, 28, 9.

II. The judgment decides the only point at issue between the parties. An absolute title to the premises was set up. If the plaintiffs claimed only the use of the property, as a common, why did they begin by asserting that their lots are lying, as they were originally granted to the former proprietors, front to the river or quay? Surely that situation could not give to the plaintiffs any more rights than to all the other inhabitants of the city. A common is given by the sovereign for the benefit of all, without any difference—if, therefore, the property in question was a public common, it was altogether imma-

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terial whether the plaintiffs' lots were situated front to the river or in the back part of the town.

They complain that the attempt to build on the property was made to their great annoyance and injury: if they intended to claim only the use of it as a common, could they with any kind of propriety, use any such language? Did they not know that any man might, with the permission of the sovereign, do what the defendant did, and that nobody could complain of it? *Partida*, 3, 22, 3.

If they intended to claim only the use of the property as a public common, would they have alledged that the judgment rendered against the mayor and aldermen, and quieting the defendant in his possession, had deprived them of their several and proper rights? No—they would have said that it had deprived them of the rights which they had in common with all the citizens.

If they had claimed only the use, as they are now pleased to say, would they have added that the enclosing anew of the property, in consequence of said judgment, was the total destruction of their fair and equitable title and rights? Most undoubtedly not. They knew very well that nobody can say that he has any

title or rights to a thing which has not ceased to be a public common, and that no title is necessary for a resident to make use, jointly with all the others, of a place really common.

What are we then permitted reasonably to infer from all the expressions made use of by the plaintiffs? Why, that they thought that their situation was a title to the ground. No, will their counsel say, because they never cease to call it a public common. Very well—but did they not, at the same time, prove the contrary, by alledging, in their petition, that a judgment had been rendered against the mayor, aldermen and inhabitants of New-Orleans, quieting the defendant in his possession? If they themselves do thus disprove that fact, after having stated it, what do all their allegations amount to? To nothing but a very bold and false assertion of indefinite title and rights to a property which, from their own contradictory shewing, cannot be considered otherwise than a private property.

We ask it with confidence, could the court below consider the action of the plaintiffs as tending merely to obtain only the use of the property as a public common? Is it not more than sufficiently demonstrated by their petition, that

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the question relative to a common, was decided; that there was nothing of the kind?

The question was decided—and, I must be permitted to add, that the plaintiffs themselves, as well as all the other inhabitants of New-Orleans, were parties to the cause in which that decision had taken place. They could not afterwards put it again at issue, either in their own and private names, or in the name of the public. Finally, they could have or claim no right to, or use of the premises, as a common. The question was decided.

They were parties to the cause—witness their petition.

Was it necessary to make them parties to the suit, to sue them separately? No man of common sense can pretend it.

The act to incorporate the city of New-Orleans, passed the 17th of February, 1805, sec. 1st, prescribes, that "all the free, white inhabitants thereof shall be a body corporate, by the name of 'the mayor, aldermen and inhabitants of the city of New-Orleans;' and by that name they, and their successors, shall be known in law, and be capable of suing and being sued, and of defending in all courts, and in all matters whatsoever." It says, sec. 13th, that "the estates, whether real or personal, the rights,

dues, claims or property whatsoever, which heretofore belonged to the city of New-Orleans, or was held for its use by the cabildo, &c. shall be vested in the said mayor, aldermen and inhabitants."

If, therefore, as the plaintiffs themselves state it fully in their petition, the present defendant and appellee has sued the said mayor, aldermen and inhabitants, who had disturbed him in his possession, and caused his fences to be destroyed as a public nuisance, and under pretence that the premises were, what they call, a common or public property—it is evident that the present defendant has sued the only persons whom he could legally sue—the only persons who were exclusively vested by law with every kind of rights to property belonging to, or held for the use of the city of New-Orleans; and the judgment obtained against them is binding against the plaintiffs as well as against all the citizens of New-Orleans. To pretend the contrary, would go to assert that, after having legally silenced, by a solemn judgment, the unfounded claims of a corporation, a party should be obliged to defend his just rights against all the members thereof. The law did certainly not intend any such thing—a doctrine of that kind would be monstrous—if, against the public

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themselves, I have obtained a sentence which declares that a property, claimed by them as public property or common, is my own, I cannot afterwards be called upon by an individual to put the same question at issue.

From these observations it follows that the judge below was bound, by the petitioners' own shewing, to look upon the question as being at rest, could not view their claim otherwise than an assertion of private right to a private property, and was obliged to decide as he did. Could he, since it was shewn by them that the property was not a common, think of their claiming the use of the same as being a common, particularly when in their petition they do not say a word of that pretended right of use? The thing is too absurd: to obtain that use it would have been necessary to shew that the property was a common, and it could not be done. The contrary was decided, and finally settled between all legal parties.

We may, therefore, safely say that, in this respect, there is no error whatever in the judgment of the district court.

But, says the counsel for the plaintiffs and appellants, should it appear that the nullity of this judgment, has in any degree been occasioned by the indistinctness, or want of precision

in the plaintiff's petition, the cause may be remanded.

To this suggestion I answer, there is no nullity in the judgment. The plaintiffs, in their petition, prayed to be maintained in the enjoyment of their legal rights, and that the defendant leave unoccupied the said ground or common.

What did they mean by their legal rights? As they produced no title, the court was bound to presume, that they founded them upon those expressions, said, but not proven, to be in the original grants of their lots, *face au fleuve*, quay or bank of the river.

The court, accordingly, decided that such words, are words of description only, and convey no interest whatever.

To shew the correctness of such a decision requires but little trouble and reflection.

Let us recollect, that in the very same petition, in which the petitioners state that their lots lay as they were originally granted, *face au fleuve*, or quay, they alledge that there is a space of ground between their lots and the quay, levee or bank of the river, which they say, is a public common.

Now if this be true, and they cannot cantradict it, what becomes of the words *face au*

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fleuve? Can those words convey to them any interest in, or to that common? No, admitting therefore that the words *face au fleuve* are inserted in the original grants, which, by the by, is not in evidence, they cannot be considered otherwise than as mere descriptive words: for it cannot be supposed, that the sovereign, by using them, intended to interdict to himself or to the city, the right of disposing of the intermediate ground as he pleased; if such had been the intention of the sovereign, he would certainly, instead of those words, have used the words *face à la commune*, and even in that case, let me be permitted to doubt, that those words would have the effect of preventing the building on the premises; for the thing would not have ceased to be common; if, for example, a church, a market, or a publick hospital had been erected thereon; the rights or interest coming by such words *face á la commune*, would not have been affected, as the same would have continued to be of a public common nature.

The court was therefore right in declaring that those words, in this case, convey no interest whatever upon that intermediate ground, which is said to be a common, and which is proven to be a private property, by the judgment against the mayor, aldermen and inhabitants.

The court, in deciding that those words convey no interest whatever (to that pretended common, as it must necessarily be understood) in dissolving the injunction, at first granted against the defendant, and dismissing the petition with costs, did certainly decide upon the matter in dispute.

No matter what the petitioners claimed or intended to claim, whether the property or the use of it; the court I repeat it, was obliged since they produced no title, to presume that they bottomed their claim on the words *face au fleuve*; which could not be inserted in the petition for nothing; the judgment pronounced that those words convey no interest whatever. The contestation is at rest. No man of sense and impartiality can pretend, that the maxim *sententia debet esse certa*, is violated. No body can say that the judge decided upon a thing that was not at issue. Every thing is embraced by those expressions; "convey no interest whatever." Every thing is decided by those words, "that the injunction be dissolved, and the petition dismissed."

If the cause was remanded, how could the petition be amended? By striking off the allegations of the former suit between the defendant and the corporation? Very well, but the de-

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fendant would prove it, as well as the judgment that quieted him in his possession. By alledging and asserting clearly and precisely, the pretended right to use the property as a public common? Very well, but the defendant would, by producing his judgment, which is a bar against all the inhabitants of New-Orleans, as well as against the plaintiffs, shew that the property is not a public common.

What then would be the result of the remanding of the cause? The parties would be exactly on the same footing as they are now. The only difference would be, that instead of having the most important point of fact, to wit, that the premises are a private and not a public property, alledged by the plaintiffs in their petition, the same would appear in evidence, by the record of the suit, and judgment, alluded to by them in their said petition. Could they destroy that judgment? No, it has acquired the force of *res judicata*, and cannot now be impeached by any man or by virtue of any law. Then, the same decision which has been already given, to wit, a decision against the plaintiffs must again be rendered. The only possible effect of such a proceeding would be to delay the cause, to deprive for several months, the defendant of the free use, possession, and

disposal of his rightful property; and I beg leave to add, that such a proceeding, far from being conformable to the provision of the 13th section of the act to organize this court, would be directly in opposition to the letter, and true sense and spirit of said provision.

I will admit, for the sake of argument only, that the judge below misunderstood the claim of the plaintiffs. What can this court do according to the said provision?

It says "no judgment or decree shall be reversed for any defect or want of form, but the said supreme court shall proceed and give judgment, according as the rights of the cause, and matter of law, shall appear unto them, without regarding any imperfections or want of form in the process or course of proceeding whatsoever."

This court is bound by law, to give judgment according as the rights of the cause and matter of law appear unto them. They must do it without regarding any imperfections in the pleadings—They cannot reverse the judgment appealed from, for any defect or want of form.

I ask it with candour and full confidence, would it not be a direct violation of this law, to remand the cause? Could it be done, with-

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out reversingt he judgment? Upon what ground would the cause be remanded? For what motive would the judgment be so reversed? Upon the ground and for the only motive that there is a defect in the judgment, in as much as the court below misunderstood the real claim of the plaintiffs, which claim was imperfectly set forth or established in their petition? I say that this is precisely what the law does not allow this court to do.

This court therefore will, I cannot doubt it one moment, give their final judgment on the merits of the cause.

They will give it in favour of the appellee. They must give it so, on the very face of the plaintiffs' petition.

Let the court consider the claim in either points of view, as a claim to the property, or as a claim to the mere use of it, as a public common.

As a claim to the property, no title is shewn in the record. As a claim to the mere use of the same as a public common, they themselves shew that the property, far from being a public common, has, in a suit before a competent tribunal, between the parties, between the defendant and the mayor, aldermen and inhabitants of the city of New-Orleans, (in which the

plaintiffs are legally included) been finally adjudged, to be the sole and private property of the present appellee; and let us remark, that the plaintiffs in their petition, do not speak of any right of use, view, or passage, on the ground in question, founded on any particular or private title, or otherwise.

Now, if the ground is not a public common, unless they shew a particular or private title of servitude on it, they cannot have any claim: do they shew that title? No, there is nothing of the kind in the record, they do not even alledge it.

There is, there can be no difficulty in deciding this cause upon the record; and if the district court has erred, this court must and will by their judgment, correct the error. But they cannot remand the cause, for the reason assigned by the plaintiffs. They might do it, perhaps, if they were by law confined to pronounce the confirmation, or reversal of the judgment. But the case is different; such judgment as may be deemed just, according as the rights of the cause, and the matter in law shall appear unto them, must be given, without regarding any imperfections or want of form in the process, or course of proceeding whatsoever.

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III. The want of a statement of fact, which by the rules of this court is fatal, is made a ground for remanding the cause. Let me remind the adverse party that, for that very want of a statement of facts, their appeal has been already dismissed once—and let me observe, that if it had not been for the bill of exceptions, (in lieu of which the latter part of the judgment of the court below stands) and for the pretended errors, which they have been permitted to assign and file, every thing would now and long ago, be at rest.

MATHEWS, J. delivered the opinion of the court. To have admitted the evidence which the plaintiffs offered, would, in our opinion, have been a violation of the rules of our statute, made for the protection of written covenants, and the security of those who hold property under them, against the uncertainty of testimonial proof. *Civil Code* 310, *art.* 242. It is contended, on the part of the appellants, that this rule is applicable, only to lawful acts, and not to such as are null and void *ab initio,* on account of the object being *hors de commerce, &c.* This may be true, but cannot be applied to the present bill of exceptions, by which it appears that evidence was offered, not to prove that the

grant to the appellee is void, because it purports to dispose of something, not grantable to their prejudice and injury, but that it is void because something else was granted to some other person, as a consideration for its nullity. To make this circumstance available, against the first grantee, it ought to be shewn that he assented to it, or covenanted to this effect: which would be to shew a contract differing from the written act, which according to our code, cannot be done by parol evidence, and the judge was correct in rejecting it.

The errors assigned, as apparent on the face of the record, although numerous, may be reduced to two classes. Those relating to the departure of the judgment from the matter in issue between the parties, and those relating to erroneous conclusions in law, drawn by the judge from facts assumed by him, but not appearing in evidence. As to those of the latter class, it is sufficient for us to observe, that this court cannot legally notice the facts in any cause, unless they appear by a statement, or the testimony, as given in the inferior court, which may be sent up with the record. In the present case, the facts are not exhibited to us in either of these forms, and consequently any erroneous opinion of the inferior court, founded

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on facts not appearing in evidence, nor shewn as required by law, cannot be corrected: for *de non existentibus & non apparentibus eadem est ratio.*

In order to discover whether any error of the first class does really exist, as stated by the counsel of the plaintiffs and appellants, it is necessary to examine minutely the declarations and complaints in the petition. The answer amounts to a general denial of all the allegations of the plaintiffs, tending to prevent the defendant's enjoyment of the premises. From these allegations, it is believed to be altogether impossible to ascertain what right the plaintiffs claim, or what injury to their property they complain of, as originating in the conduct of the defendant.

They state the lot of ground, on which are the works commenced by the defendants, complained of as an injury to their several and proper rights, to a public common.

Considered simply as a public common, without taking into view the relative situation of the property of the plaintiffs, they have no more right or interest in it than any other citizen of the town: and by their own shewing, in the petition, it has been already adjudged by a competent tribunal that it is not a public common—

a judgment having been obtained to quiet the defendant in the possession of it as his private property. It is true that they claim *several and proper rights;* but in no place do they say what those rights are—how they originated—whether they be of property in the thing, or that it should not be granted or appropriated to the separate and unlimited use of any individual, because such a grant or appropriation deteriorates and lessens the value of their houses and lots adjacent thereto, in violation of the good faith, which ought to have been observed to the original grantee; in other words, that it is not grantable as against them, and that the grant is null and void, on account of fraud or mistake; the grantor having made it contrary to some obligation, either express or implied, arising out of the original cession of the lots, held by the plaintiffs and appellants, according to an authentic and established plan of the city.

After having declared the ground, or open space between their lots and the river, to be a public common—after having complained that the judgment obtained by the defendant against the corporation of the city, as set forth in the petition, has deprived them of their several and proper rights, without, in any distinct manner, specifying and designating those rights, the

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plaintiffs finally alledge that "the defendant still persists in making preparations to build on the ground in dispute, notwithstanding their interdiction, to the total destruction of their fair and equitable title and rights?" What title? What rights? Title and rights to the disputed property? No—for they have before told us, that it is a public common. Being a common, they cannot legally claim any private right of property in it—and, considered merely as commoners, their rights have already been decided on, by a competent tribunal.

The circumstance of the district court having decided that the plain iffs and appellants have no title to the lot occupied by the appellee, is, perhaps, more than ought to have been done: as it does not clearly appear that their right of private property is put in issue, by the pleadings in the case. But this ought not to vitiate the judgment, if it be correct in other respects. It is a judgment, by which the plaintiffs' petition is dismissed—and, in the opinion of this court, properly so, as being so vague and uncertain that no final judgment or decree can be made thereon on the merits of the case.

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

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ROGERS vs. SMITH.

ROGERS
vs.
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The power of the special administrator did not extend to the estate of inhabitants of the state, although they had not resided two years in New-Orleans.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. In a former case, that of *Rogers* vs. *Beiller*, tried before this court in June, 1815, 3 *Martin*, 665, it was questioned whether the office of special administrator of certain vacant estates, created in 1804, by an ordinance of the person then acting as governor-general and intendant of Louisiana, ever had any legal existence; and, if so, whether it stood unrepealed. This court decided both these questions in the affirmative. It is now asked whether the provisions of that ordinance extend to the estates of the citizens of this state, who happen to die in the city of New-Orleans, before having resided there two years.

The expressions of the ordinance are these: "whenever any person, who shall not have resided in this city for more than two years, shall die intestate," &c.

The plaintiff contends, that the words "any person," are so comprehensive, that they exclude the idea of exception, and must inevitably embrace all descriptions of persons, no matter

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from whence they came to the city of New-Orleans. In support of that position, he relies on this general rule, that "whenever a law is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." *Civ. Code*, 4, *art.* 13.

Surely, if the words "any person," were taken separately, without attending to the sense of the whole law, and to the connection of its different parts, they would be applicable, indiscriminately, to every body. But, when the whole disposition is considered together, they are found to be circumscribed within more narrow limits.

The estate of an individual dying at New-Orleans, before having resided there two years, is to be disposed of according to the ordinance. But, after a residence of two years, what is to be done with it? The answer is, that it shall then be governed by the general laws of the country, the laws which prevail throughout the state, and are enjoyed, as well by the inhabitants of its remotest corner, as by those of its capital. Now, can the citizen of any part of the state lose, even for a moment, the benefit of those laws by coming to New-Orleans? The position is untenable. And will he, after a residence of two years in the city, be restored to

the enjoyment of those laws? This does not seem to admit of serious inquiry.

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The ordinance then, though perhaps wanting in explanation, shews itself sufficiently to be intended for persons coming to New-Orleans from abroad, not for the citizens of Louisiana.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, the costs to be supported by the estate.

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

JOHNSON vs. *DUNCAN & AL'S SYNDICS.*

APPEAL from the court of the first district.

The signature of the endorser must be proven, altho' it was agreed that the note should be received in evidence, so far as it purports to be made by the drawer.

DERBIGNY, J. delivered the opinion of the court. This case was first submitted to this court without argument. Judgment was rendered on what appeared to be the only point in controversy. *Ante* 168. A re-hearing having been granted, we will now proceed to examine the questions which have been raised.

The plaintiff and appellee is the bearer of some notes of hand, subscribed by Duncan and

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Jackson, to the order of M'Master and Adams, and endorsed in blank by the payees. The subscribers having failed, the plaintiff demands to be admitted and classed among the creditors of their estate.

The circumstances under which these notes are said to have been delivered to the plaintiffs, were mentioned by the defendants as facts formerly disclosed to the court in another case. The identity of the notes, however, not being established, and no evidence having been adduced in the present case to shew that the plaintiff is not the absolute owner of them, the court must disregard those allegations, and treat the plaintiff as the bearer and owner of the notes.

It appears that, on the trial below, the plaintiff contented himself with proving the signature of the subscribers, Duncan and Jackson, and omitted to identify that of the endorsers. It is not disputed that, in a suit against the subscriber of a note of hand, the bearer must prove the signature of the endorser; but the plaintiff thinks that this defect is cured by the admission made by the defendants in the statement of facts, that the notes shall be read in this court. Such admission, if unqualified, would probably cure any defect of proof with respect to the document agreed to be read, it necessarily implying

that the paper thus introduced is considered as legal testimony: but here the defendant has taken care to admit these notes as evidence only so far as they purport to be made and signed by Duncan and Jackson. it being expressly declared in the statement of facts that no other proof than that of the signature of the makers was tendered. In the face of such a declaration, the agreement that the notes shall be read, cannot be construed as admitting not only the signature of the subscribers, but also that of the endorsers.

We must, therefore, say, that the defect of evidence is not cured, and that the plaintiff, having failed to prove the signature of the endorsers of the notes, of which he claims the amount, cannot recover in this action.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that judgment be entered for the defendants, as in a case of non-suit.

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

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vs.
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MORGAN vs. *YOUNG & AL.*

APPEAL from the court of the first district.

The vendee, on a *fi' fa'*, is suable, before any recourse to the land sold and mortgaged.

His surety has not the benefit of the plea of discussion.

MARTIN, J. delivered the opinion of the court. This action is brought, in the sheriff's name, on a bond given by one of the defendants as principal, and the other as a surety, on the purchase by the principal of a tract of land, sold on an execution. The first part of the bond, is in the ordinary form, of the penal part of an English bond, in which the parties bind themselves, jointly and severally, in the sum of $730, for which the premises were sold, not as usual, for double the sum. The second part is in the form of the condition of an English bond, it recites the sale of the premises under the execution, the adjudication of them to the vendee, and concludes with the condition usual in English bonds, that on the payment of the purchase money, the bond will be null and void.

The answer avers, that the defendants are not indebted to the plaintiff, because one of them, Young, the principal in the bond, is a creditor of one of the persons, for whose interest the suit is brought, for the sum of $217, for which he has, at the time of the answer, a suit de-

pending in the court he is sued in—that he is a creditor of another of the persons, for whose interest the suit is brought, for the sum of $280, for professional services—and that he is ready to pay the balance.

The district court dismissed the suit, being of opinion, that "the sheriff must, first resort to the mortgaged premises, (the land sold under the execution) and in case that should be insufficient, then the estate of the purchaser, as well as that of his surety in the bond, is bound; the decree then would be, that the mortgaged property, be first sold, and in case it should not be sufficient to make the money, then for the balance, execution should go, against the estate of the purchaser and his surety—the surety is only liable in the event, that the mortgaged property should be insufficient: it must be first discussed."

From this judgment, the plaintiff appealed. The statement of facts, admits the execution of the bond, and an amicable demand.

The case has been submitted to this court, without any argument.

The allegations of the petition are not denied by the defendants, and the facts alledged in the answer are not proven.

The defendant Young, the principal obligor,

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bound himself personally to pay the $730, the price at which the land had been adjudicated to him: and although according to the act of 1808, 15, he gave a mortgage and surety; we are unable to discover, on what grounds the district court assumed the position, that the land ought to be first resorted to, and that the purchaser was not to be personally attacked, till the land proved insufficient to pay the debts.

The other defendant, who bound himself *in solido* with the vendee, appears to us to be also liable to a suit immediately. *Civil Code* 428, *art.* 7. Admitting that he had a right to demand a discussion of the mortgaged premises, or any other property of the principal debtor, yet as he did not require it, the plaintiff was entitled to judgment. The creditor is not bound to discuss the principal debtor's property, unless he should be required so to do, by the surety. *Civil Code* 430, *art.* 8.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed: and proceeding to give such a judgment, as in our opinion, ought to have been given in the district court, we order, adjudge and decree, that the plaintiff and appellant, do recover from the

defendants, the sum of seven hundred and thirty dollars, with legal interest, from the fourth day of September 1816, until paid, with costs in both courts.

Hennen for the plaintiff, *Young* for the defendants.

PIERCE vs. *GRAYS & AL.*

APPEAL from the court of the third district.

In Spain, a donation to an infant, of slaves delivered to the donee's father, is irrevocable, although he does not formally accept the gift.

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellant, claims two slaves from the defendants. On the 17th of August, 1809, he purchased from Philip A. Gray, father of the defendants, eighteen slaves, and among them, the two now claimed, as having always remained in the possession of the vendor, or his heirs. On the next day, he executed a deed of gift, in favor of Mayo Gray, and Sarah A. Gray, infant children of the vendor, for said slaves. The property remained in this situation, till the 17th of September, 1814, when the donor, seems to have changed his benevolent intention towards the donees, and declared before the judge of the parish of Feli-

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ciana, his will and desire to revoke and annul "the deed of gift executed by him, in the year 1809, before Wm. Lewis, Syndic of the district of Feliciana, then under the government of Spain."

The fact of the written donation, executed by the plaintiff, appears so conclusively, by the introduction of the instrument, intended as a revocation of the donation, that it is thought unnecessary, to notice the bill of exceptions of the defendants, on the introduction of parol evidence, to prove the acknowledgment of the plaintiff to that effect.

The only question of law, which arises out of these facts, is whether the donation was perfect and irrevocable, without any formal acceptance, for the infants by their father, or some other person.

According to the rules laid down, on the subject of donations, *inter vivos*, it is clear, that the donor is bound, only from the acceptance of the donation, in precise terms; and that it produces no effect, except from the day of the acceptance. *Civ. Code* 220, *art.* 54. Were the case to be decided by these rules, it is probable, that the judgment of the district court, would prove to be an erroneous one. But we are of opinion, that our code, does not proper-

ly exhibit the rules, by which the point in dispute between the parties, must be settled.

The contract, was made under the Spanish government, and the municipal laws of Spain, are alone applicable to it. These, it is believed, are not so rigorous as our statute, in requiring a formal acceptance, in order to give validity to a donation, or to render it perfect and irrevocable; except in the cases laid down as ingratitude, a change of situation in the donor, who has given the greatest part of his estate, the subsequent birth of children &c. which apply to donations, complete as to form.

Gomez, in his *Variæ resolutiones*, lays it down, on the subject of donations, that they are executed in two modes: by delivery or promise. By delivery, *quando nullâ precedente promissione vel obligatione quis tradit suam rem alteri causâ donationis; quia tunc statim valet & perficitur donatio; et transit dominium & plenum jus rei, in accipientem, ex titulo & causâ donationis.* A donation by promise, is when a person obliges himself to give or deliver something to another. If a donation, accompanied by the delivery of the thing, be complete and perfect, it follows, as a necessary consequence, that it ought to be considered as irrevocable, on

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the part of the donor, unless for causes authorized by law.

The donation made by the plaintiff and appellant was not accompanied by any formal delivery of the slaves given to the appellees, or any person for them; but they were left in the possession of their father, who held them before the execution of the deed of gift to his infant children. He was the proper person to have received the donation for them; and having already the possession of the slaves, no formal delivery was necessary to transfer the dominion of them in full right to the donees. We consider the slaves as having been in the possession of the father, under the donation to his children, and held for them, from the time of the execution of the deed of gift, to the commencement of this action. Was a formal, written acceptance of the donation necessary, on the part of the donees, under these circumstances, to render it irrevocable by the donor? The court is of opinion, that it was not. It is very doubtful whether, by the laws of Spain, a formal acceptance be necessary in any case, where the delivery of the thing accompanies the donation. But in cases of minors, infants and absent persons, no acceptance is necessary to render the donation irrevocable, according to Gomez.

Treatise on Donations, *n.* 3. It is true, that in a donation to an absent person, it seems required that the title or deed be transferred to the donee, in order to render the donation irrevocable; or that a clause be introduced, by which the notary or officer before whom it is made, be requested by the donor to accept it for the absent person, and that he then takes it as if accepted in due form. *Febrero*, 1, 5, *n.* 19. These regulations are confined to absent persons; and we find in the same books, *n.* 30, that a donor cannot revoke a donation, made in such a manner so as to substitute a third person to the donee, when the substitute is an infant.

From this view of the case, we are of opinion, that the judgment of the district court is correct.

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

Turner for the plaintiff, *Baldwin* for the defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District. *March*, 1818.

EASTERN DISTRICT, MARCH TERM, 1818.

ZANICO *vs.* HABINE.

ZANICO vs. *HABINE.*

APPEAL from the court of the first district.

The process verbal of the sale of property sold by the register of wills is evidence of the sale, and no act under the signatures of the parties is necessary to perfect it.

The vendee cannot demand the rescission of the sale, on account of a capital crime, committed by the slave immediately after the sale.

The plaintiff, as executrix to her late husband, caused the property of his estate to be sold at public auction, under the authority and directions of the court of probates, when the defendant, through an agent, bid for a negro man, who was adjudged her, and immediately delivered to her said agent, who directed him to go to the defendant's. The negro, on his way, made his escape, and, being pursued, committed an assault, with intent to murder, for which he was tried and condemned to death, but afterwards pardoned and released. The

defendant having refused to receive him, the present suit was brought against her.

She resisted the plaintiff's demand, on two grounds :—1. that there was only an adjudication of the slave, but no sale—2. if there was a sale, it ought to be annulled, on account of a redhibitory vice in the slave.

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

Moreau, for the plaintiff. The defendant, in the district court, contended that there was no sale, because our statute requires all sales of slaves to be made by authentic act, or under private signature, declares all verbal ones null, and forbids testimonial proof of them to be admitted. *Civ. Code*, 344, *art.* 2. But, it is clear, that this article relates only to voluntary sales, made by the owner, but does not extend to forced sales, or those made under the authority of a court of justice, or by auction. Forced sales are made under certain formalities, particularly provided for by law. *Id.* 490, *art.* 1, 1805, 26, § 14 and 15. The code provides that the seizure or forced sale of a debtor's goods transfers the property of the thing seized to the vendee. It would, therefore, be absurd to hold that the vendee is not bound by the ad-

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judication made by the sheriff. The principle is precisely the same, in sales made at auction. Auctioneers are required by law, immediately after a sale, to deliver to the purchaser a memorandum of the sale and purchase, which is to be registered. 1805, 4, § 12. The object of the law, in this respect, is to provide for the vendee an evidence of the sale; but it is not required to give it validity.

The rule must be the same in sales of the estates of minors or deceased persons. *Civ. Code*, 69, *art.* 57, 169, *art.* 105, 175, *art.* 128. The formalities attending the sales made by executors are particularly provided for. *Id.* 247, *art.* 174. According to these, the plaintiff has caused the sale to be made by the register of wills, under the authority of the court of probates, at public auction, after the requisite notice. The sale ought therefore to be binding on the vendee, as if it had been made by the sheriff or an auctioneer. The process verbal of the sale, drawn by the register of wills, and deposited in his office, is the legal evidence of the sale, and no other writing was required to be drawn, the vendee being at all times entitled to an extract of that part of the process verbal, which relates to the sale made to him.

This is perfectly in conformity with the Span

ish law. The adjudication or public sale of seized property, or of that of minors, *el remate*, was made by auction. *Curia Philipica*, 149, *n.* 1 and 3—and the mode was regulated by usage, in different places. *Id. n.* 4. *Febrero Cinco Juicios*, 3, 2, § 5, *n.* 301.

An adjudication, attended with the requisite formalities, was equivalent to a definitive sale, and transferred the property equally as well as if there had been a firm contract entered into by the parties. *Curia Phil.* 150. *n.* 7. *Febrero, id. n.* 305.

The acceptance of it by the last bidder rendered it definitive, and discharged the anterior bidder. *Curia Phil.* 150, *art.* 6—and the last bidder might instantly be compelled to pay. *Febrero, id. n.* 332. *Recopilacion*, 5, 16, 2.

The defendant's agent, in this case, accepted the adjudication, since he received from the register the slave sold. From that moment she became debtor of the price, and the slave was at her risk. 1 *Repert. de Jurisp.* 116, *n.* 6. *Verbo adjudication.*

But, admitting that the adjudication alone, does not constitute a sale, the bid made by the defendant binds her to pay damages, if the defendant refused to stand to the sale. It wrought an injury to the plaintiff; and every act which

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works an injury, gives rise to an action for damages. Every one is liable to an action, who refuses to comply with an engagement entered into. *Civ. Code*, 321, *art.* 16, 269, *art.* 42.

The bid of the defendant over the anterior bidder, and the subsequent acceptance of the slave, discharged this anterior bidder from his obligation to take the negro, at the price he had offered.

II. The defendant, cannot avail herself of the offence committed by the slave, in order to have the sale rescinded: because judicial sales are not liable to rescission, on account of redhibitory vices, *Code Civ.* 359, *art.* 74; and because, although it be true, that the commission of a capital crime, be a ground of rescission, *id.* 358, *art.* 69, the crime must have been committed, at the time of the sale. *Id. art.* 76, *Curia Phillipica*, 1, 13, *n* 25.

The discovery of a redhibitory vice, within three days after the sale, is only a presumption of its anterior existence, but in the present case, the conduct of the slave, is proven by uncontradicted witnesses, to have been irreproachable.

Livingston for the defendant. The law is express, that verbal sales of slaves shall be

void—if then, there was no sale, there can be no action for the price—but by the statement of facts, it appears, that nothing was written or signed by the parties.

It is said however, that this being a judicial sale, no writing is required, and the *Code*, 490, *art.* 1, is quoted in support of this doctrine; but first, that article relates only to goods sold by forced sale, under a judgment—not to a voluntary sale by an executor or administrator, for the purpose of settling an estate—and secondly, even if it applied to the case, it will not avail the plaintiff, because, so far from exempting such sales from the rules prescribed in cases of voluntary transfers, it prescribes additional formalities, for which it refers to special laws, made to regulate such sales—and the plaintiff's counsel, is kind enough to indicate the page and book, in which they are to be found, and where the court will at once perceive, that a conveyance in writing is at least as necessary in that species of judicial sale, as in a voluntary one. The plaintiff's argument is certainly erroneous, where it asserts, that the code declares that property sold under seizure, is transferred, "*par le seul fait de l'adjudication.*" The article says, that the seizure and forced sale of goods and chattels, transfers the property of

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the thing seized, to the purchaser, that is when the sale is complete, certainly not before; it would not therefore, be quite so ridiculous, as the plaintiff's counsel supposes, to require a sale in writing, in order to effect the transfer of real property, even under an execution.

But independent of authority, what good reason can be given, that would induce a reasonable man to believe, that the legislature intended to exempt judicial, or any other sales from the operation of the general rules, as to the transfer of real property? The danger of fraud and perjury, (which were the principal evils intended to be guarded against, by establishing those rules) are as great in this species of sale, as in any other: nor do I perceive a single reason, why verbal testimony should be refused in the one case, and admitted in the other—the words in the code, are general and prohibitory; "all sales of slaves" must be made in writing; "all verbal sales of these things shall be null." If any exception exist, it must be explicitly shewn.

The law, regulating sales at auction, is relied on as furnishing this exception; if, however, this should contain any provision, incompatible with the code, (which I am unable to discover) it is certainly as being anterior repealed by it—

and it is conclusive also against this argument, that the auctioneer's certificate was never, either tendered or accepted.

I have hitherto, considered this as a judicial sale, but in fact it has no one feature of it. It is the case of an executor, having the seizure of the estate, and proceeding to sell. *Art.* 174. The code only directs, that such a sale shall be at auction, under the authority of the parish judge; leaving all other formalities to be regulated by the general law, and I pray the court to observe, that it is the executor who sells, not the judge, the statute says "when the testamentary executor has the seizure, &c. he must proceed to sell," &c. *Civ. Code* 244, *art.* 174. Therefore, before the sale could be complete, there must have been an act of sale, between the executor and the purchaser.

Spanish authorities are resorted to, to shew that an adjudication was suffiicient to transfer property: this I do not deny, but I say that the adjudication must first be complete, and that it was never complete, till the proces verbal was signed as well by the purchaser, as the officer making the sale, and as the plaintiff's counsel, seems to rely on the usage of the place, I refer to the recollection of the court, whether among the numerous Spanish records, that have been

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submitted to them, they have ever seen the proces verbal, of a sale of real estate, that was not signed by the parties.

II. The second ground on which the defendant relies, is that the negro had two redhibitory defects: running away and being guilty of a capital crime; both these were manifested instantly after the adjudication, and the law says, *Civ. Code*, 358, *art.* 76, that in such case, they shall be presumed to have existed before the sale, or at the time it was made—but this presumption, the plaintiff thinks, is counteracted by proof of the negro having borne a good character before; this, however, cannot be the intent of the law: the expression is not that it shall be *prima facie* evidence of the defect, in which case it might be counteracted by other proof, but it shall be *presumed*. Now, I know of no proof that can counteract that which the law imperatively orders the judge to presume, or in other words, to take for granted. Besides, what is it that is to be presumed? Not that he had been guilty of the several redhibitory crimes, but that the vice existed in the mind, or temper, (see *art.* 78) prior to the sale. All the proof in the world, therefore, on this subject, cannot be received against a presumption created by

law. Such proof can only be negative; the witnesses never knew of any vice or crime—he may have had them, he may even have committed them, and the witnesses know nothing about it—but what is conclusive on this point is, that if the defect or vice exist at the time of sale, it is sufficient to annul it; and it shall be presumed, if the running away, or committing the crime, happen within three days after the sale.

The objection, that the redhibitory action will not lie, in case of a judicial sale, it is thought will not avail the plaintiff:

1. Because this has been shewn, not to be a judicial sale;

2. Because, though in a judicial sale, after it were complete, the purchaser might lose his redhibitory action, yet that principle would never compel him to complete a sale, after he had discovered a radical vice in the thing bought.

DERBIGNY, J. delivered the opinion of the court. On the subject of sales, our code contains this general disposition: "all sales of immoveable property or slaves, shall be made by authentic acts, or under private signature. All verbal sales of any of these things shall be null,

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as well for third persons as for contracting parties themselves; and the testimonial proof of them shall not be admitted." *Civ. Code*, 344, *art.* 2.

The appellee maintains that this provision is not applicable to judicial sales, of which he contends that this is one. The appellant insists upon its embracing all sorts of sales, public as well as private, and calls on the appellee to shew any exception to that general rule.

To decide this point, we are unaided by precedents or by commentators, this being a provision peculiar to our laws. Our inquiry shall, therefore, be confined within a narrow circle.

Our law requires all sales of real estates or slaves to be made by authentic act or under private signature, and pronounces all verbal sales of such things to be null. We believe that this provision extends to all sales, public as well as private. But, is it necessary that the authentic act of sale should, in every case, bear the signatures of the parties? We think not. In sales made by public officers, the written instrument drawn by them is surely an authentic act: yet, in sheriff's sales, at least, the written acceptance of the purchaser is not required. Is there any more necessity for it in sales made by auctioneers, under the authorization of justice? Is there more occasion for it in

a case like this, where the register of the court of probates sells property at auction, under a decree of that court? We think not—officers authorized by law to make public sales are certainly invested with the necessary power to certify those sales to the world, whether the parties do or do not chuse to acknowledge them under their hand. The public officer may there be considered as the medium through which the parties contract, and his act as the act of both.

If we inquire into the particular rules which are prescribed to auctioneers generally, we find that it is made their duty, "immediately after the sale, to deliver to the purchaser a memorandum of the sale and purchase, designating the object and day, so that the purchaser may cause the same to be registered, according to law, in the office of the recorder of mortgages." Here then is a simple memorandum, under the hand of the auctioneer, considered by the law as complete evidence of the sale and purchase, and so far assimilated to an authentic act of sale as to be admissible among the records of the keeper of mortgages. Will it be pretended that the record of the clerk of the court of probates, certifying a sale made by order of that court, is inferior in dignity to the memorandum of an

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auctioneer? That cannot be maintained. We think with the district judge, that the process verbal of sale, which the register writes on such occasions, in conformity to the act of the 3d of June, 1806, is evidence of its contents, without the written acceptance of the purchaser.

II. We now come to the second plea of the appellant, to wit, the existence of a redhibitory vice in the property sold.

The success of this plea rests upon the following circumstance: immediately after the sale and delivery, this slave, instead of going where the appellant's agent sent him, ran off, was pursued, and committed an assault, for which he was condemned to death, and afterwards pardoned.

From this, the appellant concludes, that the slave had a redhibitory vice, previous to the adjudication. To support this allegation, he relies on the following article of our code, as governing this case, to the exclusion of all testimony: "If the defect appears immediately after the sale, or within the three following days, it shall be presumed that said defect existed before the sale, or at the time it was made." This provision seems to have been intended for cases of latent bodily defects, the origin of

which is uncertain; but as the appellant insists upon its applicability to his case, let us see how it will bear the application.

The vice, if any existed, was one of temper and disposition. Those are limited to three sorts: "having been guilty of some capital crime, being addicted to robbery, or in the habit of running away." The first vice does not admit of the application of the rule: that a man has been guilty of a capital crime, is not to be presumed from his subsequent conduct: the law does not speak of any such thing as the habit of committing crimes, but of a crime committed. The second vice has nothing to do with this case. The third and last is the habit of running away. This slave, it is said, ran off, instead of going where the appellant's agent had told him to go. Must this be received as a legal presumption that he was in the habit of running away? Shall a slave, who changes master, and runs off, to avoid going with him, be presumed to be in the habit of running away? Surely no such presumption can arise from this fact. Supposing, then, the article relied on to be at all applicable to this kind of vice, still the fact in this case does not authorize the presumption, so far as to render it unnecessary to support it by other proof, or to exclude contrary testi-

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mony. The district judge, therefore, acted correctly in admitting testimony as to the character of the slave; and that testimony having been perfectly satisfactory on the part of the plaintiff, the plea of the defendant must fail.

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

SAUZENEAU vs. *DELACROIX & AL.*

Whether the appellee may complain of the judgment and demand more than what is given him in the court *a quo?*

If an undertaker agree to do in a theatre "all the joiner's work necessary" this will include works of ornament.

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

DERBIGNY, J. delivered the opinion of the court. In the opening of this case, the counsel of the plaintiff, who is in this court the appellee, has agitated a question of practice, which is of considerable importance, to wit, whether as appellee, he is precluded from shewing, that the judgment appealed from, has not done him justice, and consequently from asking more than that judgment has granted him. But being of opinion, that the appellee is not entitled to more than the inferior court al-

lowed him, we find it unnecessary to determine, that question on the present occasion, and will leave it open for future investigation.

The plaintiff and appellee engaged by contract to execute certain works, to the Orleans Theatre, for which he was to receive a stipulated price. It is admitted that this price has been paid him in full. But the appellee having done some extra works, over and above those which he was bound to perform, he has instituted this suit to recover the value of them. His account, which has been supported by testimony, is composed of a variety of items, part of which are articles evidently not contemplated by the contract, which speaks only of joiner's work, and the furnishing of the necessary iron to consolidate the whole, and to shut the doors and windows. For those articles he is entitled to some compensation. But as to such parts of his account as consist of joiner's work, he cannot receive any additional payment, for he was bound to execute "all the joiner's work, necessary to the edifice, whether enumerated or not in the contract." His counsel has maintained, that under the word "necessary" such things as those mentioned in the plaintiff's account, are not comprehended. But we think, that the expression fully embraces even such

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of them as were intended for mere ornament; ornaments being a necessary part, of such an edifice as a theatre.

The parish judge has undertaken the separation of the items, which the appellee is not entitled to receive, from those which he claims rightfully. We have verified his statement, and believe it to be correct.

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

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

PIERCE vs. *FLOWER & AL.*

Interest ought not be allowed on a claim, liquidated by the verdict only.

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

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellee, being at Louisville, in Kentucky, on a voyage down the river, took charge of a flat boat laden with flour, consigned to the appellants, which boat

was then in a bad condition, with her cargo partly damaged, in consequence of her having run aground, on her way from Frankfort, to the falls of Ohio. It appears that when the appellee took possession of the boat, all her hands had left her, and that one Conway, who had the care of her, was about to forsake her also. One of the witnesses says positively: "the boat was left at Louisville, by Hardin and Conway both; the other hands had all left the boat before." In that situation, the appellee undertook to take the boat down to her destination, and, notwithstanding her leaky condition, brought her safe to New-Orleans and delivered her and her cargo to the appellants. For this service he claims four hundred dollars, which is allowed, by the witnesses, to be no more than a reasonable compensation.

The appellee's claim is resisted, on the ground, that from the depositions of some of the witnesses, it would seem that he was requested by Conway, to take charge of the boat; and that appearing in the character of substitute of the master, he is liable for the damage which happened to the boat and cargo, in the river Kentucky. This objection, however, is of little weight; for the depositions which relate to what Conway told the appellee, are

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nothing but hearsay evidence; and if they were more than that, the appellee has sufficiently proved, that the damage which happened to the boat, previous to his taking possession of her, was not owing to the neglect, nor to the unskilfulness of the person who then commanded her.

Upon the whole, the demand of the appellee appears to be a most equitable one.

It has been observed by the appellants, that should they be condemned in this court to pay the sum awarded against them in the court below, still they are not liable to pay interest on it, since the judicial demand, as the amount of the appellee's claim was not liquidated until judgment was pronounced in the suit. It is generally allowed, that interest is not recoverable for unliquidated damages, or on uncertain demands; and we see no reason why it should be otherwise in this case. The judgment of the parish court must be reformed in that part.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be reversed; and that judgment be entered for the plaintiff, for four hundred dollars, and the costs in the inferior court.

Turner for the plaintiff, *Ellery* for the defendant.

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LOZE
vs.
ZANICO.

A note is not presumed to be paid, after the lapse of six or seven years.

LOZE vs. *ZANICO'S ESTATE.*

APPEAL from the court of probates, of the parish of Orleans.

MARTIN, J. delivered the opinion of the court. The petitioner opposed the homologation of the tableau of repartition, until he be placed thereon for the sum of $306—and more for the amount of a note of the deceased, of November 15th, 1811, for $300 at 60 days, payable to the order of the petitioner, and $16 due on an account. The court ordered him to be placed on the tableau for $14, and that the tableau be homologated, and the money distributed accordingly. The petitioner appealed.

The note comes up with the record, and the execution of it is admitted.

The account is for four doubloons, lent by the petitioner to the deceased, October 9th, 1812, on which a credit is given for $50, received May 4, 1813, which does not appear to have been disputed, and for which the petitioner had judgment.

A letter from the petitioner of the 4th of May, 1813, comes up with the record. By it

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he informs the deceased, that the note, for which the deceased has sent him a notice, is due on that day, and he begs payment of the sum of $64—declaring himself unable without it, to take up the note; having been prevented by indisposition, to make any collection, which compels him to resort to the deceased.

It is admitted that the petitioner was the deceased's son-in-law.

This circumstance, and the age of the note, are offered as a violent presumption, that the note is not due to him—that it must be presumed to have been paid, as to have been given up as an accommodation, to enable the petitioner to raise the sum, on a promise to take it up at maturity.

This court is unable to discover any thing that may create any presumption of payment, or of the note being any thing but what it purports to be, the evidence of a debt.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and reversed, and that the petitioner be placed on the tableau of repartition of the estate, for the sum of three hundred and four dollars, with interest on the sum of three hundred dollars, the amount of

the note from the judicial demand, May 31, 1817, and costs in both courts.

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LOZE *vs.* ZANICO.

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

FERRY vs. *LE GRAS.*

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

A renunciation to the community, made before a notary in St. Domingo, may be proved by a witness, though she be the aunt of the party.

DERBIGNY, J. delivered the opinion of the court. This suit is brought on some ancient accounts, accepted about twenty-five years ago by the husband of the defendant, at Cape François, in the island of Hispaniola, and on a judgment, recovered on said accounts, against the officer, entrusted with the administration of the estates of persons absent from the said island.

The principal defence set up against this claim is that, on the death of the defendant's husband, which happened soon after the said judgment was rendered, the defendant renounced to the community of goods, which had existed between her and her said husband, and was thus discharged from any responsibility for the debts of the said community, of which this is admitted to be one.

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To prove this fact, she produced a witness, who swears, that the act of that renunciation was made by the defendant, in her (the witness's) presence, in the office of Maureau, notary, at Cape François, where it remained deposited; and that the papers of that officer were destroyed in the conflagration of that city.

The objection raised against the credibility of this witness, because she is the aunt of the defendant, is of no moment, being unattended with any circumstance that may create any suspicion of her veracity.

Neither is there any weight in the objection that her testimony alone, unsupported by a beginning of proof in writing, is insufficient to establish the above facts; the part of the statute which is relied on, *Civ. Code*, 310, *art.* 244, being applicable only to the proof of a contract; while in the subsequent page, *art.* 247, it is provided that, in cases like the present, the deposition of a single witness shall suffice.

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

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

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MOUCHON
vs.
DELOR.

MOUCHON vs. *DELOR.*

He who has a privilege on real estate cannot exercise it, when the estate has passed into the hands of a third person, without first obtaining a judgment against the original debtor.

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

In 1813, A. Duplantier possessed an estate, in one of the faubourgs of New-Orleans, which he had purchased from the defendant. In the latter part of that year, the street before the estate being out of repairs, through the negligence of Duplantier, the corporation adjudged the work to be done to the plaintiff, who was the lowest bidder, under the express condition, that he should have his recourse on Duplantier alone for his payment. On the 7th of February, 1814, the work being completed, was approved; on the 14th, Duplantier failed, and on the 22d, the plaintiff received a draft, for two hundred dollars on the treasury, as an advance and to be accounted for, as soon as he should recover the price of his work from Duplantier; on the 16th of April, another draft was given him for two hundred and fifty dollars, as an advance and loan; on the 15th of June, Duplantier's syndics, ceded back the estate to the plaintiff, the vendor of Duplantier, the price of the estate being still unpaid.

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The present suit was then brought against the present defendant, as owner of the estate, chargeable with the repairs done by the plaintiff. There was judgment for the defendant, and the plaintiff appealed.

Hennen, for the defendant. The plaintiff cannot recover, either from Duplantier or the present defendant, for he has received his payment from the coffers of the city: and the corporation cannot use his name, because they have not been subrogated to the plaintiff's right. This point was determined, by this court at May term, 1817, in the case of *Fortier* vs. *M'Donogh*, 4 *Martin*, 718.

But, admitting the liability of Duplantier, and the priviledge for the plaintiff's claim on the estate, ceded to the defendant, was not a liquidation of the debt with, and a judgment against, Duplantier essential to the plaintiff's resort against the estate, in the possession of the defendant? Our statute provides, that the third possessor of mortgaged property, cannot be disturbed by the action of a priviledged or mortgage creditor, before judgment is obtained against the original debtor. *Civ. Code* 461, *art.* 43. It might be sufficient to cite this law and say *ita lex scripta est*: but the rule is nei-

ther arbitrary nor devoid of wisdom. The acute and philosophical jurists of Rome invented it, and all the modern codes have acquiesced in its justice. It is calculated to protect the honest purchaser from surprize and fraud, by interposing the vendor as a shield, to receive the first and last blow. No combination can take place between the creditor and the vendor, under such a rule. The latter, as debtor and warrantee, has every interest to defend the suit, and thereby prevent any circumvention.

The prosecution, supposing it strictly carried on, according to all the forms prescribed by law, instituted by the corporation against Duplantier is in the nature of a penal action: and cannot be extended, as a punishment, beyond Duplantier, who was the only object of it.

The defendant, as vendor of the estate to Duplantier, had a privilege, as such, anterior and paramount to that of the plaintiff. *Code Civ.* 471, *art.* 75.

The contract contains an express stipulation, that the plaintiff shall have his recourse against Duplantier alone. No privilege is spoken of. Admitting that one should have attended the claim, if there had been no special stipulation, it is excluded thereby. *Expressio unius est exclusio alterius.*

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Moreau, for the plaintiff. The plaintiff did not lose his right against Duplantier, by receiving in advance, and as a loan to be accounted for, a sum equal to the value of his work. It was not the intention of the corporation, in making the advance, to discharge Duplantier from his liability, but only to facilitate the undertaker. The debt of Duplantier has not, therefore, been extinguished by the advance so made; for, although the payment of the debt of another may be made by a third person, it is only when the third person uses the name, and pays in discharge of the debtor, that the debt is thereby extinguished. *Civ. Code* 283, *art.* 136, 2 *Pothier on Oblig. n.* 463.

It was unnecessary, and it would have been vain to attempt, to obtain a judgment against Duplantier. The debt was a liquidated one, resulting from an adjudication, authorized by law. Duplantier having failed, all proceedings against him were suspended, and the plaintiff's claim was rather on his property, than on his person. The debt was not a personal one: Duplantier was the debtor of it, from the sole circumstance, that he was owner of the estate, burdened with the repairs.

The present action does not partake of the nature of a penal one. The penal obligation is

that which is *added* to a contract to inforce the performance of it. *Civ. Code*, 285, *art.* 126. Thus Duplantier's obligation, to pay for the repairs done by the plaintiff, was not a penal or accessory obligation, but a principal one. The adjudication made by the competent authority, had the same and no greater effect than a direct contract with the plaintiff. It bound him to pay the price of the adjudication, after the repairs were performed.

The plaintiff's privilege on the estate, is paramount to that of the defendant. The order of privileges is not regulated by the date, but by the nature, of the claims to which they are attached. The vendor's claim is postponed to that of him who has bestowed his work on the thing sold for its preservation, or for necessary improvements. *Pothier, Vente, n.* 362, 369. Now, repairs on the road are necessary improvements. If, before his failure, Duplantier had caused a necessary building to be erected on the premises, the defendant, his vendor, would have been bound to satisfy the builder—the plaintiff is precisely in the situation of this builder.

The privilege is an accessory, which by law attends the principal obligation. Although this was confined to Duplantier, the privilege at-

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tended it, attached on his property, and must follow it, in whatever hands it passes.

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellant sues for work and labour done on the public road, before the property of the defendant, and claims a privilege on the estate, through which the road passes, having been authorized to make the repairs, under certain municipal regulations.

At the time the work was performed, the estate was in the possession of Duplantier, on whose insolvency, it was transferred by his syndics to the defendant and appellee, the original vendor.

The claim is opposed on several grounds; but being of opinion that the second is completely tenable, viz. the want of a judgment against the original debtor, a possession of the estate at the time the repairs were made, it is useless to investigate any other.

The defendant must be considered as a third possessor—and, admitting the plaintiff's claim to be good, in all other respects, and to carry with it a privilege on the property of the first possessor, in his hands—yet payment cannot be enforced by a seizure and sale of the hypothecated estate, until a fair judgment is obtained

against the principal debtor. *Civ. Code*, 460, *art.* 43. This has not been done—and, in the opinion of the court, his insolvency is not an excuse for the neglect of it; for, although the plaintiff, from the failing circumstances in which the debtor was, could not have proceeded directly against him, yet he might have pursued measures to obtain a place on the bilan, and thus have his claim liquidated and closed.

The parish court, having erred in giving judgment finally and conclusively against the plaintiff, it is ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed; and, proceeding to give such a judgment as, in our opinion, ought to have been given in the parish court,

It is ordered, adjudged and decreed, that the plaintiff's petition be dismissed, at his costs.

BARITAU vs. *LEFEVRE.*

APPEAL from the court of the first district.

A party who prays that the report of referees may be made the judgment of the court, after

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellant instituted

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this suit against the appellee to obtain an account of sales of a quantity of tafia, delivered to him by the appellant. The parties agreed to lay their respective accounts before referees: and a balance being found by them in favor of the appellee, judgment was entered for him for that balance.

correcting certain errors, cannot afterwards attack it for informality.

The defendant, although he appears entitled to a balance, cannot have judgment therefor.

The appellant raised in this court a variety of objections against the illegality of the proceedings and the consequent nullity of the report; but, having waved any exception of the kind in the court below, by stating the errors committed by the referees, and praying that their report might be made the judgment of the court, after a correction of those errors, it is now too late for him to attack the report for defects of form.

One only question, therefore, remains for the consideration of this court, and that is, whether judgment could be rendered for the defendant for the balance found by the referees. The general rule is, that a judgment cannot allow more than is demanded—a defendant usually prays for nothing but his liberation from the suit. In this case, though he alledges that the plaintiff is his debtor, he asks for nothing else. To that, therefore, and to no more, he is entitled in this action.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be reversed; and that judgment be entered for the defendant, with costs only.

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

BURKE vs. *FLOOD.*

If the defendant plead prescription, he cannot be compelled to answer on oath whether he has paid the debt.

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

MARTIN, J. delivered the opinion of the court. This is an action for work and labor done by the plaintiff, as a carpenter, for the defendant. Prescription was pleaded, and the plaintiff's counsel filed a replication to the plea, calling on the defendant to answer, on oath, the following interrogatory: Have you paid the plaintiff's claim? The parish court was of opinion that the interrogatory was an improper one, and refused to receive the replication. There was judgment for the defendant, and the plaintiff appealed.

The case is before us on a bill of exceptions

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to the opinion of the court, in rejecting the replication and a statement of facts.

Authorities have been read to shew that the prescription invoked, *Civ. Code*, 488, *art.* 37, is grounded on a presumption of payment only, and that the plaintiff may require the defendant to say on oath, whether the debt has been paid or not. 2 *Pothier's obl. n.* 684. But all the authorities cited are from French writers, and are grounded on a positive textual provisions. *Ord.* 1673, *tit.* 1, *art.* 10, *Coutume d'Orleans, art.* 265, *Napoleon Code, art.* 2275. The opinion of the parish judge appears to us correct, as no similar provision exists in the laws of this state or of Spain.

In examining the evidence which comes up, we find that the prescription had clearly run against the plaintiff, when he brought the present suit.

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

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

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LANGLISH
vs.
SCHONS & AL.

The witness to a notarial act may, in certain cases, impeach it.

LANGLISH vs. *SCHONS & AL.*

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

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellee, instituted this suit, in order to have a notarial act declared null and void, as forged and fraudulent, and to obtain damages against Schons, for his agency in the forgery and fraud.

The act purports to be a donation of liberty, from the plaintiff to his slave, and seems to have been executed in due form, after the previous measures had been pursued, as required by law, to authorize the emancipation of a slave. In this Schons alone appears to have been active. He signed the petition to the court, in which authority to pass the act of emancipation is prayed for by the master, and, as it appears, was always present and aiding in the transaction. According to the provisions of the deed, the slave is not to enjoy his liberty, until after the death of his master: it is said to have been executed before Quinones, lately a notary of this city, is signed by him in that capacity, and by Belleurgy and Schons, as witnesses.

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To prove the forgery and falsehood of the instrument, the only person offered is Belleurgy; he swears that he did sign the act, but does not know the plaintiff—that he and Schons were in the habit of signing as witnesses, at the request of Quinones, instruments passed before him—that they were generally read to them, but not generally executed in their presence. Of the present act of emancipation, he declares that he has no recollection.

According to the practice of the courts of justice, in France, founded on the laws of that country, as the plaintiff's counsel has shewn, subscribing witnesses are not receivable, to invalidate instruments, which they have received. The rules of evidence in Spain are different. The validity of an instrument may there be impeached, by the subscribing witnesses. But, in an allegation of falsehood and forgery of an instrument, three things must concur, in declaring it to be forged: viz. the witnesses must be of an unexceptionable character, they must all agree, that they were not present at its execution, and the notary must be shewn to be of bad character. There is also another mode of destroying the validity of an instrument, when the witnesses do not agree: viz. by prov-

ing an *alibi*. *Febrero* 2, 1, 1, *n.* 35 and 2, 3, 1, *n.* 342.

In the present case, there are two witnesses only: one of them is attacked in the suit, as a principal agent in the fraud and forgery: the notary is dead, and we have no evidence as to his character. The instrument, being clothed with his signature, must be considered as attested by him, and his reputation not being impeached, we are bound to consider him as a man of good fame. The instrument is impugned by one witness only, (in opposition to the attestation of the notary) and he declares, that he does not know the plaintiff, and was in the habit of subscribing instruments for Quinones, in the absence of the contracting parties, but recollects nothing with regard to the instrument, which is the object of the present suit.

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In pursuance to the rules cited, it is clear, that the evidence offered is insufficient to support the plaintiff's allegation of forgery, and the parish court erred, in giving judgment for him.

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, ought to have been

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given, it is ordered, adjudged and decreed, that there be judgment for the defendants and appellants, with costs of suit in both courts.

Morel for the plaintiff, *Seghers* for the defendants.

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GARDNER & AL. vs. *HARBOUR & AL.*

A testator may dispose of a part of his estate on an universal, and the other on a particular title.

APPEAL from the court of the third district.

MATHEWS, J. delivered the opinion of the court. This action is brought by some of the children and forced heirs of Adonijah Harbour, deceased, late an inhabitant of the country, against his other children and forced heirs.

A copy of the will is made a part of the petition, but it is not, in any part of the petition, declared to be void, on account of any informality in its institution, as wanting the requisite number of witnesses. Although the nullity of the testament has been insisted on, by the counsel of the plaintiffs and appellants, in this court, as it does not appear to have been explicitly put in issue, by the pleadings, we cannot notice it.

After stating that they have been injured to

the amount of ten thousand dollars, by the unequal and illegal disposition made of the testator's estate, the plaintiffs pray that the other heirs may be directed to collate the estate, as the law directs, and pay to them the aforesaid sum, and conclude with a prayer for general relief.

The decision of this case depends upon various rules of the civil code, by which the power of ascendants to dispose of their estates, either by donation *causâ mortis*, or *inter vivos*, is regulated and defined. It is a general rule, that they may dispose of the fifth of their estate, to the prejudice of their legitimate descendants and forced heirs. This they may give to strangers, or, as an advancement or extra part, to any one or more of their heirs, provided the disposition be made *expressly under the title of advancement or extra part. Civ. Code*, 114, *art.* 25.

In the present case, the will gives to two of the testator's children, certain property therein mentioned, and directs the balance to be equally divided between the whole of his forced heirs, without declaring that the specific legacy is intended as an advancement or extra part to the legatees, as is required in the proviso of the law just cited, and is, perhaps, on that account void; for, according to this rule, it is not to be

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easily presumed that parents intend to give an advantage to one child over another: this cannot be implied from the instrument—it must be expressed.

It is clear, that where forced heirs are deprived by will of their legitimate portion, or less than that amount is given to them, they have an action for the complement of their legitimate part; the effect of which is, to cause a reduction of any other disposition made by the testator to the prejudice of said legitimate part. *Civ. Code*, 234, *art.* 121. This is an action, accorded to forced heirs, to recover that part of the testator's estate which he may have disposed of beyond the disposable part, against those who have thus illegally acquired it.

Rules have been prescribed, by which parents are authorized to make a distribution and partition of their property, among their children, or legitimate descendants, either by designating the *quantum* of the parts, which they assign to each of them, or in designating the property of such particular kind, which shall compose their respective lots. Such a partition may be made by testament. A partition made by the ascendants can be objected to only in the single case of one of the sharers alledging, and offering to prove, that there has been lesion

of more than one fifth part, to his prejudice. The child, who objects to the partition made by the ascendant, on the plea of lesion of more than one fifth to his prejudice, must advance the expenses of having the property estimated, and must ultimately support them and the costs of the suit, if his claim be not founded. *Id.* 252 and 254, *art.* 292, 203, 208, 209.

A question here arises, whether the testator by his will, intended to make a final distribution, and partition of his estate among his children. This may be done by an ascendant, in one of two ways; either by designating the *quantum* of his estate, which each child shall have, or by designating the particular kind of property, which shall compose the lot of each—can both these modes be used by a testator, in the distribution of his property? Testamentary dispositions are either universal, or on an universal or particular title. In the will under consideration, the testator disposes of part of his estate on an universal, and part on a particular title. He bequeathed his negroes to all his children, and points out the manner in which he wishes that they may be distributed, and partitioned among them. To one of them he devises the tract of land, on which he resided at the time of his death, with his house

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hold furniture. To the same person and to another of his children, he bequeaths his stock of horses and cattle, to be equally divided between them. From these dispositions in the will, it does appear, that the testator intended to make a distribution and partition of all his property, among his children; distributing his negroes among all, but adding to the portion of two of them the land and property designated in the will, as making part of their lots. There can be no doubt of the power of the testator, to dispose of part of his estate, on an universal, and of the other part, on a particular title, by the same instrument; and it is believed, that no legal objection can be raised to a distribution and partition, made by an ascendant of his property among his descendants, by designating the lot of each, partly in *quantum* and partly in land.

Considering the dispositions of the testament under discussion, as constituting a distribution and partition of the testator's estate, amongst his children, (and in this light, it seems to have been viewed by the parties themselves: for they have partaken of their father's property under the will) it cannot be objected to, by any one or more of them, unless they alledge, and offer to prove lesion, of more than one fifth to

their prejudice. It is true, that the plaintiffs and appellants, state the distribution to be so unequal, that they have not received one third part of the estate of their ancestor, as they are entitled to; which perhaps amounts to an allegation of lesion of one fifth to their prejudice. But, this they have not proven, by having an inventory and estimation made of the estate, and by exhibiting such an estimation, and other legal proof, necessary to support the allegations of their petition. The value of the estate does no where appear in the statement of facts, and it does not seem to have been shewn on the trial, in the district court: and by that alone can a just conclusion be made, as to the relative *quantum* disposed of by the testator.

It appears by the record, that the cause was submitted to a jury below, who gave a verdict for the defendants, in conformity with which a judgment was given, in which we believe there is no error, the plaintiffs and appellants not having supported the allegations in the petition by sufficient proof.

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

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Livingston for the plaintiffs, *Duncan* for the defendants.

AMORY & AL. vs. *BOYD.*

If A writes to B, that C is unacquainted in New-Orleans, wants assistance from B, and his bill on his father will be paid, he thereby makes himself answerable.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The appellant is sued as having made himself answerable for a sum of money which the appellees advanced at his request to one captain Andrew M'Leary, upon some drafts which have returned protested. The letter, which he wrote to them on that occasion, is exhibited; and, from its tenor, we are to deduce whether it contains a mere recommendation, or a *mandatum pecuniæ credendæ*. The doctrine contended for by the appellant, that a mere recommendation, advising one to trust another, however strong the language in which it is delivered, provided it be given *bona fide*, creates no obligation on the part of the recommender, cannot be controverted. *Consilii non fraudulenti nulla obligatio* is one of those maxims which are respected every where. The difficulty, in cases of this nature, is to discriminate between that which is a mere advice, and that

which may be considered as containing a mandate. "To the end of ascertaining," says the *Repertoire de Jurisprudence, v. Mandat,* "if a contract of mandate has intervened between the parties, or if nothing more than a mere advice has been given, the expressions which they have used must be scrupulously weighed." Has the appellant merely advised the appellees to lend money to M'Leary, or has he requested them to do so? It must be premised that M'Leary was unknown to the appellees, and was introduced to their acquaintance by the letter here alluded to. The appellant, after that introduction, says, "captain M'Leary, being unacquainted at New-Orleans, will be indebted to your politeness in affording him such assistance as his present situation requires; and a bill on his father for the funds he may need for his present necessities will be honored forthwith." We think that these expressions import more than a mere recommendation and advice; that they contain an application for money in behalf of M'Leary, and made this precisely such a case as is laid down in *Domat,* 1, 15, § 1, *art.* 13. "If a person engages one in some loss that may be imputed to him, as if he should persuade one to lend money to an unknown person, to whom one lends barely on the assurance which

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he gives, that the money will be faithfully repaid, he shall be bound to make it good."

Finding enough in the letter to support the appellees' claim, we deem it unnecessary to go into the question concerning the admissibility of the oral evidence produced on their part.

It has been suggested that, should the defendant be found answerable for the funds advanced in consequence of his request, that responsibility ought to be limited to the money necessary to supply the then present necessities of M'Leary, according to the tenor of the letter, and that the sum of four hundred dollars is evidently more than he could want. There is, however, no evidence from which we may draw any such conclusion.

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

Grymes for the plaintiffs, *Dick* for the defendant.

LOUISIANA BANK vs. *DUBREUIL.*

The acts of a person, who is afterwards

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

The petition stated, that one Pacaud owed plaintiffs $2680, and by a notarial act bound himself in *solido* with the defendant, who mortgaged therefore a lot of ground. At the foot of the petition is the president's affidavit, in which a reference is made to the notarial act, which is annexed. In this act the sum due is stated to be $3350.

interdicted, anterior to the suit for interdiction, will not be avoided if her insanity was not notorious.

The answer of the defendant, who appeared, at the time of answering, to be under interdiction, on account of insanity, was filed by her curator. It denied the mortgage to be her act and deed, and averred that the defendant, at the date of the act, long before and ever since, was and is incapable of conducting her affairs, from imbecility both of body and mind:

That the sums mentioned in the petition and mortgage, did not agree—that the notes mentioned in the mortgage, on which the sum was said to be then due, had long since been canceled.

The parish court being of opinion, that "the infirmities of the defendant did not operate in such a manner, as to incapacitate her from conducting her own affairs, since she understood the nature of the obligation she contracted, and referred to," gave judgment for the plaintiffs, for $2680. The defendant appealed.

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The statement of facts shews that, on the date of the mortgage, Pacaud owed the plaintiffs on notes endorsed by Chew and Relf $3350, that these notes were reduced by subsequent renewals, on the faith of the mortgage, to that of $2680, claimed in the petition. The new notes being subscribed by Pacaud alone.

Broutin, the notary who received the mortgage, deposed that he knew the defendant indistinctly, having seen her once or twice, at her house. He read the act to her; she appeared to understand what was said to her, and answered pertinently. She was in an easy chair, spitting continually, very old and speaking with great difficulty. She appeared to understand the act. He asked her whether she would become security for Pacaud, and in case he did not pay the bank, that she would: she answered yes. She observed to her daughter, that the house stood on Royal street. The mortgage was executed in her house—two witnesses were present: the deponent believes Pacaud was there; she lived with the latter in a house in the yard. Urquhart, the president of the bank, was not there.

On the part of the defendant, several witnesses were heard.

Langoureux, deposed to his knowledge of

her for 50 years. In January 1814, she had fallen into imbecility, and had not more reason than a child of six—she was not in a situation to direct her affairs—she could not understand the meaning of an instrument read to her—she had entirely lost the use of her reason, was fed with a spoon, and in a state of bodily and mental imbecility.

Morand knew her for 45 years: for five years before January 1814, and ever since, she has continued in a state of infancy and imbecility: she was incapable of conceiving the meaning of an instrument that was read to her. Her appearance announces the state of her mind, perfect imbecility and childishness; she speaks with great difficulty, and slavers so as incessantly to require a servant to wipe her face, and cannot speak correctly on any subject.

About two years ago, Pacaud called on this witness to endeavor to persuade the defendant to execute a money engagement for him; but he refused, answering she was not in a situation to enter into any engagement. She had several houses in town, and, before her imbecility, always sent for the witness to consult him about her affairs.

Piat knew the defendant since 1814, and taught music to her grand-daughter; he attend-

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ed daily, and always saw the defendant in a state of imbecility—has sometimes spoken to her—she was treated like a child, and he thought her incapable of attending to her affairs.

Misotiere knew the defendant for thirty years: about 1813, she came to dwell at Pacaud's, who lived with her daughter, in the neighbourhood of the witness. She was then in a perfect state of imbecility. He does not think that she was, at the time, or has been ever since, at any time in a situation to understand the contents of an instrument, or to attend to her affairs. Pacaud did all her business, and told the witness so.

Blache had seen the defendant very often during these five or six years—she was, during that whole time, in such a state of imbecility as not to be capable of comprehending the meaning of a mortgage, or any other instrument. He does not know that she had any lucid interval, but every time he saw her, she was in the same situation.

The above, and the mortgage annexed to the petition, constituted the statement of facts.

In the mortgage, Pacaud promises to pay the 3350 dollars, for which the premises are pledged, and which the defendant promises to pay in

solido, at such a rate of interest and periods as the bank will require.

Livingston, for the defendant. The parish judge erred in the conclusion he drew from the testimony, viz. that the infirmities of the defendant did not incapacitate her from attending to her affairs. The number of witnesses, who depose to the contrary, must outweigh the sole testimony of Broutin, the notary. If the defendant did not know what she was doing, she ought not to be bound, and the mortgage ought to have been set aside. Pacaud had the mother and daughter under his influence; and the notary is liable to the imputation of having a strong desire to support an instrument which he drew, and must feel a great reluctance to admit that he was, at least, imposed upon. The difference between the questions put to the defendant, her answers and the act, are evidence that the notary was mistaken as to the nature of the contract. If he erred in this, he might as to the sanity of her mind.

The sum claimed varies from that for which the obligation was given—this is for 3350 dollars—and the petition demands only 2680 dollars. This variance must be fatal to the action.

Whatever may once have been due, or at

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least was due at the date of the execution of the act, has been paid, and is no longer due. This clearly appears by the absence from the hands of the plaintiffs of the notes, which were the evidence of the debt.

Lastly, the defendant added her suretiship to that of Chew & Relf, who, as endorsers, were sureties to the plaintiffs for the sum due by Pacaud. Now, the plaintiffs could not render her situation worse, without impairing their claim against her. They have destroyed their claim by a novation. Their claim on Pacaud, if it still exis', is quite different from that for which the defendant bound herself: the former was secured by the endorsement of Chew & Relf, who are not bound for the latter. The defendant, when she became surety, knew that Chew & Relf stood between her and danger. Now, she stands aloof, and if she was compelled to pay, she would be without that recourse on Chew & Relf which was the inducement held out to her by Pacaud, when he solicited her to become his additional surety for the plaintiffs' claim.

Moreau for the plaintiffs. It is contended that the defendant, at the time she executed the instrument, which is the ground of the present suit,

was in such a state of imbecility that she cannot be bound by it.

It does not suffice, in order to avoid an instrument, to alledge and prove the imbecility of the person who executed it. It is true, that if the instrument has been executed since a suit for interdiction was begun it is null, when the sentence of interdiction has been pronounced. *Civ. Code,* 80. *art.* 15. *Discours, &c. sur le Code Civil, id.*

Three circumstances are required to invalidate, on account of insanity, the acts of a person in the full enjoyment of his rights: 1. That the interdiction have been pronounced or provoked in his life-time. 2. The existence of the cause of interdiction, at the time the act was executed: lastly the notoriety of the cause: because he who contracts with a man notoriously insane, cannot have acted in good faith; but if the cause, though already existent, was not notorious, the nullity of the act ought not to be pronounced; because in cases of doubt, the presumption is in favor of a person, in the possession of the plenitude of his rights. Society ought not to suffer from the neglect, of the friends or persons, who surround him, to provoke his interdiction, and they ought not to be

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easily permitted to attack what they have tolerated.

In this case, it cannot be said, that the defendant's insanity existed at the time of the execution of the instrument: that it was notorious.

It is true the plaintiffs do not claim the whole amount, for which the defendant bound herself, in the instrument, and this, because their debt has been reduced by several payments.

Pacaud bound himself to pay the debt for the security of which the defendant bound herself, viz. 3350 dollars, at such times and in such a manner, as the plaintiffs might point out. It therefore suffices for them to shew, that the sum now claimed is the balance of the original one, reduced at different periods, by partial payments. He was the drawer of the original notes endorsed by Chew and Relf, who must be presumed to have paid him the sum, for which they were drawn. These gentlemen by their endorsement, transferred their rights to the plaintiffs, to whom the defendant engaged to pay Pacaud's debt, if he did not pay it. If at the maturity of the notes they had been presented, and the plaintiffs had had recourse on Chew and Relf, they could have compelled the plaintiffs to transfer to them all their actions, not only against the debtor, but also against his sureties.

MARTIN, J. delivered the opinion of the court. This court is of opinion that the parish judge erred in the conclusion drawn from the testimony. The weight of evidence being in favor of the position taken by the defendant's counsel, that the defendant was in the state of bodily and mental imbecility, which properly caused her to be interdicted; but the law has provided that "no act, anterior to the petition for interdiction, shall be annulled, except where it shall be proved that the cause of such interdiction notoriously existed at the time, when the deed, the validity of which being contested, was made, and that *the party who contracted with the insane person or lunatic could not have been deceived as to the state of his mind.*" *Civ. Code*, 80, *art.* 15.

Here the existence of the cause of the interdiction at the time the mortgage was executed, appears to us to be proven; but the code requires also that we should have proof of the impossibility of the plaintiffs, who contracted with the defendant, being deceived as to the state of her mind.

Giving credit to all that is sworn by the witnesses on the side of the defendant, we may well yield it also to the testimony of the notary, which is not at war with that of the other wit-

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nesses—and, if his testimony is credited, *he was deceived as to the state of her mind*—if we believe that he was deceived, we cannot conclude that the plaintiffs could not be; and if the plaintiffs could be deceived, one of the circumstances required by the code, to authorize us to annul the act, is wanting. We cannot believe that the notary was not deceived, unless we believe that he colluded with some of the parties, and absolutely perjured himself—and all that the witnesses for the defendant depose may be believed, without the perjury of the notary being necessarily a fair consequence of it. We therefore, conclude, that we cannot declare the mortgage null.

The petition states the sum due by Pacaud, when the defendant mortgaged her property, to be 2680 dollars, which was the sum due at the time of the petition: but the mortgage is annexed to the petition, and a reference is made thereto in the oath of the plaintiffs, at the foot of the petition—so that it is impossible to mistake the contract, which is the ground of the suit. The variance between the sum of 2680 dollars, which was due at the time of the petition being filed, and that of 3350 dollars, at the time the plaintiff bound herself, is not fatal.

The money due to the plaintiffs on certain

notes, at the date of the mortgage, was, as appears by that instrument, to be paid at such a rate of interest and such periods as the bank would require—in bank language, to be reduced at stated periods of renewal by partial payments: in order to effect this, the original notes must have been intended by the parties to be replaced by others, representing the balance of the debt at each renewal.

Chew and Relf, the indorsers of Pacaud's note when the defendant mortgaged her property, could not be made liable to the bank, unless Pacaud's notes were protested—they could not be protested without a demand of the whole, on the maturity of the notes. This demand was incompatible with the engagement which the plaintiffs had taken, to designate the rates and periods, at which the amount of the notes was to be paid. How could the notes be paid with interest, if no delay was to be granted? The consideration which induced Pacaud to give the security, and the defendant to bind herself and mortgage her property, was the indulgence which they expected from the plaintiffs—which they have extended to the debtor, in refraining from an immediate and absolu e demand, of absolute payment at the maturity of the notes. A consequence of this indulgence,

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is the discharge of the indorsers, which all the parties must have contemplated, as the irresistible result of an act, in which they were all concerned.

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

PREVAL vs. *DEBUYS & AL.*

If the appointment of a curator be revoked on an appeal, and he delays the delivery of the estate till the heirs come, the commission belong to the curator appointed by the appellate court.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. The right of curatorship to the estate of J. Saupin, who died intestate, was originally contested, by the parties to the present suit; they are now disputing about a commission of two and a half per cent. on the estate. Judgment having been given in favor of Preval, in the court of probates, the opposite party appealed to the court of the first district, where they obtained a reversal of the judgment, and Preval took the present appeal.

The statement of facts shews that the appellant was appointed curator by the court of probates, and the appellees obtained a rescis-

sion of his appointment, in the district court, who gave them letters of curatorship. Under the authority derived from the court of probates, the appellant had procured possession, and administered the estate of the deceased, to the period at which his letters of curatorship were annulled. The present appellees were declared to be the rightful curators by the district court.

Afterwards the appellant, at the request of the appellees, agreed to deliver the property of the deceased in his hands to them, as soon as he could make out his accounts: before this could be effected, an agent of the heirs of the deceased appeared, to whom the property was delivered by order of the court of probates, except a commission of two and one half per cent. on its amount, which was retained by the appellant, for his trouble in administering the estate, in opposition to the appellees, who claim said commission, as the only legal and rightful curators of the estate, under the judgment of the district court.

The circumstances of this case, have involved the rights of the parties, in considerable obscurity, and render it a matter of doubt, which of them ought to prevail: as no appeal was taken from the judgment of the district court, the decision of that tribunal is final and conclusive,

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as to the right to the curatorship, and as to this, has the force and effect of *res judicata*.

But, it is contended, by the appellant, that as he has administered the estate, by virtue of a power derived from a competent tribunal, and as it was his duty to take care of the estate, pending the appeal on the right of curatorship, and as he has done every thing which could be required from a faithful curator, under the sanction of legal authority, up to the delivery of the estate, to the heirs of the deceased, he is justly entitled for his trouble, to the compensation allowed by law.

On the part of the appellees, it is urged that having pursued all lawful means in their power, to enforce their legal right to the curatorship, it ought not to be injured by the improper interference of a person who was a wrongdoer *ab initio*.

Until the session of the district court, the right to the appoint ent might be doubtful: after that, it was most clearly on the side of the appellees, and had the estate been delivered over to them, as it ought to have been, no doubt could remain of their right to the legal commission, for the administration of it, as curators *de jure et de facto*. During the delay, claimed by the appellant, to arrange his accounts, pre-

paratory to the transfer of the property to the appellees, the heirs appeared by their representative, and it was delivered to him. Thus were they again, by the conduct of the appellant, prevented from obtaining possession, and administration of an estate, to which they were then undeniably entitled, under a decision of the higher court.

As the appellees had the right to the curatorship, and as they have pursued all legal means to obtain it, it is the opinion of the majority of this court, (DERBIGNY, J. dissenting) that they ought not to be deprived of the commission, to which they were most clearly entitled, on an actual administration, by the erroneous conduct of the appellant; first, in opposing their just pretentions and claim before the court of probates, and lastly, in failing to deliver over the estate to them, in conformity with the decision of the district court. To suffer him now to retain the legal commission, would be to allow him to take advantage of his own wrong.

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

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PRUVAL vs. DEBUYS & AL.

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

MAURIN vs. *MARTINEZ.*

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The act ordering the submitting of particular issues to the jury, is not a violation of the constitution of the United States

The time at which certain persons were made parties to suit is a matter of record, and cannot be submitted to the jury

APPEAL from the court of the second district.

MARTIN, J. delivered the opinion of the court. This suit is brought, to rescind the sale of a slave, attacked with the asthma; sold by the defendant, administratrix of the estate of her husband. She pleads the general issue, and avers that the plaintiff bought the slave at a sale, made by authority of justice, and without any warranty on her part.

On the 7th of July, 1817, seven months after the petition was filed, the defendant amended her answer, stating, that several heirs of her late husband, some of age and others under age, were in existence at the time of the petition, and now, and ought to have been made parties to the suit; whereupon, the plaintiff amended his petition by making the heirs parties. The heirs pleaded prescription, the general issue, the sale by authority of justice, and the absence of a warranty.

1. A bill of exceptions was taken by the defendant, to the opinion of the court, in allowing the amendment of the petition, making the heirs parties, as changing the parties and making a new cause of action.

2. The defendant prayed, that a statement of facts (issues) should be made out and submitted to the jury, to which the plaintiff objected, on the ground that he is entitled, by the constitution of the United States, to a trial by jury, that this would be abridging the powers of the jury, if they were compelled to find a special verdict, or a special finding on each issue. The district court having overruled the plaintiff's objection, a bill of exceptions was taken.

3. The first issue submitted to the jury, on the part of the defendants, was, "were not the heirs made parties to the present suit on the 7th of July, 1817, and if they were not, when were they made parties?" The plaintiff objected to this issue being submitted to the jury, on the ground, that the time was a matter of record, but the court overruled the objection: a bill of exceptions was taken.

The jury found the issues submitted to them as follows. The plaintiff purchased the negro, at a sale of the effects belonging to the estate of A. Martinez, made at the request of the

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widow, heirs and relation, for a sound price. The negro was then troubled with the asthma, which rendered him useless as a plantation negro: he was estimated at $400—The heirs were present, representing the estate; the sale was made for the purpose of effecting a partition, by the parish judge, acting as an auctioneer. The widow and heirs were in possession of the estate about nine years, after the death of Martinez. The malady of the slave, was known to the widow at the time of the sale: it was not known to the plaintiff: the negro was not warranted, nor was a warranty spoken of. If the negro had been perfectly well, his appearance would not have justified a higher price, than was given by the plaintiff, who did not ill treat him. There was no sale or conveyance made by the parish judge, except the proces verbal of the sale: the heirs were not made parties till the 7th of July, 1817.

It is admitted, that the sale took place on the 14th of August, 1815 and the disease of the slave was discovered by the plaintiff, eight or ten days after.

The district judge gave judgment for the defendant, being of opinion, that "the suit was not instituted against the children of A. Martinez, deceased; nor was the widow legally

brought into court, in her proper capacity till the 7th of July 1817", and concluding that, as more than six months elapsed on that day, since the discovery of the disease of the negro, by the plaintiff, his claim was prescribed.

The plaintiff appealed.

The widow was first brought into court, by a petition, bearing date of the 6th of December, 1816, within about four months after the discovery of the slave's disease. It is true she is called *administratrix* of the estate of the deceased: but this was a mere *descriptio personæ*, she was sued in her own right, for a cause of action which never existed against the deceased, and on which she could be liable *de bonis propriis* at once. The other defendants being parties with her, to the contract on which the action is brought, were properly made parties to the suit, and as the inception of it, interrupted the prescription as to the widow, it does also as to them. The law *fin. Cod. de duob. reis* deciding that the acknowledgement, and citation of one of the debtors, interrupts the prescription as to all, gives the following reason for it, *quum ex una stirpe, unoque fonte, unus effluxit contractus vel debiti causa, ex eadem acti ne apparuit. Domat, lib. 3 tit. 7, sec. 5 n. 16. & 17.*

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The district judge erred, and the judgment must, and is, therefore, annulled, avoided and reversed.

I. Proceeding to give such a judgment as ought to have been given below, our attention is first attracted by the bill of exceptions taken by the defendant to the opinion of the court, allowing the new parties to be made. We think the district judge did not err, and refer to the reasons adduced in expressing our opinion, that the first citation interrupted the prescription as to the heirs.

II. We are of opinion that the district judge did not err in allowing the defendant to submit issues to be pronounced upon by the jury. The provision in the constitution of the United States, invoked by the plaintiff, refers only to the trial of causes in the courts of the United States, not in state courts.

III. The day on which the heirs were made parties to the suit, being a matter apparent on the record, we believe the district judge erred in submitting the first issue to the jury.

On the merits, we are of opinion, that the plaintiff has fully proven his allegations—that

it is in vain that the defendant invokes the provision in the code, that the action of redhibition does not take place in sales made *by authority of justice, Civ. Code, 358, art. 74,* since it does not appear that the sale was made otherwise than by order of the defendant, by the parish judge, *acting as an auctioneer.* The absence of a warranty cannot avail the defendant: none is alledged, because the disease was such as to give rise of itself to the redhibitory action.

It is, therefore, ordered, adjudged and decreed, that the sale made by the defendant to the plaintiff of the negro man Thomas be, and it is hereby cancelled; and that the plaintiff be exonerated from the payment of the price at which said negro was adjudged to him, and every part thereof, on his returning the said slave to the defendant, and that the defendant pay costs in both courts.

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

East'n District.
March, 1818.

5m 438
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PEYTAVIN
vs.
HOPKINS.

PEYTAVIN vs. *HOPKINS.*

APPEAL from the court of the second district.

A certified copy of a deed of sale of a sheriff, on a *fi' fa'*, is legal evidence, & ought not to be rejected on an allegation that it differs from a paper in the hands of the adverse party, which he calls the original.

Parol evidence is to be admitted of the manner in which the vendee of real estate possesses and cultivates it, and of his attempt to alien it.

DERBIGNY, J. delivered the opinion of the court. Stephen A. Hopkins, of whom the defendant and appellee is the widow, was employed as counsel by the attornies in fact of the appellant, for the purpose of suing one Alexander Millet for a debt of twelve thousand dollars and upwards, to secure which said Millet had given to the appellant's firm a mortgage on two plantations and some slaves. Hopkins obtained an order of seizure of the mortgaged premises, by virtue of which one of the plantations and three slaves were seized and sold. At this sale, Hopkins himself, in his own name, became the purchaser of the plantation, for the sum of $5.334, and of one of the slaves, for $600. The present suit is brought against his widow and curatrix of his estate, to have payment of those sums.

To this the defendant answers, that her husband bought the plantation and slave for the account of his clients, at their special instance and request; that he always was, and that his representatives ever are, ready to reconvey the same to them.

Part of the evidence offered by the plaintiff having been rejected below, his demand was dismissed for want of proof; and the appeal is brought up on two bills of exceptions against the refusal of that evidence.

The first relates to the tender made by the plaintiff of a certified copy of the bill of sale executed by the sheriff in favor of Hopkins. The introduction of that copy was not allowed, it is said, because, when the plaintiff exhibited it, the defendant produced a paper, which he called the original, which original did not agree with the copy tendered by the plaintiff; whereupon the parish judge, who had, as sheriff, made the sale in question, was sworn to state whether the paper offered by the defendant was really the original bill of sale. To this mode of proceeding the plaintiff objected, we think, very properly. The certified copy of the sale, being the best evidence in the power of the plaintiff, ought to have been received; and the attempt made by the defendant, at that stage of the cause, to prevent its admission, under pretence that he, the defendant, had the original in his possession, was an untimely and improper interference, which ought not to have been countenanced.

The second bill of exceptions tendered by

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PEYTAVIN *vs.* HOPKINS.

the plaintiff is against the refusal of the judge to admit oral evidence to prove that Hopkins possessed the plantation in his own name, cultivating the land, speaking of it as his property, and even offering to sell it. We think that such evidence was legal and pertinent, and ought not to have been rejected; for the parties were at issue upon that very point, the plaintiff asserting that Hopkins had bought the plantation for himself, and the defendant not denying that Hopkins had contracted in his own name, but pretending that the purchase was for the account of the plaintiff, and offering to reconvey the property to him.

One other part of this bill of exceptions is against the rejection of the testimony which the plaintiff offered, to prove that the sale had been written by the parish judge, at the request of Hopkins, transferring this plantation to L. M. Reynaud, and that Hopkins refused to sign it, because it expressed a general warranty. This testimony may have been rejected as superfluous, the fact of Hopkins having bought in his own name, being impliedly admitted in the answer, by the offer to reconvey.

The same bill of exceptions then mentions the refusal made by the judge to hear witnesses, to prove that the slave bought by Hopkins was

then in the possession of a third person, who had said he purchased her from Walter Gilbert. We think that this testimony was legal, so far only as it went to shew that the slave was in the possession of a third person, the remainder of it being hearsay.

Finally, the same bill of exceptions contains the plaintiff's objection to the refusal of the judge to hear witnesses to prove the price for which the land in question could rent per year. This evidence, we think, was properly rejected; the rent of the plantation having nothing to do with the demand, which is not a claim of the land, but of a sum of money, the price of the purchase.

As to the question, which seems to have arisen below, on the validity of the original bill of sale, exhibited by the defendant, it does not come in such a shape as to authorize this court to take notice of it. The plaintiff filed his bill of exceptions as to the time and manner of its introduction—but nothing shews that he opposed it on account of any defect of form; and as to the reasoning of the defendant, to demonstrate that a document, introduced by herself, is defective and not valid, it is treating her with indulgence to pass it by unnoticed.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be reversed; and that this cause be remanded, to be tried anew, with instructions to the judge to admit the certified copy of sale tendered by the plaintiff, and any oral evidence by which he may offer to prove the manner in which Hopkins possessed the plantation and slave in question, and any step which he may have taken towards alienating them. It is further ordered, that the appellee do pay the costs of this appeal.

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

HIGHLANDER vs. *FLUKE & VERNON.*

If parol evidence be improperly offered, the opposite party must object to its introduction.

If, by the contract of sale, the vendee lets the premises to the vendors, no delivery needs to be proved.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. The plaintiff states, that the defendant, Vernon, sheriff of his parish, has illegally taken three of his slaves, on an execution issued in a cause, in which the defendant Fluke was plaintiff, and one Howard, defendant. The answer, after a general denial, avers that the slaves properly seized as the property of Howard.

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

The record is accompanied by a statement of facts, and the plaintiff and appellant has filed an assignment of errors.

The statement of facts apprises us, that at the trial, the plaintiff introduced five documents.

1. A bill of sale from Howard to the plaintiff, for twelve negroes, dated December 12th 1815, recorded February 8, 1816.

2. A deed for a tract of land on Pearl river, sold by Howard, to the plaintiff, dated December 13, 1815, and recorded 8th of February, 1816.

3. An agreement between Howard and the plaintiff, by which the latter employs the former as an overseer, on the plantation on Pearl river, for three years, and engages to put the above twelve slaves, under the direction of Howard.

4. A note of hand of Howard, to the plaintiff for $5000, of the 2d of March, 1812, payable September 1, 1815, with a receipt on the back, dated December 13, 1815, as part payment of lands and negroes.

5. A note of hand signed by *** and witnessed by R. Powers, in payment of the hire of one of the negroes, sold by Howard to the plaintiff.

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HIGHLANDER *vs.* FLUKE & AL

The consideration money, expressed in the bill of sale for the negroes, is $3500, and that in the deed for the land, 3000 dollars, and both sums are acknowledged to have been received, at or before the signing.

It was admitted by the defendants, that the three slaves seized by the sheriff, as stated in the petition, were part of those conveyed by Howard to the plaintiff.

Powers and Morgan, the subscribing witnesses to the bill of sale and the deed, were the only witnesses examined by the plaintiff.

Powers deposed, that the note of *** was given to the plaintiff, (whose agent, the witness has been since the purchase of the land and negroes) for the hire of one of the negroes, sold by Howard to the plaintiff, another of whom has been ever since hired by the witness, who has paid the hire to the plaintiff.

On the cross examination of this witness, the defendants' counsel suggested fraud, between the plaintiff and Howard, and the witness added, he had been long acquainted with them, they are brothers-in-law—he saw no consideration money paid, nor any delivery of negroes.—Howard has often spoken to him of his, Howard's debts, as being many and pressing, without ever naming any of his creditors, none of whom are known to the deponent.

Morgan saw no delivery of negroes—he wrote the indorsement, or receipt on the back of Howard's note to the plaintiff, for 5000 dollars, saw the latter sign it, and heard the former acknowledge, it was in part payment of the land and negroes, and saw the latter pay the balance of the consideration money to the former.

The defendants introduced two witnesses, Crane and Lawrence: Crane deposed that in the summer of 1817, Howard came to him to buy corn, but he refused to credit him. Howard came a second and third time, and told the witness it was not true that he, Howard, had conveyed away his property.

Lawrence deposed, that at the gathering of the crop of 1817, Howard told him he had sold his cotton at 30 dollars, and the rise of the market.

The defendants further proved, that at the time of the sale, the slaves were on the land sold by Howard to Highlander, where they have ever remained since, and still are, that Howard remains on the plantation, and has the direction of it and the slaves.

The present suit was instituted the 29th of May, 1817.

The plaintiff and appellant assigned for error, that "although the defendants do not alledge in

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their answer, any fraud, or want of legal consideration in the deed of sale, of the negroes who are the objects of this suit, made to the plaintiff and appellant, they were nevertheless on the trial of the cause, permitted to suggest fraud in the said sale, and to endeavour to bring proof of the same—whereas, by the law of the land, no such suggestion or proof is admissible, unless the party, against whom it is to be made, has had due notice thereof in the pleadings, in order to be prepared to meet and answer, or disprove the same."

In examining the record, we find no suggestion of fraud, except in the statement of facts—this suggestion must therefore have been merely *oral*, and during the trial: it is not easy to discern, how the defendants could have suggested fraud in any other manner; the plaintiff had not stated in the pleadings, that he claimed the slaves, under a bill of sale from Howard, and the production of this document to the jury, was the first notice, which the defendants had of this circumstance. How can it then be imputed to them, that they did not alledge fraud in the pleadings? If in pursuance of this sudden allegation, any improper evidence was offered, it was the duty of the plaintiff's counsel, to oppose its introduction, which does not ap-

pear to have been done. Besides as all the evidence came up with the record, this court is enabled to take a complete view and decide on the merits of the case; we are therefore of opinion, that this assignment of error cannot avail the plaintiff and appellant.

He avers, that the defendants have wrongfully seized his negroes, on an execution issued in a suit, to which he was not a party—they reply, that the facts as alledged are untrue, and the negroes were properly seized as the property of the defendant, in the execution.

The statement of facts admits the seizure—so that the real question is, whether the slaves were the property of the plaintiff?

These slaves, both parties admit were the property of Howard, and the plaintiff shews, that in December 1815, he bought them, by an instrument under the private signature of the vendor; which in February 1816, he caused to be recorded. The two subscribing witnesses to this instrument prove it, and one of them deposes to the consideration money.

Is this sale a fraudulent one? The circumstances, from which the defendants contend that it is, are—

That Powers heard Howard say, he had many and pressing debts—Crane heard him say,

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years after the sale, and months after the institution of this suit, that it was not true he had conveyed away his property, and he told Lawrence he had sold his cotton crop; can these assertions of Howard, out of the plaintiff's hearing, affect the solemn act and deed, under which Howard conveyed his property to him? We think not.

The absence of a delivery is argued as a badge of fraud. The defendants' witnesses prove that the negroes sold have ever remained on the land, and Howard has always continued to have the direction of them.

The plaintiff has proven that he has hired two of these slaves, and that Howard is his overseer—that in February 1816, fifteen months before the institution of the present suit, he employed Howard as his overseer, and that their articles of agreement, were executed before the judge of their parish; that by this agreement, which took place within less than two months after the purchase, Howard is to manage the plantation and negroes for the plaintiff, during the space of three years, which were not elapsed at the time of the seizure, and have yet several months to run. Violent, however, as is thought to be the presumption of fraud, arising from the near relationship, in which the

plaintiff and Howard stand, and from his remaining in possession of the negroes after the sale, it must vanish or at least be immensely weakened when we reflect, that there is no evidence, which the court may listen to, of Howard being at all in debt, at the time of the sale to the plaintiff. It is true witnesses say they heard Howard talk of his many and pressing debts; but this is no evidence against Howard, who is not a party to the present suit, and who had no opportunity to cross-examine. It is not evidence against the plaintiff, because it is the report of the conversation of a third person, in the absence of the plaintiff. The sale took place fifteen months before the seizure of the slaves, under the execution of Fluke, a period too long to authorize us to conclude, that Fluke's cause of action then existed. For any thing that appears on the record, Howard did not own one single cent, on the day of the sale of the negroes seized. If he was not in debt, there was no person to be defrauded—fraud cannot exist.

But, the absence of a delivery, if not a presumption and even evidence of fraud, prevents the vesting of the property sold, in the vendee.

There is not a truer principle than this, and it has been made the basis of the decision of

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HIGHLANDER vs. BLUKE & AL.

this court, in the case of *Durnford's syndics* vs. *Brooks*, 3 *Martin* 322, and *Mumford* vs. *Norris*, 4 *id.* 20. But in the present case, there has been a delivery: where, by the contract of sale, the vendee lets to the vendor the premises, the lease is equivalent to a delivery: for the vendor holding no longer the premises as owner, but as lessee, he ceases, and the vendee begins to possess it: *nam possidemus per colonos & inquilinos nostros. L.* 25, § 1. *ff. de regulis juris.* Here, the agreement executed by the parties, vendor and vendee, in presence of the parish judge, a few days after the sale, that the vendor should manage the plantation and negroes sold, as overseer of the plaintiff, and his consequent occupation of the premises accordingly, is a holding of possession for the vendee—the vendor, therefore, acknowledges he is to oversee the plantation and negroes for the vendee, for a fixed salary. His possession is that of his employer. This possession began on the 8th of February, 1816, the very day on which, by recording his private instrument of sale, the plaintiff gave it effect, against third parties. We are of opinion, that his title became, on that day, complete and perfect against third persons, and that the slaves seized, were wrongfully seized as the property of Howard.

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HIGHLANDER *vs.* FLUKE & AL.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and proceeding to give such a judgment, as ought to have been given below, it is ordered, adjudged and decreed, that the injunction heretofore granted by the district judge, be made perpetual, that the defendants deliver the negroes Fanny, Billy and Manuel to the petitioner, and as we are without any evidence of the amount of the injury sustained by the plaintiff, that he recover nominal damages, viz. one dollar for the unlawful taking and detention, with costs of suit.

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

TREPAGNIER'S HEIRS vs. *DURNFORD*

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

An heir, to establish his own claim, may shew what was allotted to some of his co-heirs, several years before the suit brought, while he was an infant.

If fraud and

MARTIN, J. delivered the opinion of the court. The plaintiffs state, that their mother and natural tutrix, entered on the estate of their father, and afterwards failed and surrendered her pro-

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TREPAGNIER'S HEIRS *vs.* DURSFORD.

perty, without having given them any account; that they obtained judgment against the syndics for 5602 dollars and 28 cents, and received only 644 dollars, the rest of the estate being absorbed by creditors with a higher privilege—that the defendant holds a lot, which he purchased from their mother, on which they have a tacit mortgage—they conclude that he either pay their claim, or that the lot be sold therefor.

collusion be alledged against two persons, records, to which one of them was a party, may be given in evidence.

The finding of the jury is to be understood with a reference to the pleadings.

The answer avers, that the defendant is absolute owner of the lot, under the sale, in the petition, the sale being one *a reméré* and a judgment by him obtained thereon against the syndics of the creditors of the plaintiffs' mother—that one or more of the plaintiffs were present at the sale made to him by their mother, and gave no notice of any claim—that the plaintiffs have been guilty of fraud and collusion with their mother—that they have a mortgage for 4250 dollars on a piece of ground in the possession of P. Mitchell, to which they ought to resort—that the judgment against the syndics, mentioned in the petition, is not binding on the defendant; he requires full and strict proof of their claim and allegations.

The following facts were especially found by the jury:

1. One of the plaintiffs is 24, and the other two 22 1-2 years of age.

2. There was neither fraud nor collusion.

3. There is property especially mortgaged for the plaintiffs' claim, as appears by an act before Pedesclaux, notary, dated January 13th, 1810.

4. The principal of their claim is 5602 dollars, and they have received 643 dollars.

5. Their father was, in his life-time, possessed of a plantation in the parish of St. Charles, now in possession of Butler and M'Cutcheon, sufficient to pay the claim—there is likewise other property in the hands of Cadet Moulon, according to bill of sale.

6. Lavillebeuve and Lambert married sisters of the plaintiffs, and each of them has received from the plaintiffs' mother 1867 dollars and 44 cents, balance of his wife's rights in her father's estate, in 1802 and 1805.

7. The papers relating to Trepagnier's estate were delivered by the notary, Quinones, to Lambert, who lost them in travelling.

The plaintiffs admitted that the defendant owns the land in question, by virtue of four documents, which compose the record of the suit in the parish court, between him and the syndics of the creditors of the plaintiffs' mother.

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The parish court gave judgment that the plaintiffs, having received part of their claim from the syndics, and brought suit against Moulon for the same cause of action, do recover from the defendant 1250 dollars and 38 cents, with interest from the judicial demand: the property, which the jury found to be especially mortgaged, having, between the verdict and judgment, been disposed of for a sum which is admitted by the parties to reduce the claim of the plaintiffs against the property seized to the sum decreed.

The defendant appealed.

Five bills of exceptions come up with the record, and must be disposed of before the case be examined on its merits.

The first is to the opinion of the court in allowing the submission to the jury of certain issues, viz. whether Lavillebeuve and Lambert married sisters of the plaintiffs—whether they received any part of their wives' share of their father's estate—what part, and from whom. The defendant's counsel contend that these issues were improper, as nothing relating to the parts intended to be ascertained was alledged by the plaintiffs. It was the duty of the parish court to strike out the issues, to which the defendant refers, *if they did not fairly arise out of the pe-*

tition and answer, 1805, 26, *s.* 6—if they fairly arise therefrom, they were proper to be submitted. The answer alledges *fraud on the part of the plaintiffs and their mother, in regard to their claim. Fraus vel non* was, therefore, the issue. To prove the fairness of the plaintiffs' claim, as to its *quantum*, the plaintiffs might reasonably expect that they would be aided by shewing that, in 1802 and 1805, about 10 years before the defendant purchased, at a time the plaintiffs were about 10 or 11 years of age, when no fraud could be meditated against the defendant, the shares of two of their sisters, in their father's estate, were ascertained in a manner which shews the fairness of their own present claim. This court thinks the parish judge did not err in disallowing the defendant's objection in this respect, as the question, on which the jury were interrogated, fairly arose out of the answer.

The other bills are to the opinion of the court, in overuling the objections made by the defendant's counsel to the admission in evidence of the certified copy of the bilan of the plaintiffs' mother—of Lavillebeuve's receipt—the proceedings in the court of probates—and the judgment against the syndics, stated in the petition.

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To all these documents the plaintiffs' mother, the principal debtor of the plaintiffs, who have a tacit lien on the property seized upon, was a party. They were, therefore, proper evidence against the present defendant, whose object is to resist the execution of the plaintiffs' judgment on the property tacitly hypothecated for their payment.

The defendant has put the plaintiffs' in his answer to the proof of every allegation in the petition, and he contends that this proof must be found in the finding of the jury—and, if it does not exist there, the plaintiffs must fail. He contends that nothing in the finding of the jury shews that Madame Trepagnier, his vendor, was the mother and tutrix of the plaintiffs—that the finding fixes the *quantum* of the debt, but nothing as to its nature—that for any thing that appears there, the sum due may be the result of any other than the cause alledged in the petition—that it is not found that, at the time the defendant purchased the lot in question, his vendor was the tutrix of the plaintiffs already.

The jury find the principal of the plaintiffs' claim to be 5602 dollars, the very sum stated in the petition. We must take it for granted, though they say nothing about it, that they mean the claim against their mother; because, as they

speak *generally* of a claim of the plaintiffs, it would be absurd to infer that they speak of a claim against any other person, not named or hinted at in the petition. Likewise, it must be concluded that they speak of that claim of the plaintiffs against their mother, which is the object of the suit, viz. for property of theirs which came to her hands as their tutrix—not for money which they might have lent her, or the price of any property sold to her. It, therefore, clearly appears, from the finding of the jury, which must be taken with a reference to the pleadings that the defendant's vendor was the mother and natural tutrix of the plaintiffs, and that the claim on which the jury have passed is a claim against her in that capacity; but the plaintiffs were bound to prove that she did become their tutrix before the sale to the defendant. We find the date of this sale from the notarial act, and from the answer, to be the 13th of February, 1813—and the jury inform us that, as early as the years 1802 and 1805, she paid to Lavillebeuve and Lambert the shares of their wives, the plaintiffs' sisters, in the estate of their father; it is then clear, that eleven years before the sale she was in possession of the estate of her deceased husband, as the mother and natural tutrix of their common children. Their

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claim and the consequent tacit lien are, therefore, fully established on the estate of their mother: the defendant admits that the lot which he purchased is part of it.

But he alledges that one or all of the parties were present at the sale, and gave no notice of any claim—their presence is not proven. He adds, that the plaintiffs have been guilty of fraud and collusion; but the finding of the jury falsifies the averment.

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

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, APRIL TERM, 1818.

East'n District.
April, 1818.

TODD
vs.
LANDRY.

TODD vs. *LANDRY.*

If the act which gives jurisdiction to a court, in a case, be repealed, at any time before judgment is pronounced, the judgment is erroneous.

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APPEAL from the parish court of Ascension.

The plaintiff claimed from the defendant, six hundred dollars, the price of the adjudication of a new levee, ordered by the inspector of the district, to be erected before the defendant's plantation, and which was adjudged to the plaintiff, as the lowest bidder, on the 6th of March, 1817, to be completed on or before the 20th of the following month. On the 12th of May, the plaintiff, having obtained in due time, the certificate of the inspector, that the levee had been completed and received as such,

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brought this present action, and obtained an order of seizure and sale of the defendants plantation, which was accordingly, on the 20th, advertised for sale by the sheriff, unless cause was shewn within the legal time.

On the 23d of June, the defendant filed his answer. The plaintiff objected to its being received, on the ground, that the time allowed by law, to the defendant had expired, 1816, 40, § 29, 2 *Martin's Digest*, 618, *n.* 29. This objection was overruled, and the plaintiff hereon excepted to the opinion of the court.

The case was tried by a jury, to whom the plaintiff submitted the two following issues: 1. Were not the repairs adjudged to the defendant's levee, adjudged to the plaintiff, as stated in his petition, and was he not the lowest bidder? 2. Were not the repairs completely made by him, and was not the work received, by the inspector, agreeably to the contract?

Several issues were likewise submitted to the jury, by the defendant, in order to establish that his levee had been examined, and received by the inspector, in due time, and that, on the opinion of the inspector himself, as well as of all the neighbouring planters, it was capable of withstanding the force of the river at high water.

The jury found the first issue, submitted by the plaintiff, in his favor, but added that they thought the adjudication illegal. As to the second, they found that the repairs were received by the inspector, but that they were not completed according to contract.

They found the issues submitted to them by the defendant, in his favor.

There was judgment for the defendant and the plaintiff appealed.

Morse, for the plaintiff. The parish court erred in receiving the defendant's answer. The sheriff had advertised on the 21st of May; the legal time allowed to the defendant to answer, expired on the 20th of June: the defendant was therefore too late, in his application to be admitted to answer, on the 23d.

This court must be aware of the great importance of the levees, to the safety and the very existence of the country, and how necessary it is, to enforce the legislation of the state, for their maintenance and preservation.

Dumoulin, for the defendant. The importance of levees in this country, and the necessity of inforcing the laws of this state, in regard to them, cannot be contested. But the act, on

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which the plaintiff relies, was no longer a part of the laws of the state, when the inspector made the illegal adjudication, which is the ground of the present action, for the act of the legislature, approved on the 6th of February, 1817, repealed it.

But, admitting, for argument's sake, the act of 1816, to be still in force, yet the plaintiff is not entitled to recover. This will appear by a comparison of the facts of the case, as spread on the record, with the tenor of the act itself, especially the 16th, 17th, 18th, 19th and 29th sections. By the 19th, it is made the duty of the inspector to inspect the levees of his district between the 16th of August and the 16th of December, of each year; and, in case the works which he may order should not be sufficiently advanced on the first of September, to afford a reasonable ground to judge that they will be finished on the 16th of December, he is directed to adjudge them to the lowest bidder; and the 16th, 17th and 18th sections provide that, should any further repairs be necessary, they may be made by a general call on all the inhabitants of the district.

Now, in this case, the jury found that the defendant's was received as sound by the inspector, consequently he could no longer adjudge

the levee under the 19th section, but must, if any new work was required, pursue the mode pointed out by the 16th, 17th and 18th sections.

But the inspector and the plaintiff colluded to oppress the defendant. They knew that the law on which they rely was repealed by an act approved on the 8th of February. Within two days the repealing act might have been known in the parish. The scene of action being only seventy-five miles from the seat of government: the repeal became operative on the 16th or 17th, the repealing act having been promulgated in New-Orleans on the 9th or 10th of February. *Civ. Code* 4, *art.* 6.

MATHEWS, J. delivered the opinion of the court. The act of the legislature, on which this action is brought, in the cases for which it provides, (and of which the present is one) extended the jurisdiction of the parish courts, and authorizes an appeal directly to this. But, it has been repealed *in toto*, by an act bearing date of the 8th of February, 1817, which was pleaded to the jurisdiction of the court below, by the defendant, and not denied by the plaintiff to be in force at the time it was pleaded.

The repealing act, being in force before the parish court gave judgment in the cause, and

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the jurisdiction of that court depending entirely on the repealed one, it is clear that the latter had ceased to exist, and that the court erred in sustaining its jurisdiction in the case.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed; and this court, proceeding to give such a judgment as, in their opinion, ought to have been rendered in the court *a quo*, it is ordered, adjudged and decreed, that the plaintiff's petition be dismissed, with costs.

AUGUSTIN & AL. vs. *CAILLEAU & AL.*

A judgment is not *res judicata* as to those who were not parties to the suit.

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

DERBIGNY, J. delivered the opinion of the court. The plaintiffs are persons of color, who have been seized under execution, at the suit of the appellees, as slaves, belonging to the estate left by Marie Françoise de Magnan, widow Letourneur, who died in this city some years ago. They claim their freedom as emancipated by their late mistress.

To this claim the defendants and appellees opposed the authority of the thing judged, pre-

tending that, inasmuch as the appellants had been sequestrated at their suit, pending the demand for which they obtained judgment against the estate of the widow Letourneur, they must be considered as parties to that suit, and the judgment *res judicata* against them. It is hardly necessary seriously to observe that, to make any one party defendant to a suit, he must be served with a citation and a copy of of the petition. Slaves may sue and be sued, when they have to claim or to prove their freedom; but then, undoubtedly, they must be made parties, according to the usual rules, and not merely be put in jail, without any other notice. The plea of *res judicata* was, therefore, properly overruled by the court below.

Upon the overruling of that plea, the judgment obtained by the appellees remained open to the attacks of the appellants; and it became their right to show any thing that could contradict it and destroy its force. It does not appear, however, that the appellants thought themselves at liberty to question the validity of that judgment. They admitted it to be a judgment against the estate of their mistress, and did not offer any evidence in opposition to it, relying upon other considerations to support their claim to freedom. This point would, therefore, be

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settled by that admission, had not the record itself been brought up and laid before us: for, when reference is made to a record, the record must agree with the statement of the facts, or else that statement must be viewed as a mistake, and the record alone be considered as containing the truth.

On opening this record then, we find that, instead of a demand against the executor of the widow Letourneur, for the purpose of obtaining a liquidation of the appellees' claim, it is a suit *in rem* against the slaves said to belong to the estate, of which the appellees pretend to be creditors. The petition purports to pray for their sequestration and sale; and, as some of them had been bequeathed to Louis Magnan and to Eliza Magnan, wife of Evariste Marchand, these persons are made defendants as legatees. It has, indeed, come out collaterally, that this Louis Magnan is the same individual whom the widow Letourneur had oppointed her executor; but, although the petition states that the widow Letourneur disposed of her property by will, giving to the present appellants their freedom, and bequeathed other slaves, no prayer is made that the executor testamentary, whoever he was, be cited to defend the suit. Magnan is called upon as legatee of three slaves, in the

same manner as Eliza Magnan is made party as legatee of two other slaves. They do not appear to have made any defence, nor is it seen what has become of the slaves bequeathed to them. At the same time, the remainder of the estate, consisting of the present plaintiffs, is unrepresented, and of course not defended. The suit, said to be founded on a claim of the appellees against the husband of the testatrix, as their tutor, is prosecuted to judgment *ex parte*, and the unrepresented estate is found debtor of the appellees, in a sum of fifteen thousand dollars, *and upwards*. Leaving these proceedings for what they are worth, we say that this judgment, whatever name it may have received in the court below, is not a judgment against the estate of the widow Letourneur; and that if the counsel for the appellants had ever gone the length of admitting the debt as liquidated by a judgment against the estate, it would not avail the appellees, no such judgment having in fact been rendered.

The situation of the parties to the present suit is, therefore, this: the emancipation of the appellants, under the will of their mistress, is not only proved, but acknowledged by the appellees themselves. On the other side, the appellees have not proved their claim against the

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estate of the widow Letourneur, either by judgment obtained against it, or in any other manner. The appellants must, consequently, be left in possession of their freedom.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the appellants be relieved from the custody of the sheriff.

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

DELOR vs. *MONTEGUT'S SYNDICS.*

If an insolvent leaves no estate, except one tacitly mortgaged to the vendor, the latter will be postponed till the law charges be paid.

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

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellant opposes the homologation of a tableau of distribution of the estate of the insolvent among his creditors. She claims, as vendor, a privilege on certain real property, which came to the hands of the syndics, and was by them sold as part of said estate.

It appears, from the statement of facts, that the real estate on which she claims a privilege, was sold by her to the insolvent, and that, at the time of the sale, by the syndics, a sum above that, of $25,000, for which it was adjudged to her agent, was due to her on account of the original price. It also appears by the tableau of distribution, that the amount of the sale of the insolvent's estate is $57,626; that the expenses incurred by the syndics, in managing the estate, after it came to their hands, including a commission on the amount at five per cent. are $5,312 83; $2,451 68 of which are admitted to be just, and to be properly deducted from the amount of the estate. Another sum of $10,636 67 is acknowledged as the aggregate of debts privileged on the whole estate. It further appears from the tableau, that, after deducting the whole amount of the expenses and debts, with a general privilege, a sum sufficient to discharge entirely the debts having special mortgages and privileges on the various immoveable property of the insolvent does not remain. The deficit is apportioned equally on the different mortgagees and persons having special privileges by a proportionate deduction from the amount for which each of the hypothecated tracts was sold.

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The plaintiff and appellant is the only creditor who complains of this arrangement. She resists it on two grounds:

1. The syndics are not, as she says, entitled to the commission charged or any other, because they have renounced to their right.

2. As she has a privilege and preference, as vendor, on the property which the syndics afterwards sold to her agent, she thinks she is not bound to contribute to the expenses incurred by the syndics, in the management of the estate, until every other part of it be exhausted; and on the event alone of a deficiency to discharge said expenses can, in her opinion, any demand be made on the produce of the property, on which her debt is privileged.

I. The terms, on which the first objection is stated, seem to admit that, if the syndics have not renounced their right to a commission of five per cent. on the property of the insolvent, they are entitled to it. Now, nothing is shewn to this court, or seems to have been exhibited to the parish court, from which it appears that they have renounced to their commission. It is, therefore, fair to conclude that they are entitled to it.

II. To arrive at a correct decision, on the second objection, it is necessary first to determine, whether the privilege of the vendor on the thing sold be higher than that of a mortgage creditor on the mortgaged property.

The rank of claims, secured by mortgage, is determined by the date of the deed or that of its record. When there are several of the same date, they concur. This takes place both in conventional and judicial mortgages, which must be recorded, in order to give them effect against third persons. As to tacit or legal mortgages, as these are not required to be recorded, their respective rank is fixed by the day on which they began to take effect, according to law, and those of the same day concur together. They likewise concur with judicial and conventional mortgages, without any preference over them, if their date be of the same day, on which the latter were recorded. *Civ. Code*, 470 and 472, *art.* 79 and 80.

From these provisions of the code, it seems that a dispute about rank in mortgages can only take place when the same property happens to be mortgaged to several persons, legally, judicially or conventionally, and then the preference which one may have over another is to be settled entirely by the date.

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It is further laid down that when, for want of moveable property, creditors (who have a privilege extending to immoveable and moveable property) demand to be paid out of the proceeds of the former, in concurrence with creditors who have a mortgage thereon, the payment must be made in the order of privileges enumerated in articles 73 and 75; and among those of the last article, is the privilege of the vendor. *Civ. Code*, 470, *art.* 77. Now, it is evident, from these regulations, that, if an insolvent surrenders no other property, except such as may be tacitly mortgaged to his vendors, and, on a sale for the benefit of his creditors, it does not produce a sum sufficient to discharge all the expenses enumerated in the 73d article, above the price for which it may be then mortgaged, they will be diminished by a deduction of said expenses. The privilege of the vendor is founded on a tacit or legal mortgage, which authorises him to pursue the thing for the payment of its price, even in the hands of third persons. A conventional one gives the same right. The vendor has a privilege or preference on the thing sold—so has a mortgaged creditor on what is mortgaged. Thus far, we perceive, that the rank and dignity of the claims are equal; but, when they conflict about the

same property, the mortgagee will always be postponed to the vendor—because the privilege of the latter must, of course, be prior in date, unless the purchaser had given a general mortgage on all his property, both present and to come; and, in such a case, although the mortgage would be anterior in date—yet the time of its affecting the thing bought, would be after the sale and delivery, and, consequently, the completion of the contract: so it could not lessen, much less destroy, the lien which the vendor has on for the thing sold for the price secured to him by a privileged mortgage, or a privilege. *Civ. Code*, 456, *art.* 29. This does not happen, when the mortgages, whether tacit or conventional, are limited and confined to distinct objects of the insolvent's estate. Then, they hold equal rank, each on the thing mortgaged, and ought to concur in the payment of all legal and necessary expenses, incurred in the management of the estate.

According to this view of the case we discover no error in the judgment of the parish court.

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

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

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STATE
vs.
EDWARD.

STATE vs. *EDWARD.*

APPEAL from the court of the first district.

A judgment will be reversed if the law on which it was rendered be repealed, before the cause be pronounced upon, in the supreme court.

MATHEWS, J. delivered the opinion of the court. The Attorney General has filed a libel against a slave, named Edward, praying a claim of forfeiture and sale, in favor of the state, on account of his having been legally imported.

The authority of the courts of this state to interfere in such cases, was derived from an act of the territorial legislature, passed on the 6th of March, 1810, respecting slaves imported in violation of the act of Congress of the 2d of March, 1807. 3 *Martin's Digest*, 664, *n.* 72. Since the appeal in the present case, the act of the territorial legislature has been repealed, and the repealing act is now in force. According to the provisions of the existing laws of the state, independently of the law of the United States, it is evident that forfeiture is not a consequence of the introduction of slaves into this state, and their introduction is no longer a violation of the laws of the state; and consequently a matter not appertaining to the jurisdiction of its courts.

The law under which the district court acted having ceased to exist, and all the jurisdiction of

the state court on the object of the present suit having ceased with it, the only thing left for this court to do, would be to give judgment in conformity with the law as it now stands, unless its obligation can be fairly tested on the ground of unconstitutionality. But the district court having dismissed the libel, which in our opinion is correct, according to the present existing laws, whatever it may be under the former, it is ordered, adjudged and decreed that the appeal be dismissed. 1 *Cranch* 103—110, 5 *id.* 280, 6 *id.* 329.

Moreau, Att. Gen. for the state, *Henry,* for the defendant.

DUBREUIL vs. *DUBREUIL.*

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

The court of probates cannot proceed to judgment on *ex parte* evidence.

MATHEWS, J. delivered the opinion of the court. The judge *a quo* certifies that the record contains all the matters on which the suit was heard before him.

Errors have been assigned according to the practice of this court, as apparent on the face of the record: 1. That there was no proof pro-

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duced at the trial to establish the existence of P. Dubreuil, the plaintiff and appellee; 2. That all the evidence introduced was illegal, having been taken *ex parte* and introduced on the trial, without the consent of the defendant and appellant. Other errors were assigned, which we deem it unnecessary to notice, as the appellant must succeed on that record.

It is clear from a view of the record, that no legal evidence was offered or heard on the issue between the parties, as it seems to have been all taken *ex parte* by the plaintiff, and ought not to have been received in the court below.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed; and this court proceeding to give such a judgment as, in their opinion, ought to have been given in the court of probates, it is ordered, adjudged and decreed, that the petition be dismissed with costs of suit in both courts; without any prejudice to the defendant in any prosecution which she may hereafter institute to have the mortgage mentioned in the answer, annulled and cancelled.

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

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JOUBLANC'S EX. vs. *DELACROIX.*

JOUBLANC'S EX.
vs.
DELACROIX.

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If there be a standing account between two persons & one of them produces his own checks, received from the bank, payable, to, and with the receipt of the other thereon: he will be entitled to credit, unless it be shewn that the checks were given for some other distinct claim.

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

DERBIGNY, J. delivered the opinion of the court. The defendant and appellant employed J. B. Joublanc in the direction of certain works, by him contracted for with the Orleans Navigation Company. Joublanc died, and the appellee, his executor, having found among his papers, an unsettled account, according to which a balance appeared to be due from the appellant, instituted the present suit to recover that balance. The accounts between the parties were submitted to arbitrators, and their final adjustment of them appears to this court correct and unexceptionable in every point but one.

The arbitrators have refused to allow to the appellant credit for some checks drawn by him on the Planters' Bank, and bearing Joublanc's receipt on the back. The motive, on which that refusal was grounded, was a consideration of the danger of admitting such documents as evidence of payment in countries, where men who have any intercourse of business or even of common friendship, are in the daily habit of lending to

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one another checks on the banks, or of giving them out upon any occasion where they want something to be done, paid or bought for them. That there exists such practice among men of business may well be the case; and yet it by no means follows that those, who receive money from them in that way, are in no case obliged to give some account of it.—A distinction must first be drawn between checks payable to bearer, and checks payable to a certain person or his order; the first surely are no evidence that any particular individual has received the amount; but the second, on which stands the signature of the payee, is, no doubt, sufficient proof of his having received the money. Yet, as it does not appear for what particular purpose that money was delivered, the mere evidence of its having been paid, could not, if alone, support an action for the reimbursement of the amount, for the presumption then would be that the money was paid because it was due. But in an action where the receiver of the check sues the drawer of it to obtain payment of an alledged debt, the drawer may surely exhibit the receipt of the plaintiff to prove that he has paid him so much. But again, as the receipt does not express the cause for which the money was given, this can be no more than *prima facie* evidence

of payment, which the plaintiff may contradict by shewing that the check was delivered on account of some other transaction.

It is said, however, on the authority of *Hayne* vs. *Barnett*, 3 *Espinasse* 196, *Peake* 256, 257, 370, that the receiver of the money is not bound to produce any proof that it was paid on some other account, but only some evidence that other transactions did take place between the parties. We do not think that the authorities cited support this position. When the plaintiff is proved to have received money from the defendant, if he wishes to exonerate himself from the presumption that it was given him in payment of the debt which he claims, he certainly ought to be able to ascribe the delivery of that money to some other transaction. But even supposing that he would prove enough by shewing that other transactions took place between him and the defendant, ought he not at least to satisfy the court that for those transactions the defendant used to deliver money in this manner? Nothing of this has been shewn in this case. Even the mere existence of other transactions between the parties is far from being satisfactorily proved.

Upon the whole, we are of opinion, that the three checks, which bear the signature and ac-

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quittance of Joublanc, must be considered as so much paid him on the unsettled account, which is the object of the present suit. These checks amount together to eight hundred and twenty-three dollars, from which must be deducted the four hundred dollars acknowledged by the deceased to have been paid him, and for which the defendant has been already credited. Thus, the further sum for which he ought to have credit, will be four hundred and twenty-three dollars, which taken from the final balance found against him by the arbitrators, to wit, nine hundred and ninety-one dollars and thirty-six cents, will reduce that balance to the sum of five hundred and eighteen dollars and thirty-six cents.

It is ordered, adjudged and decreed, that the judgment of the parish court be reversed; and that judgment be entered for the plaintiff for five hundred and eighteen dollars and thirty-six cents, with costs, save those of this appeal which will be paid by him.

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, MAY TERM, 1818.

LEFEVRE vs. *BONIQUET'S SYNDICS & AL.*

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LEFEVRE *vs.* BONIQUET'S SYNDICS & AL.

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

The syndics prayed for the homologation of the tableau of distribution, in which Cucullu, the other defendant, was classed as a mortgage creditor. The plaintiff, creditor by mortgage of the insolvent, under a deed of a later date than that of Cucullu, opposed the homologation.

A jury, to whom the case was submitted, found that the mortgage to Cucullu was executed in good faith, by an act under private signature, which was recorded in due time, on the production of the original.

An instrument, under private signature, may be recorded by the register of mortgages, on the production of the original.

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LEFEVRE *vs.* BONIQUET'S SYNDICS & AL.

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

Carleton, for the plaintiff. The parish court erred in giving judgment for the defendant, as the jury found that Cucullu's claim was not recorded, upon a compliance with the only formality, on which the law authorized the record of it, viz. the production of an authentic copy of the act.

The creditor, who wishes to have any act recorded, shall present, by himself, or a third person, to the register of mortgages, *an authentic copy* of the judgment or act from which the mortgage originates. *Civ. Code*, 466, *art.* 63. Mortgages, which are not recorded, or, which is the same thing, the record of which is not legally done, have not any effect against third parties. *Id.* 464, *art.* 52. No person can claim a privilege, unless he brings his case strictly under the law which grants it.

The register of mortgages has not the power to administer oaths—nor means of verifying the signatures of the parties to an act: the law has, therefore, imposed on him the obligation of requiring, before he records an act, the production of an authentic copy of it. Such a copy will enable any interested person to consult the ori-

ginal, and ascertain its genuineness. But, if the register records a private instrument, which is afterwards carried away, what means is there of access thereto?

In France, under a similar provision in the Napoleon code, the decisions of the higher tribunals have irrevocably settled the principle, that the record of a mortgage, *l'inscription hypothecaire*, is null and of no effect, if it be not attended with all the formalities which the law requires. *Dict. des arrets modernes, verbo Inscription.*

Moreau, for the defendants. The only question in this case is, whether the record of the mortgage on the production of the original act, be not as valid as if it had been on the production of an authentic copy of it?

The plaintiff relies to support the negative answer, on our civil code and several French decisions.

We will endeavor to shew that these decisions support the affirmative: but it is proper that we should point out a striking difference between our code and the Napoleon code, on the subject of mortgages, and the recording of them.

Here a mortgage may be by a public act, or one under private signature. *Civ. Code*, 453,

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art. 5. In France, it must be by a public act. *Nap. Code*, 2127. Here the record of it is made by a transcript of the act. *Civ. Code*, 465, *art.* 52. Not so there—a note, furnished by the creditor, of the names of the parties, the amount, date, &c. is alone copied. *Nap. Code*, 2148. The only similarity, in the requisitions of the two codes, is the production of the act. There the production of the *original en brevet*, or an authentic copy is required. *Id.* Here an authentic copy alone is spoken of. *Civ. Code*, 467, *art.* 63.

Is the record void for want of the production of an authentic copy, when this has been supplied by the production of the original act?

Legislative dispositions, expressed in *imperative* words, do not occasion the nullity of an act in which they are disregarded, when this nullity has not been expressly pronounced. 1 *Jurisp. Code Civ.* 65, 69. It is otherwise when *prohibitive* words are used. *Code Civ.* 5, *art.* 12.

It is true, our statute imperatively prescribes the production of an authentic copy of the act; but it does not pronounce the nullity of the record, in case this be not done.

But, the plaintiff's counsel contends that, as the statute has provided that the rank of mort-

gage creditors shall be regulated by the date of the record of their respective acts, in the manner prescribed by law, the record is null, if it be not attended by every requisite of the law.

This question was agitated in France, and there are several decisions upon it. According to Merlin, they amount to this: although the omission of essential formalities, prescribed for the recording of mortgages, renders the recording void, according to the principle that formalities, which are of the substance of an act, ought to be observed, under pain of its nullity, it is otherwise with regard to formalities, which, though prescribed by law, cannot be considered as indispensable, and as part of the substance of the act. 6 *Rep. de Jurisp.* 221, 222, § 5, *n.* 3. Merlin afterwards examines the formalities, prescribed by the Napoleon code, the omission of which is a cause of nullity, without such a nullity being pronounced. *Id. n.* 4, 7 & 12.

According to them, almost every particularity required in the note, which the creditor is required to furnish, must be inserted therein, excepting a few, however. So the omission of the first name, *(prenom)* the profession of the party, &c. is not a cause of nullity. Such particularities, though mentioned in the law, have not been considered as sufficiently important to

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occasion the nullity of the act. Merlin thinks, that the authentic copy of the deed of mortgage, of which the Napoleon code speaks, is not of so material importance, that the authentic act, or even an unauthentic copy, may not be offered in its stead, and that this circumstance will not occasion the nullity of the registry. *Rep. de Jurisp. verbo Inscription Hypothecaire.* It appears his opinion prevails in France. 2 *Persil, Regime Hypothecaire*, 23, 24, *n.* 4, *sur l'art.* 2148, *du Code Napoleon.* He cites a judgment, in which it was decided, that the record of a judgment by default was valid, although made before the expedition of the judgment. 1 *Id.* 34, *n.* 30 & 31. A report of that judgment is found in 10 *Sirey, part.* 2, 39.

Evidence of the authenticity of the act produced is required solely for the safety of the register of mortgages—it is not, in other respects, an essential formality. In cases of acts under private signature, on the production of the original, this officer is as perfectly safe, where the signature at the foot is known to him, as if he was transcribing a notarial copy of it, and more so: notaries ordinarily recording acts under private signature, without receiving any evidence of their authenticity.

MATHEWS, J. delivered the opinion of the court. This case must be decided by the application and interpretation of a few articles of our code. It is clear that conventional mortgages may be granted either by an authentic act, made in the usual form of contracts, or by an act under private signature. *Civ. Code* 453, *art.* 5. But, judicial and conventional mortgages cannot operate against third persons, except from the day of their being legally entered in the office of the register of mortgages: and, in order to have any act registered in that office, the creditor, who desires it, is either by himself, or some other person, to present to the register an authentic copy of the judgment or act from which the mortgage originates. *Id.* 454, *art.* 14, 466, *art.* 63.

In applying these general provisions of law to particular cases, no obscurity or difficulty could occur, if mortgages could be granted by authentic acts alone: for of such, copies properly certified are on all occasions used instead of the originals. *Peytavin vs. Hopkins, ante* 438. But our laws recognize mortgages granted by acts under private signature, as well as sales of immoveable property and slaves; the latter of which must be recorded in the office of a notary public, in order to give them effect against third

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persons. The rules of law relating to acts of sale (although cited and relied upon by the plaintiff's counsel) it is believed, are not applicable to the registry of mortgages, and give no aid in the decision of the question under consideration. We will, therefore, examine only the law on the subject of mortgages, to every part of which it is our duty to give full force and efficacy; provided it can be done without leading to gross absurdity and palpable injustice.

Mortgages may be granted by acts under private signature or by those executed in a public and authentic form. When they are offered to be recorded the provision of the law is, that an authentic copy must be produced to the register. This provision is also strictly applicable to judicial mortgages; for the original judgment cannot be removed from the custody of the court, in which it was rendered. It may also be properly applied to conventional mortgages passed before a notary; because, as to such instruments, authentic copies are always legal evidence of the contracts which they purport to prove.

The only thing necessary to give effect to mortgages against third persons, is that they be recorded in the office of the register of mort-

gages, in the manner prescribed by law; which is effected by presenting copies, properly authenticated, of public acts, as judgments and notarial instruments.

But, it is self-evident, that nothing could be more absurd than to require the exhibition of an authentic copy of an act under private signature—when, it is by no means clear that such a copy can, in any way, be obtained. To interpret the law on this subject, so as to require an authentic copy of a mortgage, under private signature, would be to annul entirely that provision of the code, by which such acts are authorized, and in open violation of a sound rule, for the interpretation of laws, which requires that they should be so construed, *ut res magis valeat quam pereat.*

From this view of the subject, we are of opinion that, in cases of mortgages granted by acts under private signature, it is sufficient for those, who intend to claim a benefit and privilege under them, to present the original instrument to the register, to be recorded. When recorded, as directed by law, if there be nothing fraudulent in them, they ought to be held as good and valid against third persons, without any previous recording by a notary public.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and the cause sent back to that court, with directions to allow the defendant and appellant, Cucullu, the privilege of a creditor, by a mortgage legally recorded; and it is ordered, that the plaintiff and appellee pay costs.

REBOUL vs. *NERO.*

In the Spanish colonies, land was not assigned to the Indians by actual survey. They were permitted to occupy a specified spot, and the law gave them a right to one league around it.

APPEAL from the court of the second district.

DERRIGNY, J. delivered the opinion of the court. A tract of land, now in the possession of the defendant and appellant, is claimed by the plaintiff and appellee, by virtue of a Spanish grant, in due form. The appellant's title is a sale from the Indians, duly authorized by the government, anterior to that grant. Both titles are, therefore, complete; and the question is only whether the second in date interferes with the first.

The land in dispute lies on bayou Plaquemine, at the distance of about twelve arpens from its entrance. It was first surveyed on the application of the widow Schlater, the grantee,

and was then represented as vacant; but a survey of the land, purchased from the Indians, by Antoine Lanclos, under whom the appellant claims, having been made shortly after, that purchase was found to include about three-fourths of the land granted. Whether the situation of that Indian purchase was correctly ascertained, is now the question.

It appears that the Chetimacha Indians, Lanclos's vendors, had been originally settled at some place much lower down the bayou Plaquemine than the spot of which Lanclos's purchase is said to be a part; but that, on account of the overflowing of their land, they went further up the bayou, from and to which place they removed, it seems, as occasion required. Which was their principal abode, and whether they finally quitted the one for the other, cannot be ascertained from the testimony, most part of which is vague and contradictory. But there is positive evidence, and that of great weight, that, at the time the Indians applied for permission to sell what they called their upper village, the situation of that land was recognized by the Spanish government to be somewhere in the neighborhood of the widow Schlater's plantation, from whence arose the clause in their bill of sale, that "the land should be taken behind hers."

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The manner of locating the lands assigned to the Indians was not by fixing their boundaries by actual survey. They obtained permission from the government to settle on a certain spot; and round that spot they were by law entitled to possess an extent of one league. *Recop. de Ind.* 6, 3, 8. In the present case, we do not see that the Indians were placed by order of the government on any particular spot towards the upper part of the bayou Plaquemine. But, what amounts to the same thing, we see that the lands, which they asked permission to sell in that neighbourhood, were recognized by the government as theirs. Where did those lands lie? They lay not far from the plantation of the widow Schlater. Where was or had been the Indian village from which these lands depended? The surveyor, who measured out the widow Schlater's grant, adjoining her plantation, says that he ran his line through the place where the main village or greatest number of houses stood when the Indians lived on that land; that is to say, through the very center, round which the land of the Indians extended one league. Thus it is ascertained beyond a doubt that the Indians had a claim to all the land which lay between that village and the lines of the widow Schla-

ter's plantation, for there is not one league's distance, in any direction, from the centre of the village to any part of the lower boundary of that plantation.

But Lanclos did not buy all the land of the Indians: he bought only thirty-five arpens front on the bayou, with the ordinary depth. Where are those thirty-five arpens located? They are undoubtedly situated where the commandant, Croker, with the assistance of the vendors, ascertained them to be. The grant to the widow Schlater had been made, as all grants were, *sin perjuicio de tercero,* provided it did not interfere with the rights of third persons. Upon a representation that it did, the competent authority, to wit, the intendant, with the advice of the assessor, ordered a verification to be made by the commandant, under the direction of the surveyor-general. That verification took place in the presence of all parties, or the parties duly called, and the grant was found to interfere, as represented. What more certain rule than this survey can this court follow to fix the boundaries between the parties; moreover, when it is considered that not only the spot in dispute, but all the intermediate space between the Indian village and the lower boundary of the widow Schlater's plantation was included with-

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in the league allowed by law to the Indians round their villages?

It is, therefore, 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.

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

CUFFY vs. *CASTILLON.*

A master, who has agreed to free his slave, for a fixed price, cannot be compelled to free him, after he has received a partial payment only.

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

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellant claims her freedom, and that of her children, under a contract between her former master and Cuffy, a freedman, her father. A copy of the contract comes up with the record, as well as the proceedings, which took place, in a Spanish tribunal on that contract, by which it appears that a judgment was rendered, fixing the value of each slave, who was to be manumitted, under the stipulations in the contract, and imputing a payment of 316 dollars to the benefit of one of them.

By what rule of law, or principle of justice, the Spanish tribunal acted in its decision, it is useless to enquire. The matter must be considered as a *res judicata*, and is of little importance in deciding the cause, as it is now placed before this court.

The expressions of the contract itself shew clearly that Andrew Almonaster, the defendant's first husband, and former master of the plaintiff, bound himself to liberate the slaves mentioned therein, only on the condition of receiving 3400 dollars, the price of their liberty, stipulated between him and Cuffy. It does not appear that the sum or any part of it was paid to him or his representatives, except 316 dollars, which were imputed on the price of John Baptist, one of the four slaves named in the contract, by the judgment of the Spanish tribunal, from which no appeal appears to have been taken, and which fixes and determines the appropriation of that sum. But even that sum, were it now to be considered as a general payment, on the contract, for all the slaves named in it, could not avail the present plaintiff.

Her counsel relies much on principles of the Roman law; *quoties dubia libertatis interpretatio est ff.* 50, 17, 20, and the law *de servo suis nummis empto*, 40, 1, 40, in which, among other

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things it is declared, § 10, that, although the whole price of his freedom should not be paid by the slave, nevertheless he acquires it, if the deficiency be afterwards supplied by his labor, or if he should acquire it by his industry. As to the rule requiring the interpretation, in doubtful cases, to be in favor of freedom, it is sufficient to observe that no one rule of interpretation in law or contracts ought ever to be considered of so much consequence, as to exclude the operation of others, equally founded in justice and common sense. Freedom must not be so favored by interpretation, as to depart entirely from the intention of the contracting parties, apparent on the contract itself.

The law which authorizes the *residue* of the price to be supplied by the labor of the person claiming his freedom, as purchased with his own money, or by the circumstance of acquiring property, is, in our opinion, (and as insisted on by the counsel of the defendant) applicable only to such persons as are made free *instanter*, on condition of paying a certain sum *in futuro*. In such a case, when a part of the price of the person is paid, and the freedman continues to labor for his former master, the value of his labor may be fairly imputed, as a payment: or if he be suffered to act as a free person, and ac-

quire property, he may be compelled, by legal proceedings, to complete the payment of the price of his freedom.

But, in the case under consideration, the master contracted to give the deed of emancipation of the children of Cuffy, when the latter should have satisfied and paid him 2400 dollars. This mode of expression demonstrates the intention of the master to liberate them *in futuro*, after the fulfilment of the condition, on which alone they were to be freed, viz: the complete payment of the price of their freedom. On tendering the full amount of the sum for which he promised to give them their freedom, (at any time perhaps) they would be entitled to demand their freedom. But, without payment, or an offer to pay, they surely can claim no benefit, under the contract on which they rely. This opinion we believe to be in conformity with every just rule for the interpretation of contracts.

It is supported by the authority to which the plaintiff's counsel has resorted *ff.* 40, 7, *de statuliberis*. In the fifth paragraph of the third law which declares that the *statuliber* must fulfil the condition on which he is to be entitled to his freedom, provided he be not hindered, and the condition be possible; it is laid down that if the condition on which the slave is to be free,

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be the payment of a certain sum to the heir of the master, and he does not pay the whole, he shall not obtain his liberty. *Si decem jussus dare & liber esse, quinque det; non pervenit at libertatem, nisi totum det.*

We are of opinion that there is no error in the judgment; and it is therefore ordered, adjudged and decreed that it be affirmed with costs.

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

DOUBRERE vs. *PAPIN.*

APPEAL from the court of the first district.

The judgment is valid, if the reasons of giving it appear, on reference to the petition.

MATHEWS, J. delivered the opinion of the court. This is an appeal from a final judgment rendered against the bail of the defendant.

The case comes up on a bill of exceptions to the opinion of the district court, overruling the opposition of the counsel of the bail, on a rule to shew cause why judgment should not be entered against him.

The causes shewn were, that judgment had been rendered for the defendant on the 17th of September, 1817, and an appeal taken by the plaintiff, which did not suspend the execution, and so the bail was discharged—and that the

judgment rendered against the defendant is void, because the judge did not give his reasons for rendering it; so that bail cannot be made liable on a void judgment.

The first of these causes is entirely without foundation. It appears from the record that no judgment was rendered for the defendant, since the persons who are now prosecuted as his bail, bound themselves as such.

The second cause was properly overruled. For, admitting that a judgment, without reasons, is void, (on which we give no opinion,) yet it appears, in examining that of the district court, in this case, that it is supported by a reason or motive, the best, perhaps, that could have been given: proof that the defendant owed the amount. It is true, that this reason is not given *in his verbis*—but, taken with a proper reference to the plaintiff's petition, it amounts to this. *Laverty & al.* vs. *Gray & al.* 4 *Martin*, 463, *Sierra* vs. *Slort*, *id.* 316, *Urquhart* vs. *Taylor*, *ante* 202, *Porter* vs. *Adams*, *ante* 201.

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

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

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LAFON
vs.
RIVIERE.

LAFON vs. *RIVIERE.*

APPEAL from the court of the first district.

If the first citation be not served, the appellant is entitled to an *alias*.

A clerical error, in describing the return day, will not prejudice the party.

MARTIN, J. delivered the opinion of the court. In this case, the district judge made the appeal returnable on the 6th of April last—the citation was irregularly served, and the appellant took out a new citation, returnable on the first day of May, instant, citing the appellee to appear on an appeal, returnable on the same day. The appellee prayed the citation might be set aside, as there was no appeal returnable on that day.

We are of opinion that, in case the first citation be not served, or be irregularly so, the appellant may take, under the 9th section of the act of 1813, a new citation, returnable on the first day of the next succeeding term—that in the present case the error of the clerk in irregularly describing the appeal, as returnable on the day on which the citation was by law to be made returnable, is a clerical error, which cannot work any disadvantage to the parties.

It is therefore ordered, adjudged and decreed that the appellant take nothing by his motion.

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

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DURNFORD
vs.
BARITEAU.

DURNFORD vs. *BARITEAU.*

If illegal interest has been paid, the difference between five per cent. and the rate at which it has been paid, must be imputed on the principal.

APPEAL from the court of the first district.

The plaintiff obtained a writ of seizure on a notarial instrument, executed by the defendant, who had a provisional injunction, on a plea of payment. The parties proceeded to trial, and there was judgment for the plaintiff—the defendant appealed.

The whole evidence came up with the record, and consisted only of the deposition of a witness. He deposed that, about two years ago, the plaintiff desired him to call on the defendant for the principal of the claim in suit; but the defendant always put him off—that he knows the defendant paid the interest, at the rate of two per cent. per month, during the last four months—that he has given a receipt, dated April 7, 1817, for two months of that interest—that the plaintiff told the witness the defendant owed him for some syrup—that he knows the three endorsements on the notes produced to be in the proper handwriting of the plaintiff—that the plaintiff never spoke to him of the interest paid by the defendant—that he never received any note for the plaintiff from the defendant—that

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the plaintiff negociated his own affairs with the defendant—all which he knows, having frequently seen the defendant at the plaintiff's.

The notes produced were of the defendant to the plaintiff, endorsed, in blank, by the latter; one of December 31, 1816, for $449 16, payable February 4, following—another, of February 19, 1817, for $467 79, payable on the 4th of April, 1817—the last of the 4th of April, 1817, for $472 34, payable one month after date.

At the trial, the defendant offered to prove, by a person who had been agent for the plaintiff for the three last years, that the plaintiff is a noted usurer, and did no other business but to lend money at an illegal interest, and to shew what interest the plaintiff is in the habit of taking, in his transactions with the people. The court refused to examine the witness, and the defendant excepted to its opinion in this respect.

Morel, for the defendant. The defendant has paid the plaintiff interest above the legal rate, and therefore, in conformity with the civil law, is entitled to a credit on the notes for the amount thus paid beyond the legal interest. *Les interets payes au dessus du taux legal sont sujets a repetition (par imputation sur le capital qui est encor du.) Dictionnaire du Digeste*

100, *verbo condictio indebiti, n.* 10. *Justin. digest,* 12, 6, 26, with the commentary of Godefroy, *Pothier Pandectae Justinianeae,* 22, 1, *n.* 36. *Voet in Pandectis,* 12, 6, *n.* 13. 1, *Clef des Lois Romaines,* 507, *verbo, Interest.* 5 *Rodriguez Digesto Teorico Practico,* 126. 7 *Promptuani Mullesi,* 703, *n.* 11. The amount paid is proved by the receipt of the plaintiff's agent, and by the notes of the defendant in favor of the plaintiff, which have been paid, and are now in the hands of the defendant. And as there was no written convention or other account of the interest, it must be reduced to the legal rate, five per cent. per annum.

If the defendant be entitled to credit, on the principal, for the excess of interest he has paid, he had a right to shew the ordinary rate, at which the plaintiff lent his money to others, and the judge erred in rejecting the witnesses offered for that purpose.

Hennen, for the plaintiff. Whatever payment of interest has been made to the plaintiff, above the legal rate, was for the forbearance of exercising a legal right of enforcing payment; and that being a valid consideration founded in equity, the defendant has no right to recall that payment: *volenti non fit injuria.* At all events,

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the interest can be reduced only to 10 per cent per annum, as there is written evidence between the parties of an agreement to pay more than the legal rate. The notes offered in evidence by the defendant, cannot be considered as a payment of the present demand: they carry on the face a consideration, and unless proof be produced that they were given in payment of this claim, the court is bound to consider them as the payment of some other debt.

The judge did not err, in rejecting witnesses offered to prove what interest the plaintiff may have received in other cases. On the plea of payment by the defendant, the plaintiff could not imagine that it was necessary for him to be provided with testimony to contradict the witnesses offered. Indeed if usury had been pleaded, the testimony could not have been received.

MARTIN, J. delivered the opinion of the court. We are of opinion that the district court did not err in rejecting the evidence thus offered. The defendant has relied on no other plea than that of payment. This plea may give the plaintiff sufficient warning, that the defendant contends that he has received something which ought to go to the discharge or reduction of the

claim; but it cannot so far put him on his guard as to induce him to come prepared to defend his general conduct, or to meet any charge, in respect to his transactions with other people.

The defendant contends that the court below erred in refusing to consider three notes which he introduced, as payment of monies in discharge of the bond, and in refusing to allow a deduction for the excess of interest, or illegal rate of it, proven by the witness.

We cannot see on what grounds it can be ascertained or presumed, that the notes were given in part payment of the plaintiff's claim. A note is *prima facie* evidence of a new debt; if its object be the payment of a former one, that circumstance must be proven.

The defendant having proven payment of interest, at the rate of eight per cent. for four months, (two per cent. per month,) while the legal interest during that period, (at five per cent. a year,) is only one and two-thirds per cent.—the excess, six and one-third per cent. is a payment which ought to be deducted from the principal. We cannot agree that the previous interest being presumed or proven to have been paid, must be presumed to have been so, at the rate of two per cent. per month. Neither can we think, with the plaintiff's counsel, that

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the defendant cannot avail himself, under the plea of payment of what, in the opinion of the counsel, is hardly available on the plea of usury. Under a plea of payment, the defendant may give evidence of any money paid by him to the plaintiff, and the court will deem it to have been paid in discharge of the debt, if the plaintiff cannot shew that he has a right to apply it otherwise.

Neither can we allow conventional interest, at any rate between five and ten per cent. a year, because conventional interest must be fixed *in writing*. *Civ. Code*, 408, *art.* 32.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and this court doth further order, adjudge and decree, that the defendant be allowed the payment of two hundred and six dollars and sixty-six cents and two-thirds—and that this sum, being deducted from three thousand one hundred dollars, the plaintiff do recover from the defendant the balance, viz. two thousand eight hundred and ninety-three dollars and thirty-nine cents and one-third, with costs in the inferior court, and interest on the said balance, at five per cent. from the institution of the suit till paid—and

that the plaintiff and appellee pay the costs of the appeal.

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DELACROIX vs. *ORLEANS NAVIGATION CO.*

APPEAL from the court of the first district.

If it be stipulated that a certain part of the price of a work shall be paid, when one third of it is done, & another when the second third is done, this is not such a division of the work as to preclude the employer from complaining of any deficiency on any part of it, after the two first payments are made.

DERBIGNY, J. delivered the opinion of the court.* On the 10th of October, 1812, the Orleans Navigation Company contracted with the late Daniel Clark, for the digging of the canal Carondelet and its basin. No time was fixed within which the work was to be performed; but it was covenanted that the undertaker should employ at the said work, until its completion, not less than sixty labourers. Daniel Clark having died shortly after, the contract was, with the consent of the company, assigned by his executors to Francis Dussuau Delacroix, who thereby put himself in the place and stead of said Clark.

It appears that Dussuau Delacroix neglected to keep at the said work the stipulated number of negroes, owing to which the work suffered

* MARTIN, J. did not join in this opinion, being a stockholder of the company.

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much delay. After several remonstances on the subject, the company, on the 23d of December, 1816, brought suit against him for damages, to the amount of his bond, and for the rescision of the contract. Propositions for some amicable arrangement were then made; and, after some debate, it was finally agreed between the parties that, "provided Dussuau Delacroix would place eighty good working negroes on the canal, on or before the 15th of January then ensuing, and have the said number constantly employed in said work until it should be completed, agreeably to contract, the suit instituted against him would be suspended; the company reserving to themselves the right of bringing it to trial, at any moment they might discover that the said number of eighty negroes were not regularly and constantly employed." Upon those terms then, the undertaker went on with the work, and was, if he should adhere to them faithfully, to be exonerated from any responsibility for past neglects and delays.

It appears that, from the date of this compromise, the work was so carried on as not to incur the disapprobation of the company, until the 2d day of April, when the undertaker, pretending that the work was completed, wrote to the company to deliver it, and withdrew the

greatest number of his hands, leaving only such as were necessary to remove the dam, at the entrance of the canal into the basin.

On the 5th of April, a committee, appointed by the company, to examine the works which the undertaker offered to deliver, found them incomplete and defective; whereupon they determined to prosecute their suit to trial—and Dussuau Delacroix, having on his side brought suit for the last instalment of the price of his undertaking, both causes were consolidated and tried together. With a verdict and judgment, reducing Dussuau Delacroix's claim to fifteen thousand, instead of sixteen thousand dollars, amount of said instalment, both parties have been dissatisfied, and have appealed.

The first question to settle is, whether the undertaker did or did not fail to comply with the stipulation last agreed upon between the parties, whereby he was bound to keep constantly employed, at the canal, eighty good negroes, until the completion of the work, agreeably to contract; for, if he has fulfilled that engagement, he is discharged from any responsibility for past delays. On this point, then, we are satisfied that, until the 2d of April, 1817, the undertaker did perform that obligation. The testimony of the overseer, which we see no

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good reason to disbelieve, leaves no doubt on that subject: and, although he states that there were always some of the negroes, sometimes as many as twenty-five or thirty, sick, as it does not appear how long the same individuals remained disabled by sickness, no reproach can attach to the undertaker for not having replaced them—that evidence we would deem sufficient, even if standing alone, to establish this fact; but the silence of the company, who had declared their intention to prosecute the suit, at any moment they might discover the required number of negroes were not regularly and constantly employed, is a circumstance strongly corroborative of the testimony by which it is attested, that the required number was there.

On the 2d of April, the undertaker wrote to the company that the work was completed, and called upon them to receive it: at the same time, he withdrew the greatest number of his hands. It appears, however, that something still remained to be done, and that a part of the work, to wit, the basin, was not made according to the dimensions fixed by the contract. One of the answers of the undertaker to this is, that he had formerly delivered to the company the two first thirds of the work, in which the defects complained of are to be found—that the com-

pany had received them and paid for them—and that, as to the last third, it was not pretended that there was any defect in it.

This position does not appear to us to be supported by the expressions of the contract; it is there stipulated, that a proportion of the whole price shall be paid when one-third of the work shall have been done—another proportion when the work shall have progressed two-third parts—and the remainder when the whole shall be complete and finished. This is evidently intended for nothing more than fixing the terms of payment. The work itself is not divided into parts; even the manner of carrying it on is left at the disposal of the undertaker. If, instead of digging the canal to the whole depth, as he advanced, he had chosen to dig the whole length, to a certain depth, at first—or if, instead of beginning at one end and advancing regularly, it had suited him to dig separate parts at first, no such thing as a delivery of one-third could have taken place. Neither can any such delivery have been made, according to the manner in which the work appears to have been conducted. No determinate and fixed parts of the canal and basin were measured out as composing the first and second thirds of the work. The parties themselves do not seem to know

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where that first and where that second third ended. No formal delivery of any part was made, and no discharge given. The money was paid, according to contract, when the work was considered as having progressed, first to one-third, and then to two-thirds, of the undivided whole; and the last payment was to be made when the whole should have been complete and finished.

We think therefore, that on completing and finishing the work, the delivery of the whole was to take place, and that for any defects, then found in any part of that whole, the undertaker is answerable. We will now proceed to examine if there are such defects, and in what they consist.

It is in evidence that, when the undertaker tendered the canal as finished, some small bars, two of them the remains of dikes, still obstructed the navigation, and that, in the whole length of the canal, there was dirt, at several distances, which had fallen from the caving in of the banks. The whole of that work was undertaken and finished, by one of the witnesses, for eight hundred dollars; so that making allowance for such filling as may have been caused by the crevasse of 1816, and for the tumbling in of the banks, nothing can be absolutely ascribed to the neglect of the undertaker, but his having left

some inconsiderable remains of the dikes, at both ends of the canal.

As to the basin, it appears that it falls short of the dimensions fixed by the contract; but, when it is considered that the undertaker received his measurement from the engineer of the company, and that, from the mouth of that engineer himself, we hear that the company gave him orders to change the dimensions of the basin, on the north side, we can no longer view the description in the contract as the invariable rule of the parties. Yet the company had complained of this deficiency, on the north side of the canal, until the declaration of their own agent compelled them to give up that part of their claim. If we add to this circumstance the presumption resulting from their long silence ever since the digging of the canal was finished, much doubt must arise, as to the cause of the deficiency found on the south side. The engineer's de position on that point does not remove that doubt; he says that he measured the east line to its end on the south, and *could not* be mistaken in that measurement, as he employed, for that purpose, a chain of sixty feet; that Joublanc, the overseer of Dussuau Delacroix, fixed piquets along the line as he measured it, but that he did not put a stake at the south end,

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on account of a bridge in the way to which the stake would have been, and that he accordingly fixed one within the line to serve him as a mark. But he also states that he gave to Joublanc the perpendicular on the south side, and that this south line measured one hundred and eighty feet. He does not say that he marked and picketed that south line: but, by referring to the contract, we see that it was his duty to do it or see it done. If he did, the presumption would be, that his marks were attended to; if he did not, the neglect is his, and consequently the company's. To the uncertainty resulting from this testimony must be added the diffidence with which it ought to be received: for the witness, however fair and honorable his character, was called upon to declare whether or not he had committed a mistake, the result of which was of considerable prejudice to his employers, and, in such a situation, must naturally be considered as under the influence of some bias in favor of his own accuracy.

Upon the whole, we are of opinion that the damages granted by the jury to the company, under a full view of all the circumstances of the case, do not so evidently appear out of proportion with the injury, as to authorize this court

either to increase them, or to remand these cases to be tried anew.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed; and that the costs of these appeals be supported equally by the parties.

Seghers for the plaintiff, *Ellery* and *Duncan* for the defendants.

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ROBIN'S WIDOW & AL. vs. *HIS EXECUTORS.*

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

If the executors present their accounts, which are contested, and a decree be made for the balance; and they afterwards receive monies of the estate, they cannot present an additional account, including these monies, and some of the items in the first account, with additional charges, not before produced.

DERBIGNY, J. delivered the opinion of the court. On the 30th October, 1816, the executors of the late Andrew Robin, appellees in this case, presented their account in the court of probates of New-Orleans: the account was contracted by the widow and heirs of the deceased, appellants, and after a course of proceedings which it is unnecessary to mention here, the court of probates rendered a final decree, by which the appellees were ordered to pay to the appellants, over and above the balance by them acknowledged, a sum of 1682 dollars, and 85 cents, and also to deliver into their hands the several

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items of *reprise*, or uncollected debts, mentioned in their account.

It appears that, pending the proceedings on the approbation of the account, to wit: on the 11th March, 1817, the appellees received from the sheriff the amount of a judgment, which figured in their account among the uncollected debts—and that this sum, not being comprehended in the balance which was struck off in favor of the appellants by the decree of the 30th of April, 1817, the appellees presented an additional account, in which they included that sum, together with several of the items already mentioned in the decree, and some additional charges, not yet produced. The appellants objected to this proceeding, alledging that the jurisdiction of the court had ceased from the moment that the decree of the 30th of April had been rendered—and that for all sums or articles not delivered, the appellees were bound to settle with them, without any further interference of the court. Their objection was overruled, and another decree was rendered, from which they have claimed the present appeal.

We think that the decree of the 30th of April, awarding a balance in favor of the appellant, and ordering the appellees to pay it to them, as also to deliver into their hands all the

items of uncollected debts, was a final settlement of the curatorship of the appellees, which put an end to the jurisdiction of the court of probates; and that, after such a judgment, they had no right again to bring the appellants into court, to hear new accounts and debate new charges.

It is, therefore, ordered, adjudged and decreed, that the decree of the court of probates, bearing date the 11th of June, 1817, be annulled, avoided and reversed; and that the appellees pay the costs of this appeal, and the costs accrued in the court of probates since the decree of the 30th of April.

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

GENERAL RULE.

The appellee must answer within five days after the appeal is filed.

Every party, appellee, having been duly cited to appear in this court, shall be allowed five clear days, from that of the filing of the appeal, to answer thereto; and, if the said party shall not answer within that period, the cause may be set down by the appellant and this court will proceed to hear it *ex parte*, at the time appointed. *See* 1 *Martin's Digest*, 442, *n.* 6.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District. *June*, 1818.

EASTERN DISTRICT, JUNE TERM, 1818.

STEARNS *vs.* RUST.

STEARNS vs. *RUST.*

Whether the certificate of a justice of the peace, in Massachusetts, authenticated by the governor, shewing that a power of attorney was acknowledged before him, be legal evidence of such an acknowledgment?

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

MARTIN, J. delivered the opinion of the court. The plaintiff presented his petition to the court of probates, stating that Solomon Stearns, his son, died intestate, and without issue—that the defendant was appointed curator of his estate; wherefore he prayed that the defendant be directed to render an account of his curatorship, and to pay the balance in his hands.

The defendant answered, denying that the petitioner is the deceased's father, and that he,

the curator, received as much of the estate as is stated in the petition.

Rogers, the special administrator, deposed, that he found, in the deceased's trunk, a letter from one William Stearns, from the contents of which he understood him to be the deceased's father; he accordingly wrote to him, and the letter has been presented to him by William Stearns, junior, a son of the petitioner. He understood, from several persons, the deceased's father resided in Massachusetts. He was satisfied that William Stearns, who handed him the letter, was the son of William Stearns, the deceased's father; he has heard that he is, and it is so reported in New-Orleans.

Braynard deposed he is acquainted with the family of the Stearns—that they reside at Aburnham, in Massachusetts, (the place to which Rogers directed his letter.) In the spring of 1816, he saw, in Boston, W. Stearns, the father, who informed him he had received Rogers' letter, apprising him of the death of his son in New-Orleans. It was generally reported in Boston, that W. Stearns had lately lost a son in New-Orleans. From his knowledge of the family, he has no doubt of the petitioner being the father of Solomon Stearns, deceased. The petitioner resides at a distance of 48 miles from

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the witness, who saw him, for the first time, in 1816, when he came to inquire of the witness about the affairs of the deceased. The witness's wife, as he understood from her, was intimate with the family of the Stearns, both before and after her marriage, and one of the petitioners' nieces spent some time at the house of the witness, in Boston, and at her request his wife desired him to make inquiries about William Stearns.

Fitz deposed that, about eighteen months ago, he saw the petitioner in Boston, at a Mr. Pratt's, where he had come to inquire about the estate of his son, lately dead in New-Orleans, with a view to obtain information respecting the formalities to be fulfilled, to obtain the estate, and some account of the person in whose hands it had fallen—that he was accompanied by W. Stearns, junior, his son, whom he was about to despatch, on that errand, who is now here, and brought a letter from Pratt to Shepperd and Touro, his correspondents.

A power of attorney from the petitioner to William Stearns, junior, empowering him to receive that estate, was produced, acknowledged by him before a justice of the peace in Massachusetts, whose certificate was authenticated by the governor of that state.

The defendant objected to the introduction of this power, as not legally proven.

The judge of probates ordered the curator and defendant to account and pay the balance to W. Stearns, junior, the bearer of the power of attorney.

From this judgment the curator appealed.

This court is of opinion, that the court of probates correctly admitted that the issue between the parties, as to the right of the petitioner to the estate, was proven; but, in regard to the power of attorney, as we are without any mean of ascertaining whether it was legally executed, according to the laws of Massachusetts, we cannot say that it ought to have been admitted.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and reversed; and it is ordered, that the defendant and curator do account with and pay the balance due to the petitioner, and that the costs in this court be paid by the appellee, and in the court of probates by the appellant.

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

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MONTSERRAT vs. *GODET.*

APPEAL from the court of the first district.

A judgmeut by default must contain the reasons on which it is grounded.

MATHEWS, J. delivered the opinion of the court. The defendant suffered judgment to go by default against her, on an unliquidated demand, and the judgment was made final, and the amount due to the plaintiff ascertained and fixed by the court. The defendant appealed, and the record comes up, without a statement of facts, bill of exceptions, or certificate that it contains all the documents and evidence on which the cause was heard.

Several errors have been assigned by the appellant's counsel, none of which, in the opinion of this court, authorize the reversal of the judgment, except one, viz. the neglect of the judge to adduce the reasons on which his judgment is founded, as required by the twelfth section of the fourth article of the constitution of this state. This is imperative on the judges, and requires them, *in all cases*, to adduce the reasons on which they ground their definitive judgments.

The command is not enforced by an express declaration of the nullity of the judgment: and, according to a distinction, made by jurists, between imperative and prohibitive laws, a ques-

tion might be raised, whether judgments, given by a court, acting under our constitution, in which the reasons, on which they are grounded, are not adduced, are absolutely or relatively null and void: in other words, whether they are void in themselves, or such only as may be avoided and annulled by persons immediately interested in them. This question would also lead to inquiries as to what matters ought to be considered of the essence of the thing commanded by law to be done, what merely circumstantial—how far every thing, required or commanded by a constitution or fundamental law, emanating from the people, in the formation of their government, must be implicitly obeyed by all functionaries established under it, without interpretation, according to the rules applicable to ordinary acts of legislation. All this we leave untouched, being of opinion that the want of reasons in a judgment is an error, for which it ought to be reversed, when appealed from, in due time.

As all the facts of the case are not before us, we cannot proceed to give such a judgment here, as in our opinion, ought to have been given below.

It is, therefore, ordered, adjudged and de-

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creed, that the judgment of the district court be annulled, avoided and reversed, and that the case be sent back, to be proceeded on according to the constitution and law, with instructions to the judge to adduce, in his judgment, the reasons on which it is grounded: the costs of this appeal to be borne by the appellee. *Laverty & al.* vs. *Gray & al.* 4 *Martin*, 463, *Sierra* vs. *Slort*, *id.* 316, *Urquhart* vs. *Taylor*, *ante* 202, *Porter* vs. *Adams*, *ante* 201, *Doubrere* vs. *Papin*, *ante* 498.

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

CROCKER & AL. vs. *AINSLIE & AL.*

APPEAL from the court of the first district.

A letter from the vendor, announcing his failure, cannot be read in evidence against the vendee, to impeach the validity of the sale.

MARTIN, J. delivered the opinion of the court. The plaintiffs attached certain goods as the property of the defendants, who reside out of the state. Rhind intervened, claiming the goods as having purchased them from the defendants, before the seizure. The plaintiffs contested the claim, and at the trial, offered in evidence a letter, written to them by the defendants, the day previous to that on which the claimant purchased the goods from them, stating

that they had failed. The claimant objected to the letter being read, and the district court sustained the objection: whereupon the plaintiffs excepted to the opinion of the court. There was judgment for the claimant, and the plaintiffs appealed.

The case is before us on this bill of exceptions only.

The fact of the vendors' failure, which would have invalidated a posterior sale, was to be proven by legal evidence; if the vendors could at all be heard, to establish a fact which invalidated a sale made by them, they ought to have been sworn: their letter can have no more weight than their certificate. The district court decided correctly, that it could not be read.

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

Morse for the plaintiffs, *Dick* for the claimant.

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If A sues for B, the latter is the real plaintiff.

The whole penalty cannot be recovered on a partial breach.

APPEAL from the court of the first district.

Harper, for the plaintiff. This action is brought to recover the penalty of a charter-party, on account of the violation of it by the appellee. The charter-party expressly stipulates

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that the appellee should proceed with a cargo of the plaintiff and appellant, consisting principally of fruit, from the port of Cadiz to Havana, and from thence to New-Orleans, and for the fulfilment of this engagement the appellee bound himself in the sum of five thousand dollars. The evidence in the cause proves, that instead of proceeding directly to Havana, the vessel went into Porto Rico to land passengers, and although the appellee pretends that he was under the necessity of going into Porto Rico, on account of a want of fuel, vet it is proved that he had taken passengers at Cadiz to be landed at Porto Rico, and therefore intended, in any event, to go into Porto-Rico. It is conténded that this was a departure from the voyage, and such a violation of the written contract as to make the appellee liable to the penalty.

To obviate this charge, the appellee alledges a consent on the part of N. Fowler, the agent of the appellant, to go into Porto Rico, and produced the parol evidence of his captain and mate in the court below, to prove this consent. To this evidence the counsel for the appellant excepted, as well on the general principle of law that no parol evidence shall be received to contradict, vary or disannul a written agreement, as upon the special authority of *Powel on*

contracts, 435 & 436. Upon this principle, it is contended that all the parol testimony in the cause tending to prove the consent of the freighter to touch at Porto Rico is inadmissible, even if true; but it is also contended, that the evidence is in itself incredible: for it cannot be supposed, that an agent who had contracted for a specific voyage, and of which he had given notice to his owner or principal, in order that he might effect an insurance on the cargo, would have consented to such a change in the voyage as would have discharged the underwriters, and annulled the policy—if, as is pretended, he consented to this change in the voyage, why was it not endorsed on the charter-party? We find a circumstance of much less importance carefully noted on the contract, to wit: the deficit in the amount of cargo, which had been stipulated for.

The circumstance of the appellee having protested at Porto Rico, although it is evident he intended going there when he left Cadiz, is conclusive evidence that he knew he had no right to enter that port. From all these circumstances it is contended that the evidence, going to prove the consent of the appellant's agent to touch at Porto Rico, is incredible, and on that account ought to be disregarded by the court.

If then parol evidence against the written

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charter-party in this case be inadmissible on legal principles, or if in this instance it be disregarded as incredible, it follows that the conditions of the charter-party have been broken by the appellee, and therefore the penalty incurred. But it is said the *whole* penalty is not recoverable unless it be shewn that actual damages to the amount of the penalty have been sustained. Of what importance then is it to the contracting parties to stipulate a penalty? If the actual damage sustained is to be the criterion of of decision, that must be shewn by testimony, and the insertion of a penalty in a contract is altogether nugatory. The penalty in this case was the measure of damages, agreed upon by the parties themselves, and is therefore equally obligatory on them as any other stipulation in the contract.

In this case however, it is contended, that actual damage to the amount of the penalty has been sustained by the appellant. The evidence in the cause proves, that the current price of raisins at New-Orleans, at the time the Oswego ought to have arrived here, if she had proceeded direct from Cadiz, was about five dollars per box. But the account of rates, as made by the port wardens, shews that the average price for which these raisins were sold in this market

was about one dollar and a quarter per box. Two witnesses, who were called upon in the first instance by the officers of the customs, swear that the raisins were damaged seventy per cent. Now, it is in proof, that the raisins and other fruit were in good order when shipped; but, in consequence of being detained improperly in hot latitudes, they sustained a loss of seventy per cent. in the opinion of two witnesses, and an actual loss of more than three dollars per box, as shewn by the report of the port wardens. The actual damage of the whole cargo, thus sustained, will appear to be equal to the penalty expressed in the charter-party.

The objection against M'Nair's right to sue on the charter-party, on the ground that he was not privy to its execution, is sufficiently obviated, by having proved the fact, that Fowler, who signed it, was the agent of M'Nair; and, although the appellee may not have known the name of Fowler's principal, at the time of making the contract, yet he knew he was contracting with an agent, for he acknowledged the fact to one of the witnesses, on the passage. The fact then, of Fowler being the agent of the appellant, gives to the appellant the right of action on the contract made for his use; and it also establishes the competency of Fowler's evi-

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dence; for, it will not be denied, that an agent is a competent witness for his principal.

Excluding from this case all parol evidence, tending to contradict or essentially vary the written charter-party, it seems to amount to this, that Thompson, the appellee, instead of proceeding from Cadiz to Havana, and from thence to New-Orleans, as stipulated by the charter-party, has been guilty of a deviation in the voyage, in going into Porto-Rico, for his own benefit, and contrary to the consent of the freighter, and that, in consequence of that deviation, the voyage was protracted, in hot latitudes, and the cargo ruined.

If this be the true state of the case, the only question is, whether the appellee is liable for a violation of his contract.

Dick, for the defendant. The grounds of defence in this action, are two-fold—1. as to the mode of action, and—2. as to the merits of the case.

I. The petition is in the name of "Nathaniel Fowler, of Beverly, who sues for the use of Rob. H. M'Nair, of New-Orleans," and is founded upon a charter-party of affreightment, entered into at Cadiz, the 4th November, 1817,

between the said "Nathaniel Fowler, of the one part, and Solomon Davis, master of the American brig Oswego, of the other part:" the said Davis agreeing to receive from the said Fowler, on board the said vessel, 120 tons of merchandize, with which he is to proceed to the port of New-Orleans: in consideration whereof, the said affreighter agrees to pay the sum of $1950—and it is further agreed, that the said Davis shall touch at the port of Havana, where the affreighter is at liberty to exchange a part, or the whole, of the said 120 tons of merchandize, paying at the said port one-half of the freight and primage, &c.—and, for the true performance of all and every of the conditions in the said charter-party, "the said parties bind themselves, reciprocally, each to the other, &c. in the penal sum of five thousand dollars." Thompson, the owner of the Oswego, defendant and appellee, confirmed the contract entered into by captain Davis. It is alledged, that the conditions of this charty-party have been violated, by the Oswego's stopping at Porto-Rico, on her voyage from Cadiz to Havana; and that, consequently, the penalty is forfeited. In order to enforce the payment of this penalty, (among other things,) the present suit was brought: the defendant, not being a

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resident of Louisiana, his property was attached, in the name of Rob. H. M'Nair, to whom, it was said, the penalty accrued, and to whom, as the alledged owner of the Oswego, shipped by Fowler, in his own name, and in his own property, is indebted. Now, it is conceived, that M'Nair cannot, by any subtlety of pleading, as a party, nominal or real, or by any principle regulating contracts, maintain an action on a covenant such as this, to which he is not a party or privy, upon which he could not be liable, and of which any stipulation that he may desire to enforce, is in favour of another, under whom, whatever may be his actual relation, in point of interest, he has not derived any legal title. The principle that one, not party or privy to a deed or other negotiable instrument, cannot maintain an action for the breach of its conditions, is fully supported by the English authorities—1 *Chitty on pleading* 5, *& seq.* 1 *Salk.* 197—and equally deducible from the rules of the civil law, in relation to the parties to, and the effects of, contracts.

1. As to the parties to a contract. In general, a person can stipulate, in his own name, but for himself. *Civ. Cod.* 262, *art.* 19. Cases of stipulating for another. *Civ. Cod. id. art.* 20, 21. A person is deemed to stipulate for himself,

&c. unless the contrary be expressed, or result from the nature of the contract. *Civ. Cod.* 264, *art.* 22.

Illustrations of the rule, that a person can stipulate only for himself. 1 *Poth. on oblig. n.* 53, 54, 55, 74 *et seq.*

2. As to the effect of contracts. Agreements have effect only between the contracting parties. *Civ. Cod.* 270, *art.* 65.

The obligations which arise from agreements, and the rights which result from them, being formed by the consent and concurrence of intention of the parties, they cannot oblige or give a right to a third party, whose intention did not concur in forming the agreement. *Poth. on oblig. n.* 87.

One of the exceptions given by Pothier, in the foregoing number, being that of a factor binding his principal, it may be proper to consider here the character of Fowler's agency; and whether, if it had been fully declared, when stipulating with Thompson, it would have been binding on M'Nair, and, consequently, whether he, M'Nair, could have derived any right under it.

By the letter of attorney from West and M'Nair, Fowler was authorized to sell the ship Moskow, and to invest the proceeds in mer-

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chandize, to be shipped to West; and directing him, Fowler, to conform to such instructions as M'Nair might give.

The letter of instructions does not enlarge the authority contained in the procuration—and, taken together, they merely constitute Fowler a special agent for specific purposes: he had no power of binding his principals by an instrument, under seal, unless as related to the transfer of the ship, or by a penal instrument of any kind, unless resulting usually or necessarily from the character of agency with which he was clothed. But, is there any thing in the usages of trade, which authorizes a factor, when directed to make a shipment of merchandize, to charter a vessel for the undertaking, and to bind his principals in such stipulations, and subject them to such penalties as he may deem proper? It is conceived not—nor is it conceived that there would be any necessity for such a proceeding, or any justification of it, unless the factor were specially instructed.

"The attorney cannot go beyond the limits of his procuration." *Civ. Cod. 424, art. 24.*

An agent, constituted for a particular purpose, and under a limited and circumscribed power, cannot bind the principal by any act, in which he exceeds his power. 3 *Term Rep. 757.*

If then, Fowler could not bind M'Nair by such an instrument as that on which the present action is founded, it is presumed he, M'Nair, can derive no right under it.

But, at any rate, it was incumbent, in order to produce any privity of contract between M'Nair and Thompson, that Fowler should have declared the character in which he contracted, if intending to contract as agent, and that that character should appear on the instrument.

The plaintiff ought to have chosen either to sue on the covenant for damage, or for the penalty: he cannot, in the same action, demand both penalty and resulting damage. This is the English rule; and our code says, that a party cannot demand principal and penalty together. *Civ. Code*, 284, *art.* 129, *Ev. Poth. on oblig. n.* 234, *or* 342. The creditor ought to elect.

II. Upon the merits of the action, we contend—1. that the stopping at Porto-Rico was by stipulation—2. that it was necessary, or—3. that it was not such an act as forfeited the penal sum mentioned in the charter-party—4. that no damage has been shewn to have resulted from the stoppage, or—5. that if such damage has ac-

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crued, it has been removed by the affreighter's receiving his merchandize at Havana and at New-Orleans, without complaint.

1. The stoppage at Porto-Rico was by stipulation. This is fully proven by the testimony of Cooper, the captain, and Lake, the mate, of the Oswego, who both say it was notorious at Cadiz, that they were to stop at Porto-Rico; that Fowler consented to this, and came from the shore to the vessel, in company with certain passengers, intended to be landed at Porto-Rico. But, it is said, that any parol testimony, going to shew Fowler's consent to the stoppage at Porto-Rico, was inadmissible, as it was dispensing, by parol, with the conditions of a written agreement. While the general rule is readily admitted that testimonial proof cannot be received, except under certain circumstances, to contradict a written agreement, it is denied that that rule is applicable here.

The voyage, in this case, was from Cadiz to New-Orleans, with permission to the affreighter to stop at Havana, and exchange his cargo. Now, has an agreement to stop at Porto-Rico—a place directly on the rout from Cadiz to Havana, and, as we will shew, it is usual for vessels on that voyage to stop—any thing in it repugnant to the charter-party, or which dispenses

with or annuls any of its conditions. Clearly, if operating upon the charter-party, such testimony merely operates an enlargement or explanation of its stipulations; and that this may be done by parol is, we think, supported by strong authority.

The owner of a vessel covenanted, by charter-party under seal, to sail from the Thames to a port in the British channel, there to load such goods &c. as the freighters should tender; afterwards agreed by parol that the ship instead of loading at some port in the channel should load in the Thames. By the charter-party, moreover, the freight was to commence from the day of the vessel's sailing from Gravesend; by the parol agreement, it was to commence from her entry outwards, at the custom-house. Ruled that there was no conflict between the charter-party and the subsequent agreement. *White* vs. *Parkin*, 12 *East*, 578. The case of *Leslie* vs. *De la Torre* is cited in the foregoing case, page 583, where a party wished to prove by parol, in the face of a charter-party, that Corunna had been substituted for Portsmouth. But Lord Kenyon decided "that the agreement by charter-party being under seal, the plaintiff could not set up a parol agreement inconsistent with it." This decision of Lord Kenyon's is con-

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firmed in the case of *White* vs. *Parkin*, but held not applicable to that particular case. *Phill. Ev.* 433.

On a charter-party, dated the 6th February, conditioned that vessel should sail before the 12th, averment sustained that the charter-party was not executed until the 15th March, whereas the condition was dispensed with. *Hall* vs. *Cazenove*, 4 *East*, 477. If such can be averred, it is a necessary consequence that it can be shewn in evidence. 2 *Ev. Poth.* 208.

Action on a charter-party stipulating that the merchant should have the exclusive use of the ship and cabin. Evidence of custom admitted, against the stipulation, to allow the master to ship merchandize. *Abb. on sh. Am. Ed.* 242.

The East India Company chartered a vessel for trade and war, and sent her on a voyage of examination or discovery, in which she was lost. Lord Kenyon held that the company were bound to the owners, until it was afterwards ascertained that the master was acquainted with the destination of the vessel, before he left England, without any objection on the part of the owners. *Jacobson's Sea Laws*, 222. The loss in the foregoing case must have been on a voyage different from that contracted by the charter-party; and the discovery afterwards

made, of the captain and owners consenting to it, must have been by parol.

The time of performing the condition of a bond enlarged by parol; and where substantial but not literal performance, parol evidence admitted to wave any further performance. 3 *Johns.* 528. 1 *Johns. Cas.* 22.

A receipt, although absolute, in its terms and expressing to be in full, is not conclusive, and parol evidence is admissible to shew a mistake in it, or explain it. 1 *Johns. Cas.* 145. 2 2 *Johns. Rep.* 378. 5 *Johns. Rep.* 68. 3 *Johns. Rep.* 319. 8 *Johns. Rep.* 389. 9 *Johns. Rep.* 310.

Parol evidence may be given to contradict a written simple contract, or to shew that the whole of it was not reduced to writing. 6 *Mass. Rep.* 434.

"Stress has been laid on the circumstance, that the agreement is contained in a solemn and sealed instrument. The policy of that act (the statute of frauds) in relation to certainty, and the avoiding of prejudices, is as much answered by a written as by a sealed instrument. If it were necessary to quote authorities on this point, *Powell on contracts,* 436, &c. states many instances in which the most solemn and sealed agreements were considered as altered and

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waved by acts other than the execution of instruments deemed of equal dignity with them; the spirit of equity, especially as applying to the construction of the statute of frauds, exploding the maxim, *dissolvitur eodem ligamine quo ligatur.*" By Roane, justice, *Cringan* vs. *Nicholson*, 1 *H. & Mumford* 439, 40. In which case a contract under seal was set aside, on parol evidence of its having been vacated and abandoned.

2. The putting into Porto-Rico was necessary. It is admitted that the intention, on leaving Cadiz, was to stop at Porto-Rico: but the intention to deviate is not a deviation. *Park on ins.* 314, *Marshall on ins.* 231. The evidence is strong and satisfactory, that it was necessary to put into some place for fuel, before reaching Havana, and Porto-Rico was assuredly the most convenient place. If then, it was necessary to put into some port, and the Oswego had been lost afterwards, the putting in would not have been such a deviation as would discharge the insurers; and, *a fortiori*, it cannot be deemed such as would give the freighter a claim for damages.

3. In the absence of all stipulation to that effect, and of all necessity, the stopping at Porto-

Rico was not such an act as forfeited the penal sum in the charter-party.

In the construction of an obligation with penal clauses, the real intention of the parties ought to be sought after, and carried into effect, where it can be discovered from the instrument itself. Where it is clearly inferable from the nature and terms of the contract, that the parties have estimated and liquidated their damages, and have inserted the amount to be paid in case of non-performance, the court would be bound so to consider it. The cases in the English books, 4 *Burr.* 2228, 2 *Term Rep.* 34, where penalties have been considered in the nature of liquidated damages, are either, where it appears from the contract that the penalties have barely exceeded the damages sustained; or where, from the nature and circumstances of the case, no rule for estimating the actual damages could be adopted, or it was manifestly the intention of the parties that the sum inserted should be as a compensation, and not as a penalty. Thus, where A and B entered into an agreement, by which A agreed to convey to B 700 acres of land, to be appraised in part payment for a farm, valued at $3750, which B agreed to sell to A; and it was covenanted that, in case either party failed to fulfil the agreement, the party

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failing to perform, should forfeit and pay to the party who should fulfil the agreement, the sum of $2000, as damages, it was held that the $2000 were to be considered as a penalty, and not as liquidated damages. *Dennis* vs. *Cummins*, 3 *Johns. Cas.* 297.

But where A, in consideration of 500 dollars, covenanted to convey to B 50 acres of land by a good deed &c. or in lieu thereof to pay him 800 dollars; it was held that B was entitled to recover, on a breach of the covenant 800 dollars; the same being in the nature of liquidated damages, and not a penalty. *Slossem* vs. *Beadle*, 7 *Johns. Rep.* 72.

The decision on the first of the above two cases went on the ground, that it never could be presumed that the parties had the penal sum in view, as a measure of damages, it being entirely disproportionate to the matter to be performed by the covenant, and not reciprocal—and, in the second, that "the defendant had received the consideration of 500 dollars; and at the end of the year he was to convey, or in lieu thereof, pay the 800 dollars. This was an alternative reserved for his election."

By the stipulations of the charter-party between Fowler and the defendant, the latter was to receive, in consideration of performing the

voyage, the sum of 1950 Spanish dollars; and for the true performance of all and every of the conditions of the charter-party, the parties "bound themselves reciprocally each to the other, the affreighter, the destined cargo, and the captain, his said vessel, &c. in the penal sum of five thousand dollars." Can it be seriously said, or soberly listened to, that this sum of 5000 dollars was the estimated and liquidated damages, determined upon by the parties, in the event of a failure in all or any of the conditions of the contract, by either of the parties, and demandable by the other! Suppose Fowler to have declined furnishing his 120 tons of merchandize; suppose him to have failed paying one half the freight at Havana, or the other half here; nay, suppose him to have failed "procuring his own provisions and stores necessary for the voyage," would he have been liable to pay Thompson the sum of 5000 dollars?

Our law has two provisions relating to this subject, which it will be sufficient to recite: "When the contract specifies that he who fails to execute it shall pay a certain sum, by way of damages, the other party can recover neither a larger nor a smaller sum." *Civ. Cod.* 268, *art.* 52. "The penal clause is the compensa-

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tion for the damages which the contractor sustains by the non-execution of the principal obligation." *Ib.* 284, *art.* 129.

In the first place, the contract under consideration does not specify that he who fails to execute it, shall pay a certain sum, by way of damages; and, in the second, the penal clause has not been forfeited, because the principal obligation has been fulfilled. The principles regulating penal clauses in obligations, are fully and satisfactorily illustrated by Pothier, *Tr. on ob. part* 2, *ch.* 5, *n.* 337, *et seq.* and are all resolvable into considerations of equity: when excessive, it may be reduced and modified, *n.* 345; and, where the creditor voluntarily receives his debt, it is discharged, *n.* 358 *et seq.* In the present case, the defendant received the goods of Fowler at Cadiz, and transported them to New-Orleans, stopping at Havana, all in conformity with what he undertook; and, after so transporting them, delivered them, part to Fowler, at Havana, and part to M'Nair, at New-Orleans, who received them, and paid the stipulated freight. In all the actions on charter-parties, to be found in the English or American books, it is believed that no case can be cited where the penal sum, always introduced, has been considered as compensation or stipulated

damage, or even demanded in such cases. Two are now before me, 10 *East*, 295, and 12 *East*, 381, where penal sums are recited, but not thought of being demanded; a charter-party, being only a covenant or agreement, shall be construed according to the intention of the parties, and the custom of merchants. 4 *Bac. ab.* 626, *tit. Merchant, &c. H.*

4. No damage was sustained by the cargo of the Oswego, from stopping at Porto-Rico, or running into the latitude of that island.

If any such damage had been sustained, the the affirmative was with the plaintiff, and should have been established fully and precisely. Nothing of the kind, however, was attempted in the court below; on the contrary, the testimony there given powerfully negatives any such presumption. In the *first* place, it is proven, by a crowd of skilful mariners, that in running from Cadiz to Havana, it is not extraordinary to go as far to the south as 15 degrees of north latitude, and usual to run into 17 degrees—that the trade winds are fresher and more certain in the low latitudes, and that a cargo of a perishable nature is not more subject to damage or decay in a transit through the latitudes of 17 and 18 degrees, than of 20 and 21 degrees of north latitude. The reason is obvious—the prevalence

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and constancy of the trade winds in the low latitudes. *Secondly*, it is certain that the voyage from Cadiz to Havana was a fair one, performed in the usual time: this appears from the testimony of all the witnesses interrogated to that point. *Thirdly*, as to damage, no evidence of any appears, except in the testimony of two persons appointed by the custom-house to appraise such of the raisins as were brought here, with a view to the estimation of duties. One of these, Mellon, an intelligent and experienced grocer, says that it was impossible to say where the damage had been sustained, or from what circumstance it arose—that they appeared to be old, and were originally of an inferior quality—that the boxes seemed to have passed through many hands. This circumstance of their being old and of inferior quality, is confirmed by that of their cost, which, at Cadiz, was one dollar and thirty cents per box; yet, we find, that raisins of the same species, but fresh, in new boxes, and of good quality, cost, at a market more favorable than Cadiz, two dollars and fifty cents per box. The latter sold in this market for four dollars and fifty cents—those of Fowler's, of which any particular account is given, were sold at Havana at from two dollars to two dollars and fifty cents. That

this was a fair price, even for fair raisins, appears from the testimony of Lunt, who sold a cargo at Havana, shipped a month earlier from Cadiz, at from two to three dollars in Havana. Besides, some of the raisins sold by Fowler at Havana, and bought here by Duff, were sold in this market, before the arrival of the Oswego, at four dollars and seventy-five cents per box, and afterwards re-sold at five dollars and fifty cents, by Whitmore. In the absence then, of all proof, and even presumption, of damage from the conduct of the defendant or his agents, and with as strong evidence to the contrary as the nature of the inquiry in which it appears would admit, is it not fair to say, that the allegation of M'Nair or Fowler, however they may be associated or interwoven in the cause, is fanciful and unfounded.

5. But, admitting every previous ground to be untenable, that damage accrued, was proven, and was proven to have resulted from the misconduct of the defendant, or his agents, yet the conduct of the plaintiff, in receiving the goods at Havana, and at New-Orleans, precludes him, however, on insisting on such damage.

It appears from the testimony of Lake, Cooper, and Fowler himself, that on arriving at Havana, he spoke of landing all the fruit and a

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certain portion of the wine: he did in effect land 939 boxes of raisins, of the 1567 on board; and 100 kegs of figs, of 110 kegs. 270 boxes of the raisins thus landed were re-shipped, and, together with the remaining 628 boxes, were brought to New-Orleans. The 10 kegs of figs brought here were put in the boat to be landed at Havana, but being in bad order, were re-shipped. At Havana, Fowler remained twenty-one days, endeavoring to dispose of his cargo, and to obtain other—he received the larger portion of the fruit there, and paid one half the stipulated freight, without a murmur of discontent, without a single complaint, or any charge of misconduct on the defendant or his agents. Fowler at Havana, too, was in contract for the purchase of a vessel, and asked Thompson how much he would relinquish of the stipulated freight to be discharged there. This arrangement not being consummated, Fowler shipped additional cargo, and obtained other on freight, of which he derived the profit, and proceeded to New-Orleans, the ultimate port: there he, or his consignee, received the remainder of the cargo, without complaining of damage, and paid the remainder of the freight. This plain statement of the facts in the case shews clearly that the demand for damages was an afterthought;

the result of Fowler's cunning and management, and M'Nair's disappointment in his market, and in his agent. And how are the damages, as thus claimed, estimated? Two-thirds of the raisins, 939 out of 1567 boxes, and ten-elevenths of the figs, are delivered to Fowler at Havana, where he chooses to dispose of 669 boxes of raisins, and the figs, and then claims damages upon these raisins at the price they would have sold at in New-Orleans, when in bringing them to the latter market he would have been subject to the payment of duty, &c. and when he had no agency in preventing his doing so! The price at New-Orleans, moreover, is rated 6 dollars, when it is in proof that the best and freshest raisins, and which cost nearly double the sum his did at the place of exportation brought but 4 dollars 50 cents. I refrain from continuing a task that apparently would be endless; the pointing out the inconsistencies, and the detecting the fallacies which abound so profusely, and so jostle for precedence, in the petition and demands of the appellant. One authority is here introduced which was intended to have been offered in another place, it is from a sure source, however, and cannot at any time be deemed obtrusive. "When, (says *Pothier, contrat de charte-partie, n.* 88.) the consignee

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receives the merchandize without complaint, he cannot afterwards alledge that they have been damaged."

Upon the bills of exception taken by the defendant, but little, it is presumed, need be said. They relate to the protest, and accompanying documents, executed by Fowler at Porto-Rico, and the protest at New-Orleans; and to the admission of Fowler as a witness in behalf of the plaintiff.

1. As to the protest, the seal of a court, acting under the law of nations, is evidence. *Peake's Ev. 72—3, and note at page 73*, as to the admissibility of public instruments of foreign countries, as evidence; and that the admission of protests of bills of exchange, is a relaxation of the strict rules of evidence for the convenience of the mercantile world.

Protest at Porto-Rico, not under oath, therefore, ought not to be read. 1 *Dall.* 317.

2. As to the admission of Fowler to be a witness. Enough has been already said as to Fowler's legal relation to the contract, which he was called upon to explain and enforce. A competent witness must not be interested, directly or indirectly, in the cause. *Civ. Code, 312, art. 248.* But Fowler, if considered only

as an agent, profited in proportion to the profits of the voyage, and would be entitled to his commissions on any amount recovered from the defendant. Besides, he is, as an agent, liable to M'Nair: and is he not, as the person stipulating with Thompson, and as a nominal plaintiff, at least in this suit, liable to Thompson in damages, should the present suit prove to have been improperly and injuriously brought? Above all, on the broad principle that no man can be permitted solemnly to contract with another to-day, in his own name, and to-morrow to come forward and dispense with his engagement, or enforce it on the other side, by alledging that he acted for another, and is, therefore, neither responsible or beneficially interested—Fowler's testimony ought to have been excluded.

Harper, in reply. It is contended, this action cannot enure to M'Nair, he not being a legal party to the contract, as we call it: not choosing to make so free use, as the defendant's counsel, of the technical terms, peculiar to the common law, of deed and covenant, and to which alone the authority cited applies.

The gentleman ought to have been aware, that although, as we admit, none can at common

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law be a party to the suit, on a sealed unnegotiable instrument, but the party to the deed, yet nothing has ever been more common, than for him, who is in the form of law, the party, to sue for the use and benefit of him, who is equitably entitled to the substantial benefit of the suit. In Virginia, such is the practice every day, in recovering bonds under seal, for the payment of money. But references of this kind, to the peculiar forms of the common law, are not pertinent to the point now in dispute. Maritime concerns and the dealings of commerce, are necessarily placed on a more liberal, if I may not say, looser principle of construction. The remoteness from each other, of the real parties in interest, the unforeseen accidents attendant on the uncertainties of the ocean, and the resulting necessity, often times, for prompt and decisive proceedings, have, by the usage of trade, imparted to a distant agent authorities and powers which, in the discussion of a feudal land tenure, would be considered totally inadmissible. This liberality of construction is seen, under certain circumstances, even through the whole law of bottomry and respondentia bonds; sales of ships in foreign ports, insurance, abandonment and salvage, redemption from capture,

seamens' wages, freight, whether by charter-party or otherwise.

In this case, however, it is shewn, that the defendant knew of the agency of Fowler; and he, therefore, has no right to contest the interest of the principal. One thing is certain, that if he has committed the wrong complained of, he is bound to answer to somebody; and, in a case like this, his only concern must be, that he answer to a person who is so far the true party, that a judgment in his favor will bar any future judgment in favor of another, of which, here, there can be no doubt.

M'Nair, in this case, is the party really injured; and it is as consonant to reason as to law, that he should be the party redressed.

The authority of Fowler to contract and to bind M'Nair is disputed; but by the very argument of the defendant's counsel, it is shewn that "Fowler was authorized to sell the ship Moskow, and to invest the proceeds in merchandize, to be shipped to West." Now, what more is wanting to authorize this contract? The merchandize is to be shipped. Can that be done without a ship? Does not a power to ship goods necessarily involve a power to pay freight? And what is a charter-party, but a contract of affreightment? Had the goods arrived safe, and

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properly subject to freight, no matter by whose contract, would not the defendant have had his resort to the owners, or, which is still the same, to the property on board, of those owners? If reciprocity of obligation be all that is required, to sustain this action, surely we remain fully secure.

It is objected that Fowler had no power to bind his principal by a penal instrument. The answer is, that a charter-party, by whatever name you call it, penal or otherwise, is an instrument usual, and of daily practice, and in which agents are permitted to bind their principals—and that the present charter-party is one of ordinary character, and not distinguished by any transgression of the established mercantile practice.

II. As to the demand of penalty and consequential damage, at the same time, it is unnecessary to argue. The demands are as separate and distinct in the pleadings, as if they were advanced in two different suits; and the court will give or refuse, one or the other, or both, according to their sense of the law and the evidence.

III. The stopping at Porto-Rico was by sti-

pulation. For this fact the principal reliance is on the testimony of Cooper, a witness to whom we except as incompetent, and to whom we did object, as unworthy of credit, in the court below, when we had that opportunity of observing his prevarication of manner and unblushing predetermination to serve only one party, which, unfortunately for the justice of this cause, cannot well be had, from the written evidence before this court.

We object here to parol evidence, to prove a change of voyage. Such testimony goes to vary the very essence of the contract; for if the voyage itself be not an essential constituent of a charter-party, it is not easily conceived what of essence can any where be found in such an instrument. But, it is said, that such testimony merely operates an enlargement of the stipulations. It merely does, we confess; and it is, therefore, that we complain of it. The written contract of charter-party would soon go out of use, if stipulations, thus solemnly made, are so easily enlarged or restricted to any extent. I say to any extent—for, if a voyage to Havana can be changed to a voyage to Porto-Rico, as well may the master of a vessel carry you, with captain Cook, on a voyage of discovery, round the globe, and then *bring himself* to

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prove, (for such is the case now) that it was a mere enlargement. In this case, it is the party who testifies to this mere enlargement; for, in truth, Cooper, the master of the vessel, and successor of Davis, was himself bound to the fulfilment of the charter-party, and is introduced as a witness, to prove its fulfilment.

But, admitting him a competent witness, the facts stated by him are so improbable in their nature, as not to be believed. The universally established usage of reducing charter-parties to writing; and the course intended by these parties, apparent from an endorsement on the charter-party of much less importance, forbid the idea of any verbal agreement, at least until it be shewn by less equivocal testimony, and that too disembarrassed of the various circumstances which, in this case, have a contradictory tendency.

IV. The putting into Porto-Rico is said to be necessary. This, we are satisfied, is not established by the evidence. The defendant's counsel mistakes us, when he imagines that we meant to say that an intention to deviate was a deviation; but we do say, that a deliberate, premeditated intention to deviate, without the then existence of any necessity, followed up by ac-

tual deviation, is very strong evidence that the deviation was not of necessity, and that any necessity set up is either a false pretence, or a matter of voluntary contrivance.

V. The stoppage at Porto-Rico works no forfeiture of the penal sum. On this subject the defendant's counsel has made a long argument, which it only requires, we think, two sentences of his own quotation to confute.

The penal clause is the compensation which the creditor sustains by the non-execution of the principal obligation. *Civ. Code* 284, *art.* 129. So much for the penal part of this contract; now for the damages.

When the contract specifies that he who fails to execute it, shall pay a certain sum by way of damages, the other party can recover neither a larger nor smaller sum. *Civ. Code* 268, *art.* 52.

But says the defendant, this contract does not specify a certain sum by way of damages. And what, I would ask, ought to follow from that? Why simply that the party injured, instead of being confined to a specific sum for damages, may recover any sum, larger or smaller, which proves to be the true measure of actual damages. It does seem to us that the defendant might have

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made much better use of these quotations, by contending that we had specified a certain penalty, and thus endeavoring to confine us to the amount of that penalty.

VI. No damage was sustained, &c. On this enough has been said, and as this is matter of fact, the court will satisfy themselves thereon, on a view of such of the evidence as they think proper to admit.

VII. The plaintiff's receiving the goods at Havana and New-Orleans, precludes him from insisting on damages.

The court will remember that Havana was one of the ports of discharge mentioned in the charter-party, and the act of Fowler in attempting to sell a part of the cargo at that port ought not to prejudice the plaintiff, because it was only by the discharge made there that the damage was discovered to exist, and only by the attempt to sell, that the extent of damage could be understood. Had the whole cargo been sold at its then dull value, the defendant ought not lay so much emphasis on a transaction, which whether "cunning" or not cunning in law, must have been for the benefit of all concerned, and himself among the rest, in making

the least of the loss incurred, by his miscon- duct.

As to the plaintiff's having received the balance of the cargo, at New-Orleans, the fact is expressly denied. So far from this, a survey of the port wardens was had upon it, and by them it was sold.

It is true the freight was paid to M'Lanahan by the plaintiff, but it was paid under an express understanding, that the payment was in no measure to prejudice the suit about to be brought.

The bill of exceptions to the protests offered in evidence, is not considered as very formidable, or if so, as very material; but that to Fowler's testimony, merits a more careful notice.

It would readily be admitted, without any citation from the books, that a witness interested directly or indirectly, cannot be competent. Fowler, it is said, is entitled as agent to his commissions, on whatever may be recovered from the defendant. It might as well be said, that if this were an action against an insurance office for a loss of the cargo, he would be entitled to his commissions on what was recovered; that if it were such an action, and the ship had foundered at the moment of leaving port, the master could

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have recovered the whole freight on all the goods for which the insurers proved liable. The truth is the voyage, such as it is, good or bad, profitable or unprofitable, is now over; and capt. Fowler can have no more concern with it. And further, it is established by his evidence that his affairs with M'Nair are settled.

Fowler's pretended liability to Thompson in damages for the wrongful bringing of this suit, has no bearing whatever on his competency. A judgment in this suit would not go to decide the judgment in the suit for damages, and it will be time enough, as respects matters between him and Thompson, to dispute the truth of what he now says when the suit for damages shall have been brought—he will then be party and cease to be witness, and then his present testimony cannot avail either to his advantage or disadvantage.

We have not troubled the court with a review of the numerous authorities cited on the part of the defendant; because, with all due deference to the intelligence, the ingenuity and the research of the counsel opposed, we feel compelled to say that we do not consider his authorities in general as applicable to the cause, and from those which are deemed applicable we apprehend no injury to our claim.

Derbigny, J. delivered the opinion of the court. The first ground of defence is a plea in abatement to the person of the plaintiff. The suit is brought in the name of Fowler, for the use of M'Nair. Fowler, the nominal plaintiff, is the person who was party to the contract of affreightment of the brig Oswego, which contract is the foundation of this suit. He now declares that he acted as agent of M'Nair; but he stipulated in his own name: the contract was his—not M'Nair's. The agent, (says the *Curia Phil.* 1, 4, 4,) is the person who contracts in the name of another, and not in his own. A person is deemed to have stipulated for himself, unless the contrary be expressed, or result from the nature of the agreement. *Civ. Code*, 264, *art.* 22. Thus, if M'Nair should come forward, without the assistance of Fowler, he would be without any right. But Fowler's declaration, that he sues for the use of M'Nair, amounts to a relinquishment and transfer of his own right in his favor, and is considered as sufficient to enable M'Nair to appear in this case as the real plaintiff.

The first object of this suit is, to recover the penalty stipulated in the charter-party; and the first inquiry must be—has any breach of that contract been committed? It was stipulated that

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the vessel should proceed from Cadiz to New-Orleans, and on her way there should touch at the Havana. The breach complained of is, that he deviated from the strait course to touch at Porto-Rico, put into that port to land some passengers, and remained there three days. The fact of touching at Porto-Rico is proved; an attempt was made to shew, by oral evidence, that this was done with the consent of the affreighter; and a bill of exceptions was taken against the introduction of that testimony: but, whatever be our opinion concerning the admissibility of that evidence, we think it unnecessary to declare; because, whether it is admitted or not, the result on the merits of this case must be the same.

We will then consider it as proved, that the vessel of the defendant, without any leave from the affreighter, touched at Porto-Rico, and stayed there three days. To that fact must be confined the breach of the charter-party; because it is by no means equally clear that Porto-Rico is out of the way from Cadiz to Havana.

For this departure from one of the defendant's obligations, to wit, that of not going from Cadiz to Havana, without stopping, the plaintiff demands that the full amount of the penalty stipulated in the charter-party be allowed to

him, without any reference to the quantum of damages which he may have sustained. This pretention is thought to be supported by the following article of our code: "When the contract specifies that he who fails to execute it shall pay a certain sum, by way of damages, the other party can recover neither a larger nor a smaller sum." *Civ. Code*, 268, *art.* 52. And afterwards—"the penal clause is the compensation for the damages which the creditor sustains by the non-execution of the principal obligation." *Civ. Code*, 284, *art.* 129. To these quotations we will add—"the penalty may be modified by the judge, when the principal obligation has been partly executed, except in case of a contrary agreement." *Id.* 131. Taking the whole of that doctrine together, it amounts to this: where the parties appear to have themselves assessed the value of the damages, which they may respectively suffer, in consequence of the non-performance of the contract, those damages can neither be reduced nor increased, because the assessment is itself a part of the agreement. But this, it is evident, must be confined to the case of the absolute failure of performing the contract; for, when it has been performed in part, the proportion of damages is different, and no previous estimation

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can be supposed to have taken place. Thus, where a penal sum has been stipulated for the true performance of all the conditions inserted in a contract, that sum cannot be viewed as an assessment of damages, applicable to the failure of any of these conditions, whether of much or of little moment; to a slight deviation from one of the clauses, as well as to a direct violation of all. Such a construction would be monstrous. But what is to be done, when some part of the contract has been departed from? Assess the damages which that departure has caused to the other party; for it is, after all, the end in which must terminate all difficulties of this nature.

Have any damages been incurred by the plaintiff in this instance—and, if so, to what amount? The damage, if any, has happened to that part of the cargo, which consisted of raisins. There is no complaint that the rest received any injury. Upon this point, the substance of the evidence is as follows: Fowler shipped on board of the Oswego fifteen hundred and sixty-eight boxes of raisins, which he bought at Cadiz, at one dollar and thirty cents per box. The price of good raisins, even at Malaga, the original place of exportation, was, about that time, two dollars and fifty cents per box. The plaintiff's raisins were not fresh when shipped;

the boxes appeared to be old, and to have passed through several hands. They were shipped in rainy weather. The passage from Cadiz to Havana, including the stay at Porto-Rico, was of forty-three days, which is considered a fair passage. When the vessel arrived at Havana, Fowler landed nine hundred and thirty-nine boxes of raisins, sold six hundred and sixty-one there, and re-shipped two hundred and seventy, supposed to be of the same which had been taken out. The vessel was detained at Havana twenty-one days for Fowler's business alone, during which time the weather was occasionally very warm. When the rest of the cargo arrived at New-Orleans, it was not possible to say how and where the raisins had been damaged.

This evidence requires no comment. Far from proving any thing in favor of the plaintiff, it holds out, as strongly probable, that the raisins were originally bad; and that, if they grew worse, it was owing to their getting wet in the act of shipping them at Cadiz, and to the detention of twenty-one days at Havana, rather than to the stoppage at Porto-Rico. Upon the whole, we are bound to say, that the plaintiff has not supported his action by sufficient evidence.

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

METAYER vs. *NORET.*

Twenty years possession of freedom, in the absence of the master, are required for the time of prescription.

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

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellee is a woman of colour, who complains of having been arrested and imprisoned as a slave by the appellant, and sues him for damages. The fact of the arrest and imprisonment is admitted; but the defendant and appellant contends, that the plaintiff is the slave of Jean Pierre Metayer, whose attorney in fact he shews himself to be. The only question at issue between the parties is, whether the plaintiff is a free person or a slave. Jean Pierre Metayer has intervened in the suit; but, as that intervention changes not the situation of the case, there is no necessity to notice it.

It is admitted, on both sides, that the plaintiff once was the slave of Charles Metayer, the father of the person in whose behalf the defen-

dant caused her to be arrested. But the plaintiff maintains that she has been enfranchised by him. The evidence, however, which she has introduced in support of that allegation, is of such a nature that it would be nugatory to investigate it. One only circumstance deserves some notice; and that is, her enjoyment of her freedom during a number of years. It is in evidence that the plaintiff, ever since she left Cape François, in 1803, has lived as a free person, first at Baracoa, in the island of Cuba, and from the year 1809 at New-Orleans. A creditor of her late master caused her to be seized in 1810, as the property of his debtor; but a civil interruption of possession can take place only at the suit of the owner; and this interruption by the owner did not happen until some time in the year 1816, that is to say, after a possession of about thirteen years.

By the laws of Spain, a slave can acquire his freedom by a possession of ten years, in the presence of his master, or of twenty years in his absence. It appears in this case that, during all the time that the plaintiff enjoyed her freedom, her master was absent. Thus, according to the Spanish laws, the possession of the plaintiff falls far short of the time required to prescribe.

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It was doubted whether that disposition of the Spanish laws had not been repealed by the general provision introduced in our code concerning the prescription of slaves. But, it is believed that this article of our code is relative only to the acquisition of slaves by prescription, and cannot be construed to embrace the prescription of liberty by themselves.

We are, therefore, bound to say, that the plaintiff has not succeeded to prove her freedom, and that she cannot recover any damages for what she calls her unjust imprisonment and detention.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be reversed, and that judgment be entered for the defendant.

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

DESHON & AL. vs. *JENNINGS.*

An executor of a will made abroad cannot act on it, in this state, till a judge of probates has ordered the ex-

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

MARTIN, J. delivered the opinion of the court. Deshon and Woodward presented their petition

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to the parish judge, stating themselves to be the friends and agents, in New-Orleans, of Guy P. Champlin, who was indebted to them in the sum of $200, or thereabouts—that he was drowned in the bayou Vermilion, and had property in the city to be administered upon—that he died intestate, without any heirs in the state, whereupon they prayed letters of curatorship.

execution of the will. A curator is to be appointed by the judge of the parish in which the deceased died.

The usual monition having been made, Jacob Jennings opposed the grant of letters of curatorship, on these grounds: 1. that the court is without jurisdiction, Champlin having died in the parish of St. Mary—2. that he, Jennings, had applied for letters in that parish, and his application was still pending—3. that Champlin did not die possessed of any property in the parish of New-Orleans, and his principal property was, at the time of his death, in the parish of St. Mary. Farther—he, Jennings, was alone entitled to letters of curatorship on the estate, which he prayed for, if his opposition was overruled.

Deshon and Woodward in a supplementary petition, stated that Jennings, without any authority, had taken about $7000 of the money, which the deceased had with him, at the time of his death, and deposited $5200 of it, in his own name, in the Bank of Orleans—that they

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had obtained a writ of sequestration from the parish court, on which the money had been taken by the sheriff; but were apprehensive the writ might be set aside, and the money removed—wherefore they prayed the interference of the court of probates. *Civ. Code*, 175, *art.* 127 & 128. Whereupon the register of wills was ordered to make an inventory of the effects of the deceased, in the parish, and a defensor was appointed to the absent heirs: the sheriff was enjoined from paying the money to Jennings, on whom a rule was made to shew cause why it should not be deposited, to await the order of the court.

James Deshon, a brother of one of the petitioners deposed that the firm had a claim of 180 dollars or thereabouts on the estate, for three drafts of Champlin on them, which they had honored, that Champlin had sent to them drafts of $16350, which have been protested. In addition to this he knows of 5200 dollars deposited in the bank of New-Orleans, by Jennings, who told him he took the money from the corpse.

Widney, another witness deposed that Jennings told him he had taken more than 6000 dollars from the corpse, that he paid an attorney 1000 dollars for his counsel and advice.

Deshon and Woodward filed a supplemental petition stating that Jennings failed in March, 1816, and surrendered his estate to his creditors.

Henry Coit now intervened and filed his petition, stating that the deceased had left a will in the state of New-York, where Coit was named executor, which had been duly proved in that state, he produced a copy of the will and letters testamentary, under the seal of the surrogate of the city of New-York, concluding that he might be put in possession of the property inventoried, and that his letters might be registered.

Jennings answered this petition by a general denial, and a plea to the jurisdiction of the court, insisting that the judge of the parish in which Champlin died was alone competent to order the executor of his will.

The defensor of the absent heirs answered also by a general denial.

The judge of probates sustained the plea to the jurisdiction, and both the other parties appealed. Deshon and Woodward and Coit.

This court is of opinion that he did not err. An executor, it is true, derives his power from the will, not from the letters testamentary, which are only evidence of the probate of the

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will. But the law of this state has provided that the powers of an executor shall not be exercised within this state, until the judge of the parish in which the testator died, if he died within the state, shall have given his *fiat*. This is in order that debtors in this state may have a record at hand, from which the authority of the executor may appear. *Civ. Code, 242, art. 143.* There is another provision made to regulate cases of testators dying out of the state; but in the present case, it appears that the testator was drowned in the bayou Vermillion, certainly out of the parish of New-Orleans. It is, therefore, clear that the judge applied to was without authority to order the execution of the will.

He was also without authority to appoint a curator, since there was a will, the executor of which was present and ready to take on himself the execution of it, and as he was not the judge of the parish in which the deceased died.

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

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

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LATHAM vs. WEST.

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vs.
WEST.

The master of a vessel, lost through his negligence cannot claim his wages.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The defendant is sued as half owner of a vessel, and as agent of the other owner, for wages due to the plaintiff as master of her. The answer denies that the defendant does owe the sum claimed, nor any part thereof in the manner declared in the petition, for that by the negligent, unfaithful, wicked and criminal conduct of the plaintiff, the vessel was wrecked and lost.

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

The reason assigned by the judge, *à quo*, is that the vessel which the plaintiff commanded was lost by his neglect and mismanagement. The testimony of the mate and of the seamen comes up on a statement of facts, and this court is of opinion that the conclusion drawn from it is correct—and it clearly follows that the master of a vessel cannot claim wages, when she is lost by his fault.

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

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

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

A minor has a tacit mortgage, but no privilege on his tutor's estate.

APPEAL from the court of the first district.

MARTIN J. delivered the opinion of the court. The plaintiff alleges, and the defendants admit that one thousand dollars of her money came to the hands of the insolvent Welman, her father and natural guardian, which sum was credited to him on the books of the firm, and went into the mass of the estate which they ceded to their creditors, and came to the hands of the defendants.

The district court gave judgment that the plaintiff's claim be placed on the tableau of distribution of Welman, and that the defendants pay it to her out of the estate of Welman, as a *privileged* debt.

The defendants appealed, and the case is submitted to us without an argument.

The minor has *a tacit mortgage* on the estate of his tutor or guardian for the security of his administration, and the responsibility which results from it. *Civ. Code, 72, art. 75, & 454, art. 19.* We know no law granting a privilege

The judgment of the district court is erroneous, and is annulled, avoided and reversed, and it is ordered, adjudged and decreed, that the defendants consider the plaintiff as a mortgage creditor of the sum of one thousand dollars, (since the 3d of December, 1815,) of the insolvent Robert M. Welman, with interest at five per cent. from that day until paid, with costs of suit below, and the plaintiff and appellant to pay cost in this court.

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

HARROD & AL. vs. *CONSTANT.*

APPEAL from the court of the first district.

A planter, who receives advances from a merchant, is not bound to give him the sale of his crop.

MATHEWS, J. delivered the opinion of the court. The only error complained of is the refusal of the district judge to allow an item in the plaintiffs and appellants' account, by which they charge the defendant with a commission, to the amount of $365, 42, on the amount of a crop of sugar, which was not sold by them in their character of commission merchants.

It is contended, on their part, that they are

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entitled to this sum, according to a general custom which prevails among merchants who buy and sell for others on commission. They claim it on the ground of advances made by them to the defendant and appellee, in the expectation of a remuneration in the disposal of his crop. But, it seems that in this instance he did not think it proper to place it in their hands for sale.

It is the opinion of this court that no custom or law exists, which authorizes the plaintiffs and appellants to recover.

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

Grymes for the plaintiffs, *Livingston* for the defendant.

BERTHOLE vs. *MACE*.

The defendant may avail himself of his own answer to an interrogatory, put to him by the plaintiff.

Although the vendor avails himself of the

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

The plaintiff sold a tract of land to the defendant, the consideration of which was stated in the deed to be one thousand dollars, and to

have been paid. The petition alledged that, notwithstanding this enunciation of the payment of the consideration, one hundred dollars only were paid—the exception *de non numeratâ pecuniâ*, was not renounced, and the petition concluded that the defendant be decreed to pay the remaining nine hundred dollars.

exception *de non numerata pecunia*, the vendee is not at liberty to shew by parol evidence that the consideration of the sale, is not that which is expressed in the deed.

The following interrogatory, to be answered on oath, was put to the defendant: Have you paid the sum of one thousand dollars, for the premises, or have you only paid one hundred dollars, or what part of the purchase money have you paid?

The vendee may avail himself of any parol evidence, introduced by the vendor, to shew that the sale was a simulated one, although he could not have introduced such evidence.

The answer sets forth that the premises were actually and *bona fide* purchased for one hundred dollars only: but, in order to enable the defendant to dispose of the land on more advantageous terms, one thousand dollars were mentioned as its real price, at the request of the defendant; and the plaintiff had not then, nor has she now, any just claim on the defendant, for one cent more. The answer further states, that the sale of the land was a fraud, practised by the plaintiff, in order to extort money from the defendant, inasmuch as the land is not, nor ever has been, in her possession, nor has the same ever, of right, belonged to her, nor has

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she ever put him in possession; neither is it, nor has it ever been, in her power so to do.

In answer to the interrogatory, the defendant swore—"The purchase was made for one hundred dollars, and no more, which sum I actually paid, and she, the present plaintiff, received, in full satisfaction, at the time of signing the contract of sale. It was considered, both by her and myself, at the time, to be the whole of the purchase money: but, if I should be able to sell the said land for a *good* or *large price*, which I verily believe to be the words mentioned, then, and in that case, I was under a verbal promise to make her a donation; but, even that was, by her and myself, at the time, considered at my own option and free will."

By agreement of the counsel, the depositions and bill of exceptions, which came up with the record, were to be taken as a statement of facts.

George Pollock, a witness for the plaintiff, deposed, that he has a perfect knowledge and understanding of the transaction. He believes the defendant was influenced throughout the whole of it by motives of the purest humanity. The deponent undertook, several times, to procure to the plaintiff the possession of the land. She consulted him on the propriety of empow-

ering several persons to procure it for her; but he dissuaded her; the persons she named not appearing to him trust-worthy. Afterwards she informed him the defendant was going to undertake it; and when they came to the office to execute the deed, he understood and believed the defendant required it, in order that he might not be controled or overruled by the fickleness or caprice of the plaintiff. The deed was accordingly executed, and one hundred dollars paid down by the defendant, which the deponent understood were advanced to relieve the plaintiff's necessities. The impression on the deponent's mind was, and still is, that, should the defendant obtain a greater price, he was to account for the overplus; but there was no written agreement to that effect. The deponent understood this from the conversation between the parties, and was confirmed in the opinion that the defendant contemplated no advantage to himself from the circumstance of his having been requested by the defendant to inform the plaintiff's counsel he was ready to re-convey the land, on being reimbursed his disbursements. The plaintiff was not in possession of the land.

Croswell deposed, he was present at the execution of the deed, and heard the defendant

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say, in the presence of the plaintiff and George Pollock, he had purchased the land. He spoke in English, a language not understood by the plaintiff.

Quarles deposed that, before the execution of the deed, he heard the plaintiff acknowledge to the defendant that she had sold the land to him, but did not hear any price mentioned by her. He afterwards heard the defendant telling the plaintiff he had given her one hundred dollars; but, if he obtained possession of the land, he would give her nine hundred or one thousand dollars.

On the following question being put to Croswell, by the plaintiff's attorney—"Was there any verbal agreement or sale, made by you, with the plaintiff, on which to base a sale of the land in question; and, if so, what sum of money had you agreed to give for it?"—the defendant objected, and the objection being sustained, the plaintiff excepted to the opinion of the court.

Moreau, for the plaintiff. The defendant's counsel contended below, that no interrogatory on facts and articles, tending to prove the contrary of what is contained in an act, can be put: and that, consequently, he was not bound to an-

swer the interrogatory in the petition, by which he was called upon to declare whether he had not paid a less sum than that mentioned, as the consideration of the purchase.

It is true, that the law provides, that no parol evidence shall be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making such acts, or since. *Code Civ.* 310, *art.* 242.

But it is manifest, from the very words of the law, that the prohibition had no other object than the exclusion of testimonial proof. The reason of the law is, that from the corruption of manners and the frequency of the subornation of witnesses, that mode of proof is always admitted with caution, and never permitted to destroy the faith which is due to the act. But, do the same objections lie to the confession of the party, to whom the oath is deferred? Surely not. First, because the law speaks only of testimonial proof: secondly, nothing can be less suspicious than the declaration made by one of the parties, against his own interest, in a case in which the oath has been deferred to him, and he has, in some manner, been made his own judge. So the judiciary confession has always been considered as the strongest of all proofs, and as dispensing the adverse party from pro-

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ducing any other proof of the fact admitted. 2 *Pothier, Obligations, n.* 798.

The law is so far from excluding this mode of proof, in the case of an act, that it authorizes it, as the only means of discovering truth, especially in cases of fraud and simulation. Judicial confession, says Pothier, is the declaration which one of the parties makes before the judge, as to a fact, upon which he is interrogated. *Id. n.* 797.

Judicial confession is there defined: the declaration made before the judge, by the party himself, or the person having his power for that purpose. It may be made in three different ways: 1. by writings produced by the party or his counsel—2. by the declarations or answers of the party, before the judge, either on an interrogatory on facts or articles, or in open court—3. by the answers or declarations of the counsel of the party. *Desquiron, Testimonial Proof,* 17 & 18, *n.* 20. The author adds, immediately after, "judicial confession forms a full proof, against the person who made it: and it is evident that, if Marius demands of me ten thousand francs, and I admit the receipt of them, there cannot any longer be any contestation: since yielding to the voice of truth, I have been my own judge."

The force of this proof is such, that it may even destroy the faith due to what is contained in the most authentic act. For this reason, the oath may be deferred to either of the parties, on any fact whatever. The decisory oath may be defined, says Pothier, in every kind of contestation, and in every civil case. In petitory as well as in possessory actions, in real as well as in personal. *Jusjurandum & ad pecunias & ad omnes res locum. L.* 34, *ff. de jurisp.* 2 *Pothier on oblig. n.* 819.

The decisory oath may be deferred, in every kind of decision whatever. *Desquiron*, 76, *n.* 147.

Our statute holds the same language, with regard to interrogatories on facts and articles. 1805, 26, *sect.* 7, 8, 9.

Every argument that the defendant's counsel may use, in this respect, must yield to the decision in the case of *Greffin's ex.* vs. *Lopez*, 5 *Martin*, 145, in which it was decided, that testimonial proof could be admitted in the case of the simulation of a notarial act.

Lastly, the interrogatory having been answered, the defendant cannot now contest the plaintiff's right to put it.

The act of sale does not state that the one thousand dollars were paid in the presence of

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the notary, nor that the vendor renounced the exception *de non numeratâ pecuniâ*. In such a case he may, within two years, require the vendee to make proof of the alledged payment. 2 *Febrero, Contratos, ch.* 4, § 8, *n.* 163. The defendant was then bound to prove this payment: *â fortiori*, was the plaintiff entitled to interrogate him, and receive his sworn answer.

The defendant being thus bound to prove this payment, his declaration on oath, is an incomplete proof, in this respect, on his part—1. because it cannot be binding on the plaintiff, unless she evidences an intention to use it, at least for that part in which he declares that the consideration of the sale was only one hundred dollars—2. because this declaration was, in some manner, destroyed by the witnesses which he has himself introduced.

The answer is not categorical. He was asked whether he had paid one hundred or one thousand dollars, as the consideration of money expressed in the deed: he answers he paid one hundred dollars only, because the sale was made in consideration of that sum only.

The court will determine whether, in this case, the defendant did not overleap the limits fixed by the law, and whether the plaintiff was bound to accept it *in toto;* whether she is not

to be permitted to divide it, inasmuch as it contains matters, foreign to the question propounded.

The party, *wishing to avail* himself of the avowals made by the adverse party, in his answer to the interrogatory on facts and articles, must not divide them, but must take them entire. *Civ. Code*, 317, *art.* 264. Then he is not bound to take them at all, if he do not wish to avail himself of them.

The plaintiff in this case is then at liberty to avail herself of the defendant's answer or not. If no interrogatory had been put, it would have been incumbent on the defendant to have exhibited proof of the actual payment of the one hundred dollars—he is equally bound so to do, if the plaintiff do not avail herself of his answer. Then, the judgment of the inferior court is correct.

Will it be said that, on the refusal of the plaintiff to avail herself of the answer, with the view of avoiding the inconvenience of taking it entire, the defendant may use it to prove his payment, because the statute says that such an answer shall be received as true, unless disproved by two credible witnesses, or of one credible witness, and strong corroborating circumstances. 1805, *ch.* 26, *sect.* 9. Admit-

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ting that this question can be solved in the affirmative, the defendant's answer would not avail him much, because it is improbable and contradicted by the testimony of his own witnesses.

He answers, he bought the land for one hundred dollars only—but he made a verbal promise to make a present to the vendor, if he obtained a good price for the land—a promise which, he says, he reserved the faculty of disregarding, if he saw fit. Pollock, who heard the conversation of the parties, on this subject, declares, that the sale was made with no other view than to enable the defendant, who was desirous of serving the plaintiff, to sell the land for her account, and that the one hundred dollars paid were only an advance made to relieve her present necessities, and that the overplus, in case of a sale, was to be paid to her. Quarles, a witness for the defendant, far from supporting his answer, deposes he heard him say to the plaintiff he had given her one hundred dollars, and would give her five hundred or one thousand dollars more, if he could get possession of the land—a promise, the defendant informed us, the performance of which depended on his future will.

It does not, therefore, appear by the depositions of these two witnesses, that the sale was made absolutely for one hundred dollars, accompanied by a vague promise of a donation, in case the vendee was pleased to make it.

The want of verisimilitude, in the account of the transaction, given by the defendant in his answer, would have been apparent, if the parish court had not rejected the proof which the plaintiff was about to make by the introduction of Croswell, by whose testimony she expected to prove that he had offered her five hundred dollars for the premises; that she had acceded to his offer, and they were going to execute the conveyance, when the defendant interfered, told the plaintiff she was making a bad bargain—that the land was worth a great deal more, and offered her the price mentioned in the deed.

The plaintiff has taken a bill of exception to the opinion of the court in this respect, and now claims the benefit, if this court be of opinion that the testimony before it is not sufficient to support the judgment of the parish court.

The defendant rested a considerable part of his defence on a suggestion that the land in question was not really worth much more than the sum of one hundred dollars, which he had paid. She alledged, and offered to prove, that

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Croswell had offered her five hundred dollars, which she had refused to accept—the court would not permit this. The testimony, in our humble opinion, was relevant, for it went to establish a fact, which would make it improbable that she would have sold for one hundred dollars a tract of land for which she was offered five times that sum. The mode of proof was the best of which the fact was susceptible, viz. the declaration of the very person who had made the offer. It is not easy to imagine on what grounds the parish court rejected it.

Hennen, for the defendant. It will be a sufficient answer to all what is said by the plaintiff's counsel, as to his right of putting interrogatories, and having them answered, that we did answer, and have only a wish to use our answer, and none to withdraw or withhold it.

To what is asserted on the authority of 2 *Febrero, ch.* 4, § 8, *n.* 163, we answer, that a different provision is made by our law. *Civ. Code*, 304, *art.* 219, 311, *art.* 242.

If the defendant's answer did not appear to the plaintiff sufficiently categorical, she ought to have excepted thereto; and, having neglected so to do, she must now receive as it is. The defendant, however, had an undoubted right to

explain what he said in his answer; otherwise he might have been entrapped by so general a question. *Read* vs. *Bailey*, 2 *Martin*, 60, 296, *Martineau & al.* vs. *Carr & al.* 3 *id.* 497.

The construction given by the plaintiff's counsel, to the civil code, under which he contends that he is not bound to use the defendant's answer, may be correct: but it does not follow that, because the answer may not be resorted to by him, the adverse party is precluded from using it, if he please. Every piece of evidence called for or introduced by either party, when once in the possession of the court, is there for the benefit of both parties. Either may use it, and the court may *ex officio* resort to it.

The account given by the defendant of the transaction in his answer, will not appear incredible, when it is remembered that one of the plaintiff's witnesses deposed that the defendant has offered to re-convey the land on receiving his disbursements.

The defendant has a right to have his answer taken together and undivided. This principle is to be found in every elementary writer on the law of evidence, whether in the civil or the common law.

It is alledged, that as the contract of sale is for $1000, and only $100 have been paid (though

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an acknowledgment of the payment in full has been made) the remaining $900 are due. On what principle? It appears distinctly from the record, that the plaintiff agreed to take $100 for the land, and likewise to state in the sale that the consideration had been 1000 dollars. She does not pretend to say that she has not been paid the *actual* consideration; therefore the absolute and dangerous doctrine *de non numeratâ pecuniâ* can have no operation in this case.

If the plaintiff be entitled to contradict her acknowledgment of the full payment of the consideration, the defendant assuredly is at liberty to shew what the consideration really was, in contradiction to the terms of the conveyance.

Does the insertion, in the conveyance of a *false* consideration, or of a consideration *different* from the *real* one, vitiate the sale, or bind the purchaser to perform more than he actually agreed for? Certainly not. Upon no principle can such a doctrine be maintained. There is to be found a decision of the court of cassation in France (April 28, 1807, and July 1, 1808) on the 1356 art. of the Napoleon code, of which a literal transcript is in our code, 315, *art.* 257, on both these points, on which alone, it is apprehended, this case depends. The substance of it is thus expressed by Paillette, *Manuel du*

droit Francais, 327, *note on art.* 1356. The declaration in court of him to whom an obligation was made, that it has not for its true cause that which is therein expressed, but another lawful one, cannot be divided, nor the obligation thereby avoided, as being without a cause. So here, the confession or answer to interrogatories, which contradicts the consideration expressed in the contract, and states the real one, cannot be divided, nor the contract annulled, as it was founded on a legal consideration.

On the merits, the case is certainly to be determined in favor of the defendant.

The parish court did not err, in refusing to allow Croswell to depose whether there was any verbal agreement or sale, between the witness and the plaintiff, as to the premises mentioned in the deed; and, if so, what sum he had agreed therefor. Verbal agreements for the disposal of real estates are void, and no parol evidence is ever permitted to be given of them, between the parties. *Civ. Code*, 310, *art.* 241, 242. *A fortiori*, no evidence of them can be given, in a suit, in which the parties are not those to the agreement. How can the defendant be affected by an incipient contract, a conversation, between a third person and his vendor? The question was quite irrelevant and improper, and the pa-

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rish court acted correctly in refusing to permit the witness to answer it.

MARTIN, J. delivered the opinion of the court. The plaintiff's counsel contends, that he is at liberty to use the defendant's interrogatory, and is not bound to have recourse to it. This may be true; but it is equally so, that the defendant has an undoubted right to avail himself of it. It is legal evidence in the cause, and cannot be prevented from being resorted to, by the party who introduced it. A party, who has taken the deposition of a witness, cannot set it aside, when it appears unfavorable to his cause. All legal pieces of evidence on the record may be freely used by either party; not more by the one who introduced it, than by his opponent.

The defendant's answer to the interrogatories, if used at all, by either party, must be taken together, and cannot be divided.

He had a right to explain his answer, and add thereto such circumstances as might prevent his being entrapped by too general an answer to a too general interrogatory. But his counsel contends that, as the plaintiff can contradict her acknowledgment of full payment, he has the right to shew what the consideration really was, in contradiction of the terms of the conveyance.

The argument appears plausible; but will not perhaps stand the test of a close examination.

The general rule is *contra fidem scripti, testis non adhibitur:* to this the legislator has seen fit to introduce an exception, viz. that, when the act does not express that the consideration was paid at the time and in the sight of the notary, the vendee is not liberated by the acknowledgment of the vendor, that the consideration money was previously paid, from the *onus probandi*, from proving the payment there acknowledged, if sued within two years, unless the right of thus calling for this proof be expressly waved, by a renunciation to the exception *de non numeratâ pecuniâ*. It does not necessarily follow, as a consequence of this principle, that when the vendor avails himself of this exception, every thing or any thing else, except the payment, is afloat in the conveyance, and is necessarily to be proven or susceptible of being disproven by *parol* evidence. Will the vendee be permitted to say that he made no contract at all—that he had long terms of payment, not yet elapsed—that there was a warranty agreed on and not expressed, by the breach of which he is exonerated? When the vendee would avail himself of this right by denying what he had assented to in the deed—or by insisting on

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clauses not therein mentioned, would not the vendor claim as a corollary the right of setting afloat any inconvenient averment in the deed? If some, and not all, of these deviations from the letter of the act are to be tolerated, where is the line to be drawn? Perhaps the safest way is not to allow any exception from the general principle, except the one introduced by the statute, and that the vendee does not derive, as a corollary from the right of the vendor, under the exception *de non numeratâ pecuniâ*, that of gainsaying any thing averred in the act, particularly to alledge and demand to be admitted to prove by parol evidence, that the consideration was a lesser one than that acknowledged in the deed—although he might, perhaps, alledge and prove by parol evidence, that a less sum was received in payment of a larger one, stipulated for; as in case of a deed, expressing a sum of one thousand dollars, agreed to be paid at a future day, parol evidence might be admitted to shew, that afterwards the parties agreed to postpone the payment to a more remote one—or that the obligee received any thing or a less sum, in full payment or discharge of the sum mentioned in the act.

In the present case, if the defence rested on the plea that the consideration of the sale was

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one hundred and not one thousand dollars, the plaintiff would be entitled to a recovery.

But the defendant has pleaded that the sale was *a simulated one;* that the consideration was one hundred dollars in cash; but that, in order to enable the defendant to dispose of the premises, on more advantageous terms, one thousand dollars were mentioned, at the request of the defendant, and the plaintiff had not then, nor has she now, any just claim on the defendant for one cent more. In other words, that the contract was *a simulated one.* There is no doubt that, if the defendant had a counter letter, by which he could make that appear, he might avail himself of this defence; and it is equally clear that he might likewise have the benefit of this defence, if the plaintiff had interrogated him in this respect. It remains for us to consider whether, when the plaintiff shews by *parol evidence,* a circumstance which, if shewn, by *written evidence,* would avail, it must not be deemed to have been legally proven. Written evidence is insisted on by law for the protection of him who claims the execution of the deed of his adverse party, lest the latter should destroy, by suborned witnesses, the effect of the agreement, which the former had the precaution to consign in a

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written act—lest, through the frailty of human memory, even honest witnesses might represent it in a different light; but every one may renounce any benefit which the law secures to him—if he, therefore, will run the risque of probing his adversary's conscience, he must abide by the result. If, when the parties are at issue on the simulation of an act, the party who claims the execution of it, introduces *parol* evidence of its simulation, will the court shut their ears? When they are thereby convinced that the act is simulated, can they find the issue against the simulation?

Here the defendant pleaded the simulation of the instrument, viz. that, although the real consideration was one hundred dollars, one thousand dollars were mentioned, to favor some fair view of his—not injurious to the plaintiff. The plaintiff introduces a witness, who deposes that the contract was really a *simulated* one; that, although it purported to be an absolute sale of the premises for one thousand dollars, the parties intended that the plaintiff should preserve her interest, though she parted with the title, the apparent right in the premises, in order that the defendant, appearing as owner of them, might with more confidence, be treated with, by persons desirous of purchasing—that,

after the sale, the plaintiff was to receive the price of the premises, deducting the one hundred advanced, and likewise a proper remuneration for the defendant's trouble. Although this testimony does not perfectly accord with that of the defendant's witnesses, yet all who are sworn declare, that the sale was not an absolute one, as the plaintiff insists upon—that it was *simulated*. The plaintiff's main averment, in her petition, is traversed by the defendant, and disproved by the plaintiff's own witnesses. Will it be said, her witness was introduced to destroy the credit of the defendant's answer to the interrogatory—and the court must notice what he says for this purpose, and shut their ears, and reject every thing else of which he speaks, even when the plaintiff especially interrogated him thereto? The court thinks that the deposition can neither be withdrawn nor divided.

The court thinks that the parish court erred in rejecting Croswell's testimony—the plaintiff had a right to it, in order to discredit the defendant's answer. The offer made to and rejected by her of five hundred dollars for the premises, was a circumstance, which lessened the credit to be given to an assertion that she agreed to take one hundred dollars therefor.

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But we cannot think of remanding the cause for this error, because the rectification of it would not affect the ultimate decision of the cause; as, although it might destroy one of the principal means of defence, it would not help the claim, as it would not support the averment that the sale was absolute and not simulated.

We do not examine the allegation of fraud, because there is no evidence to support it—nor the want of possession in the plaintiff, because that possession was not alledged at the time of the agreement.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that there be judgment for the defendant on the present claim of the plaintiff; reserving, however, to her, her right of action in compelling the defendant to account for the price of the land, when disposed of, allowing all proper deductions, or to re-convey the premises, if any such right she had, before the institution of the present suit: and it is ordered, that the plaintiff and appellee pay all costs above and below.

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APPEAL from the court of the first district.

The drawee's declaration of an intention to pay the bills, if he has the means, does not preclude him from contesting the drawer's authority to draw.

MARTIN, J. delivered the opinion of the court. The petition states that J. Nelson & Co. are indebted to the plaintiff, in the sum of $7419, 02, for goods sold and monies lent to them, according to an annexed account, and that the defendant is the only member of the partnership known to the petitioner.

The answer denies all the facts stated, and particularly the existence of a firm of J. Nelson & Co. of which the defendant is, or ever was a member.

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

The evidence is all written, and accompanies the record.

S. Kidmore deposed that he was in Louisville in the summer of 1817, when the defendant received a letter from J. House, dated in New-Orleans, advising him he had drawn bills on J. Nelson & Co. in favor of the plaintiff, for the purchase of a cargo for the barge Mary Ann, and for monies for her use; House being then master of her. The defendant blamed House for having purchased a cargo of unsaleable

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goods which would not produce funds to meet the drafts. The defendant added he would sell property to pay his part of the drafts, if the others would do the same, but he could not pay the whole. When the barge arrived, her cargo was taken possession of, and stored with Honoré & Colmenil, and he believes disposed of for the account of J. Nelson & Co. and others.

Thomas, deposed that, a few days before the present suit was brought, the plaintiff asked the defendant, whether he had been furnished with an account of sundries furnished by the plaintiff to the barge Mary Ann, for the defendant's account, and the defendant replied he had met the barge and J. House on board, having charge of her, who informed him of it. The plaintiff then handed an account, desiring the defendant to make some arrangement for the payment of the debt in New-Orleans, as drafts given the plaintiff on the defendant therefor had been protested by the defendant in Kentucky. The defendant replied he could make no arrangement, but would return immediately, and overtaking the barge, take her in tow, sell her cargo at auction, and remit the proceeds to the plaintiff, charging House with the loss. He added his intention had been to sell property in Louisville to pay the drafts, but finding more demands

on him than he could satisfy, he gave up the idea of taking up the bills. The deponent did not know of any house of J. Nelson & Co. in Kentucky, except what he heard from the plaintiff. The defendant told him House had no interest in the barge, but was left as the agent of her owners, and had nothing to do but to act as such in expediting her. She belonged to the old concern. The deponent understood from the defendant that, when he met the barge, House did not exhibit any bill to him, but told him of the transactions with the plaintiff, and made the extent of the purchase known to him. The defendant in his conversation with the plaintiff disavowed the authority of House in the purchase, and in the drawing of the bills, and spoke in very harsh terms of him, disapproving what he had done. The defendant refused to make any arrangement, for the plaintiff's payment in New-Orleans. The articles in the account annexed to the petition were purchased and paid for by the plaintiff, and put on board of the barge.

Craig deposed, the barge Mary Ann was generally understood to belong to the defendant and E. Young; the latter told him they had loaded her up. He never heard of the firm of J. Nelson & Co. till he came to New-Orleans,

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and then only from the plaintiff. There was at Louisville such a firm as Nelson & Young, or Young & Nelson. Such was the common expression when these persons were spoken of as dealing together; but since a few days the defendant informed him there was no such a firm.

J. A. Honoré deposed, he has resided in Louisville for some ten or twelve years, and has, during that time, known the defendant, who resides there, and is a pilot of the falls. He never knew of a firm of J. N. & Co. He is slightly acquainted with House, who follows farming and waggoning. He never knew him to be a partner of the defendant, though he is a joint owner of the steam-boat Franklin. The barge Mary-Ann, belonging to the defendant and E. Young, arrived at Louisville late in the summer of 1817; House was in her, but went off in the course of the day. It being understood that he was wasting the cargo, and acting otherwise improperly, so as to endanger the freight, Young, at the suggestion of the deponent, went down the river and secured the barge and cargo. The goods were stored with Honoré and Colmenil (of whom the deponent is one) subject to freight and charges. There were two bills of lading; the one for the goods bought by the plaintiff and shipped by House, and con-

signed, in his own name, to H. and C. and the other for the goods of Young and Nelson. He saw the two annexed letters of the plaintiff and of House, when the bills appeared. The defendant was then absent on the steam-boat Franklin to New-Orleans. Young, to whom the bills were presented, expressed great surprise, and declared he knew no such firm as J. N. & Co. The expenses of the barge being very considerable, were paid by the owners, by orders on H. & C. A small part of the cargo has been sold, and the proceeds applied to the expenses of the voyage, freight, storage and commission; the rest was in store, when the deponent left home, November 22, 1817, subject to the orders of the persons concerned. From the returns of the cargo, made to H. & C. 500 or 600 dollars worth of goods were missing, and House, in her general account, could not account for a sum of about 1500 dollars.

The plaintiff's letter, referred by the witness, was directed to J. Nelson & Co. and informed them of the supplies furnished in goods, provisions and money for the barge Mary-Ann, of which it enclosed an account; and advised them of his having drawn on them for the balance. House's letter was directed to the same persons,

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and appraised them of his having resorted to the plaintiff to procure a cargo, and furnish whatever had appeared necessary for the barge Mary-Ann, the former consignees of which, (Maunsel White & Co.) having done nothing, detained him some time, and disappointed him. He praised much the plaintiff's conduct, and recommended him as a proper person to attend to the affairs of the barge, in her future trips.

F. Honoré, a son of the preceding witness, deposed, he has resided in Louisville since 1806, and is well acquainted with the defendant, a pilot of the falls, not concerned in trade. He knows of no such a house as J. N. & Co. He never knew House to be concerned in mercantile business in Louisville, and does not believe that he ever was a partner of the defendant. He has ever understood the barge Mary-Ann was the property of Y. & N. when she was loaded, in 1817, with the goods of House. When she arrived at the falls, the goods on board were stored with H. & C. under the direction of Young, and with the consent of House, subject to freight. Part of it consisted of the goods of Y. & N. and the rest of those sold by House, and there were distinct bills of lading for each of these parcels. Young, before the arrival of the barge, apprehensive that the cre-

ditors of House, who was in bad circumstances, might seize the goods in which Young and Nelson were interested; and desirous to secure the freight of those of House and the plaintiff, went and met the barge at the Red Banks, where he prevailed on House to give separate bills of lading, as above stated, consigned to H. and C. To the best of the witness's recollection, the bill for the goods of the plaintiff and House, expressed that they were for the account and risk of them, Nancarow and House. Some of the goods of Y. and N. have been sold, and the proceeds credited to them. Some of those of the plaintiff and House have been sold also; he does not know to whose credit the proceeds have been passed, but heard Colmenil say they should be passed to that of Nancarow and House.

This witness proved the bill of sale of the barge Mary-Ann, bought by Emanuel Young and John Nelson.

Pryor deposed that, about the last of April, or first of May, 1817, he was with the defendant, House, and Andrew Jack, and heard House say that, if he could not get freight, he would buy goods and load the barge Mary-Ann, on his own account—before he heard this, he saw the barge partly loaded with forty hhds.

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sugar and some bundles of raw hides. House added, he had in the barge some loading on freight. In descending the river, in the steam-boat Franklin, he met the barge loaded, House being on board. He knows no firm of J. N. and Co. in Louisville, and knows not that House is otherwise concerned with the defendant, than as part owner of the steam-boat Franklin.

Scott deposed that, in May, 1817, House hearing it observed by the son of the defendant, that there was more loading on board of the Mary-Ann than had been left by the company of the steam-boat, replied, he had purchased it for himself, and should pay freight for it; that he was captain of the barge, and could take what freight he pleased, and that he expected to make for himself, out of the goods he was then taking, the sum of fourteen or fifteen hundred dollars.

Chapman deposed, he is one of the firm of Maunsel White & Co.—that the barge Mary-Ann, belonging to the defendant and E. Young, was placed in the hands of M. W. & Co. and by them advertised for freight in April, 1817; House then mentioned, as that firm had no other agency than to receive the freight or loading, there was not in New-Orleans any other

person charged with the agency of the barge but M. W. & Co. who were at all times ready to furnish money and any thing necessary to get her off. There was already a considerable part of her loading on board, when the witness went with his partner to inform House that he, the witness, would attend to the affairs of the barge, White going out of town. House replied he wanted but little more—that the plaintiff had agreed to put a considerable freight on board, and but little more would be wanted. He heard Young say, that the necessary supplies and provisions for the barge were deposited at several places on the river. The defendant, Young, House, and Andrew Jack, were owners of the steam-boat Franklin, as individual part owners, and paid as such. In the transaction of the affairs of the steam-boat, each owner signed for himself. M. W. & Co. were the agents of the boat, and are well acqainted with the mode in which the part owners carried on their affairs. So far as this deponent knows or believes, House is not otherwise concerned with the defendant than as joint owner of the boat. In the spring of 1817, M. W. and Co. sold goods to House, which they charged to him alone. He never said or pretended to be a partner of the defendant.

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The defendant is not sued for a breach of the promise he made to return to Louisville in the steam-boat, taking the barge in tow, selling her cargo, and remitting the proceeds to the plaintiff; neither is he sued on the bills, which he expressed an intention to pay, in part—but, as a partner of the firm of J. Nelson & Co. for certain goods furnished for the use of the said firm. There is not the least tittle of evidence in support of the existence of that firm. If, however, the plaintiff had proven that a cargo for the Mary-Ann was purchased by a person, clothed with powers for that purpose, by E. Young and the defendant, it would have been proper for this court to inquire whether evidence of goods sold to Young and Nelson might not support the plaintiff's claim, who might have contended, with what success, we do not pretend to say, that the facts in his petition were sufficiently proven, if he proved supplies to a firm, of which the defendant was a member. But the only part of the testimony, which may be invoked in support of this position, is the declaration of the defendant to Thomas, that House had been left in N. Orleans, as agent of the owners of the barge, viz. the defendant and Young; but this general expression is in the same breath qualified—he had nothing to do but to act as such (as agent)

in *expediting* her. Expediting a barge, might include the act of purchasing a cargo—but the witness goes further, and informs us, that House's authority in the purchase was disavowed.

There is no evidence of any authority to trade, vested in House by the defendant, out of the deposition of Thomas, and this is entirely in what he relates of the conversation between the parties to this suit: a conversation which cannot be divided.

The intention manifested by the defendant, in a conversation with S. Kidmore, to pay part of the bills, the reason alledged for not paying the whole, might give rise to a presumption that the defendant would have paid the whole of them, if the cargo of the barge had afforded him the means, and that consequently he considered them as the bills of a person authorized to draw, and to draw on Young & Nelson, describing them by the appellation of J. Nelson & Co.—but when this is weighed in connexion with the rest of the testimony, it is evidence only of an honest intention to apply the proceeds of an unauthorized purchase to the payment of the imprudent and deceived individual from whom it was made.

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The judgment of the district court appears to us perfectly correct, and it is, therefore, ordered, adjudged and decreed, that it be affirmed with costs.

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JULY TERM, 1818.

East'n District.
July, 1818.

LUCILE
vs.
TOUSTIN.

LUCILE vs. *TOUSTIN*.

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

Although a sale in writing, was made in a place where it might have been made verbal, parol evidence of it may not be received, without proof of the loss of the writing.

DERBIGNY, J. delivered the opinion of the court. The appellant and defendant has been, by herself and her vendor, in possession of a female slave during more than five years. That slave is now claimed by the plaintiff and appellee, as having never ceased to be hers. It is proved that previous to the month of May, 1809, the appellee was the owner of this slave; but the appellant alledges that the appellee then sold her to the person under whom she holds. She relies on that sale, and further pleads prescription.

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The appellant abundantly proves by a number of witnesses that this slave was sold by the appellee to Mlle. Maurin, the appellant's vendor, sometime in 1809. But, as some of those witnesses also deposed that a written act of that sale was executed, a question has arisen whether the defendant could produce any parol evidence of the sale, without first proving the loss of the document in the manner prescribed by law.

That such is the rule, when the contract is one of those for which the law requires a written act, is, of course, not disputed. The question is, whether this rule is to govern in cases where a contract, which could have been made verbally, was reduced to writing: for it is admitted that verbal sales of slaves are not illegal in the country where this is said to have taken place.

Although this is not a case where the written proof of the contract could alone be received, and where, in its defect, no parol evidence would be admitted without first shewing that it was lost through some unavoidable accident; yet, the moment it appeared that the purchase here relied on had been reduced to writing, it became the duty of the defendant to produce that instrument, or shew that it was not within her

power or reach, according to this first rule of evidence, that "the best evidence should be produced which, from the nature of the case, must be supposed to exist." The defendant having neglected to produce it, lies under the suspicion of concealing a document which, if exhibited, would make against him; and all his parol testimony must go for nothing.

The manner in which a part of the statement of facts, agreed upon between the parties, is conceived, had caused the court to doubt whether they ought not to consider the bill of sale spoken of by the witnesses as actually produced, though the judgment of the inferior court is bottomed on the omission of the defendant to produce it; because the statement of facts contains a copy of that sale, under the name of "document admitted by the plaintiff." But, in refering to the other part of the statement, it is seen, that this admission must have been made since the judgment appealed from was rendered; for the parties further agree, that the plaintiff shall have a right to make all legal objections against the parol evidence, as inadmissible, before the loss of the bill of sale had been proven.

No title having been shewn by the defendant,

East'n District. *July*, 1818.

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his possession of the slave, during five years, cannot avail him.

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

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

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5m 614 113 454

HART vs. *CLARK'S EX'S.*

A verbal promise, to pay to the vendor, the difference between the price at which a tract of land is purchased, & that at which it may be sold, cannot support an action.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This action is brought on a verbal promise, said to have been made by the defendants' testator, according to which he was to pay over to the plaintiff all the surplus of the sum of six thousand five hundred and eighty-nine dollars, the price for which the plaintiff had re-sold to him the tract of land, described in the petition, which, it is averred, he sold for eight thousand dollars, with specified interest thereon. The difference between the latter sum, with said interest, and the former, is claimed.

It is the opinion of this court, that the promise or agreement thus made, must be consider-

ed either as a donation on his part, or as an addition to the price at which he re-purchased the land, by a deed, bearing date of the 11th of March, 1811.

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HART *vs.* CLARK'S EX'S.

As a donation, being verbal, the agreement created no perfect obligation on the part of the testator to fulfil his promise, and his executors cannot be legally compelled to comply with it.

If the agreement be considered as a stipulation to pay an additional price for the land, the plaintiff and appellant is equally without a remedy: it makes no part of the written contract between parties, and parol evidence cannot be received in its support. This point was settled in *Clark's ex's & al.* vs. *Farrar*, 3 *Martin*, 252, 253.

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

Maybin for the plaintiff, *Turner* for the defendants.

JOURDAN vs. *PATTON*.

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

If, on an injury done to her slave, the plain-

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JOURDAN *vs.* PATTON.

MATHEWS, J. delivered the opinion of the court. The plaintiff claims damages, for an injury done to one of her slaves, by one of the defendant's. She obtained judgment, and the defendant appealed.

tiff recover his full price, the property is transferred to the defendant, on payment of the judgment.

The injury done to the slave was of such a nature as to render him wholly useless—his only eye having been put out.

No interest can be given on such a price, but the damage sustained by the plaintiff by the delay in receiving it, till a fair judgment may be taken into view in valuing the slave.

The parish court decreed that the plaintiff should recover twelve hundred dollars, the supposed value of the slave, and a further sum of twenty-five dollars a month, from the time he was deprived of his sight; and that the defendant should pay the physician's bill, and two hundred dollars, for the sustenance of the slave during his life, and that he should remain for ever in the possession of the plaintiff.

We are of opinion, that this judgment is erroneous, in giving damages for the full value of the slave, and compensation for the loss of his labor, from the time he became blind, during an undetermined period. Further, it is thought to be erroneous, in decreeing that the defendant should pay two hundred dollars for the subsistence of the slave, and that he should remain for ever in the possession of the plaintiff.

The most that could have been equitably claimed, in addition to the full value of the

slave, was legal interest thereon; which, though it could not be given as interest, upon an uncertain and unliquidated sum, might have been taken into view, in estimating and fixing the damages.

In the present case, from a comparison of the testimony, as to the value of the slave, we are of opinion that full and complete indemnity has been given, for a total loss. When the defendant shall have paid the sum thus decreed, we are of opinion that the slave ought to be placed in his possession, deeming that the judgment making full compensation to the owner operates a change of property. In this view of the case, that part of the judgment of the parish court, which orders the defendant to pay two hundred dollars, is evidently erroneous. The principle of humanity, which would lead us to suppose that the mistress, whom he had long served, would treat her miserable, blind slave with more kindness than the defendant, to whom the judgment ought to transfer him, cannot be taken into consideration, in deciding this case. Cruelty and inhumanity ought not to be presumed against any person. A remedy for them can only be applied, when they are legally proven.

The judgment of the parish court being er-

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JOURDAN *vs.* PATTON.

roneous, in these points, it is ordered, adjudged and decreed, that it be annulled, avoided and reversed; and this court, proceeding to give such a judgment as, in their opinion, ought to have been given in the court below, it is further ordered, adjudged and decreed, that the plaintiff recover from the defendant the sum of twelve hundred dollars, as an indemnification for the value of the slave, and that she shall further recover the amount of all expenses incurred for the attendance and treatment of the slave, with costs of suit in the inferior court.

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

WILLIAMSON & AL. vs. *THEIR CREDITORS.*

Before the act of 1817, syndics of an insolvent could, for the purpose of effecting the sale of his property, release any mortgage existing thereon.

Whether the recourse of nullity against judgment, as exercised in

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. In this case a rule was obtained by the assignees of Wm. P. Mecker, creditors by judicial mortgage of the estate of Williamson & Patton, ordering the syndics of the creditors of that estate to shew cause why they should not rescind that mortgage, make a bill of sale of a

house, by them sold to S. Henderson, which was subject to said mortgage, and pay to Mecker's assignees the proceeds of that sale, as well as the price of some land lying in the Alabama territory, which was also sold by the said syndics. The syndics, in answer to that rule, state, that they have no power to rescind the mortgage in question; that as to the proceeds of the Alabama lands, they are restrained from paying them by a bond which they have entered into to pay only when the right of the claimants shall have been established; they further say that the judgment under which the assignees claim is null, and that it gives them no right to be paid in preference to the other creditors. The district court, considering that they had not sustained their pleas, made the rule absolute, and ordered them to pay into the hands of the assignees the sum by them claimed. From this decree the syndics have appealed.

Spain, still exists in this state?

Under a general allegation of nullity, nothing which does not appear on the record can avail.

A judicial mortgage cannot extend to lands out of the state.

A doubt was suggested whether this is a decision from which an appeal can lie, but that it has between the parties the effect of a final judgment, and bears all the marks of such except the name, is so evident, that any demonstration of this is deemed useless.

The first cause shewn by the syndics of Williamson and Patton, why they should not com-

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ply with the rule, is, that they have themselves no power to rescind the mortgage obtained by the assignees of Wm. Mecker, and that the mortgagees alone can exercise that right. A law enacted on the 20th of February, 1817, concerning the voluntary surrender of property, has especially provided, that for the purpose of effecting the sale of the property of the insolvent the syndics shall be authorized to release the mortgages existing on it; but the syndics of Williamson and Patton contend that this provision is not applicable to failures made anterior to that law. Whether it is or not, we think that this act did not introduce any innovation on this particular subject, and that before its enactment syndics of creditors were fully vested with the power which the present parties disclaim exercising. Before appealing to any authorities on that point, it may be premised that this results from the nature of things; as soon as a failure is declared, all the property of the debtor passes into the hands of his creditors. A general liquidation becomes necessary, for which purpose the creditors must resort to a sale of all the estate. To effect this, the creditors make choice of agents, under the name of syndics, who are vested with the necessary authority to do for all the creditors what these

would have a right to do for themselves. The sale which they make of the property to the end of paying each creditor, according to his rank and privilege, is a sale made by all. After such a sale, no individual creditor can retain a lien upon the property sold and paid for, any more than he could retain it after selling the property himself and receiving the price. The rescission of the mortgages and privileges is a necessary consequence of that sale. Nor does it appear requisite that a formal release of them should be given, because when the creditor has caused his pledge to be sold to have payment of his debt, the pledge is gone, and is re-placed by the price for which it sold. *Febrero, book 3, de juicios, ch. 2, sect. 5, n. 340,* speaking of the purchaser of property exposed at public sale, says: "he is equally free from any molestation on the part of the creditors, who were parties to the *concurso,* and at whose instance the thing was sold, although the purchase money should not be sufficient to pay their claims, because by their consent to the alienation of the property, their right on the thing was relinquished," &c. It is our opinion that, by a sale legally made at the instance of the creditors, through their syndics, all mortgages and privileges which existed in favor of those who were

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parties to the *concurso*, become *ipso jure* extinct, and that a formal release of them is not necessary: but that when such release is required by the purchaser, the syndics are the proper persons to give it. In this case the sale of the house to S. Henderson does not appear to have been made in the manner required by law; but the mortgage creditors having, by their demand of the purchase money, assented to the alienation, and ratified the act of their agents, the respective situation of these parties is the same as if the syndics had originally observed the established rules.

But if the syndics are authorized to release the mortgages which may exist on the property sold, in order to receive the purchase money, they say that this money ought not to be paid to the assignees of William P. Mecker in preference to the other creditors, because the judgment under which they claim is null. Under that plea, however, they do not appear to have attempted to shew any ground of nullity apparent on the face of the record; but they offered to go into evidence to prove that the judgment was null, collusive and fraudulent.

Admitting the recourse of nullity against judgments still to exist, a question which this court will be unwilling to decide, so long as

there shall be no absolute necessity to pronounce upon it. *Mecker's assignees* vs. *Williamson and Patton's syndics*, 4 *Martin*, 625.

We believe that a general allegation of nullity does not put at issue all the facts from which any of the causes of nullity can arise, but only such as may be apparent on the face of the record. The causes of nullity, as laid down by the Spanish jurists, are multifarious. Most of them are vices or defects of form, proceeding from violation of the solemnities prescribed by law in the administration of justice. Of those proceedings the only legal evidence is the record; and therefore, a general allegation of nullity may well embrace all the questions arising on the face of it, because the parties are not at liberty to seek evidence elsewhere; but when the cause, from which the nullity is expected to be shewn, depends on facts out of the record, then a special allegation of such facts is indispensible to enable the adverse party to come prepared to meet them. Nothing would be more unjust than to submit him, under a general allegation of nullity, to try any question which the complainant might think proper to start. For example, a judgment is said to be null when it has been obtained by means of forged papers, when it has been procured by bribery, or when

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the party, whose oath has been required for some discovery, has perjured himself. Can he, against whom the nullity is alledged generally, be compelled to go to trial, upon any or all of these matters? That would be contrary to all principles of law and rules of practice.

The same reasoning will apply to the testimony offered to shew that the judgment was obtained by collusion and fraud, that fact not being at issue between the parties, under the general allegations contained in the pleas of the appellants.

It is our opinion that the only error, in the decree complained of, is in that part of it which allows to Meeker's assignees the proceeds of the Alabama lands; because that property, being situated out of the territory of Orleans, as then possessed by the United States, could not be affected by the judicial mortgage under which they claim.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and this court, proceeding to give such a decision as they think ought to have been rendered below, do order, adjudge and decree, that the appellants do complete the sale by them made to S. Henderson

of the house mortgaged to the appellees, and pay into the hands of the appellees the purchase money of the same, when received: and it is further ordered, that the appellees do pay the costs of this appeal.

Duncan for the plaintiffs, *Livingston* for the defendants.

DREUX, EX'R. &c. vs. *DUCOURNAU*

Although the register of mortgages certifies that the land is free of mortgage, if it appear that the order of court, by which a mortgage was ordered to be cancelled, was obtained in the absence of the mortgagee, the purchaser is not compelled to pay the price.

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

MATHEWS, J. delivered the opinion of the court. This suit is instituted to recover the balance of the price of a tract of land, sold by the plaintiff and appellant, on which a mortgage was retained for the payment of the price.

The defendant and appellee resists the claim, on the ground that a mortgage still exists on the land, against the plaintiff's testator, in favor of one Berger, from whom it was purchased.

An order of seizure having been granted by the parish court against the mortgaged premises, was stayed by an injunction, which was afterwards made perpetual, unless the plaintiff should

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legally prove that Berger's claim, resulting from the mortgage in his favor, has been satisfied.

From this decision the plaintiff appealed.

The facts necessary to be noticed in the case are as follows: Bouthemy, the plaintiff's testator, purchased the premises from Berger, for the sum of eight thousand dollars, giving a mortgage to the seller, general on all his property, and special on the land sold. This mortgage was afterwards transferred to J. B. Labatut, to secure the payment of fourteen hundred and eight dollars and fifty cents, and afterwards to T. Durnford, to secure that of three thousand two hundred dollars, payable June 13, 1807, who, on the 13th of June, 1808, gave a final acquittance, on his part, by a notarial act. Labatut did the like. All this appears by the certificate of the register of mortgages: these acts being regularly recorded in his office. It is also shewn that Berger's mortgage was entirely cancelled and annulled, by an order of the parish court, on the 15th of May, 1817. The register further certifies, in general terms, that no mortgage now exists on said property. But, on referring to the record of the suit, in which the order for cancelling Berger's mortgage *in toto*, was made, we find it to be a suit against Durnford, to which Berger was not a party.

The only question, arising on these facts, is whether the mortgage on the property purchased by the defendant has been legally and justly cancelled, so as to render him liable to be condemned to pay the plaintiff's claim, either in equity, or according to the terms of their contract.

The certificate of the register of mortgages, declaring, in general terms, that, according to his records, no mortgage now exists on the land against Bouthemy's estate is *primâ facie* evidence in favor of the plaintiff's right to recover his claim, on the ground of Berger's mortgage having been raised and annulled. But, this must be compared and examined with, and explained by, the other facts apparent in the case, which shew the manner of proceeding on the part of the plaintiff, in a former case, to affect the raising and cancelling of said mortgage.

It is perhaps true, that either of the assignees of the mortgage might have received the whole amount secured by it, and in that event an acquittance *in toto* would have been good against the original mortgage. The debt secured was payable by instalment, and the debtor and mortgagor thought fit to pay to the assignees of his creditor, the sums for which the transfer was made, and acquittances were given and

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received to that effect. It is our opinion that these acquittances operated an extinguishment of all the equitable right, title and interest, which the assignees held under the transfer of the mortgage, and perhaps all authority to sue for or collect any balance that might remain, which is certainly the property of the original mortgagor, who may be considered as reinstated in his former right as to what remains due after an acknowledged satisfaction made to his transferees.

If this opinion be correct, the parish judge was right in considering his order of the 15th of July, 1817, as founded in error, being granted in a suit against Durnford who was no longer interested in the mortgage. For by such an order or decree, the right of Berger ought not to be affected, as he was not made a party to the action. This decree of the parish court, it is believed, being the only foundation for the certificate of the register of mortgages, by which he certifies that no mortgage now exists on the land: the force of its evidence is destroyed by the erroneous circumstances, under which the order was made, and leaves the property, for any thing that appears to the contrary, still liable to Berger's mortgage for the balance remaining due of the price, which Bouthemy

bound himself to pay for it. The defendant, having knowledge of this, could not have paid the whole amount promised by him for the plantation, with safety, unless he should be well secured against Berger's claim, and ought not, in equity, to be compelled to do it, without such a surety. But, by the stipulations of his contract, he cannot be compelled to pay, till the plaintiff produces legal evidence that the mortgage granted by his testator to Berger has been fairly cancelled and annulled, which does not appear in the case.

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

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

DENYS vs. *ARMITAGE.*

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

A curator's surety is liable to an action, on the bond, although neither he nor his principal have been sued for a settlement.

MARTIN, J. delivered the opinion of the court. The plaintiff sues as attorney to the absent heirs of one J. Hatfield, and the defendant

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is the surety of one B. Fleming, who has been appointed curator to Hatfield's estate. The object of the suit is to recover 305 dollars 12 cents, the amount of the estate of the deceased. There was judgment for the plaintiff, and the defendant appealed.

The statement of facts admits the appointment of the plaintiff, by the court of probates to institute the present suit—that the defendant and L. Shaw executed the bond in suit, as sureties of the curator—that the amount of the property inventoried is 305 dollars, 12 cents—and that the curator died without accounting.

The defendant contends the suit is prematurely brought, as there is no proof of any demand, and consequently no evidence of any *refusal* on the part of the curator or his representatives, and it is only in the case of a refusal that the act of 1809, 4 § 4 authorizes a suit like the present to be brought. The petition alledges, and the statement of facts admits the appointment of the plaintiff to bring suit. We must presume, that the necessary requisites were shewn to the court of probates before the appointment was made.

It is said the suit is to be brought to compel a settlement, and the defendant is sued to pay. The act cited speaks of compelling the party to

deliver the amount in his hands; and this is to be obtained by a suit on the bond.

II. It is contended, that the bond is void, being for *double* the sum which the law requires, we are of opinion that it is void *pro tanto* only.

III. The defendant alledges, that the debt due by the curator is unliquidated, and the curator was entitled to certain allowances for several expenses, &c. The rule is *de non existentibus & non apparentibus eadem est lex.* If he was entitled to any allowance, he ought to have alledged and proved his claim, and the inferior court could not allow it otherwise.

IV. The present suit is in the nature of an action of debt at common law; but it does not follow that all common law principles, relating to that kind of action, apply to a suit on a bond brought in this country.

V. It was the duty of the curator and his representative, *to account and deliver the amount in his hands.* For the performance of this duty, he gave the bond, which the defendant signed, as surety. This has not been done; and, on a breach of the condition, the surety is liable to a

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suit, although neither the curator nor his surety have been sued for a settlement.

Lastly, there cannot be a question that the parish of Orleans has a court of probates, whose business is transacted as in all other parishes of the state, and the judgment was properly rendered in this case for the amount due.

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

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

ALEXANDER vs. *JACOB & AL.*

The mortgagee cannot prevent the sale of the premises by a creditor of the mortgagor, but may insist on his being paid, out of the proceeds, in preference of the seizing creditor.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellant built a house for Henry Jacob, one of the defendants. Jacob, not being able to pay him, agreed to let him collect the rents of the house until the extinguishment of the debt. The appellant did actually obtain part of his payment in that manner; and, being about absenting himself, left the house under the care of an agent, authorized

to receive the rents. While he was absent, Prampin, a creditor of Jacob, caused the house to be seized and sold by the sheriff, and received the purchase money. The plaintiff, on his return, instituted the present suit against Jacob, and Madam Souzet and her husband, the now occupiers of the premises, praying that Jacob might be condemned to pay him the amount of his claim, and that the other parties might hear it decreed that his said claim is privileged upon the house in question. Judgment was rendered in the lower court against Jacob, but in favor of the other defendants.

The defence of the appellees rests upon several grounds; the first of which in order is, that the appellant is not entitled to have and maintain his action against them. The objection which they raise, under that part of their answer, is that, before the plaintiff could sue them, he ought to have obtained judgment against his debtor, Jacob, as required in such cases by our statute. *Civ. Code*, 460, *art.* 43. The article relied on does not seem, however, to support the defendant in that objection. It goes no further than providing that the creditor, whose pledge is in the hands of a third possessor, shall not cause it to be sold, without having previously obtained judgment against his

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principal debtor; but it does not say that the third possessor shall not be called to hear that judgment; and this mode of proceeding, being clearly more advantageous to the third possessor, to whom it gives an opportunity of debating the claim of the creditor and contradicting his evidence, we see no good reason why it should not be admitted.

But, under that part of the answer of the appellees, another objection arises, which this court must take notice of, and which goes to defeat this action. The appellees are not third possessors, who have bought from a debtor property incumbered with a mortgage or privilege. They are purchasers of property sold under execution, at the suit of a creditor of the mortgagor. The creditor, whose pledge is seized and offered for sale at the suit of another creditor, would not, if present, have a right to oppose that sale, and to preserve his pledge in kind, until he should please to have it sold himself. His right is that of being paid out of the proceeds of sale, in preference to the seizing creditor, if his claim is of a higher order or anterior date. *Curia Philipica, tercero opositor, n.* 9. As a consequence of that principle, if the privileged creditor was absent, and had no knowledge of the sale, his first recourse is

against the seizing creditor, to make him refund the proceeds, before he can molest the purchaser, and cause the property again to be seized and sold. *Febrero, de juicios*, 3, 2, *n.* 344. This is the course pointed out by justice and equity, and which this court think themselves bound to maintain.

This view of the case precludes the necessity of examining the other points at issue between the parties.

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

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

Workman, on a motion for a re-hearing. The appellees, says the court, are not third possessors who have bought from a debtor encumbered property—they are purchasers of property sold under execution at the suit of a creditor of the mortgager.

These persons appear to me to be third possessors, in the strictest sense of the law. What meaning can the expression third possessors have, if not that of possessors distinct from

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either of the two parties, debtor and creditor? In what do the purchasers from a debtor himself, differ from those who purchase at a sheriff's sale? Is not the sheriff on such occasions a mere agent or minister of the law? Is it not the debtor's right, and that right only, which he is authorized to dispose of? The plain, obvious, lexicographic import of the words *third possessor* is any lawful possessor other than the debtor or creditor in question.

The passage cited from the *Curia Philipica* does not tend to destroy or diminish my client's right. The article referred to says—"*Si el accreedor posterior executante se opone, pidiendo solo se le entreguen como tal los bienes executados per derecho de prenda de su deuda, esta oposicion no impide la execucion. Y asi sin embargo de ella, se ha de continuar, y vender los bienes, y de su valor y precio pagar al anterior, y de lo que restare, al posterior que executó.*" All this is very satisfactory. It is not pretended, that the privilege or mortgage creditor can prevent the sale by a subseqent creditor, and preserve his pledge in kind, until he should please to have it sold himself. Such sales may always take place, subject to the antecedent incumbrance; and such sales will clear off the incumbrances, provided payment be

made to the antecedent creditors. This payment, the court will perceive, is the essential and indispensible circumstance to give validity to the proceedings. The law does not say that the anterior creditor shall have a mere right to payment—a good cause of action against the subsequent creditor, who receives the proceeds of the thing sold. It says he shall be paid. His right to the proceeds is of the same kind as that which, previous to the sale, he had to the pledge itself. Now, it seems most evident, that all this doctrine contemplates the case of a sale made when the anterior creditor is present, and when the proceeds of the sale are in the hands of justice. The object of the law is to secure the right of that creditor—not to defeat it. Therefore, the doctrine cannot be applicable, when the proceeds of the sale have got into the possession of the executing creditor; otherwise the privilege would be annihilated. The privileged creditor would have lost his pledge; and, being reduced to the rank of a mere simple contract or chirographic creditor, he would be left to his remedy against the person, or the personal property, of the subsequent executing creditor. For the monies once paid into the hands of the latter, how could they be fixed—how bound by any privilege whatever? How

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could they be traced,—by what sign or ear-mark identified? Thus, according to the decision of the court, the rights of any privilege or mortgage creditor might be defeated, and his lien on the pledge wholly destroyed by the contrivance, even of his debtor. This debtor would only have to grant a new mortgage to some friend or accomplice, and procure this new creditor to sue for an order of seizure and sale, which not being objected to, according to the supposition of collusion between the parties, would take place in ten days; at the end of which period, the confederates might share the spoil, and leave the antecedent mortgagees to seek their remedy as they might. To sue persons who might have absconded from the state, or who, if they remained in it, might entertain their creditors with a *cession de biens*, and settle all accounts according to the provisions of the act of insolvency.

If the anterior creditors were present, and in the habit of perusing the advertisements in all the daily newspapers, they might, indeed, defeat this goodly project, by interposing their claims. But who thinks, or who ever thought it necessary to be thus perpetually on the look out to preserve a privilege or a mortgage? Does not every mortgage creditor deem it sufficient

that his hypothecation is recorded, and that it is thus completely secured against the legerdemain of chicane or fraud?

If the creditor on the spot would have some chance of security, the absent creditor would have none at all.

Publish this doctrine to-morrow, and in less than a twelvemonth, I am persuaded, we shall find the rights of mortgage creditors, and the credit of the state itself, materially injured by it.

The texts, on which the commentary above mentioned of the *Curia Philipica* is founded, put the question out of all doubt. The 5th part. title 13, law the 38th declares that the right of pledge is extinguished by paying the creditor, or depositing the sum due for him, in case he refuses the payment.

All these provisions arise out of the following decision of the Roman civil law. *Quod si res sit pignorata, quæ pignori capta est, videndum est an sic distrahi possit, ut dimisso creditore, superfluum in causam judicati convertatur. Et quanquam non cogatur creditor rem, quem pignori accepit, distrahere, tamen in judicati executionem servatur, ut si emptorem inverterit res quæ capta est, qui dimisso priore creditore, superfluum solvere sit paratus, admittenda sit hujus quoque rei distractio. Nec*

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videtur deterior conditio creditoris fieri suum consecuture, nec prius jus pignoris dimissuri, quam si ei fuerit satisdatum. Dig. 42, 1, 15, § 5. Here it is seen that the payment of the prior creditor is the condition precedent, the *sine quâ non* of the execution. The subsequent creditor is not entitled to the proceeds of the pledge, but only to the overplus, remaining after the anterior creditor has been satisfied.

And let it be particularly remarked, if the court please, that all the authorities referred to, contemplate a pledge, not a mortgage,—*pignus*, not *hypotheca*, a thing in the actual possession of the creditor, not a thing possessed by others, in which he has only an invisible, incorporeal right. To sell this pledge without his knowledge, is impossible. And when it is sold by judicial authority, he may retain or demand the amount for which it may have been pledged to him. Very different is the situation of a mortgage or privilege. The property affected by the one or the other, may be disposed of, as in the instance now before the court, without the creditor's consent or knowledge; and the whole proceeds removed or dissipated before it could be possible for him to secure, or even to claim any part of them.

The articles of the civil code, already quoted

at the trial of the cause, secure the privilege creditors whatever may have been the Spanish law on the subject. If there is any discrepancy between these systems of legislation, our code must of course prevail.

Lastly, the determination of the court in the case of *Sadler* vs. *Lafon*, referred to and explained at the first hearing, is in strict conformity to these laws, and was supposed to have set all these questions at rest. 4 *Martin*, 477.

The decision of the present case is believed to admit principles unknown to our ancient law, principles adverse to those of our civil code, contrary to uniform and approved practice, and dangerous to the rights of all privileged and mortgage creditors. A rehearing of the cause is therefore respectfully and earnestly requested.

No re-hearing was granted.

D'APREMONT vs. *PEYTAVIN*, *ante* 323.

In this case, there was judgment for the plaintiff, in this court, last January. He was, however, decreed to pay costs, there being an allegation in the answer of the defendant, in the district court, that no amicable demand was made, and no evidence of such a demand hav-

After the copy of a judgment has been sent to an inferior court, to put it in execution, the parties are out of court, and the supreme court cannot amend

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ing been offered by the plaintiff; it having escaped the attention both of his counsel and this court, that the defendant had, in the petition, been required to say, on oath, whether an amicable demand had not been made, which he had neglected to do.

it, on the motion of the party injured.

Turner, for the plaintiff, now drew the attention of the court to this error, and prayed that the judgment might be amended. But, THE COURT was of opinion, that this could not be done, as the defendant was out of court, nearly six months having elapsed since the rendition of the judgment: *Moreau*, the defendant's counsel, declining to consent to an amendment, as he was without authority from his client, and a copy of the judgment, with the mandate of this court, to put it into execution, having issued several months ago.

DESHON & AL. vs. *JENNINGS*, *ante* 568.

Former judgment confirmed.

Workman, for the plaintiffs, on a motion for a re-hearing. The judgment of the court, if carried into effect, will, it is apprehended, occasion great injury to the heirs and creditors of the estate, the care of which has been en-

trusted to the appellant, by his testator, Champlin. The suit instituted against Jennings, for the recovery of the property, which he took from the body of the deceased, in Attackapas, may be abated, and he, of course, be left at liberty to walk off with his plunder, wherever he pleases.

The provisions of the *Civ. Code*, 242, *art.* 153, will, we apprehend, be found incompatible with, and utterly destitute of, the very important provision of another part of the statute, *id.* 109, *art.* 232, in favor of wills made in foreign countries. The former of those articles says expressly, that no testament can have effect in the territory until it has been presented to the judge of the parish, &c. Now this presentation, in case of most wills, made in foreign countries, will be impossible, as the originals of those wills cannot be obtained. So that, unless we admit that the concluding words, *in the cases prescribed by law*, have reference to the ordering the execution, as well to the opening and proving of the will, we must conclude that foreign wills can have no validity whatever in this state. The article in question consists but of one sentence. Is it not then clear, that the restriction of the concluding words is applicable to every part and provision of the article?

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So that it should be construed as if written thus: "In the cases prescribed by law, every testament shall be presented to the judge, &c. and, after being opened and proved, the judge shall order it to be executed."

Then comes the question, what are the cases in which these formalities are prescribed by law? The answer is obvious: the cases of wills, made in the state—the only wills which can be presented, opened and proved in the manner directed. Would it not be quite unnecessary for the legislature to require proof of that, the proof of which was already made and admitted? If they had contemplated any thing of this kind, in the case of wills made in foreign countries, they would have ordained that the probate of such wills, not that the wills themselves, should be proved here.

The provisions of the 109th article would be completely effectual, if the executor were allowed to sue, on presenting to the judge or the probate of the will. If a common power of attorney be sufficient to enable one man to sue for another, where would be the danger or inconvenience of allowing an executor to bring suit, under the authority of a probate; an instrument generally executed with many forms and much solemnity. In either case, forgery would un-

doubtedly be impossible; but, in that of the probate, it would be much more difficult, and liable to detection, than in the case of the power of attorney. In the one case, as well as in the other, whenever suspicious circumstances occurred, the proceedings might be suspended, until the truth could be inquired into and ascertained.

At all events, we trust that the court of probates of this parish may be authorized to appoint a temporary curator to the estate, to save it from dilapidation, until the testamentary executor can be recognized in the manner required by the judgment of the court, should their opinion remain unaltered. According to the opinion already pronounced, it would seem, that the court of probates does not possess this power, so long as there is an executor present, who is willing to act. If the executor cannot act lawfully, and if no curator or administrator can be appointed, the consequence would be, that the succession in question may be plundered with impunity.

Hennen, for the defendant. The provisions of our code are positive and too clear to be contradicted. A will must be proven before the

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judge of the parish in which the testator died, if the will was made and he died in the state.

A curator can only be appointed by the judge of the parish in which the intestate died. Champlin having died within the parish of St. Mary, the judge of that parish alone can appoint a curator to his estate, or approve any will, which may be produced from any other state, provided it be clothed with the requisite formalities.

The only question before this court, in this appeal is, had the judge of the parish of New-Orleans jurisdiction in the case? Certainly he had not, since Champlin died in another parish. All the provisions of our civil code demonstrate that, if inconveniences arise, under the acts of our legislature, it belongs not to this court to provide a remedy. Its province is only to interpret and enforce the laws. In no state of the union are wills, made abroad, proven with more facility than in this. It is only required that the will be executed according to the laws of the state in which it was made. On the proof of that, it has its full effect here.

The curator appointed in one parish can act in every other, and have an inventory of the intestate's property made wherever it is situated. So may the executor. All that the judge of

this parish could do, would be to make an inventory of Champlin's property found in it.

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MARTIN, J. delivered the opinion of the court. In this case a re-hearing has been granted to the appellants.

They contend, that the provision of the civil code, that "no testament or codicil can take effect in the territory, until it has been presented to the judge of the parish, in which the testator died, if he died within the territory, or in which his principal estate lies, if he died out of the territory, and the said judge shall order the execution of the said testament or codicil, after its being opened and proved in the cases prescribed by law," (*Civ. Code* 242, *art.* 153,) applies only to testaments and codicils made in the state.

This is said to be rendered clear from the latter words, "the said judge shall order the execution, &c. in the cases required by law." These cases are said to be those of testaments and codicils, made in this state and no other. And it is added, that when testaments or codicils are made according to the laws of, and with all the formalities required in, other states and countries, and are there proven, they do

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not require to be proven here, and we are referred to the *Civil Code* 232, *art.* 109.

The distinction taken by the counsel does not appear to us within the letter nor within the spirit of the code, in which we are told that no testament or codicil can take effect in this territory until, &c. and this whether the testator died within or without it. Testaments made and proven abroad are not produced to the judge to be proven: but yet the execution of them may be ordered. This appears particularly necessary in case of foreign wills, that copies, or the originals in some cases, may be exhibited in the court of probates and there registered, in order to perpetuate in favor of persons who may pay monies to the executor, the evidence of his authority. Foreign wills, which have been proven abroad, are to be presented although they require no additional proof, any more than authentic wills made here. And this article speaks of testaments to be presented to the judge, which the law does not require to be either opened or proven, *after their being opened and proved in the cases prescribed by law*.

In the other part of the code relied on, after the provision that the formalities, required in the confection of wills in the state, are matters of rigor, and the absence of any of them avoids

the will, the legislature next proceeds "provided always that the testaments and codicils made in foreign countries, &c. shall take effect, if they be clothed with all the formalities prescribed in the place where they have been respectively made." *Civ. Code* 232, *art.* 109.

Nothing here militates against the necessity of producing such testaments to the judge, in order that, if they be clothed with such formalities, the execution of them may be ordered.

II. It is next contended that the *Civil Code* 174, *art.* 127, requires the judge of the parish or of the parishes in which the deceased had moveable or unmoveable property, debts or credits, to make inventories of the same, &c. and the counsel contends that it follows, as a necessary consequence, that a curator is to be appointed in each of these parishes. This by no means follows. The parish judge cannot act out of the limits of his parish, he cannot go into a neighboring or distant one to make an inventory. Each judge must do so in his parish *ex necessitate rei*, but these inventories must be cumulated in that parish in which the curator is appointed. He may go or send and act by himself or attorney in every part of the state.

This curator is to be appointed by the judge

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of the parish in which the deceased shall have died, if he died within the territory, or, if he died abroad, by the judge in whose parish the greatest portion of his estate shall be situated. 174, *art.* 131.

The counsel further complains that our judgment does not decide whether the parish judge of New-Orleans can retain in his hands the property which he has caused to be inventoried, or appoint a provisional curator thereto, until a person shall appear properly authorized to administer the estate.—Farther, that the judgment simply affirms the judgment of the court of probates; that we do not say what is to be its operation, and we do not determine what is to become of the injunction granted below.

The appellants prayed for the absolute curatorship of the estate—it was refused them—they appealed to this court, who think the curatorship was properly denied. If there be any particular feature in the case, which requires the interference of the court of probates in any measure; this interference must be specifically prayed for, and we entertain no doubt that what ought to be, will be done. If it be not, the way to this court will remain open.

Upon the whole, it is ordered, adjudged and

decreed, that the judgment heretofore rendered in this case shall remain in full force and vigor, in the same manner as if no re-hearing had been granted.

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*** There was not any case determined in the month of August.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

West. District. *Sept.* 1818.

WESTERN DISTRICT, SEPTEMBER TERM, 1818.

WHITE *vs.* WELLS' EX'RS.

WHITE vs. *WELLS' EX'RS.*

A confirmation of title by the commissioners of the United States cannot avail against a complete title, under the crown of Spain.

APPEAL from the court of the sixth district.

DERBIGNY, J. delivered the opinion of the court. The father of the plaintiff obtained, on the 20th of April, 1793, an order of survey for the tract of land in contest. The conditions of his grant were, as usual, that he should make some improvement, and open the road within the first year, and *settle* the land before the expiration of three years. The grantee, however, suffered the three years to elapse without attempting to do any thing on the land, nor even to have it surveyed. A few days before the expiration of the three years, the late Levy

Wells, the defendants' testator, applied for the land, and obtained an order of survey, and two days after the three years had elapsed, to wit, on the 22d of April, 1796, he received from the Spanish government a complete and final grant of the same.

Posterior to that final title, Thomas White, the plaintiff's father, attempted to put himself in possession of the land, for which he had obtained, in 1793, the order of survey above mentioned, and subsequently caused that order of survey to be confirmed by the commissioners of the land office.

We are of opinion, that this confirmation does not, as in the case of two inchoate titles, put the claim of Thomas White on a footing with the final title granted by the Spanish government to Levy Wells, and that it does not replace the parties in the situation in which they were, before that final title and patent issued. The functions assigned to the commissioners were those of ascertaining and adjusting claims to lands, where the title was yet inchoate. But wherever the right of the sovereign had been finally transferred, any subsequent relinquishment of the right of the United States cannot affect the anterior title.

It is in vain to say that Levy Wells did not

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comply with the conditions usually attached to grants. In his case, it has pleased the grantor to dispense with requiring any. The grant is a full and complete title, issued after the inchoate right of White had become null by the nonperformance of the conditions imposed on him: it cannot be disturbed.

But, although Levy Wells was indisputably the owner of the land in contest, and, as such, could have ousted the possessor of it, he had no right to take possession by force. The jury have found that he has done so, and caused damage to the plaintiff to the amount of fourteen hundred dollars. The plaintiff is entitled to recover these damages.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the plaintiff and appellee recover from the defendants and appellants the sum of fourteen hundred dollars; and it is further ordered, adjudged and decreed, that the former pay the costs of this appeal.

I. Baldwin for the plaintiff, *Wilson* for the defendants.

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MARTIN vs. JOHNSON & AL.

MARTIN vs. JOHNSON & AL.

APPEAL from the court of the first district.

One who holds land by purchase from the Indians, by a private sale, approved by the governor of the province, cannot be disturbed, on the ground that the sale was not by auction, by a person who does not claim, under them.

Whether Indians, located by the governor of the province, had only the use, or the property, of the land allotted to them?

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellant claims a tract of land, part of which is in the possession of the defendant. The title which he presents, is a certificate of the commissioners of the land office, containing a settlement right, the history of which is as follows: in the year 1790, or 1791, one Jesse Kirkland began some clearing on the land in contest, which was then a part of a tract of country assigned to the Choctaw tribe of Indians, a long time before. Kirkland's clearing consisted of two or three acres of ground, on which he had cut the canes and planted some corn: he never lived there, and made only one crop: he sold his corn and the crib that contained it to one Martin Trentham, who continued sometime to cultivate there, it is said about five acres; he lived in a cabin made of pickets: some of the witnesses say he was there only by permission of the Indians, because he was a gunsmith, and mended their guns. Trentham,

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MATHEWS, J. did not join in this opinion, having some interest in the decision of the question in controversy.

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after one or two years residence on that spot, went away, and never returned to it again. An attempt has been made to shew, that Jesse Kirkland, his predecessor, had applied by *requête* for the land; but that fact was not proved. Twelve or thirteen years after Trentham had left the place, his widow undertook to take possession of it again.

In the mean time, however, say about twenty-two years ago, the Pascagoula and Biloxi tribes of Indians were removed to bayou Bœuf, and, with the consent of the Choctaws, were located on part of their land: the portion which includes the land here in contest, falling to the share of the Pascagoulas. The Pascagoulas remained in possession of that tract until the year 1802, when they and the other Indians, their neighbors, did, with the approbation of the Spanish government, sell their respective portions to Miller and Fulton, under whom the defendant now holds. Under that purchase, Miller and Fulton applied to the commissioners of the land office for a confirmation of their claim; and by the law of April, 1816, it was confirmed, as the court then conceived it, to the extent of one league square.

To facilitate the decision of this cause, in case that league square should include the land

here in contest, this court had, by an interlocutory decree, ordered that verification to be made; but, as it appears by the return of the survey, that a portion of that land is not embraced by the league square, the cause remains in the same situation.

It has been contended by the defendant, that the act of congress, above mentioned, did not merely confirm the purchase of Miller and Fulton to the extent of one league square for the whole, but of one league square for each purchase, each being a separate claim or orginal right, though included in the same application for confirmation. Waving, however, any inquiry into that question at present, we will now investigate the defendant's right, on the original merits, independently of any confirmation by the United States.

It is unnecessary here to determine what was the rights of the Indians to the soil of America, when the Europeans took possession of it. The defendant is probably correct, when he considers them as the primitive lords of the land. But they were not indistinctly and promiscuously owners of the whole. The several tribes, who inhabited this country, were independent and separate. Each was in possession of a certain extent of land, over which they

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claimed the right of ownership. In order then to apply to the present case the principle contended for by the defendant, he ought to have shewn that the tribes, under whom he claims, were, at the time of the arrival of the Europeans, the occupants of the tract here in dispute. But the reverse being the case, this part of his defence cannot avail him.

The fact, as given to the world, in all the laws enacted on the subject is, that the king of Spain, in taking possession of his dominions in America, disregarded the rights of the original lords of the soil, and declared himself the sovereign of the country. As some compensation, however, for that usurpation, he assigned to the former proprietors such extent of land as they wanted; and particularly took care to secure to them, by law, such tracts as he conceived were sufficient for the purposes of cultivation, and the which pasturage of their cattle. In the title 12th, book 4th, of the *Recopilacion de las Indias*, treats of the manner in which lands shall be disposed of generally, the law 13, among other dispositions, provides that the Indians "shall be maintained in the possession of the lands which had hitherto been allotted to them, and shall receive any additional quantity which they may want." On the regulations concerning the

lands and villages of the Indians, the whole 3d title of book 6th may be referred to.

The law 8th of that title, however, particularly says—"the seats on which the villages of the Indians shall be placed, shall be such as are well provided with water, arable lands and woods, and to which there may be easy access, and they shall have a common of one league in extent, where their cattle may graze, without being mixed with that of Spaniards."

But, it is contended on the part of the plaintiff—1. that, in this case, the land was not assigned to the Pascagoula and Biloxi tribes by the proper authority—and 2. that, if it were, yet the Indians did not acquire an absolute title to the land, so as to be capable of transferring it to other persons.

I. The evidence, as to the first of these objections is, that the Baron de Carondelet, then governor of Louisiana, ordered Valentine Lessart, commandant of Rapides, to remove the Pascagoula and Biloxi tribes of Indians to the district of Catahoulou; but that, upon representation made to the governor, he thought proper to dispose that those tribes should be located on the bayou Bœuf, along with the Choctaws, and that they were so located with the consent of the

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Choctaws. It is well known that, for the location of an Indian village, no such thing as formalities and written proceedings were in use in this country. An order from the governor to that effect was sufficient, as it was in many other instances of greater importance. Valentine Lessart himself has been heard on that point, and his testimony corroborated by others, and by the long possession which those Indians had of that tract of land, is deemed sufficient and satisfactory.

II. But, it is said, that such location of the Indians, on any tract of land, did not convey to them the property of the soil, but gave them a mere possession, for the temporary purposes of the Indian mode of life. By the laws of the Indies, 6, 1, 27, however, it is recognized, that Indians can hold land, as well as other people; nay, that they can alienate it, with permission of government. That this was holden by them, as owners, there can be no doubt; there they had their villages and fields; there they lived permanently for a number of years; it was not a place of temporary residence; it was their home.

But, if the Indians, under whom the defendant holds, were proprietors of the soil in dis-

pute, and could sell it, yet it is contended, that the sale which they undertook to make of it, is not a valid one, and, consequently, could convey no title to purchasers. It is true, that the laws of the Indies require the property of the Indians to be sold at auction, and that this was a private sale. But, although we are disposed to believe that the subsequent approbation of the governor of the province did cure that defect, supposing that it did not, the result would be that the Indians have not been legally divested of their title, and could perhaps take advantage of that against the defendants; but, until then, the defendants hold in their right, and cannot be disturbed by others.

Although the court has already said, in the case of *Reboul* vs. *Nero*, that the Indians were entitled by law to one league in extent, round their villages, *ante* 490, it is deemed unnecessary to determine it; for allowing them much less, it would still embrace the property in dispute.

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

I. Baldwin for the plaintiff, *Johnson* for the defendants.

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MARTIN'S HEIRS vs. GARDNER & AL.

MARTIN'S HEIRS vs. GARDNER & AL.

APPEAL from the court of the first district.

The defendant cannot be disturbed, when the plaintiff does not shew a better title.

MATHEWS, J. delivered the opinion of the court. The parties claim the tract of land in dispute, under titles derived from different persons. These titles are so nearly equal in solemnity and perfection, that it is useless, in this respect to compare them. The defendants and appellees shew a commencement of title older than that of the plaintiffs and appellants, which being equal to it, in other respects, they ought not to be disturbed in their right and possession to the disputed property.

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

I. Baldwin for the plaintiffs, *Wilson* for the defendants.

BRADLEY'S HEIRS vs. *CALVIT.*

APPEAL from the court of the sixth district.

It is not enough to prove that a paper, purporting to be a bill of sale, was seen in the hands of the adverse party:

MATHEWS, J. delivered the opinion of the court. The plaintiffs and appellees claim a tract of land, described in their petition, as

heirs of Nancy Bradley, who succeeded, as sole heir, to her son, Joshua, who was the legal heir of the land, at and before the time of his death, having a title to it, by virtue of a sale, under private signature, by J. Clayton, who held under an incomplete title from the Spanish government. The defendant and appellant, who is in legal possession of the premises, sets up a title, derived from the same original proprietor, by an authentic deed of sale to Francis Bradley, a brother of Joshua, the person who filed a claim to the premises, before the commissioners of the United States, and obtained their certificate, confirming his title.

but proof must be made of its genuineness.

It is the opinion of this court, that the effect of the certificate thus obtained, does not, in any respect, alter the rights which may have been acquired under the former government of the country, and which must be decided on between individuals, according to the laws and regulations of said government. Viewed in this manner, the certificate obtained by Joshua Bradley is nothing more than a confirmation of Clayton's title, and must accrue to the benefit of persons claiming under him, by legal and *bona fide* contracts. The sale to Joshua Bradley, under whom the plaintiffs claim, being a private act, requires testimonial proof, even to give it force

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and effect between the original parties; and, was it supported by legal testimony, would be clearly good between them, and, according to the principles of equity and justice, ought to bind third parties, who have a knowledge of the existence of such a sale.

In the case under consideration, the private act of sale, being out of the power and control of the plaintiffs and appellees, they offered proof of its existence, and succeeded in establishing the fact, that a paper, purporting to be such a sale, did exist, and was, at one time, seen in the possession of Francis Bradley, under whom the defendant claims title; but they have produced no evidence of its genuineness—nothing to induce a belief, arising from legal proof that it was the act and deed of Clayton, the original proprietor of the land in dispute: a fact, the proof of which is deemed indispensible by this court, in making a legal deduction of title from Clayton to the plaintiffs.

The circumstance of a probability that this act of sale was before the commissioners of the United States, and that they recognized it as genuine, cannot avail, in a dispute like the present, founded on a title not immediately deduced from the United States.

It is a general rule that, in all petitory ac-

tions for the recovery of property, the plaintiff must recover on the strength of his own title, and not on the weakness of that of his adversary.

The failure of the plaintiffs, in the present case, to prove the genuineness of the act of sale from Clayton to Joshua Bradley, leaves them without a title, derived from the former to the latter, and, as they can claim nothing under the certificate of the commissioners of the United States, except in conformity with, and supported by, Clayton's title.

On this ground alone, without examining any other question in the case, we are of opinion, that the plaintiffs and appellees have not shewn aught to authorize a judgment in their favor.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and, proceeding to give here such a judgment as, in our opinion, ought to have been given in the district court, it is ordered, adjudged and decreed, that judgment be entered for the defendant and appellant, with costs of suit, in both courts.

I. Baldwin for the plaintiffs, *Wilson* for the defendant.

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FRANKLIN vs. KEMBALL'S EX'RS.

FRANKLIN vs. KEMBALL'S EX'RS.

APPEAL from the court of the first district.

A certificate that the record contains all the facts on which the cause was tried is good, though made one year after judgment.

If the executors, interrogated as to the genuineness of their testator's note, answer, they believe it to be so, but believe it paid, this will be no proof of payment.

MARTIN, J. delivered the opinion of the court. In this case there is no statement of facts—but the district judge has certified to this court that the record contains all the evidence adduced on the trial, under the act of 1817, *p.* 34. § 13.

The certificate is objected to on the ground that it was given upwards of a year after the judgment, while in the opinion of the counsel, this mode of presenting to this court the facts of the case, being only a new mode of making a statement of facts, the time is therein as imporant as when the former mode is resorted to, and therefore the certificate ought to have been given before judgment, and could not be made afterwards.

A majority of this court, (MARTIN, J. dissenting) is of opinion, that as the act of 1817 fixes not a particular time within which the judge may certify, he may do so at any time, in his discretion, as long as his memory serves him.

The defendants are sued on a note of the testator for 300 dollars, claimed with interest—on the back is an endorsement acknowledging the

receipt of 94 dollars 50 cents, subscribed by the plaintiff. Two of the defendants pleaded payment, the third, Joseph Kemball, denied being an executor.

The petition contained an interrogatory, whether the note was not made and signed by the testator. To which, the two defendants Daniel M. Kemball and Middleton W. Kemball answered "that they believe that the note was signed by the said F. Kemball (the testator) and that the amount of said note was paid by said F. Kemball in his life-time to the said Franklin."

There was judgment for the plaintiff, for the sum of 300 dollars, with legal interest till paid."

The defendants appealed.

They cannot avail themselves of the part of their answer, which alledges payment by the testator, because they swear only to their *belief*.

The district court erred in giving judgment against Joseph Kemball, as he denied that he is one of the executors, and there is no proof of it.

The court erred also, in disallowing the payment, endorsed on the note.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the plaintiff do recover

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from Daniel M. Kemball and Middleton W. Kemball, executors of Frederick Kemball, the sum of two hundred and five dollars fifty cents, with interest at five per cent. from the inception of the suit, till paid with costs in the district court; the costs of the appeal to be borne by the plaintiff and appellee, who is also to pay the costs incurred by Joseph Kemball in both courts.

T. Baldwin for the plaintiff, *Johnson* for the defendants.

HOOPER vs. *MARTINEAU.*

If it be shewn that the whole testimony has not been transmitted, a *certiori* will issue.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This is a case in which the evidence comes up with the record, under an act of the legislature, approved on the day of 18 . It appears by affidavits, taken by the appellee, that the whole evidence did not come up, but that the testimony of one Anderson, who was examined in the district court, is wanting.

This circumstance, not being denied by the appellant, it is ordered that a mandate, in the nature of a *certiorari*, be directed to the district

court, requiring that the testimony of every witness sworn on the trial of the case, taken down in writing, be certified and transmitted to this court, and particularly that of said Anderson, returnable at August term next.

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HOOPER *vs.* MARTINEAU.

Wilson for the plaintiff, *L. Baldwin* for the defendant.

MAYES vs. *CALVIT.*

APPEAL from the court of the sixth district.

This case turns on a mere question of fact.

MARTIN, J. delivered the opinion of the court. The plaintiff sues for a mulatto slave, sold to him by the defendant, whom the latter refuses to deliver. The answer contains a general denial, and an amended one states that the defendant never received any consideration for the said mulatto, and that neither the plaintiff nor any one else has paid to the defendant the consideration money for the sale.

Annexed to the petition is a paper purporting to be signed by the defendant, acknowledging the receipt of two hundred dollars, in full, for the price of the mulatto.

The plaintiff interrogated, as to the manner

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in which the consideration money of the sale of the mulatto boy was paid, answered that he paid eighty-five dollars in part payment of a note of the defendant to Joseph Catril, nineteen dollars to Henry Winns, on the defendant's verbal order—a gold watch, of the value of two hundred dollars, delivered to the defendant, by giving the title to the said watch to the defendant, in presence of Coleman Martin or Joseph Martin, the plaintiff not recollecting which of them—in all three hundred and four dollars.

The above answer being excepted to, and a fuller one required, the plaintiff answered, that the title which he gave to the defendant, for the watch was a verbal order on one E. Head, of Natchez: the defendant knew that the watch was the plaintiff's property, and said he knew in whose hands it was, and that a verbal order would answer his purpose, as well as money, and he would take the order in part payment of the boy—that the defendant took the said order, on his own risk, and received the watch thereon, or a full compensation therefor.

James Fillup deposed, that the watch was seized, as the property of John M. Martin, by the sheriff, at Natchez, and sold, and he believes J. Thompson bought it. Some time after, Coleman Martin appeared and claimed the

watch, and made affidavit that it was his property.

By the record of a suit, in the county of Adams, state of Mississippi, it appeared that, in a suit instituted by attachment, at the instance of John Foster, against John M. Martin, a gold watch was attached and finally sold by the sheriff to said John Foster, for one hundred and thirty dollars, January 17, 1814—three weeks after the date of the receipt of the present defendant, for the price of the mulatto boy.

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

The plaintiff has not administered any proof of the genuineness of the defendant's signature at the foot of the receipt, annexed to the petition, which he was bound to prove—the answer having denied it. There is, therefore, no evidence of any sale of the mulatto boy, nor of the payment, except what results from his answer to the interrogatories.

He swears he paid two hundred dollars, by the delivery of a watch—that is to say, the transfer of his right thereto, by a verbal order for the delivery of the watch to one C. Head, of Natchez; but he also swears that the sheriff had taken possession of the watch before the

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transfer of it by the plaintiff to the defendant; and by the record of the suit, in which the watch was sold, it appears that the watch was seized on the 9th of June, 1813, more than six months before the date of the receipt annexed to the petition—so that, from the plaintiff's own shewing, the order which the defendant received from him was directed to a person who had not the watch then, and does not appear ever to have had it since. If the defendant received this order in full payment of the value of the watch, it must have been on the assurance that the person to whom it was directed had the watch in his possession, and could deliver it—in this it is clear he was deceived by the plaintiff.

The answer of the plaintiff, that the watch was not sold as the property of Martin is contradicted by the deposition of Muse, and by the record.

The answer of the plaintiff is not entitled to any credit, and there is no evidence in his favor out of it. The district court was, therefore, correct in giving judgment for the defendant.

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

Wilson for the plaintiff, *I. Baldwin* for the defendant.

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Boggs
vs.
Reed.

BOGGS vs. *REED.*

APPEAL from the court of the sixth district.

The courts of this state cannot presume what the laws of other states or foreign countries are. Such laws must be proven.

MARTIN, J. delivered the opinion of the court. In this case, the plaintiff offered in evidence the depositions of John Carlisle and John M'Coy, of the state of Ohio, to prove the legal interest in that state, on promissory notes, (where no interest is expressed therein) which was objected to by the defendant. The district court was of opinion that no interest was allowed at common law, more particularly where none was mentioned in the contract—that, therefore, it was presumable that interest was allowed in the state of Ohio by statute—that parol evidence of the statute could not be admitted, and rejected the evidence. To this opinion the plaintiff excepted, and there being judgment for him for the principal, without interest, he appealed.

The case stands before us on the bill of exceptions only.

We think the district court erred, in assuming it as a fact that interest cannot be allowed under the common law of the state of Ohio. The knowledge which the judges of the courts of the state of Louisiana have of the laws of their own

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state, and of those of the United States, must direct their opinions and their conduct. The laws of other states must be *proven before them*, in every case in which it is proper they should influence their opinion. No country is believed to exist in which every tittle of the law is reduced to a text. The memories of the members of this court does not enable them to cite any country in which some part of the law is not unwritten. We have no official means of information that may enable us to conclude that the people of the state of Ohio are without unwritten law. We, therefore, conclude that the witnesses offered by the plaintiff ought to have been heard.

The judgment of the district court is, therefore, annulled, avoided and reversed, and the cause is remanded for a new trial, with directions to the district court to hear the witnesses offered—and it is ordered, that the costs of this appeal be borne by the appellant.

Sutton for the plaintiff, *I. Baldwin* for the defendant.

CURTIS vs. *MARTIN*.

The surety may be sued, without the principal.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court.

The defendant is sued on a note which he subscribed as surety. He answers that the property of the principal has never been discussed and is sufficient, and he avers that the note has been paid by the principal.

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

The statement of facts shews that a demand was made from the principal, but no suit was instituted against him before the bringing of the present suit—that, at the date of the note, the principal resided in the parish of Rapides, and before the suit was brought he removed to that of Avoyelles—that the plaintiff and defendant did and do still reside in Rapides.

As there is no proof of the alledged payment, it appears to this court that the district judge erred in giving judgment for the defendant. The plaintiff is not required by any law to sue the principal before he resorts to the surety. In many cases a suit against the principal would be productive of delay and expense only.

It is true, that if the surety requires a discussion of the principal's property, it must be made, but "the surety who does require the discussion is bound to point out to the creditor the property of the principal debtor, and furnish a sufficient sum to have the discussion carried into effect."

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Code Civil, 430, *art.* 9. As the defendant did not point out any property and furnished no money for the discussion, the plaintiff was not bound to discuss.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed; and that the plaintiff do recover the sum of six hundred and thirty three dollars, sixty two and one half cents, the amount of the said note, with interest as therein promised, at the rate of ten per cent. a year, from the twentieth of October, eighteen hundred and seventeen till paid, with costs of suit in the district court, and in this.

Wilson for the plaintiff, *Scott* for the defendant.

CASSON & WIFE vs. *FULTON'S EX'RS.*

On a verbal sale of land, either of the parties may recant before the conveyance be executed.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This is a case, in which the plaintiffs and appellants sue to recover certain lots of ground, in the town of Alexandria, or to have the price which they paid for them reimbursed, if they fail in their attempt to establish their title to them.

It appears from the evidence that the testator of the defendants and appellees did, in his lifetime, make a verbal sale of said lots, to Mrs. Casson, before her marriage, received the stipulated price and promised to make to her a regular conveyance, at some convenient time, as alledged in the petition. The evidence also shews that he afterwards refused to make such a conveyance, giving as a reason that the purchaser had offended him.

These facts shew that the intention and agreement of the parties was to have their contract of sale reduced to writing, and according to the principle recognized by this court in *Villere & al.* vs. *Brognier*, 3 *Martin*, 507, whenever a contract is to be reduced to writing, either of the parties may recant before signing.

In the present case, it appears that the vendor, before his death, declared that he would not comply with his verbal bargain, by making the conveyance stipulated for; and, it is believed that there are no legal means by which he could be compelled so to do, were he living, nor can any decree be made against his executors to that effect.

It is, therefore, ordered, adjudged and de-

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

Wilson for the plaintiff, *Scott* for the defendant.

BOISSIER & AL. vs. *METAYER.*

The surrender of the sole evidence of an inchoate & conditional title, before the accomplishment of the condition, is an implied abandonment of all rights under it. The Spanish government could lawfully grant the land, when the grantee had neglected to fulfil the condition of the grant.

APPEAL from the court of the sixth district.

DERBIGNY, J. delivered the opinion of the court. A tract of land, which is in the possession of the defendant and appellee, since a number of years, is claimed by the plaintiffs and appellants. The title, which they exhibit, is an order of survey, obtained in 1789, from the then governor of Louisiana, recommended for confirmation by the commissioners of the land office, for the western district of this state, and finally confirmed by act of congress in 1815. In opposition to it, the appellee produces an order of survey of the same land, by him obtained in 1795, and confirmed by the commissioners of the United States in 1812—he further pleads prescription. The right of the United States having been relinquished in favor of both these claims, the decision of this contest rests upon the strength of the original titles of the parties. The material facts in the case are the following:

As early as 1788, Sylvester Boissier, one of the appellants, and father of the other appellants, Sylvester, Cesar and Pamela Boissier, went on the land in question, with three negroes, cut several acres of cane, and opened the road in front; in the same year, he applied for a grant of the land; and, in 1789, obtained from governor Miro an order of survey and conditional grant, in the usual words—according to which he was to make some improvement, and open the road within one year, and to settle the land before the expiration of three years, in defect of which the grant was to remain null. It is, however, in evidence that, after his first attempt, in 1788, he ceased to do any thing upon the land—that he never settled it, and that, at sometime between the years 1789 and 1795, (it does not appear clearly when) he surrendered his title into the hands of the commandant of Natchitoches, among the papers of whose office it was lodged, in a bundle entitled *Requêtes des concessions de terres reunies au domaine*, where it remained until the archives of that office were delivered to the person who received possession of that place for the United States.

It is objected, that the fact of this surrender is not sufficient to destroy the written title of

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the plaintiff, and that nothing short of a written declaration from Boissier, that it was his intention to abandon the land, can do away his grant. We are, however, of opinion, that the surrender of the only existing evidence of an inchoate title, into the hands of the person from whom it had been obtained, and upon the accomplishment of a condition necessary to make it complete, implies an abandonment of the inchoate right. But, independently of that abandonment, resting the case upon the circumstance of the non-performance of the conditions imposed on the plaintiff, S. Boissier, by the Spanish government, we think that, at the expiration of the time fixed by the grantor for the accomplishment of those conditions, he had a right, when they were not fulfilled, to consider the grant as null, by virtue of the reservation by him made to that effect, and to grant the land to others, if he thought fit so to do.

In this case, after a verification that the land granted had not been settled, the Spanish government granted it again to the defendant under the same conditions—and the defendant, having performed those conditions, acquired the absolute right, which depended on that performance.

It is true, as the plaintiffs have observed, that the Spanish government was often very indul-

gent to grantees, and did not rigorously enforce the fulfilment of the conditions imposed on them. It is because of that notorious indulgence, that the United States have considered it beneath their dignity to treat with rigor the grantees, who, at the time of the cession of Louisiana, had neglected to execute what the conditions of their grants required of them. But because the Spanish government was often indulgent to grantees, surely we are not to consider as a dead letter the reservation made in every provisional grant, that the grant should be null, if the grantor failed to execute its conditions—that the grantor had, and that right he exercised in this among other cases. The first grantee, therefore, could not disturb the second, who, under this lawful exercise of the sovereign's right, has received the land, and acquired a final title to it, by the performance of the conditions attached to the grant.

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

I. Baldwin for the plaintiffs, *Murray* for the defendant.

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SLOCUM.
vs.
SIBLEY.

C. SLOCUM vs. *SIBLEY.*

APPEAL from the court of the sixth district.

In particular partnerships one partner cannot bind the others, without authority, and the partners are not bound *in solido.*

MARTIN, J. delivered the opinion of the court. The judgment of the district court is in the following words: "The parties appeared, by their counsel, whereupon it is ordered, adjudged and decreed, that judgment be rendered for the plaintiff for two hundred and eighty-two dollars and seventy-four cents, with interest from November 17th, 1811, till paid, with costs of suit to be taxed."

The defendant appealed, and assigns as an error, that there is not the citation of any law, neither are any reasons adduced in the judgment. It is, therefore, annulled, avoided and reversed.

This court is now to proceed, examine the record, and give such a judgment as, in its opinion, the district court ought to have given.

The action is grounded on a note of hand, executed by the defendant, under the firm of W. Slocum and co. of which he is stated to be the surviving partner, payable to B. Shaumburg, by whom it was endorsed to the plaintiff.

The defendant pleaded the general issue and a former judgment on the note, at the suit of

Shaumburg, against Slocum and the defendant, in which they had judgment.

The statement of facts made by the district judge, is composed of the record of Shaumburg's suit, and the depositions of J. Harrison and I. Lanard.

The first witness deposes, that Slocum was indebted to Shaumburg for goods furnished by the latter to the former, for a tavern, in Natchitoches, to the amount of four hundred dollars and twenty cents—that Shaumburg, threatening to sue, the plaintiff agreed to pay the debt, provided he might have against the present defendant the recourse which Shaumburg had. Accordingly, the note, on which this suit is brought, was executed by W. Slocum, and endorsed by Shaumburg, to the plaintiff, who advanced the money. All this was done at once, and an endorsement made on the back of the note of a payment of one hundred and seventy-two dollars and seventy-five cents, the amount of certain goods due to Shaumburg, by W. Slocum, on his private account.

The note is for four hundred and fifty-five dollars and forty-nine cents, with interest, at ten per cent. from November 17th, 1811, and is reduced by sundry payments to two hundred and eighty-two dollars and seventy-four cents.

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SLOCUM *vs.* SIBLEY.

The articles of partnership between W. Slocum and the defendant are annexed to the record; and its object is the keeping of a house belonging to the defendant, as a tavern, by W. Slocum, for his and the defendant's account. By these, Slocum is to take charge of, and manage the house, stables, &c. to the best of his capacity, for the mutual benefit of the parties. All expenses whatever are to be equally defrayed and the profits so divided. The books and accounts to be kept by Slocum.

The second witness was introduced for the sole purpose of proving the death of Slocum.

On the plea of a former judgment, it does not appear to this court that there is any error in the judgment. Nothing shews that the goods, the value of which was claimed in the two suits, and both suits are posterior to the date of the present note.

But, the defendant alledges, that Slocum had no right to bind him, and at all events not *in solido*. Their partnership was not a commercial, but a particular one. In particular, it is otherwise than in commercial, partnerships. The parties are not bound *in solido* for the partnership debts, and none of them can bind his partners, if they have not given him power so to do. *Civ. Code*, 398, *art.* 43.

The articles of partnership authorize Slocum to manage the house, stables, &c.—and the first witness deposes, that the note was given in payment of goods furnished by Shaumburg for the tavern. Both parties must, therefore, be bound, either from the implied authority to purchase necessaries, resulting from the obligation and authority to manage the house and stables, or from the circumstance of the goods having been used for their mutual benefit; but they are not bound *in solido*.

It is, therefore, ordered, adjudged and decreed, that the plaintiff recover from the defendant the sum of one hundred and forty-one dollars and thirty-seven cents, with interest, at the rate of ten per cent. since the 17th of November, 1817, till paid, with costs of suit in the district court. But the plaintiff and appellee to pay costs in this court.

Bullard for the plaintiff, *I. Baldwin* for the defendants.

JUSTICE vs. *WILLIAMS*.

APPEAL from the court of the sixth district.

In a possessory action, the judgment ought not to determine on the title to the premises.

MATHEWS, J. delivered the opinion of the court. It being questioned whether, according

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JUSTICE vs. WILLIAMS.

to the petition, the present action be a petitory or a possessory one, it is agreed, by the counsel of the parties in this court, that it is to be considered as possessory, and that the right of possession alone is to be decided in it. Viewed in this light, the part of the judgment, in the district court, which decides on the titles of the suitors, is erroneous; but it is correct, so far as it decrees the right of possession to be in the defendant and appellee: he having been in peaceable possession of the land, more than one year, before the suit was commenced, as appears from the facts in the case.

It is, therefore, ordered, adjudged and decreed, that the defendant and appellee be quieted and maintained in his possession of the premises, without prejudice to either party, in any petitory action that may hereafter be brought by any of them, founded on their respective titles. The costs to be paid by the appellant.

I. Baldwin for the plaintiff, *Wilson* for the defendant.

MUSE vs. *CURTIS.*

Even when the judgment is grounded on a verdict, the reasons which

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff, in this case, had a verdict, and

the court gave judgment in the following words: "Judgment for the plaintiff, for the sum of seven hundred and fifty dollars, with costs of suit to be taxed." The defendant appealed—and assigns for error, that the judgment makes no reference to any law, and contains none of the reasons on which it is grounded.

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determined the court, must be inserted therein.

The plaintiff and appellee replies, that there was a verdict, and the record, after the entry of it, proceeds—"Whereupon it was decreed by the court in the following words, viz. judgment for the plaintiff," &c.—that the word *whereupon* conveys the idea, that upon the verdict, upon the facts in issue being found for the plaintiff, the court gave judgment for him—which suffices, as the idea is thereby conveyed that the case turned on a question of fact, which the jury have found for the plaintiff.

The constitution of this state requires 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, in virtue of which such a judgment may have been rendered, and *in all cases* adduce the reasons on which their judgment is founded." *Art.* 4, § 12.

In the present case, we have the judgment of the court *in hæc verba*, "judgment for the plain-

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MUSE vs. CURTIS.

tiff for the sum of seven hundred and fifty dollars, with costs of suit to be taxed," the word whereupon, presented to us as shewing the reason on which the judgment was rendered, makes no part of it. It is, when used by the clerk, an adverb of *time*, almost synonimous with *afterwards*. It is not the province of the clerk to detail the reasons which influence the court in what they are doing—he is only to record chronologically what is done.

We readily admit that, if the reasons of a judge could, in any case, be dispensed with, it is when it is bottomed on a verdict—but if they could be dispensed with in such a case, could they be insisted on, on a *demurrer*, or *a demurrer to the evidence*, on an arrest of judgment? In all these cases, as well as in the present one, the record shews, that the facts were previously settled, and that the judge did not do any thing but to apply the law.

When the constitution makes no distinction, and requires reasons to be adduced *in all cases*, can the judges of this court say that none are required in cases in which there is a general or a special verdict, a demurrer to the petition, answer, or to the evidence, or when the judgment is arrested? *Ubi lex non distinguit, nec nos distinguere debemus.*

When a magistrate is about to pronounce upon the claim, to dispose of the property, of a fellow-citizen, he ought to pause a while—and the constitution has wisely lengthened this pause, by requiring the judge to dwell upon and specify on the record the reasons which decide him. If we were to determine that in the present case, no reason was necessary—it would not be easy for us to draw a line between the cases in which a court may abstain from, and those in which it is bound to, assign reasons.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed—and, as there is no statement of facts, or any thing which may enable us to examine the case, it is ordered and adjudged, that it be remanded, with directions to the court to give judgment therein as the constitution requires, referring, if possible, to the particular law, in virtue of which the judgment is rendered, and adducing the reasons on which it is founded—and it is ordered, that the appellee pay costs in this court. *Laverty & al.* vs. *Gray & al.* 4 *Martin*, 463, *Sierra* vs. *Slort*, *id.* 316, *Slocum* vs. *Sibley*, *ante* 682, *Montserrat* vs. *Godet*, *id.* 522, *Doubrere* vs. *Papin*, *id.*

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498, *Boston* vs. *Adams*, *id.* 201, *Urquharts* vs. *Taylor*, *id.* 202.

Wilson for the plaintiff, *I. Baldwin* for the defendant.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, OCTOBER TERM, 1818.

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HICKS & WIFE *vs.* CALVIT.

HICKS & WIFE vs. *CALVIT.*

APPEAL from the court of the sixth district.

If a slave is claimed, under a statute which declares him forfeited, if he be removed without the consent of the reversioner, the petition must state that he was so removed.

Quere—whether a slave, forfeited under the laws of a state, may be recovered in another—whether the courts of a state will carry into effect the penal laws of another?

MARTIN, J. delivered the opinion of the court. The plaintiffs claim a negro woman and her offspring, as part of the estate of Mrs. Hicks's father, who died intestate, and whose only heir she is. The general issue is pleaded. In order to establish her title, the plaintiffs shew, by testimony, that the wench made part of the estate of her father—that he died intestate—and that she was his only daughter and heir; but the witnesses depose, that the woman in dispute was assigned to the widow of the deceased, Mrs. Hicks's mother, as part of her dower—that the widow removed, after her husband's death, from Virginia to Tennessee, bring-

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HICKS & WIFE
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ing with her, among other property, the slave sued for. The plaintiffs shew that, by an act of the legislature of Virginia, a widow, who removes out of that state any slave assigned to her, as part of her dower, without the consent of the reversioner, forfeits such slave, and every other part of her dower, to the reversioner. *Revised Code*, 191. The district court gave judgment for the plaintiffs.

It is neither alledged nor proven, that the removal of the slave was illegal, *i. e.* without the consent of the reversioner, and we are bound to presume that it was not so. For any thing that appears in the record, this must be presumed. It is true, that a negative fact is not susceptible of proof, and is necessarily presumed, when the party against whom it is alledged does not shew some positive fact, which overthrows the presumption; but here the illegality of the removal is not alledged.

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

I. Baldwin for the plaintiffs, *Wilson* for the defendant.

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HOLMES & AL. vs. PATTERSON.

HOLMES & AL. vs. *PATTERSON.*

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiffs claim from the defendant, curator of the estate of Joseph Holmes, the property of the deceased, which came to his hands.

A deed of sale, not valid as such, may be so as a deed of gift.

A donation is valid, tho' the donor died, without delivering the deed or the property, if he did not make any other disposition of the property.

The right of the plaintiffs to the estate is not disputed; but the defendant contends he has a right to a negro slave, named Lucy, and her offspring, who were by him inventoried, as the property of the deceased. He shews he was but nineteen years of age, when he made the inventory, and produces an authentic bill of sale of the slave, from Joseph Holmes to him.

It cannot be doubted that, as he was a minor, he cannot be precluded by the inventory.

The bill of sale is made *for value received.* Neither the amount, nor the nature, of what was given as the consideration of the sale, is expressed nor proven. It is contended that, on this account, the bill of sale is void. A price is of the essence of the contract of sale. *Pothier on obligations, n.* 6: and this price must be a *serious* one. *Pothier, contrat de vente, n.* 16. And as, in the present case, it does not appear that there was a *serious* price, there is

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HOLMES & AL. vs. PATTERSON.

no price. A price, says Pothier, which bears no proportion to the thing sold, is not a *true* price, as if a valuable tract of land be sold for a crown. *Id.* 20. But the defendant's counsel shews that a deed *for value received* is good. *Jackson* vs. *Alexander*, 3 *Johns.* 484.

He further contends that, if the instrument under consideration be not evidence of a *sale*, it is of a *donation*. *Pothier, contrat de vente*, *n.* 16. The plaintiffs contend, that the donation, if any existed, was revoked by the death of the donor, before the acceptance of the donee. In the present case, it does not appear that there was any such acceptance; but we are of opinion that the instrument is valid, at least as a deed of gift, and that as there was such a deed, the donation is valid, although the donor died without having delivered either the deed or the property mentioned therein, if he did not make any other disposition of it. *Quando ni la cosa ni la escritura fueren entregadas, si (el donante) muere y no ha dispuesto de ellas, tiene efecto la donacion a favor del que se expressa en la escritura. Fuero real*, 3, 12, 10.

The district court erred in decreeing the delivery of the slave and offspring to the plaintiffs; and the judgment is, therefore, annulled, avoid-

ed and reversed; and it is ordered, that the defendant be quieted in the possession and enjoyment and property of the said negro Lucy and her offspring, and that he account for the balance of the estate, in the district court, and the costs of the appeal be borne by the appellees.

Sutton for the plaintiff, *I. Baldwin* for the defendant.

MARSHAL, J. & WIFE vs. *MARSHAL, S. & WIFE.*

APPEAL from the court of the sixth district.

If the testator leaves to his wife the enjoyment of his estate, and directs that, as his children shall come of age, she shall pay to each of them, the sum coming to him, out of the estate, in equal shares, to be ascertained by an inventory and appraisement, she takes the whole estate, on the appraisement, made at the time of her taking possession, and has a legacy of the *enjoyment*, or of the interest, which she should be bound to pay.

MARTIN, J. delivered the opinion of the court. The plaintiffs claim the share of Mrs. Marshal in the estate of her father, W. Wells, whose executor Mrs. Marshall, senior, is. The clause under which the claim depends, is in the following words: "My will is, to leave all my property to my children, five in number: and I appoint my wife, Rose Meuillon, their tutrix. My will is, that my wife shall have, as I give her, the enjoyment, *jouissance*, of all my estate: and as my children shall arrive to full age, my wife shall pay to each of them the sum coming to him, out of my estate, in equal shares, which will be ascertained by an inventory and appraisement.

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MARSHAL, JUN. & WIFE vs. MARSHAL, SEN. & WIFE.

had not such a legacy been made.

The district court was of opinion, that "it was the intention of the testator that his wife should be tutrix of his children—that the property should remain entire in her possession—and that, as they arrived at the age of majority, she should pay them off, agreeably to the value of the estate, to be ascertained by estimation—that, by accepting the tutrixship and the property, she is bound to render an account of the fruits and revenue, and of the expenses of the maintainance and education of the defendant to be adjusted by the parish judge;" and decreed, that "the plaintiff recover one-fifth of the value of her father's estate—that is, one-fifth of the half of the whole community, together with so much as shall appear due, after the settlement of her mother's administration, and of her account as tutrix.

We are of opinion, that the intention of the testator was, that his wife should take his whole estate, on a fair and legal appraisement of it, made at the time of her taking possession of the estate—that he gave her a legacy of the enjoyment or usufruct of his estate, that is to say, of the interest which she would have been bound to pay, had not this legacy been made to her—that the present plaintiff is only entitled to one-fifth of such appraisement, out of which

any account which she may legally establish, of expenditures made for the plaintiff, is to be deducted.

The testator intended to give a legacy to his wife—and the words of his will do not appear to us susceptible of any other construction—perhaps he gave more than the disposable part of his estate—in that case, the legacy is reducible to that part, to wit, one-fifth of the estate. *Cod. Civil*, 214, *art.* 26.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the cause be remanded to the district judge, for a re-hearing, with directions to ascertain whether a legal inventory and appraisement was made at the time the estate came to the hands of the executrix, if not, what was the value of the estate at the time—and whether the legacy to the wife does not exceed the disposable part of the estate: and it is ordered, that the appellees pay the cost of the appeal.

I. Baldwin for the plaintiffs, *Murray* for the defendants.

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Smeltzer & wife vs. Routh.

SMELTZER & WIFE vs. ROUTH.

APPEAL from the court of the seventh district.

The neglect of a collector to advertise in the newspaper, does not affect the sale of land for taxes.

MARTIN, J. delivered the opinion of the court. The defendant is in possession of a tract of land, which was once the property of persons whom the plaintiffs now represent, and which he purchased from a person who acquired it at a sale from the collector of taxes. The tract is now claimed, on the ground that the sale was irregular and void, as there was no advertisement published in the newspapers, under the 18th section of the act of 1813, *ch.* 13, *Martin's Digest, verbo Land, n.* 6. The former owner of the land is admitted to be a non-resident of the parish.

The 12th section of the act cited, requires that at least *three weeks* public notice be given of the sale of land, for the non-payment of taxes.

The 18th section gives to non-residents of the parish the right of redeeming their lands, sold for non-payment of taxes, within a year and a day thereafter, on paying the amount of said taxes, with interest, at six per cent. per year, with all costs and charges which may have accrued, and also on indemnifying the pur-

chaser," &c. and it is made the duty of the collector of taxes to "give two months public notice in a French and English newspaper at New-Orleans, besides advertising in the parish for the same space of time in the most public places."

The 15th section of the act of 1814, ch. 21, *Martin's Digest, verbo Land, n.* 10, provides that, before collection, proceed under the 18th section of the act of 1813, to any sale, they "shall give *one month* public notice thereof, in the manner prescribed by the said act."

The only alteration wrought as to the advertising of lands to be sold for the non-payment of taxes, by the act of 1813, is an extension, in certain cases, of the *time*, viz. from *three weeks* to *one month*—the mode of advertising is not changed—*public notice* is the expression used in both acts. Printed advertisements in a gazette, and advertising in the next public place in the parish, are only required *after* a sale of land of persons not residing in the parish, in order to enable them with more facility to avail themselves of the right of redemption.

The neglect of the collector to advertise in the newspaper, does not affect the *sale*—and if the plaintiffs wish to avail themselves of a right of redemption, they must comply with the re-

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SHELTON & WIFE vs. ROUTH.

quisites of the law, claim it specifically, and give the defendant the opportunity of contesting it.

The district court erred, in avoiding the sale, it is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the plaintiffs pay costs in both courts. But nothing herein said is to affect their right of redemption, if any exist.

I. Baldwin for the plaintiffs, *Wilson* for the defendant.

PHILLIPS vs. *ROGERS & AL.*

Aliens may inherit land, in Louisiana.

APPEAL from the court of the sixth district.

Porter, for the defendants. This is an action, in which the property of the late Archibald Phillips, of the parish of Rapides, is claimed, by two different classes of heirs—by the appellant, Thomas Phillips, who is the brother of the deceased, the nearest relation in the collateral line, an alien, and subject of the king of Great-Britain and Ireland, on the one hand, and by James Rogers and others, appellees, on the other, who are admitted to be citizens of the United States, and the nearest collaterals, after the plaintiff and appellant aforesaid.

The court below gave judgment, decreeing to the heirs, citizens of the United States (the defendants) all the real estate, and to the brother, residing in Ireland, all the personal property of which the said Phillips died possessed.

From this judgment the brother has taken an appeal—and the question now to be decided on is believed to be of the first impression in this state, and of the highest importance.

As our own statutes and code are silent on the subject, to ascertain the rights of the parties here, we must have recourse to those systems of laws, which form the jurisprudence of this country, in the absence of positive provisions from our own legislature.

Let us take them from their source—and first, as to the Roman law.

"A foreigner cannot take property by inheritance." *Dictionaire du Digeste, verbo Etranger, ff.* 28, 5, 6, *n.* 2, *id.* 59. *n.* 4.

The above authority is decisive, unless the plaintiff can shew that different regulations have been established in Spain; but so far from the common law of that country having been changed or altered in this respect, we shall find, on examination, that, in common with every other country in Europe, they have embodied

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PHILLIPS vs. ROGERS & AL.

in their legislation this maxim of Roman jurisprudence.

Following the example of ancient nations, France, and almost every other country in Europe, have adopted the *droit d'aubaine*. *Encyclopedie, verbo Aubaine.*

Nobody denies that the *droit d'aubaine* is established in France, and in the neighboring kingdoms, and indeed among most civilized people. 3 *D'Aguesseau*, 120, 32*d. playdoyer.*

According to some authors, the establishment of the *droit d'aubaine*, as it is known to us, at this day, dates as early as the fourteenth century. Edward, king of England, is said to be the first who prohibited aliens from inheriting. France followed the example, and extended the prohibition to real and personal property. Neighboring nations did the like, and the *droit d'aubaine* was established through Europe. 2 *Denisart*, 517, *verbo Aubaine.*

These authorities, entitled, as they are, to the highest respect, prove how universally the right prevails in Europe—let us now examine how the law stands in Spain.

With the like view of retaining wealth in Spain, Alonso, the wise, forbade the alienation of property, *inter vivos* or *causâ mortis* to foreigners. 5 *Elizondo, Pract. un. for.* 196.

In the spirit of the law of king Henry, our brother, made at Cordova, in 1455, we declare, that we do not intend to give to any king, or any other person, out of our kingdom, any city, town, castle, place, land or hereditiment, nor island. *New Recop.* 5, 10, 2.

The donation made to any alien, out of our kingdom, of any city, town, castle or hereditament, shall not be valid. 11 *Theatro de la legislàcion*, 245, *Ordinamiento real*, 5, 9, 10.

Letters patent, in the form of an edict, of July, 1762, recorded in the parliament of Paris, on the 3d of September following, provide that the subjects of the kings of Spain and the two Sicilies shall not be deemed *aubains* in France, nor the French in Spain, the Sicilies, and Naples—and that, for this purpose, the *droit d'aubaine* remain abolished, as to every kind of property, without any exception. *Denisart, 9th edition*, 1771, *verbo Aubaine.*

The defendants feel convinced that these conclusive authorities establish the doctrine for which they contend. If such a principle had been common to both France and Spain, it would have been unnecessary to abolish it for the future.

It only remains to consider whether there were any provisions in the Spanish colonies in regard

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to this subject different from the laws of the mother country—and here it might be sufficient for the appellees, after shewing how the law stood in old Spain, to call on the appellant to prove the exception in respect to her American provinces. But as positive law is to be found, even for these provinces, it may be as well by a recurrence to them to place the question beyond doubt.

The edict already cited has proved this—it provides for abolishing the *droit d'aubaine* through the whole extent of the Spanish monarchy. Now if it did not exist through the whole extent of the monarchy, why provide for its extinction?

But, a reference to the laws of the Indies will shew that there is nothing in that code, made expressly for the Spanish provinces, different from the laws of old Spain on this subject. On the contrary, its provisions recognize the regulations of the mother country, and enforce them. We find that foreigners are prohibited from settling in the colonies. Exceptions are afterwards made in favor of those who may obtain a special licence, and subsequently we find even that permission repealed. *Recop. de las leyes de las Indias*, 27, 9. It is difficult to believe that a government so jealous of the introduction of strangers into their American pro-

vinces meant to extend to their heirs greater privileges than they had in the mother country. A further examination of these laws, however, negatives completely the idea.

Testamentary executors, heirs and holders of property of deceased persons, who, in obedience to a testament, are bound to deliver the estate, or any part of it to persons who dwell in one of these kingdoms, shall be bound &c. *Leyes de las Indias*, 2, 32, 46. The conformity of the two systems is placed beyond a doubt, by the next extract. We order and command our viceroys and audiences that, if any lawful persons, with proper documents, present themselves to collect the estate of any person, dying in the Indies, it may be decreed to them, they not being aliens, nor the property of aliens to our subjects. *Id.* 2, 32, 44.

These provisions were well understood in the Spanish colonies, and accordingly we find that Gayoso, governor of the province of Louisiana, in conformity thereto, provided, in his regulations for the allotment of lands—"In case of death he, the grantee, may leave them to his lawful heirs, if he has any resident in the country, if he has no such heir in the country, they shall in no event go to an heir who is not of the country, unless such heir shall resolve to come

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and reside in it conformably to the established conditions. *Laws U. S.* 543. *n.* 15. The defendants feel that they could add much easier to the number of these authorities than increase their force, and in this persuasion the court are merely referred to *Rogers* vs. *Beiller*, 3 *Martin*, 663, where this court hold that the governors of Louisiana, under the Spanish government, were invested with legislative authority—if they were, in such a case as was presented for decision, then how much more are their edicts entitled to respect on a subject such as this, when the law they promulgated does nothing more but enforce that of the mother country, nor, as it has been said, is there any hardship in this. their principles are founded on the doctrine of reciprocity. A citizen of the United States at this day could not take or hold lands by inheritance in the country where the appellant resides; why then should a subject of the king of Great Britain have such a privilege here?

The authorities quoted by the plaintiff from the *Recopilacion de las Indias*, by no means destroy the doctrine which we contend for. That found in *lib.* 8, *tit.* 27, *law* 31 32, provides for foreigners naturalized by twenty years residence, ten of them holding immoveable proper-

ty, or marrying with a native, or daughter of a foreigner born in Spain or the Indies, and say that with this residence and certain other formalities, letters of naturalization shall be given to them. But Philip, the ancestor, here was not in that situation either by residence or marriage: the authority, therefore, has no application to the case before the court. The principle contained in the law read from the same work, *lib.* 8, *tit.* 27, *law* 32, supports the right of the appellees. It provides that those who may have performed important services to the monarchy, shall be naturalized and enjoy several important privileges. What is this but an exception which proves the principle for which we contend—for, if the law was, as they insist, where would have been the necessity for a particular provision in favor of those who rendered important services in favor of the monarchy? In regard to what is stated by Solauzano, in his *Politica Indiana*, it is sufficient to say, that, it is in direct opposition to the positive laws of Spain, as has been already shewn to the court.

If the court should come to the opinion, that the defendants have established the principle, that the heir, who is a foreigner, has no right to inherit, it only remains to consider if the ap-

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pellees, as the next in the order of succession, have not a right to receive the property. On this subject, it is presumed, there can exist little doubt. The brother is considered as if he did not exist—the court cannot recognize him in a capacity to inherit. The law takes no notice of him, unless to reject his claim, if he presents himself in character of heir. The appellees, of course, have a right to the inheritance, no other collaterals nearer in consanguinity existing, to take the property. Again, if they cannot inherit, no other can, as our statute provides that, "in defect of *lawful relations*, or of a surviving husband and wife, or acknowledged natural children, the estate belongs to the territory." *Civil Code*, 156, *art.* 51. This defect does not exist here, as there are lawful relations in the United States, capable of taking the property. Upon the whole, it is concluded, with great confidence, that the appellant cannot recover, and that the district court committed no error, except in decreeing to him the amount of the moveable property, of which the intestate died possessed. From the authorities referred to in this statement, and on which the defendants rest their claim for success, it appears that a foreigner cannot inherit either moveable or immoveable property. Judgment,

it is therefore hoped, will be rendered in favor of the appellees, for the whole amount of the property, of which A. Phillips died possessed.

Workman, for the plaintiff. The sole question in this case is, whether an alien can inherit immoveable property in the state of Louisiana?

When this question was first proposed to me, I conceived that it was at once decided by the provisions of our civil code. A different opinion being strenuously maintained by lawyers of great talents and learning, a full investigation of the subject becomes necessary.

Our adversaries have probably been misled by not attending to the difference between the principle which prevailed in the free states of antiquity, and the modern principle, as recognized throughout the civilized world, respecting the rights of foreigners.

Antiently, it was an established maxim of jurisprudence, as well as of politics, that foreigners were entitled to nothing, except in virtue of a solemn treaty, or a positive law. From every thing not thus conceded or secured to them, they were held to be absolutely excluded. You might lawfully make war upon all those foreign states, with which you had not entered into a treaty of peace. So generally was this princi-

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ple known and established, that the greatest of all moral philosophers, Aristotle, treats of piracy, or as we should term it, privateering, as an usual and lawful calling.

The Greek republics, from which Rome is believed to have received the elements of her jurisprudence, were extremely jealous, and even what we should deem illiberal, as to the participation of their civic rights. In Athens, indeed, during the infancy and early growth of the state, we are told by Thucidides, *book 1st, Introduction*, that many of those who were driven from the other parts of Greece, by war or sedition, betook themselves to the Athenians for secure refuge, and, as they obtained the privileges of citizens, continued to enlarge that city with fresh accession of inhabitants, insomuch that at last Attica, being insufficient to support the number, they sent over colonies into Ionia. But this wise and liberal policy ceased with the necessity which had occasioned its adoption. The political laws of Athens respecting foreigners, were soon assimilated with those of the other Grecian states. Not only the right of voting in their assemblies, and of holding posts of trust and honor, but the right of purchasing or inheriting immoveable property, the right of marriage, the right of com-

merce, and even the right of legal residence, were withheld from all, except their own citizens, or those on whom those rights were bestowed as a great favor and special privilege. Such exclusions ought not to surprise us, when we consider the nature of the governments of most of those celebrated states. Those governments were democracies, in the strict sense of the word. All the great, the gratifying and seducing powers of sovereignty were exercised by their citizens in their own proper persons—their political rights were not confined to abusing a magistrate, bawling at an election, or throwing a piece of papyrus or an oyster shell into an urn: they raised fleets and armies—they appointed and removed generals and admirals—they made war and peace, at their pleasure—they were addressed, courted and flattered to their very teeth, not merely by their own ministers and orators, but by the representatives of the greatest kings, and the ambassadors of the most powerful nations. No wonder then that they were so parsimonious in the participation of such flattering privileges. A citizen of Athens—the queen of a thousand cities—might be considered as great a personage, in those days, as a small German prince would be in our own, and he was equally proud of his

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dignity, and importance. The Romans were not less disposed than the people of Greece, to monopolize their civil and political rights. In the infancy of their state, necessity made them also liberal of naturalization. While they dreaded the vengeance which their outrages had provoked—while the imperial banditti, destined to subdue the world, were yet few in number, and struggling for existence, they freely admitted the natives of every country, and the robbers of every gang, to partake of their dangers and their booty. But by the time they adopted from Greece the laws of the twelve tables, they adopted also the excluding policy of the Grecian republics. To the Roman citizens belonged exclusively the right of voting in the different assemblies of the people, the right of holding the public offices of the commonwealth, the right of participating in the sacred rites of the city, the rights of intermarriage with a Roman citizen, of high parental authority, of making a testament, and of succeeding to an inheritance.

The exclusion of foreigners from the right of making a will, and of inheriting property, is often alluded to, and seems to have been generally taken for granted, during the period of the Roman republic, and for a considerable time after the establishment of the Imperial govern-

ment. And yet this exclusion did not arise from any positive law, but from the excluding principle, which I have already mentioned, of the ancient jurisprudence; that no civic rights could be claimed or exercised, but by those to whom they were positively and specifically granted. Cicero tells us that, "*Peregrini vel advenæ & hospites non sunt cives; nec testamenti factionem habent; nec est eorum testamentum justum, quia non sunt indigenæ; sunt extranei, sic dicti quasi alibi nati.*" *Lib. 2, de officiis.* This is very like what is unhandsomely and ungallantly called the ladies reason: foreigners cannot make a will, because they are foreigners: the true reason was because the making of a will was held to be a civil, and not a natural right, and that there was no positive law of Rome authorizing foreigners to exercise that right. There are laws, indeed, from which their exclusion from the exercise of that right, as well as from the right of inheritance, is spoken of, or may be obviously inferred. Thus in the digest it is said, "*Solemus dicere, media tempora non nocere: ut puta civis Romanus heres scriptus, vivo testatore factus peregrinus, mox civitatem Romanam pervenit, media tempora non nocent.*" *D.* 28, 5, 6, 2. Again, in the same book and title, law 59, par. 4—"*Si heres institutus scri-*

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bendt testamenti tempore civis Romanus fuit: deinde ei aqua & igni interdictum est, heres fit si intra illud tempus quo testator decessit, redierit.

The same doctrine is still more plainly recognized in the code, *lib.* 6, *tit.* 24, *l.* 1, which is in these words: "*Qui deportantur, si heredes scribantur, tanquam peregrini, capere non possunt; sed hereditas in en causâ est, in qua esset, si scripti heredes non fuissent.* Thus stood the Imperial law, in the time of Titus Ælius Antoninus; and so many suppose it remained to the end. But, on continuing to examine the body of the law itself, we shall find that a total change in the system of exclusion at last took place. The law to which I refer is as follows: "*Omnes peregrini, et advenæ liberè hospitenter ubi voluerint. Et hospitati si testari voluerint, de rebus suis liberam ordinandi habeant facultatem, quorum ordinatio inconcussa servetur. Si vero intestati decessêrint; ad hospitem nihil perveniet. Sed bona ipsorum per manus episcopi loci, si fieri potest, heredibus tradantur, vel in pias causas erogentur.*" *C.* 6, 59, 10. *In anthent. nov. de stat. et consuet,* § *omnes peregrini, &c.*

"Let it be permitted to all foreigners and strangers to lodge freely where they shall think

fit; and if they wish to make a testament, let them have the faculty of disposing of their property, and let their will in this respect be inviolably observed. If they die intestate, no part of their succession shall belong to their host; but their property shall be delivered up by the bishop of the place to their heirs, or if this cannot be done, it shall be appropriated to pious purposes."

This law, it is true, does not go so far as to allow aliens to inherit the property of Roman citizens. (See *Heineccius, on the Roman civil law, n.* 538.) But this, as we shall soon see, is not at all material to our case. That is amply provided for by the Spanish law and our own statutes.—The final subversion of the Roman empire was followed by a new and extraordinary order of things, among the states that grew out of its ruins. The feudal system, in a word, was generally established throughout Europe. The rude legislators and conquerors of the north knew not how to reward their followers, or secure their conquests, otherwise than by dividing the conquered lands and people among them, on the tenure of allegiance and military service. Landed property was thus erected into a political benefice: though bestowed in general as a reward for services rendered to the

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donor, its profits and advantages were still considered as the wages of an office, for the due performance of which allegiance was indispensibly requisite. It followed, of course, that no one could lawfully hold land, unless he was qualified to hold the office of which it was the salary, and the duties of which that land was given to enable him to fulfil: and hence aliens were prohibited from acquiring, either by purchase, gift or inheritance, that species of property. Thus the excluding principle of the Greek and Roman republics, was adopted by most of the half barbarous monarchies of the middle age.

Yet were there many exceptions to this rule of exclusion. Aliens were often permitted to acquire fiefs, provided they took the oath of fidelity to the Suzerain. In some of the southern states of Europe there was much of the land which was not held by feubal tenure, but continued *allodial*. In Spain, particularly, the Roman law maintained under the governments of all her Gothic invaders, a divided empire with their feudal codes; a fact which is apparent in most of the titles of the Partidas, and which, in the present case, it is very important to investigate.

But before I examine and explain the Span-

ish law of inheritance, respecting foreigners, it will first be proper to dispose of some of these quotations, brought forward by the opposite party, and dignified with the name of authorities.

The *Encyclopedie Francaise*, they tell us, declares, that "*à l'example des peuples anciens, le droit d'aubaine s'est introduit dans la France, et dans toutes les contrées de l'Europe.*"

They also cite Denisart's dictionary, which says—"*èt bientot le droit d'aubaine fut etabli universellement en Europé;*"—and D'Agueseau, who remarks, "*personne ne revoque en doute que le droit d'aubaine ne soit etabli en France, comme dans les royaumes voisins et dans la plupart des nations policées.*"

Are such notices as these deserving of attention, when the question concerns not foreign laws, but laws which are, or lately were, the laws of this country? What would be said in the supreme court of the United States, or in Westminster Hall, if things like these were offered as legal authorities—if, on a doubtful point of common law, or an obscure act of congress, the advocates were to refer to the compilations of Dr. Rees or Dr. Brewster, instead of the great luminaries of our jurisprudence? What should we think of him who, on a ques-

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tion of French laws, or French usages, would quote the foul-mouthed Jedediah Morse, who asserts in his work, entitled *The American Universal Geography, p. 265, (edition of* 1812,) that "the French, as a nation, are at present, by the confession even of sober and discreet Frenchmen, false and faithless, revengeful and sanguinary. The law of divorce has rendered marriage the mere cover for prostitution—and France presents at this moment the picture of one great common brothel, in which every variety of lewdness is indulged, without shame and without restraint." Even the French Encyclopedia is stained with some gross errors, when it treats of foreign nations. In fact, almost all works, especially those of the popular sort, that treat of the laws, manners or customs of foreign countries, are strongly characterized by the uncharitableness, hatred and malice which the people of different nations seem so fond of entertaining for each other. As to the opinion of D'Aguesseau, it is so guarded and restricted as to be of no use to those who offer it, if D'Aguesseau himself were of any authority as a Spanish jurisconsult.

Reference is made to certain letters patent, which recite a treaty made between France and Spain, in which it was provided, that the

droit d'aubaine should not operate in either country, with respect to the subjects of the other. But I can by no means admit the inference drawn from this stipulation, to wit, that if the *droit d'aubaine* did not exist to the same extent in both countries, there would have been no occasion to provide that it should be abolished in both for the future. Stipulations of this kind in treaties are almost always made mutually and reciprocally between the high contracting parties, for the following obvious reasons:

1. Because this reciprocity is deemed more suitable to the dignity of those parties, than if one of them only were to engage to do or not to do any thing, while the other party were left to do it or not, as he might think fit. This last would be what is termed an unequal, and, therefore, to one of the parties, a degrading treaty.

2. Because, on the principles of that universal law, which furnishes the rules for interpreting treaties, as well as all other contracts, every promise or stipulation should have some lawful consideration to support it. And

3. Because such stipulations bind the parties to preserve those laws which otherwise they might alter or repeal, at their pleasure.

In the treaty in question, the stipulation on the part of Spain, would prevent her sovereign

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from establishing any *droit d'aubaine*, as against Frenchmen, if he were even disposed to do so; or if he did establish such a law, it would at least expose him to war and the just penalties of violating a solemn treaty.

A reference to many of our own public treaties will shew the absurdity of our adversary's argument on this point. In the treaty between the United States and Prussia, it is stipulated, *art.* 9, *(vid. laws of the United States, vol.* 1, *p.* 249, *Colvin's edition)* that "the ancient and barbarous right to wrecks of the sea, shall be entirely abolished, with respect to the subjects or citizens of the two contracting parties." And yet, who ever heard of such a right existing in these United States? In the next article of the same treaty it is provided, that "the citizens or subjects of each party, shall have power to dispose of their personal goods within the jurisdiction of the other by testament, donation or otherwise." According to the counsel's reasoning, it might hence be inferred, that the *droit d'aubaine* operated in the United States, with respect to *personal property*—the contrary of which is notorious.

In our treaty with Spain, *art.* 7, it is stipulated that "in all cases of seizure, detention or arrest for debts contracted, or offences commit-

ted, by any citizen or subject of the one party, within the jurisdiction of the other, the same shall be made and prosecuted *by order and authority of law only.*" Who ever heard that a Spaniard was ever liable, in the United States, to be arrested for debts or offences, otherwise than by order and authority of law? Multitudes of such passages might be cited from such compacts between governments of different kinds, and having different codes of laws, and different usages, to prove the fallacy of the corrollary drawn from the treaty adduced by the counsel.

Let us now inquire what the Spanish law is, on this important subject, not from the compilations of foreign ignorance or jealousy, but from the code of Spain itself; not from Elizondo, nor Frebrero, nor the Theatro de la Legislàcion, but from the Partidas, the Recopilacion, and the Autos Accordados; the uncorrupted fountains of the Spanish law. It is ordained, *Partida*, 6, *tit.* 3, *l.* 2, that any person whatever may be instituted an heir, who is not prohibited by law from being so. "*E brevemente dezimos, que todo ome, a quien non es defendido por las leyes deste nuestro libro, quier sea libre o siervo, puede ser establecido por heredero de otri,*" &c. "We say, briefly, that every man, to whom it is not forbidden by the laws of this book, whe-

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ther he be a freeman or a slave, may be instituted as the heir of another." In the fourth law of the same book and title of the same code, *twelve* classes or descriptions of persons are enumerated, who may not inherit. *Foreigners are not among the number.*

The *4th Partida, tit. 4th, law 2d,* enumerates the various modes of acquiring naturalization. Among these, the 6th mode is *by inheritance.* "*La sexta, por heredamiento. Part.* 6, *tit.* 1, *law* 13, declares and specifies the descriptions of persons *who may not make a testament—foreigners are not among the number. Part.* 6, 1, 30. *Los peregrinos tienen libre facultad de hacer testamento, &c. Compendio, &c.* 1, 157. The succeeding law of the same title, makes it the duty of the diocesan bishop, or his vicar, to take care of the property of strangers and pilgrims, for their heirs, and to write to them, that they may come or send for such property. And if the heir neglect to come or send for it, it shall be employed in pious uses. These laws are taken from the *authentic,* already quoted, "*omnes peregrini.*"

But, were there no exceptions, no modifications of this extraordinary liberality of the Spanish law towards strangers and aliens? There were: and the court shall see the nature

and extent of them. It was enacted by Don Alonzo IX. *law* 3, *tit.* 27, *Ordenamiento de Alcalà*, and by Henry IV. in the cortes of Cordova, that no donation made by the sovereign to any other king or kingdom, or to any foreigner whatever, of any city, castle or royal jurisdiction, should be valid. This law, quoted by the adverse party, from the *Theatro Universal*, is recited very fully, and re-enacted, or confirmed, by the 1*st law*, *tit.* 10, *lib.* 5, of the new recopilation, which is, *l.* 6, *tit.* 5, *book* 3, of the *latest recopilation of* 1805. The second law of the same book and title, goes much further. It ordains as follows: "*Siguiendo la ley precedente, declaramos dar ni hacer merced á rey, ni á otro persona extrana de fuera de estos reynos, de ciudades ni villas, ni castillos, ni lugar, tierra ni heredamiento, ni islas de nuestro corona real, ni permitir ni dar lugar que tal se haga: y asi lo seguramos por nuestra verdadera fe y palabra real: y defendemos, que ningunos ni algunos de nuestros subditos y naturales no sean osados de dar ni vender, ni trocar villas ni lugares ni castillos, tierras ni heredamientos, ni islas de nuestros reynos à rey ni à senor, ni otra persona extrangera de fuera de nuestros reynos, so pena de la nuestra merced.*" "In pursuance of the preceding law,

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we declare, that we will not give, nor allow to be given, to any king or to any foreigner whatever, any cities, towns, castles, places, lands, inheritances, or islands belonging to our royal crown: and so we pledge our true faith and royal word. And we forbid all and every of of our natural born subjects to *give*, or *sell*, or *exchange* any towns, places, castles, lands, inheritances or islands of our kingdoms to any foreign king, lord or other person, on pain of being dealt with according to our pleasure."

As this is the law principally relied on by the adverse party, I have quoted it at full length. But, is it not evident, at the first view of this statute, that its great object is to preserve the rights and seignories of the crown—that the prohibition of alienation which it contains, extends only to property of a feudal nature, to which there belong privileges and jurisdictions unfit for an alien to enjoy or exercise? The word *inheritance* is indeed used; yet we may remark, that the prohibition is confined to *giving*, *selling* or *exchanging*. Surely an ordinance so very loosely penned, and which does not once mention *devise*, or *the right of inheritance*, could never be construed to repeal, by mere implication, as it were, the very solemn, positive and precise laws I have already cited.

But if even such a construction were possible, it could not avail the other party; for we find, on proceeding a little further in this law, that, though the alienations in question to foreigners are forbidden, they are *not void*—they only subject the offending persons to a penalty; and that penalty, which this law leaves at the king's discretion, is fixed precisely by the first of the *autos accordados*, annexed to the title of the *Recopilacion*, in which the law itself is contained. This *auto* is *law* 12, *tit.* 5, *book* 1, of the *Novissima Recopilacion*, 1805—it is as follows: "*Ordenamos &c. que qualquier lego y otra persona sujeta á nuestra jurisdiccion real, que donaren ó vendieren, ó en otro qualquier manera enagenaren por qualquier titulo qualquier heredamiento ó otros bienes raices á universidad ó colegio, á persona ó personas exêntas que no sean de nuestra jurisdiccion real ni sujestas à ella, sean tenidas de pagar, y paguen a nos la quinta parte del verdadero valor de las tales heredidades, &c. y esto demas de la alcabala que nos pertenece,*" &c. "We ordain, that whoever shall give, or sell, or transfer in any other manner or by any title whatsoever, any inheritance or other real property to any university, college or person, not belonging to our regal jurisdiction, nor subject to it, shall be

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held to pay to us the fifth part of the true value of such inheritances or other property, &c. over and above the ordinary *alcubala.*" So then the law on which our adversaries confidently rely, as making void all donations and devises of lands to aliens, does in fact, when explained by this *auto accordado,* fully authorize and confirm all such donations and devises, on the condition of the payment of a duty of twenty per cent. in addition to the ordinary duty on the sales and transfer of lands, which, I believe, is only five per cent. on their full value.

The appellee next cites the laws of the Indies. *B.* 2, *t.* 32, *laws* 44 *and* 46. By these laws it is forbidden to deliver up the property of deceased persons to foreigners: in a word, foreigners are not allowed to be *depositaries* or *curators* of the vacant estates of intestates; a provision not unwise or extraordinary, considering that few foreigners were admitted into Spanish America, and that even of these, but a small number were permitted to carry on commerce, or exercise any lucrative or honorable profession.

But this citation is extremely unfortunate for those who have made it. For it naturally draws our attention to the preceding law, (43) which has this important enactment: "*Pero si*

el que muriere dexare memoria en forma de testamento, que se ha de verificar con testigos, ó, siendo extrangero, hiciere testamento, aunque dexe herederos en estos reynos, toca el conocimiento de ellos à la justicia ordinaria." "But if the deceased shall leave any memorial in the form of a testament, which requires to be proved by witnesses, or if, *being a foreigner*, he shall make a testament, the cognizance of the succession, even though the testator should leave heirs in these kingdoms, belongs to the ordinary tribunals of justice." This law, the court will remark, is regulating the competency and jurisdiction of certain courts of justice; and we find that it recognizes, as a matter of notoriety, the right of foreigners *to make wills*, and the right of their heirs, in or *out of the Spanish kingdoms*, to inherit: for such is the obvious construction which the word *aunque* indicates. The provision of the 32d law, title 27, ninth book, of the same code, is yet more completely decisive in our favor.—*Y declaramos por lo que toca á la de tener bienes raices los estrangeros para adquirir naturaleza, &c.—Que sea en cantidad de quatro mil ducados proprios, ô adquiridos por via de herencia, donacion, compra, &c.* "We declare, with respect to the real property which foreigners must hold, in order to be qualified to

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obtain naturalization, that it must be of the value of four thousand ducats, whether originally their own, or acquired by way of *inheritance*, donation, purchase," &c. Beyond this, nothing can be required. To prove that the Spanish law of inheritance continued, as I have shewn it to be, from the *Partidas* and the new *Recopilacion*, I refer the court to the professor, Don Juan Sala's *Illustration de Derecho, vol.* 1, *p.* 19 *&* 148; and to another institutory work, by *Asso and Manuel, p.* 23. The first of these works is one of the best of its kind, that I have seen. It was published—at least my edition of it—in 1803. Asso and Manuel's book appeared in 1805. It is of inferior merit to the other; but neither of them could be mistaken, on a subject so important and well known as the law of inheritance.

To satisfy the court still further on this point, I refer them to the *Novissima Recopilacion*, published in 1805, in which are incorporated all the *cedulas. pragmaticas*, decrees, laws and ordinances, of a general nature, which had been promulgated up to the year 1804. In *tit.* 11, *book* 6, *vol.* 2, *p.* 165, of this comprehensive digest of Spanish statutory law, will be found various provisions respecting foreigners, none of which derogate in the least from those of the

Partidas. One of the laws, the second of this title, contains this extraordinary proviso, which the liberality of former laws had perhaps made requisite—that English and Irish Catholics should *not* enjoy in Spain any other privileges than those of the native Spaniards. What reflections must such a law excite in the minds of the Catholics of Great Britain and Ireland, who have been fighting the battles of a government that rewards them for their services with disfranchisement and degradation.

The regulations of governor Gayoso, for the allotment of lands, are referred to and relied upon by our adversaries. Without inquiring whether the Spanish governors of Louisiana were invested with legislative authority, it will be sufficient, in the present instance, to shew that the regulations in question do not contain any thing subversive of the Spanish law, as I have stated it to be. When donations are made, the donor may annex to them whatever reasonable conditions he thinks fit. The lands to which alone Gayoso's regulations were applicable, were granted *gratuitously* by the government. There was nothing then illegal or unreasonable in prescribing the mode or conditions on which those lands might be disposed of by the grantees. If they did not like those condi-

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tions, they need not accept of the property. If the Spanish law were conformable to Gayoso's regulations, why was it deemed necessary to state it in them? Those regulations are of a special, not a general, nature. They had no more to do with the law of inheritance, than with the law of purchase and sale, unless it was intended by them to deviate or derogate from the established law. And that such was their intention and object is obvious from the first part of the article, (the 15th,) from which the opposite party have quoted such an extract as they thought would suit them. The words of that part of the article I refer to, are these: "He (the grantee) shall not possess the right to *sell* his lands, until he shall have produced three crops, on the tenth part of his lands, which shall be well cultivated." *See Laws of the United States, vol.* 1, *p.* 543. The regulations, then, limit the grantee's right of selling, as well as the right of devising his property. From the ordinance that the particular lands in question shall in no event go to an heir who is not of the country, the counsel infers that, by the law of Spain, no alien can inherit any land whatever. By the same kind of logic, it would follow, from those regulations, that no one, (foreigner or citizen,) could, by the Spanish law, sell his lands,

until he had produced three crops on the tenth part of them.

Solanzano, in his *Politica Indiana*, recommends the adoption of the *droit d'aubaine*, so that foreigners may no longer inherit the property of the native subjects of Spain. But the authority of this writer is objected to—I do not rely upon it, or want it. I rely upon the codes and statutes themselves, not upon any commentators whatever. Commentators may be advantageously consulted when the interpretation of a law is doubtful; but when the law is as clear as I take that of the present case to be, no comment or glossary is requisite to explain it.

That the law of inheritance was as I have stated it to be, in Louisiana, during the time the colony continued under the dominion of Spain, is a fact of general notoriety, a fact for the truth of which I can appeal particularly to one of the members of this honorable court, judge Derbigny. Foreigners, of various countries, were allowed to dispose of their property by will, and to inherit property here. This is the first time I ever knew their rights in this respect to be denied or questioned. If the general law of Spain were as the other party misrepresent it, the long-established and uninterrupted custom of Louisiana would modify that law in

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this country. Custom is the un-written law, used for a long time. *Part.* 1, 2, 4. It must not be absurd, nor contrary to natural right, or the common welfare, nor be introduced through error. Custom is the interpreter of the law; it corrects the ancient law, if it is general; but if it is special, it corrects the law only in the place in which it is observed, if the sovereign knows of it, and does not oppose it for the space of ten or twenty years. *Part.* 1, 2, 5 and 6. Thus in the digest *de Legibus*. *D.* 1, 3, 32. An ancient custom is observed with reason as a law: it is called the customary law. For, inasmuch as the laws are binding upon us only from their being received by the opinion and consent of the nation, that which the people have approved of, though un-written, should be binding upon all. And it is, therefore, rightly established, that laws may be abrogated, not only by the will of the legislator, but also by disuse, approved of by the tacit consent of the whole nation.

But, whatever may be the law of inheritance of Rome, or of Spain, or of the late province of Louisiana, the point now in dispute is decided completely in our favor, by the provisions of the civil code of the commonwealth of Louisiana. This code, the court well know, is for the far

greater part, a transcript from the *Code Napoleon*, or, as it is now termed, *Le Code Civil Français*. To understand our code thoroughly, we must often investigate the French law as it stood before the revolution; and we must then compare the two codes together, to see how far they agree, and wherein they differ from each other.

The *droit d'aubaine*, it is certain, was in full force in France, until the fall of the old monarchy. It was abrogated by the decrees of the constituent assembly, in 1790, and 1791; and those decrees were confirmed substantially by the second chapter of the 1st title of the 3d book of the Napoleon code. This chapter, though it is entitled, *Des qualitès requise pour succéder*, treats chiefly of those who may not succeed, or inherit; it being, of course well understood, conformably to the great principle of jurisprudence established throughout Christendom, that every one may inherit who is not expressly prohibited or excluded from the right of inheriting. The first article of this chapter—the 725th article of the code, ordains that, "to succeed, it is necessary to be in existence at the moment of opening the succession.—Those, therefore, are incapable of succeeding—1. He who is not con-

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ceived—2. The infant born incapable of living—3.—He who is dead in law, *(mort civilement.)*"

These few exceptions, would, on the well known principle I have just stated, leave the right of inheriting property in France open to persons of every country, color and cast. But the framers of the Napoleon code, on mature reflection, were of opinion that this absolute, unqualified confimation of the repeal of the *droit d'aubaine*, was neither just nor politic, considering that that odious law of exclusion still subsisted, with more or less of atrocity, in many of the nations of the world. Why should a foreigner be permitted to inherit property in France, when a Frenchman could inherit nothing in that foreigner's country? France was not, like America, in want of population, nor had she an acre of land to spare. For this reason the 726th article was introduced; by which it was provided that "a foreigner is admitted to succeed to the property which his relation, whether a foreigner or a Frenchman, possesses in the territory of the empire, only in the case, and in the manner in which a Frenchman might succeed to his relation possessing property in the country of that foreigner, conformably to the dispositions of the 11th article "of the title *on the enjoyment and privation of civil rights.*"

The 11th article thus referred to, enacts that "every foreigner shall enjoy in France the same civil rights as those which are, or which shall be allowed to Frenchmen by the treaties of the nation to which that foreigner shall belong."—By these articles we see that no foreigner can inherit any property in France, unless in virtue of a treaty which would allow a Frenchman to inherit the same kind of property in that foreigner's country. Such is the construction given to those articles by the best French commentators, and by the French tribunals. Without these two articles, the old *droit d'aubaine* would have remained completely abolished in France. Now, neither of these two articles, nor any thing like either of them, appears in our civil code; while its general provisions on the qualifications requisite for inheriting are still more clear and strong than those of the French code. Our code proclaims *(p. 158, art. 64)* that "all free persons, even the minor pupil, the lunatic, and the like, may transmit their estates *ab intestat*, and inherit from others. Slaves alone are incapable of either." Our legislature do not, like the framers of other codes, give us a mere negative declaration of those who may *not* transmit their estates, or inherit the property of others, and

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leave us to the inference which our jurisprudence would thence draw in favor of all who were not thus specifically excluded: but they do *affirmatively and most positively* enact that *all* free persons may transmit and inherit estates, without making any distinction whatever as to the kinds of property, whether real or personal, moveable or immoveable, of which such estates may consist. If the *droit d'aubaine*, or any thing like it, existed in this country previous to the promulgation of our civil code, it was not possible for any legislative art, care, or providence to have destroyed that *droit d'aubaine* more completely and effectually than our civil code has thus done.

The omission, in the redaction of that chapter of our civil code which establishes the right of inheritance, of those articles of the French code which, in a certain degree, revived the *droit d'aubaine* in France, was evidently the result of design and deliberation. Our legislature, guided by the principles of a policy equally wise, liberal and provident, perceived clearly that the adoption of those excluding articles of the code Napoleon, however suitable they might be for France, would have been pernicious in Louisiana. Our staple commodity is land. We want purchasers for this property,

and freemen to encrease the strength of our independent and glorious commonwealth. We know by experience that whoever is interested in our soil, will be faithful to our state. Let a foreigner, of whatever nation or political sect, however hostile to our country and institutions, be put in possession of a good plantation on the banks of the Mississippi, and a sense of his own interest, constantly operating on his mind, will cure him of all his political and national prejudices, however strong and inveterate they may be. His estate makes him a patriot, whether he will or no. The attachment he feels for his property, (and we all know how strong that generally is,) will be transferred by an easy and inevitable association to the government, and the laws that protect it; and thus he becomes of necessity a friend and supporter of order, of justice, of the country. It is no merit for an inhabitant of Louisiana to adhere zealously to its government. In doing so, he only does what his own interests and those of his family require. To be a traitor to a country in which every freeman may enjoy all that any reasonable man can desire, is to be at once both fool and villain.

The sentiment of interest is, I conceive, the surest bond by which to attach the native of

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one country to the government of another. It is the best, if not the only substitute for those early, and dear, and cherished associations which produce the filial affection of patriotism, and which bind men, as by the force of a natural and innate passion to COUNTRY—that beloved, and venerated, and adored Being which the imagination elevates to a rank between God and man.

A large portion of our population must, for a long time, be composed of the citizens of other states, and the natives of foreign countries. To expect from those emigrants the natural, habitual patriotism I have just spoken of, would be too much. Their attachment to their new country will be best secured by enabling them to become deeply, permanently and self-evidently interested in its welfare. Perhaps, indeed, the patriotism which is, on the whole, the most substantially advantageous to a community, is that which has individual interests for its basis. When men perceive that the prosperity of the republic is identified with their own, they labor in the public cause with all the ardor, and energy, and perseverance of self-love. Their exertions are not like those of mere unsupported enthusiasm, few, temporary or capricious, but continued and uniform. A perfectly disinterested patriot, in

these unchivalrous, calculating times, might be, like a Platonic lover, of very little use to the object of his affections. The government of Louisiana is too wise to rely on the romantic attachments of her people. The laws of Louisiana, by throwing open widely the doors of purchase and inheritance, have furnished to all her free inhabitants, wherever they come from, the most powerful incentives to useful industry, and the most solid and durable foundation for rational patriotism.

The judgment of the court below has, perhaps, been founded on the law of England—a law which, as it has been adopted on this subject in the other states of the union, ought, it may have been supposed, to be adopted in Louisiana also. How that law has come to be so generally established in the United States, appears to me quite unaccountable. The law of England, prohibiting aliens from holding real property, is founded on the feudal system, to which we have nothing in these states bearing any resemblance. "Under the feudal system, (*B. Comm.* 4, 386,) every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them: and there was a mutual trust or confidence subsisting between the

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lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him; and on the other hand, that the vassal should be faithful to the lord, and defend him against all his enemies. This obligation on the part of the vassal was called his *fidelitas* or *fealty*; and the oath of fealty was required by the feudal law, to be taken by all tenants, to their landlords, which is couched in almost the same terms as our ancient oath of allegiance; except that, in the usual oath of fealty, there was frequently a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgement was made to the absolute superior himself, who was vassal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception." Now, all lands in England are supposed to be held mediately or immediately from the king. Allegiance to him—which an alien of course cannot owe permanently—is therefore considered a necessary qualification for holding landed property. Besides, there are annexed to the possession of certain kinds of property, and to particular estates in

England, various rights, which an alien could not properly exercise. The proprietors of manors enjoy some of the royal privileges. The possession of Arundel Castle was adjudged to confer an earldom on its possessor. *Selden, Tit. of Hon. b. 2, c. 9, § 5.* The manor of Scrivelsby, in Lincolnshire, is held by grand serjeanty, on the condition that its lord shall perform the office of the king's champion at the coronations. It would be a strange spectacle to see a French subject, or an American citizen —a revolutionary officer, suppose—prancing in complete armour into Westminster Hall, throwing down his gauntlet, and offering to combat any false traitor who should deny the king's title to the crown. No such rights or duties—no political rights or duties whatever—are attached to the mere possession of any lands in America. To own an estate of a certain extent or value, is sometimes required to qualify a citizen for exercising the right of suffrage, or filling an important office. But the estate, by itself, would give no more right or privilege to its possessor, if an alien, than bank stock, or cash of the same value.

I cannot, then, avoid expressing my surprise, that the law, withholding from aliens the right of inheriting lands—a political law, emanating from

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the feudal constitution of the monarchy and realm of England—a law disposing, in many instances, of the fortunes of the citizens, contrary to their express will, or, if they should die intestate, otherwise than they might be reasonably presumed to have desired—a law, branded by public opinion, through almost the whole civilized world—that this alien law, at which the common sense and moral feelings of mankind revolt, should have been adopted by most of our sister states, not one of which have to offer in justification, or excuse for the adoption, any one of the reasons, fictions, or pretences by which that law, in England, may be palliated.

Is there any provision in the constitution or laws of the United States which forbids aliens, or from which it may be inferred that aliens ought not, to hold or inherit real property? No such thing, but directly the reverse. The federal constitution requires citizenship as an indispensible qualification for being a member of the house of representatives or the senate, or for holding the office of president; but does not require it in the judges of the supreme court, every one of whom might therefore be an alien. The laws of the United States allow aliens as well as citizens to purchase and hold public lands; and, during the late war, congress be-

stowed a handsome tract of land upon every soldier, native or foreigner, who enlisted in the service of the United States. Can it then be imagined that the constitution or laws of the United States are in the least repugnant to the right of foreigners to *inherit* lands?

If it is held unjust and odious to enforce this alien law of disinherison in Europe, how impolitic must it be considered in the United States —in these free and liberal republics to which foreigners are every day invited by us, in books and newspapers, in speeches and songs and publications of every sort, to repair, as to the inviolable asylum of oppressed humanity. In most of these states, aliens may purchase and hold land, though they cannot inherit such property, nor transmit it to their alien heirs. Shall a pretext then be afforded to the envious and malignant enemies of our institutions, to insinuate that the expectation of escheats is one of the motives of our hospitality—that our political Sirens are alluring foreigners to our shores for the sake of spoil and plunder? We know how utterly false and groundless such an insinuation would be; but that will not prevent malice from making it.

Louisiana, however, stands free from the possibility of any such reproach; and she may ex-

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pect, in consequence, to receive a considerable portion of that wealth and industry which are now emigrating from Europe. The emigrants, if they establish themselves here, need not apprehend that their property will, at their death, escheat to the state, or descend to some distant relation, who may happen to be a citizen of the United States. It will be transmitted, according to the will of the owner, or if he make no will, to his nearest kindred, to whatever nation they may belong. The only case in which the state can inherit, is, as the counsel has correctly quoted from the civil code, in defect of *lawful relations*, or of a surviving husband or wife, or acknowledged natural children of the deceased. The code does not say in defect of lawful relations, &c. *being citizens of the United States*, but generally, of any lawful relations whatever. If our code contained nothing on the subject but this single article, we might fairly infer from it that foreigners were not deprived of the natural right of inheriting the property of their relations in this state.

Although far, very far, from being desirous of presenting myself in any other character than as the advocate of the appellant, I yet flatter myself that I have stated this case with as much candour as if I had the honor of being an as-

sessor of the court. I have brought forward, or noticed, every thing which appeared to me deserving of the name of an authority, on either side of this great question; a question which involves, in this one cause, a property worth between fifty and sixty thousand dollars, and which may, and probably will, extend to fortunes of ten times that amount: and on summing up and duly considering the whole, I think *we* may feel proud, that there is one commonwealth in the American union whose civil code is not disgraced by that remnant of feudal jealousy, barbarism and injustice which still lingers in our northern states; and that Louisiana, *prima inter pares*, stands as honorably distinguished in legislation as in arms.

Under these impressions, I confidently expect that the judgment of the inferior court will be reversed; and that the whole estate, real, as well as personal, of the deceased A. Phillips, will be decreed to belong to his brother, the appellant, though a foreigner, in preference to his distant relations, the appellees, who are citizens of the United States.

MARTIN, J. delivered the opinion of the court. The only question for the decision of this court

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is, whether an alien may inherit real estate in Louisiana.

It is first necessary to enquire whether he may hold real estate.

The defendant's counsel contends he may not.

He relies on *ff.* 28, 5, 6, *n.* 2, *id.* 59, *n.* 4, to shew that aliens could not at Rome; but this shews that they could not take by will. *Non habet testamenti factionem activam vel passivam.*

2. He next endeavours to shew that the *droit d'aubaine* prevails in Spain. In this, he does not appear to have succeeded: but if he had, it would only shew that an alien may not transfer property by will or succession.

3. The Spanish statutes are next relied on, to shew that the sale, gift or alienation of cities, towns, castles, lands or hereditaments, *heredita-mientos*, to an alien is prohibited.

The plaintiff's counsel contends, that the prohibition is confined to estates, to which some jurisdiction or civil or military power is annexed, and produces in favor of this position a legislative construction of these laws, which he finds in the *Partidas* and the *Nueva Recopilacion* and the *Leyes de las Indias, Ordonmiento real* and *Autos Accordados.*

Naturalization may be obtained in Spain by acquiring an inheritance, *por hereditamiento*—

Partida 4, 4, 2—by the acquisition, by purchase or donation, of real property, *bienes raices*. *Nueva Recopilacion*. And foreigners are forbidden to trade to the Indies, unless they have acquired real property, of the value of four thousand ducats, by purchase or inheritance. *Recopilacion de las leyes de las Indias*.

Now, it is impossible to give effect to these laws, by which naturalization may be acquired by an alien, unless the construction of the former laws, contended for by the plaintiff's counsel, be adopted. Is it not illusory, to say that a foreigner may obtain naturalization by acquiring real estate, if he be not permitted to make the acquisition?

If the laws, quoted by the plaintiff's counsel, be attentively examined, the construction contended for will not appear a forced one. "We declare, that we do not intend to give or grant to any king, or other foreign person, out of our kingdom, any city, town, castle, place, land or inheritance, nor any island," &c. *Nueva Recopilacion*. The donation is not valid to any stranger out of the realm, of any city, town or hereditament."

"We forbid that any of our subjects or vassals should give, sell or exchange any city, town, castle, land or hereditament, or island, of

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our kingdom, to any king, lord, or any other stranger, out of our kingdom, under the pain of our displeasure." *Nueva Recopilacion.*

The laws, which are offered as evidence of the legislative construction contended for, are positive. It is further contended that, if they do not shew that the former ones are to be thus construed, these are impliedly repealed.

The legislator, authorising aliens to obtain naturalization, by the acquision of landed property, must necessarily authorize such an acquisition, and effectually repeal the laws which forbade it. *Cum quid conceditur, conceditur id per quod pervenitur ad illud.*

If we are enabled to conclude that aliens can hold real estate in Spain, it remains to be inquired whether they may acquire it by inheritance.

Here it is proper to remark, that none, of those prohibitive laws cited, affect, except by a remote construction, the right of acquiring real estate by inheritance.

Any person may be instituted as heir, who is not prohibited from being so. *Partida* 6, 3, 2.

In the fourth law of the same title, persons, who are incapacitated from inheriting, are enumerated, and aliens are not spoken of.

Persons, who may not make a will, are enu-

merated in *Partida* 6, 1, 13—aliens are not among them.

The third law of the same title provides, that *peregrinos*, pilgrims, may make their wills.

It would be idle to suppose, that the circumstance of a Spanish subject, going on a pilgrimage, in his own country, would require a positive law to authorize him to make a will. The inference is strong, that alien pilgrims are referred to.

The succeeding law makes it the duty of the bishop, or his vicar, to take care of the property of strangers and pilgrims, for their heirs; to write to them, that they may come or send for such property; and, if the heir neglects to come or send for it, it shall be employed in pious uses.

The *Recopilacion de las leyes de las Indias* has the following proviso: If he who died left a writing, in form of a testament, which is to be proven by witnesses, as being a stranger or *peregrino*, the cognizance of it belongs to the ordinary judges.

Hence we conclude, that the maxim of the Roman law, which denied to aliens *testamenti factionem, activam vel passivam*, does not prevail in Spain.

But the plaintiff's counsel shews that the

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viceroys of Spanish America and the audiences are directed, "in case persons, with sufficient vouchers, claim the estates of persons who died in the Indies, they may receive them, unless they be strangers; and that the king's subjects may not receive the estates of strangers." *Recopilacion de las leyes de las Indias* 2, 32, 44; and this is presented to us as proof that the principle prevails, at least in Spanish America.

By the 36th law of the same title, "testamentary executors, heirs and other retainers of goods of deceased persons, who, according to the will, are bound to deliver them, in whole or in part, to persons within these our kingdoms, are ordered, at the expiration of one year, to send whatever they may have collected to the *casa de contratacion* of Seville."

Not only aliens, but many of the Spanish subjects themselves, were excluded from the dominions of the king of Spain in America, and the property of those who, contrary to the prohibition, introduced themselves there, was liable to confiscation. On the death of any individual in the American provinces, whose property was not claimed there, it was deemed proper to submit the rights of alien claimants, or of Spanish claimants, not resident on the spot, and even the claims of the colonists, to

the estate of an alien, to a severe scrutiny in Europe. For this purpose, if the claimant resided in Spain, the estate was to be sent to *casa de contratacion* in Seville, where that scrutiny was to take place. But, if the deceased was an alien, then, if an alien claimed the estate, the cognizance of the claim was exclusively confined to the council of the Indies. *Recopilacion de las leyes de las Indias* 9, 37, 24. The colonial authorities, even the viceroys and audiences, were interdicted from interfering in such cases. We see, therefore, nothing in these statutes that affect the present case.

By the 15th article of the instructions of governor Gayoso to the commandants, relating to the grant of lands, provides that, in case of death, he (the grantee) may leave them (the premises) to his lawful heir, if he has any resident in the country; but, if he has no such heir in the country, they shall in no event go to an heir who is not in the country, unless such heir shall resolve to come and live in it. 1 *Laws of the United States*, 543.

This condition, directed to attend the grant of land, is a strong presumption that there did not exist, in the knowledge of the governor, any principle of law which forbade aliens from acquiring land.

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Nothing in the laws of Spain, or of her colonies, appears to us to exclude aliens from the inheritance of real estate.

Our own statute makes no distinction in the nature of property, in order to regulate the succession. *Code Civil*, 146, *art.* 9, 10. Nothing shews that aliens must be excluded from the acquisition of real or personal property, by will or succession, and are not capable to inherit either.

All free persons, even the minor, pupil, lunatic and ideot, may transmit their estate, *ab intestat*, and inherit from others. Slaves alone are incapable of either. *Id.* 158, *art.* 64.

Nothing appears to us to exclude aliens from the inheritance of real property; and we think that the district judge erred in refusing to the plaintiff the real property, left by his brother.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is ordered, that Thomas Phillips do recover the whole estate, real and personal, of Archibald Phillips, deceased, his brother; and, as Thomas Rogers was admitted as heir, the costs to be paid out of the succession.

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6 Parol, may be admitted to shew how the vendee possessed and cultivated the land, and of his attempt to sell it. id.

7 If parol evidence be improperly offered, the adverse party ought to object to its introduction. *Highlander* vs. *Fluke* & *al.* 442

8 An heir may, in order to establish the *quantum* of his share, shew what sum was paid to his co-heirs, while he was under age. *Trepagnier's heirs* vs. *Durnford.* 451

9 The court of probates cannot proceed on *ex parte* evidence. *Dubreuil* vs. *Dubreuil.* 475

10 On the plea of payment, evidence cannot be received of the rate, at which the plaintiff ordinarily lends money. *Durnford* vs. *Bariteau.* 501

11 On the vendor's plea *de non numeratâ pecuniâ*, the vendee cannot adduce parol evidence that the consideration is not that which the deed expresses. *Berthole* vs. *Mace.* 576

12 The vendee may avail himself of any parol evidence, introduced by the vendor, and shew that the sale was simulated. id.

13 Although a written sale was made in a country where a verbal one suffices, parol evidence of it may not be received, unless the absence of the writing be accounted for. *Lucile* vs. *Toustin.* 611

14 It is not enough to prove, that a writing, purporting to be a bill of sale, was seen in the hands of the adverse party, but proof must be made of its genuineness. *Bradley's heirs* vs. *Calvit.* 662

15 The vendor's letter, announcing his failure, cannot be read against the vendee, to impeach his title. *Crocheron* vs. *Ainslie & al.* 524

See FOREIGN LAWS, 2—FRAUD, PRACTICE, 5.

EXECUTOR.

1 May sue on a promissory note, given to him in his capacity, even one year after the death of his testator. *Urquharts* vs. *Taylor.* 200

2 Cannot act under a will made abroad, without the order of the parish judge. *Deshon & al.* vs. *Jennings.* 568, 642

3 If he present his account, which is contested, and a decree made for the balance, and he after receive other monies, he cannot present a new account, including with these monies, items of the first account, with additional charges, not before produced. *Robin's widow & al.* vs. *his executors.* 515

FOREIGN LAWS.

1 The courts of this state cannot presume what

the laws of other states are—they must be proven. *Boggs* vs. *Reed.* 673

2 Whether the acknowledgment of a deed, before a justice of the peace, in Massachusetts, be legal evidence? *Stearns* vs. *Rust.* 518

FRAUD.

On an allegation of, against two, a record to which one of them was a party, may be introduced in evidence. *Trepagnier's heirs* vs. *Durnford.* 451

INDIANS.

1 Some of them were held in slavery, under the French government in Louisiana, and their freedom was not a consequence of the introduction of the Spanish or American laws. *Seville* vs. *Chretien.* 275

2 Whether, when located by the governor of the province, they had the use only or the property of the land allotted to them. *Martin* vs. *Johnson & al.* 655

3 One who holds land, by purchase from the Indians, by private sale, approved by government, cannot be disturbed by a person who does not claim under them. id.

4 In Spanish colonies, lands are not assigned to the Indians by survey. They are permitted to occupy a given spot, and the law gives them a right to a mile around it. *Reboul* vs. *Nero.* 490

INTERDICTION.

The acts of a person anterior to his, will not be

avoided, if his insanity was not notorious. *Louisiana Bank* vs. *Dubreuil.* 416

INTEREST.

1 Cannot be allowed on a sum liquidated only by the verdict. *Pierce* vs. *Flower & al.* 388

2 Above the rate allowed by law, must be imputed on the principal. *Durnford* vs. *Bariteau.* 501

3 Is not to be allowed on a purchase on credit. *Decuir* vs. *Packwood.* 300

INTERROGATORIES.

One may avail himself of his own answer to an interrogatory put by the adverse party. *Berthole* vs. *Mace.* 576

See PRACTICE, 4.

ISSUE.

1 One, the object of which is to obtain a general finding, cannot be specially submitted. *Fonteneau's heirs* vs. *Perot.* 202

2 The act, directing the submission of particular issues is not unconstitutional. *Maurin* vs. *Martinez.* 432

3 The time at which a person was made a party to a suit, is a matter of record, and cannot be submitted to the jury. id.

JUDGMENT.

1 Which does not contain the reasons on which it is grounded, whether void or voidable? *Doubrere* vs. *Papin.* 498

2 It suffices, if the reasons appear by a reference to the petition. id.

3 They must be inserted in a judgment by default. *Montserrat* vs. *Godet.* 522
4 Or on verdict. *Muse* vs. *Curtis.* 686

JURY.

Their finding must be understood in relation to the pleadings. *Trepagnier's heirs* vs. *Durnford.* 451

LAND.

1 When both parties have obtained the commissioners' certificate, the confirmation must be taken out of view. *King* & *al.* vs. *Martin.* 197
2 Whether an order of survey does not entitle the party to a petitory action against a possessor without title. id.
3 The seizure of, on a *fi'. fa'.* divests the defendant from his legal possession. *Prevot* & *wife* vs. *Hennen.* 221
4 A verbal promise to pay the vendor the difference between the price of the land and that at which it may be sold, cannot support an action. *Hart* vs. *Clark's ex'rs.* 614
5 A confirmation by the United States, cannot avail against a complete Spanish title. *White* vs. *Well's ex'rs.* 652
6 The defendant cannot be disturbed when the plaintiff does not shew a better title. *Martin's heirs* vs. *Gardner* & *al.* 662
7 On a verbal sale of land, either party may recant, before the conveyance be executed. *Carson and wife* vs. *Fulton's ex'rs.* 676
8 The surrender of the sole evidence of an inchoate and conditional title, before the performance of the condition, is evidence of an

implied abandonment of all rights under it. *Boissier* vs. *Metayer*. 678

9 The Spanish government could grant anew the land, when the grantee had neglected to perform the condition. id.

See INDIANS, 2, 3, 4.

MANDAMUS.

The supreme court cannot issue a, to restore the clerk of a district court to his office. *State* vs. *Dunlap* & *al.* 271

MINOR.

Has a mortgage, but no privilege, on his tutor's estate. *Welman* vs. *Welman & al's. syndics.* 574

MORTGAGE.

1 Before the act of 1817, syndics of insolvents could, in order to effect a sale, release mortgages. *Williamson & al.* vs. *their creditors.* 618

2 A judicial, cannot extend to lands out of the state. id.

3 Although the register certifies that the land is free, if it appear that the order of court, on which a mortgage was cancelled, was had in the absence of the mortgagee, the purchaser cannot be compelled to pay. *Dreux* vs. *Ducournau.* 625

4 The mortgagee cannot prevent the sale of the premises by a creditor, but can only insist on his being paid by preference. *Alexander* vs. *Jacob* & *al.* 632

5 One under private signature may be recorded, on producing the original. *Lefevre* vs. *Boniquet's syndics.* 481

NOTARY.

1 His acts may be impeached by the subscribing witnesses, if they all agree, and he be of a bad character. *Langlish* vs. *Schons* & *al.* 405

2 If they disagree, the execution of the act may be disproved by an *alibi.* id.

NULLITY.

1 Whether the recourse of, as exercised under the Spanish law, still exists in Louisiana? *Williamson* & *al.* vs. *their creditors.* 618

2 Under a general allegation of, nothing which does not appear on the record can avail. id.

ORDER.

He who contracts to import goods for another, must strictly comply with his. *Ralston* vs. *Pamar.* 3

PARTNERSHIP.

In a particular, the partners are not bound *in solido.* *Slocum* vs. *Sibley.* 682

PLANTER.

Receiving advances from a merchant, is not thereby bound to give him the sale of his crop. *Harrod & al.* vs. *Constant.* 575

PENALTY.

The whole not to be recovered on a partial breach. *M'Nair* vs. *Thompson.* 525

PRINCIPAL MATTERS.

PRACTICE.

1 A judgment of discontinuance cannot be pleaded in bar. *Petit* vs. *Gillet.* 19

2 The plaintiff may discontinue, at any time, before trial. id.

3 And, with leave, after the trial is begun. *Lafon* vs. *Riviere.* 500

4 Although an answer to interrogatories be excepted to, and the exception sustained, the party has no right to take it away. *Poston* vs. *Adams.* 272

5 The signature of an indorser must be proven, although it was agreed that the note should be given in evidence, so far as it purports to be made by the drawer. *Johnson* vs. *Duncan & al's syndics.* 361

6 The vendee on a *fi'. fa'.* is suable, before any recourse on the land sold and mortgaged. *Morgan* vs. *Young & al.* 364

7 His surety has not the benefit of the plea of discussion. id.

8 If A sues for B, the latter is the real plaintiff. *M'Nair* vs. *Thompson.* 525

9 In a possessory action, the judgment ought not to pronounce on the title. *Justice* vs. *Williams.* 685

10 If a slave be claimed, under a statute, which pronounces his forfeiture, if removed, without the owner's consent, the petition must state that he was so removed. *Hicks & wife* vs. *Calvit.* 691

11 An action for money laid out and expended, or had and received, does not lie against a wrongdoer. *Foster & al.* vs. *Dupre.* 6

PRESCRIPTION.

1 Settlers entitled to a grant, under the act of congress, of March 2, 1805, may prescribe from that day. *King & al.* vs. *Martin.* 197

2 The party pleading, is not doomed to answer an interrogatory, whether he has paid the debt. *Burke* vs. *Flood.* 403

3 Of twenty years, required of a slave claiming his freedom, in the absence of his master. *Metayer* vs. *Noret.* 566

PRIVILEGE.

On real estate, in the hands of a third person, cannot be exercised, without a judgment against the original debtor. *Mouchon* vs. *Delor.* 395

PROMISSORY NOTE.

Is not presumed to be paid, on the lapse of five or six years. *Loze* vs. *Zanico.* 391

REFEREES.

1 After praying their report to be made the judgment of the court, the party cannot attack it for informality. *Bariteau* vs. *Lefevre.* 481

2 If they report a balance due to the defendant, he cannot have judgment therefor. id.

RES JUDICATA.

A judgment is not, as to those who were not parties thereto. *Augustin & al.* vs. *Cailleau & al.* 464

RESPITE.

A creditor who granted a, may sue, if in the mean while the debtor becomes insolvent. *M'Bride* vs. *Crocherons.* 105

RESPONSIBILITY.

If A writes to B, that C, "being unacquainted in New-Orleans, will be indebted to B's politeness for assistance, and his bill on his father will be honored," he is responsible for the payment. *Amory & al.* vs. *Boyd.* 414

SALE.

1 When the vendee, in the contract of sale, lets the premises to the vendor, no delivery of possession is necessary. *Highlander* vs. *Fluke & al.* 442

2 The process verbal of the register of wills is evidence of a sale. *Zanico* vs. *Habine.* 372

3 The rescission of a sale cannot be demanded, on account of a capital crime committed by the slave immediately after the sale. id.

4 The vendor's privilege is postponed to law charges, if the vendee become insolvent. *Delor* vs. *Montegut's syndics.* 468

See CONTRACT, 2, 3, 4—DEED, 1—INDIANS, 1—LAND, 4, 7—PRACTICE, 6.

SLAVE.

1 A master who has agreed to free his, for a certain sum, is not compelled to do so, by the receipt of part, till he receives the whole. *Cuffy* vs. *Castillon.* 494

2 If on an injury to his slave, the plaintiff recovers his full value, the property is transferred to the defendant, on payment of the judgment. *Jourdan* vs. *Patton.* 615

3 No interest can be given on such a price; but the delay sustained by the plaintiff may be considered in fixing the value. id.

See DONATION, 1—EVIDENCE, 6—PRACTICE, 10, 11, 15—PRESCRIPTION, 566—SALE, 3, 4.

SIMULATION.

1 A feigned vendee will be decreed to re-convey, even when the object of the sale was to protect property from threatened suits. *Greffin's ex'rs.* vs. *Lopez.* 145

2 When a counter letter is accounted for, parol evidence of its contents may be admitted. id.

SURETY.

May be sued without the principal. *Curtis* vs. *Martin.* 674

See ATTACHMENT, 2—PRACTICE, 7.

WAGES.

Cannot be claimed by the master of a ship, lost by his neglect. *Latham* vs. *West.* 57

WIFE.

Binding herself with her husband, and renouncing the laws in her favor, cannot demand proof of the debt having been contracted for her benefit. *Chapillon and wife* vs. *St. Maxent's heirs.* 166

PRINCIPAL MATTERS.

WILL.

1 Attended with the formalities required in an olographic one, is valid as such, though it appears that the testatrix intended to make a mystic will. *Broutin* & *al.* vs. *Vassant.* 169

2 A superscription is not of the essence of an olographic will. id.

3 The testator may dispose of part of his estate on an universal, and of the rest on a particular, title. *Gardner & al.* vs. *Harbour* & *al.* 408

4 If a wife has a legacy of the enjoyment of the estate, she takes it on the appraisement made immediately on the husband's death, and pays no interest thereon. *Marshal* vs. *Marshal.* 695