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.

Si de interpretatione legis quæratur, in primis inspiciendum est quo jure civitas retro in ejusmodi casibus usa fuisset. ff. 1, 3, 37.

VOL. IV,

BEING VOL. VI. OF THIS REPORTER.

NEW-ORLEANS:

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1819.

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☞ There was not any change on the bench of the supreme court, during the period, the cases of which are reported in this volume.

On the 5th of January, 1819, LEWIS MOREAU LISLET resigned the office of Attorney-General, having accepted a seat in the senate, and

THOMAS B. ROBERTSON was, on the 21st, appointed in his stead.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, DECEMBER TERM, 1818.*

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LAFON vs. RIVIERE. | 6m 1 | 51 1723

LAFON vs. *RIVIERE*

APPEAL from the court of the first district.

An *alias* citation may be taken, after an irregular service of the first.

In this case, the citation of appeal was served on the attorney of the appellee, the appellee himself being within the parish: a motion was thereon made to dismiss the appeal.

Whether arbitrators appointed, by the court, may give their award, at any time during the pendency of the suit?

The court determined, that the service was merely void, and that the appellant might take an *alias* citation, from the district court, to be served on the appellee in person, notwithstanding the return day of the appeal had past.

When two causes are consolidated, the court cannot, till they be severed, give judgment on either of them alone.

* There was not any case determined in November term

East'n District.
December, 1818.

LAFON
vs.
RIVIERE.

MARTIN, J. delivered the opinion of the court. The plaintiff claims $4740, 87 1-2, the balance of an account annexed to the petition, for work and labour done on the defendant's house, with interest from the year 1799, when a judicial demand is admitted to have been made: the defendant pleaded the general issue.

The parties came afterwards to an agreement, that the settlement of the account, which is the object of the present suit, and generally all differences existing between the parties, should be submitted to the decision of arbitrators, to be appointed by the court, and authorised to pronounce upon the whole as amicable compositors, or according to good faith and natural equity, without being restricted by the rigor of the law, with power to appoint experts to examine and value the work, and make their report to the arbitrators. In case the latter disagree on the choice of experts, the appointment of them is to be made by the court. The parties bound themselves to each other, in the penalty of $2000, for the performance of the judgment of the arbitrators.

The court homologated the proceedings, and appointed two arbitrators.

Two years after, the present defendant instituted a suit against the present plaintiff, for the recovery of a balance of $3681, 75.

On the next day, the two cases were consolidated by consent, and all matters in the two suits referred to two gentlemen, who, in case of disagreement, were authorised to appoint an umpire, and their report, or that of any two of them, was to be binding, and judgment to be entered thereon, according to the agreement of the parties homologated by the court.

Three years after, by consent, two other gentlemen were appointed referees, and it was agreed that, in case of disagreement, the court should appoint an umpire.

About a year after, the case coming before the court, as the record says, the attornies of the parties, being present, three experts were appointed to examine and report on the work and the value of it, as done by the plaintiff, on the house of the defendant, more or less according to the contract.

Five months after, these experts reported and a balance thereby appeared due to the plaintiff, of $2493, 33.

Four months after this report, the same experts made a second, valuing the work done by the plaintiff, over and above the contract, at $3576, 58, and that less than the contract, at $748, 85, leaving a balance due him of $2827, 73. They valued certain objects, which they declared to be contested by the parties, at $552,

East'n District. *December*, 1818.

LAFON vs RIVIERE.

exclusively of some carving of which the plaintiff was to produce an account.

The defendant, having been served with a rule to shew cause why the report of the arbitrators should not be confirmed, and made the judgment of the court, contended that the case must be referred, together with all other controversies between the parties to arbitrators, in pursuance of their agreement on file: but, the court was of opinion, that this was null and void, the time allowed to arbitrators to make an award being expired.

The defendant next contended, that, even disregarding this agreement, the cause must be sent to the referees, as the action was brought on an unsettled account, and on a contract implying several allegations on both sides: but the court was of a different opinion, holding that the action was not brought on such an account and contract but for work and labour done, and materials furnished, which being valued by experts, their report must be made the judgment of the court.

Lastly, the defendant contended, that she was then entitled to amend her answer, so as to place before the court all the objections arising out of said account and contract, which, under the agreement of the parties, homologated by the court, she had a right to submit to arbitrators.

but the court denied leave, as the defendant, if she had any claim against the plaintiff, was at liberty to bring her action against him.

Whereupon, the defendant took a bill of exceptions to the opinion of the court, on these points.

The court then, stating that the cause shewn by the defendant was insufficient to prevent the report of the experts being made the judgment of the court, decreed her to pay to the plaintiff $3178, 83, with interest from the 1st of April, 1799, at five per cent, till paid and costs.

From this judgment she appealed.

No statement of facts comes up with the record, but the district judge has certified, that it contains all the matters on which the cause was heard.

The defendant relies, in this court, on her bill of exceptions and assigns as errors:

1. That the district court did not submit the valuation of the experts, to the referees or arbitrators.

2. That the judgment is not bottomed on either of the valuations or reports of the experts: the sum in the judgment not being that of either.

3. That the court improperly received the valuation and report of the experts, as they were made by unsworn persons, and incomplete.

East'n District. *December*, 1818.

LAFON vs. RIVIERE.

4. That two actions being consolidated, judgment was giveu in one of them only.

5. That interest was improperly allowed,

It is unnecessary to determine, in this case, whether arbitrators, appointed by the court, may or not give their award at any time, during the pendency of the suit, or whether, like ordinary arbitrators they must do so within three months, *Civ. Code*, 442, *art* 7, as the arbitrators here appointed were superceded by referees, afterwards chosen to settle the controversy between the parties.

It does not appear to us, as it did to the district court, that this action is brought for work and labour done, and for materials furnished, and that the same being valued by experts, their report must be made the judgment of the court. The petition expressly claims *the balance of an account*, annexed to and made part of it, in which the defendant and appellant is admitted to be entitled to credit, for upwards of $12000. The preamble to the agreement of the parties for the appointment of arbitrators, homologated by the court and spread on the record, states that "the present action is brought for a settlement of accounts, between the parties which is to be the result of a decision upon their respective claims, which, if it were made by the court, would occa-

sion great delay from the multiplicity of the objects, which constitute their respective claims."

Nothing having been done by the arbitrators, the accounts were submitted to three gentlemen as referees, and as they did not possess the technical skill requisite, for the valuation of part of the plaintiff and appellee's work, experts were chosen possessing it. The valuation, which the latter returned, might enable either the referees or the court to establish the amount of the plaintiff's work: but did not, alone, enable them to pronounce on the merits of the case.

Further, the parties, in this suit, and that instituted by the defendant and appellant, by an agreement approved by the court and carried into effect, consolidated the two suits: it therefore became the duty of the district court, to pass on both at once, and to give such a judgment as would put each of them at an end

As the case must be remanded, it is unnecessary to examine the question, whether the appellant may avail herself of the absence of any proof on the record of the experts having been sworn—nor the question of interest.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and the cause remanded, with direc-

East'n District. *December*, 1818.

LAFON vs. RIVIERE.

tion to the district judge, to proceed according to law to the determination of both suits: and it is ordered, that the plaintiff and appellee pay the costs of this appeal.

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JANUARY TERM, 1819.

East'n District. *January* 1819.

JOHNSON *vs.* DUNWOODY.

JOHNSON vs. *DUNWOODY.*

No action can be brought in the court of the parish and city of New-Orleans on a judgment rendered in the territory of Alabama.

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

MARTIN, J. delivered the opinion of the court. This case has been submitted to us without argument. It is an action originally brought in the court of the parish and city of New-Orleans, to recover the balance of a judgment obtained by the plaintiff against the defendant, in the territory of Alabama, in consequence of an assault on the former, in the town of Mobile.

It appears to us, that the plaintiff mistook his remedy, in suing in the parish court, whose jurisdiction extends only to *civil cases originat-*

East'n District. *January* 1819.

JOHNSON. *vs.* DUNWOODY.

ing in the said parish. Les affaires civiles qui prendront naissance dans les limites de ladite paroisse, 1813, *c* 25, § 1.

The parish court was without jurisdiction, and all its proceedings in this case are *coram non judice.*

It is, therefore ordered, adjudged and decreed that the judgment be annulled, avoided and reversed—that the suit be dismissed and the plaintiff and appellee pay costs in this and the parish court.

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

POEYFARRE vs. *DELOR.*

A sale under private signature is binding, although it recites the intention of the parties to have a notarial act executed.

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

DERBIGNY, J. delivered the opinion of the court. The parties have reduced to writing a certain agreement, by which the defendant declares *to have sold* to the plaintiff a house and lot of ground for a fixed price. But as they have mentioned something of another instrument to be executed, the defendant contends that the present one is not a complete sale, inasmuch as the parties had in contemplation some further

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act, without which the contract cannot be considered as perfect.—He has even gone so far as to maintain that the writing, in which the defendant declares *to have sold* the premises, amounts to nothing more than a promise that *he will sell* them.

We think, however, that the act under private signature, now before us, contains a complete and perfect sale, and that the parties, by expressing an intention to execute another act, evidently alluded to that kind of instrument, which, by giving authenticity to the sale, has effect against third persons.—But this was altogether for the advantage and safety of the plaintiff. If he chose to wave it he could do so, and abide by the consequences. The contract, as between the parties, was consummated, and the omission of the further execution of the public act could not affect it.

The plaintiff has offered to perform, or rather has performed the conditions which he had agreed to. He has tendered the price and the mortgage stipulated by the defendant: he is entitled to the possession of the property bought.

The objection of the defendant to the endorser of the notes tendered is one that he certainly had a right to make. But when brought before a court of justice to be compelled to yield the

East'n District. *January* 1819.

POEYFARRE *vs.* DELOR.

possession demanded, it was his duty to support that allegation by proof. Having not done this, the objection must be disregarded.

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.

SMITH vs. *FLOWERS & AL.*

A consignee who receives the goods, is liable for the freight.

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

DERBIGNY, J. delivered the opinon of the court.* The plaintiff and appellee, has brought to New-Orleans forty hogsheads of tobacco, consigned to the defendants. They received it, and refused to pay freight.—Being sued by the carrier, they answer:

That they are not liable to be sued in their capacity of consignees:

That the tobacco was damaged by the plantiff.

In support of their first plea, they contend that,

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* MATHEWS, J. did not join in this opinion, being related by affinity to one of the defendants.

this being a demand founded on a contract entered into in Kentucky, the original parties alone can be called upon to perform it. They further offered to plead, that the case having originated out of the limits of the parish of New-Orleans, that court has no jurisdiction over it.

The answer to both these positions is, that, by taking the tobacco, the defendants impliedly contracted the obligation to pay the freight of it; and this is the obligation on which they are sued.

As to the damage complained of, the plaintiff has satisfactorily proved that it did not happen while the tobacco was under his care. He even went further than there was occasion for, by shewing that it was done, while the tobacco was in the store out of which he received it.

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

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

East'n District.
January 1819.

HANNIE
vs.
BROWDER.

HANNIE vs. *BROWDER.*

APPEAL from the court of the third district.

The wife's property, not constituted in dot, is paraphiernal and she has a mortgage on her husband's property, if he dispose of it.

MARTIN, J. delivered the opinion of the court. The plaintiff in the life time of her husband, instituted a suit against him, for a separation of goods and the restitution of her property in his hands. He died before the termination of the suit, and the plaintiff made the present defendant, curator of his vacant estate, a party. She proved that she married without any constitution of dot or dowry, and that her husband had received and sold two slaves, bequeathed to her, before the marriage, and that he had also received, from the executors of her father, the sum of $ 11,757, part of a larger sum, also bequeathed to her. The district court gave judgment for her to the amount of $ 11,200—with privilege on the sum of $ 1200—she appealed.

The defendant having offered his accounts for approbation to the court of probates, the plaintiff intervened and insisted on being placed, as a privileged creditor, for the whole amount of her judgment. The court of probates ranked her according to the judgment of the district court. She appealed from this decision to the district court, by which it was confirmed. From this latter decision she appealed to this court and both

appeals are now before us and have been heard together.

This court is of opinion that the district court and the court of probates erred. The property of the wife was paraphernal, since it was not constituted in dot or dowry. *Civil Code* 327, *art.* 19, 329, *art.* 12 and 13. For her paraphernal property, disposed by the husband the wife has a mortgage on his estate. *Id.* 339, *art.* 62.

The plaintiff's original suit for separation and restitution of her property, could not be renewed against the curator of his estate, *quoad* the separation, but it might *quoad* the restitution.

It is therefore, ordered, adjudged and decreed that both the judgments of the district court be annulled, avoided and reversed : and this court proceeding to render such judgment, as in its opinion, ought so have been given, doth order, adjudge and decree that the plaintiff do recover from the defendant, as curator of the estate of her husband, the sum of eleven thousand and two hundred dollars with interest, at the rate of five per cent. from the date of the judicial demand, as a mortgage debt on the estate : the plaintiff having waved her right to the difference, between the sum of $ 117,57 in the statement of facts and $ 10,000 in the judgment. And it is further ordered, adjuged and decreed that the decision of the court of probates be annulled, avoided

East'n District. *January* 1819.

HANNIE *vs.* BROWDER.

and reversed, and that the plaintiff be classed for the said sum, as a mortgage creditor of the estate and that the defendant pay costs in the court of probates, the district and this court.

C. Baldwin for the plaintiff, *Workman* for the defendant.

METAYER vs. *METAYER.*

A slave, who enjoyed her freedom, in Hispaniola during the late revolution, may reckon that time in establishing her right to freedom, by prescription

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

DERBIGNY, J. delivered the opinion of the court. The defendant, Adelaide Metayer, a woman of colour, is in possession of her freedom, since a number of years. A person, who calls himself her master, now sues to make her return to the state of slavery.

It was at first doubted, whether the plaintiff had proved himself to be the same individual, whom the witnesses call the only son and heir of Charles Metayer of Cape François, who was the master of the defendant, when the revolution of Hispaniola broke out. But, after an attentive perusal of the record, it is now believed, that the plaintiff is sufficiently identified with Metayer's son.

The defendant pleads, in general terms, that she is free.—She has failed in a former suit,

where she was plaintiff in damages for false imprisonment, *Metayer* vs. *Noret*, 5 *Martin*, 566, to prove her freedom by emancipation under her master's hand; but the evidence, in the present case, shews that she was in Hispaniola when the general emancipation was proclaimed by the commissioners of the French government, and remained there until after the evacuation of the island by the French in 1803, a period of about ten years. It is further proved, that she continued in the enjoyment of her freedom, without interruption until 1816; so that she has lived as a free person during twenty-three years, that is to say, three years more than the time required by law for a slave to acquire his freedom, by prescription in the absence of his master.

The plaintiff objects that the time during which the defendant remained in Hispaniola, ought not to be included in this calculation, because the abolition of slavery in that island was an act of violence, and that prescription does not run against those who have been so dispossessed, so long as they are prevented from claiming their property; according to the maxim: *contra non valentem agere nulla currit prescriptio.* But the plaintiff cannot avail himself of this exception, without admitting, at the same time, that the government of Hispaniola, during its divers revolutions, continued to countenance the general eman-

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METAYER vs. METAYER.

cipation; and then, instead of the simple fact of possession, the right of the defendant to her freedom by law would be the consequence: for if the abolition of slavery by the commissioners of the French republic has been maintained by the successive governments of the island, no foreign court will presume to pronounce that unlawful which, through a course of political events, has been sanctioned by the supreme authority of the country.

Therefore, without entering into this very delicate subject any further than the present case makes it strictly necessary, we are bound to say, at least, that, by virtue of the general emancipation, the defendant enjoyed her freedom in fact, no matter under what modification, and that the years which she passed at Cape François, in that situation, must be included in the time dur ng which she did not live in a state of slavery; which time, at the lowest calculation, exceeds that which is required by law for a slave to prescribe his freedom in the absence of his master.

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

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, FEBRUARY TERM, 1819.

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MORGAN vs. *LIVINGSTON & AL.*

APPEAL from the court of the first district.

The words "front to the river," *primâ facie*, designate a riparious estate.

The vendee of a riparious estate, acquires a qualified property, in the bank of the river, and consequently the batture which may thereafter arise before the estate.

An intervening highway, does not prevent this, when the owner of the

Moreau, for the plaintiff. In the year 1789, Bertrand Gravier sold to J. B. Poeyfarré, under whom the plaintiff and appellant claims, a piece of land, then a part of a plantation, near the city of New-Orleans, on which the faubourg St. Mary now stands.

The deed expresses that the piece of land has so many feet of front to the river, and so many in depth according to a plan which had been made by a surveyor a few days before the sale.

The witnesses produced by the plaintiff depose

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that there did not exist any batture, at the time of the sale, in front of this piece of land : and it is likewise in proof that the plaintiff and those under whom he claims, did repair during a number of years, after the sale, the road and levee, in front.

estate is bound to repair it, and the soil of it is at his risk.

A few years ago, the defendants took possession and began to exercise acts of ownership on the portion of the batture, which has been successively formed in front of the premises, under what title does not appear, for when the plaintiff has brought his action against them, they rely solely on their possession of one year and one day, without producing any title. The plaintiff has shewn his own, and the defendants have contended, that the sale of Gravier to Poeyfarré did not include the batture in front of the land sold.

1. Because the sale was made, *ad mensuram* and by certain dimensions and limits.

2. Because it was made according to a plan, which indicated a basis, or boundary of the land sold, on the road.

3. Because there existed a royal road between the land sold and the batture in front of it.

4. Because, if the batture was not included in the land sold to Poeyfarré, the owner of it is the riparious owner.

5. Because, supposing that the words *face au fleuve*, gave to Poeyfarré the property of the batture, this property was not transferred to his

vendee, as his sale does not express that the land is *face au fleuve.*

Before I enter on the discussion of these several points, it is proper to remind this court, that a cause was determined in the late supreme court of the territory of Orleans, depending on the questions now raised by the plaintiff, viz *John Gravier* vs. *the Mayor &c. of New-Orleans.*

In it, John Gravier found himself precisely in the situation, in which the present plaintiff is. The city pretended that he had no right to the batture in front of the faubourg St. Mary, because Pradel, the vendor of Bertrand Gravier, the ancestor of John Gravier, had bought a measured and limited estate, bounded by the highway ; a circumstance which excluded the vendee from the batture, according to the laws of France. 2 *Am. Law Journal*, 300.

Indeed it is to be remarked that, when the king confiscated the estate of the Jesuits, the superior council of the province of Louisiana ordered that the property of the Jesuits, in it, should be sold, and accordingly, Mr. d'Abbadie, the commissary-ordonateur, caused their property to be ascertained and surveyed by Devezin, the surveyor general, who began his operations on the 14th of July, 1763, by which it appeared that the plantation of the Jesuits had

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thirty three and one third arpens and six toises, in front, instead of thirty-two, as expressed in original deeds, drawing the front line at the distance of six toises and five feet from the middle of the levee, and consequently in the highway. In a second operation, of the 14th of November of the same year, Devezin rectified his front line, finding it to be thirty two arpens in length. He next divided the plantation in six lots for the convenience of the purchasers. The process verbal of adjudication shews that these lots were sold with the extent of front, given them by Devezin, with a depth of fifty arpens. 2 *Am. Law Journal*, 343.

It seems then that it would be correct to say that Pradel, B. Gravier's vendor, having purchased a lot of seven arpens in front, and fifty in depth, beginning at a post placed at the distance of six toises and five feet from the middle of the levee and inside of the highway, which existed then, according to the plan to which the surveyor refers, at the end of his process verbal of the 14th of July, 1763, had no right to the batture along the highway, since he had purchased a measured and limited estate, separated from the batture, by the highway, not included in his deed. It will be seen by and by, how successfully the counsel of B. Gravier, one of the present defendants, repelled this objection. We cannot use

better arguments than his own, when he is pleased to support the opposite side of the question: and we do so with the greater confidence when we consider that the principles which he there contended for, received the sanction of the superior court.

The first objection seems to recognise the general principles on which we rely, viz:

1. That the alluvion is only an accessory of the soil to which it is united. *ff.* 6, 2, 11, § 7, 1 *Hulot*, 473.

2. That, as an accessory, the alluvion ought to follow its principal, unless there be a convention directing the contrary. *Ib.* 34, 2, 19, § 13, 5 *Hulot*, 28.

3. That as an accessory, it belongs to the purchaser or donee of the principal estate. *ff.* 30, 1, 24 § 2, 4 *Hulot*, 310, *id.* 7, 1, 9 § 4, 1 *Hulot*, 479, *Partida* 5, 28, 2 *Febrero, Contratos*, 7 § 1, *n.* 35.

These authorities being indisputable, the counsel for the defendants, in the district court, seemed to admit the consequences drawn from them in this cause, on general principles; but he contended that a distinction ought to be made, in the present case, as Poeyfarré, under whom the plaintiff claims, purchased a measured and limited estate, bounded on all sides by limits, which

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excluded him from the batture, in front of the premises, which cannot be considered as an accessory or a part thereof. It is to be admitted, that this doctrine of limited and measured estate, is the principal point in this case, and if we succeed in shewing that, according to our laws, it does not exclude the right of alluvion, the cause must be determined in our favor. We will attempt it.

It is first proper to remark, that in order that the defendants might have the full benefit of this doctrine, it should have been proven, that, at the time of the sale to Poeyfarré, there existed a batture already formed, in front of the land which he purchased. Our witnesses have, however, proved the contrary, in the most positive manner, and as it is not easy to shew how the figure of this batture, traced by a surveyor, on a plan made at the will of a draftsman, who might have intended thereby to describe an incipient batture, a rise of the bottom of the river, which has since become a continuation of the batture, which, at the formation of the plan of the faubourg St. Mary, existed before the greatest part of it, but not before the land purchased by Poeyfarré, in the lowest extremity of the faubourg ; since this incipient batture, was even at the time of the lowest water covered by it, so as to allow vessels, at all seasons of the year, to moor close to the levee, and could not be considered as susceptible of ab-

solute and private ownership. If the soil of the river in this place has risen to the height, at which it ceased to be considered as a portion of the bed of the river, and began to be a high ground, susceptible of distinct and absolute ownership, since the sale to Poeyfarré, it is clear, that this increase ought to belong to him or his vendees, by virtue of the clause in his deed, in which Gravier sells to him all the *rights*, uses and servitudes, appertaining to the premises; which includes the vendor's right to a batture, which might arise in front of the land sold.

No limit is given in Poeyfarré's deed, to the land sold, on the side of the river: it being simply said that it was sold *face au fleuve*, fronting the river, which implies that on that side the land was to have no other boundary than the river. Such was the reasoning of one of the present defendants, when, as counsel of J. Gravier, it was said in opposition to him, that Pradel had bought a measured and limited tract of seven arpens in front, joining the fortifications of the city, with fifty arpens in depth, without even its being said front to the river. 2 *Am. Law Journ.* 349, *Exam. of the title of the United States to the batture. Id.* 307 *and* 308, 6 *Id.* 10, 12.

The court will be surprised to find that this gentleman, who then made such a powerful use of the words *face au fleuve*, (which were not

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to be found in the deed of adjudication to Pradel, but only in Devezin's proces verbal, in which the lands of the Jesuits are mentioned) in order to assert the right of extending his lines to the river, altho' the estate was bounded by the highway, seeks to establish a different construction of a like clause in Poeyfarré's deed, in which the words *face au fleuve* are inserted

The counsel ought to have remembered that the superior court, yielding to his reasoning, the very same which we are now using, declared that it considered Pradel's land as bounded by the river; altho' it was sold by certain limits and bounded by the highway.

We know that whatever may have been the decision of the territorial superior court, its authority will not be conclusive, in the present case, should the court think that the doctrine of limited fields is applicable to the sale to Poeyfarré, which is expressed in more favourable terms than the adjudication to Pradel. We will therefore endeavour to shew that this doctrine does not militate against his right, and that of his vendees, to a batture, which may have arisen before the land which he purchased.

Pradel's adjudication took place, while this country was under the domination and laws of France, which then, and till the late revolution, recognised the Roman maxim *in agris limitatis*

jus alluvionis locum non habere constat : idque et Divus Pius constituit. 41, 1, 16, 6 *Hulot*, 269, 4 *Brillon's dict.* 281, 1 *Guyot's encyc.* 288, *verbo Alluvion.*

But this doctrine was never admitted in Spain, where neither the king nor the lord ever disputed the right of alluvion to the riparious owner.

The wisest and most enlightened interpreters of the Roman law have always considered the law *in agris limitatis* as derogatory from the common right of the subject, and have restrained it to conquered lands, divided among the soldiers by artificial boundaries. 4 *Brillon's dict.* 280.

It is not otherwise understood in Spain. 15 *Rodriguez's Digest*, 21.

The doctrine of limited fields cannot then avail the defendants : and the sale to Poeyfarré ought to be regulated by the principles of the common law : and the batture ought to be considered, since it was formed afterwards, as an accessory of the land which he purchased.

The second objection, viz. that the sale was made according to a plan, which indicated the highway, as the boundary of the land sold, seems repelled by what I have just observed. For, if the boundaries given to a riparious estate, do not affect the right of the owner to the alluvion accruing before it, when there is no express con-

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vention on this point, it matters but little whether these boundaries be established by the deed or by a plan to which it refers.

We refer the court on this head, to the arguments of the counsel of John Gravier, in the case of the corporation: where it was agreed that the land sold to Pradel was limited on all sides, and particularly on that facing the river, where it had the highway for its boundary.

The highway which existed, between the land sold to Poeyfarré and the batture, if it then existed before it, is no obstacle to his right, nor to that of his vendees to the batture.

According to the Spanish law, the existence of a highway has never been considered as an obstacle to the right of the owner of the principal estate, to an accessory of such an estate, on the opposite side of the highway. 2 *Febrero, Contratos*, 7 § 1. *n.* 35. Why then should it be an obstacle to a right of alluvion, which is only an accessory of the riparious estate? If this was the case, what would become of the battures formed before the vacant lands of the United States, afterwards sold with a boundary on the highway, which lies along the river? Would they be the property of the United States, or of the state of Louisiana, the owner of the highway? This would be contrary to the principle of our laws,

which gives the alluvion to the owner of the riparious estate, as an indemnity for the risk and expence which the vicinity of the river creates.

We see that in the Spanish law, the existence of a highway is not stated as an obstacle to the right of property which riparious owners have in the bank of the river before their estates. *Part.* 3, 28, 6 & 7.

The rule must be the same, in regard to the alluvion: since the property which the law gives to the riparious owner is grounded on the same principle of equity.

It is to be added, that Poeyfarré, by his purchase, having incurred all the expences and charges to which B. Gravier, his vendor, was liable (as the obligation of keeping up the levee, repairing the road and supplying the soil covered by them, in case of its being carried away by the stream) it cannot be reasonably supposed, that the intention of the parties was, that he should be without the only advantage, which balances these expences and charges—that he should take upon himself, all the burdens, and his vendor retain all the advantages, of a riparious owner.

There cannot be any reason to say, that Poeyfarré did not acquire the batture, as no mention is made of it in his deed. We have shown that it passed as an accessory. At the time of the sale,

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it did not exist as an object of absolute property, therefore B. Gravier did not retain it. Along every point, on each side of the river, the law recognises a riparious owner, who, as he is the individual who first suffers by the encroachment or inundation of the river, is the one who benefits by its recess or by any addition of soil made. In this country, particularly, this riparious owner is the person on whom the law imposes the burden of repairing both the road and the levee, and the obligation of supplying the ground which these objects cover, in case either or both be carried by the stream. Now, after the sale from B. Gravier to Poeyfarré, there was not a foot of ground retained by Gravier, between the land acquired by Poeyfarré and the river. Gravier then was no longer the riparious owner. He could by no possibility receive any injury from the river, nor any land of his between Poeyfarré and the river. His obligation to repair the road and the levee passed to Poeyfarré, and the record shews that the latter did actually repair the road and levee. Had these objects been carried away by the stream, Poeyfarré, not Gravier, would have been the loser. How can it be then contended that the latter continued to be the riparious owner?

If it be admitted, that Poeyfarré, having purchased *face au fleuve*, front to the river,

became entitled to the alluvion or batture, which might afterwards be formed before the land, it is clear, that he transmitted the same right to his vendee, although the words *face au fleuve* be not used in his deed. For he made no reservation; he sold a certain quantity of ground of so many feet in width, part of what he had purchased from B. Gravier His vendee became, as he himself was before the sale, the riparious owner; because there was not of a single foot of ground, susceptible of private ownership between him and the river, from which he was separated by the road and levee only—both of which were burthensome appendages of the land which he had purchased, accessories of it, and as such necessarily passing with the principal estate, without being mentioned expressly, or even by reference or implication, under the expression *face au fleuve*, front to the river, or any other.

Livingston, for the defendants. Prior to the 21st of April, 1788, Bertrand Gravier was the proprietor of a plantation bounded on the Mississippi, above and adjoining the city of New-Orleans. The public road from the city, then ran across the front of this plantation, as it now runs; except, that, at that period, it was only 36 feet wide, from the banquette or footway to the levee. And at that period, a considerable increase

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of the land, between the levee and the river, had taken place by alluvion, which has been somewhat augmented by the same means since.

On the day last mentioned, the 21st of April, 1788, Bertrand Gravier caused a plan to be made by the surveyor general of the province, for the division of a part of his plantation into town lots of the usual size. On this map, a range of lots is laid out, the front lines of which coincide with the margin of the road, in its whole extent across the land of Gravier.

At the time of making this distribution into lots, there was a parcel of land inclosed by a fence, in the form of a trapezium; which, on the plan, is marked as lot no. 7, and by a note of reference in the margin of the plan, is designated as to be sold in the manner in which it is *inclosed.*

The front line of this, as well as those of the other lots, coincides with the margin of the road; but none of them encroach upon or go beyond it, either by a prolongation of the side lines, or by the position of the front line.

Between these lots and the river, was first immediately in their front, the public road; then the levee, and lastly, the ground which had been added by alluvion to that on which the levee stood.

This was the situation of the property when J. B. Poeyfarré entered into negociation for the

purchase of this trapezium of land: And on the 9th of February, 1789, a survey of it is made at his (Poeyfarré's) request, by the same surveyor general Trudeau, who made the first plan of distribution; (a plan and process verbal of which survey is made and signed by the surveyor general) on which plan, the front, side and rear lines are laid down and measured; and the contents of the figure in square toises, feet and inches, are given. And by the process verbal the lot is described as *bounded in front by the public road*, and that road, the levee and batture, or alluvial land are all designated and laid down, as lying between the trapezium and the river.

On the 27th of the same month of February, the act of sale is passed before a notary, by which Gravier sells to Poeyfarré, a piece of land forming a trapezium, situate without the Chapitoulas gate, composed of 415 feet of land, of front to the river—188 feet in depth on the side of the city—411 feet 4 inches on the side of the garden of the seller—and by the upper side, 229 feet 8 inches. The whole forms 2386 toises, 4 feet and 6 inches of superficies; as appears *(como lo manifesta)* by the plan of Don Carlos Trudeau, public surveyor, dated the 9th instant, which the parties have signed and which remains in the power of the purchaser, together with all the *in.*

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gresses, *egresses*, *rights*, *usages* and *services* thereunto belonging.

Poeyfarré, being by virtue of this conveyance, the proprietor of this trapezium, on the thirtieth day of October, in the same year, sells to Pierre Bailly, a part thereof, which in the act is thus described :

"A lot of mine, situated out of the city of New-Orleans, composed of 70 feet in front, and 180 in depth, the whole forms in conformity with the figurative plan of Don C. Trudeau, surveyor general of this city, bounded on one side by a lot of the vendor, and on the other by land of D. Bertrand Gravier."

This last mentioned lot, Pierre Bailly sold in the year 1816, as he himself had purchased it, to the plaintiff; who, the following year, brought this action to recover the land lying between the levee and the river, in front of this lot; and he grounds his right on one of two positions.

1. That he is the owner of the soil to the water's edge, by virtue of the conveyances above recited.

2. That although the principal lot conveyed to him, should not extend to the water's edge, he is yet entitled to the land in front, as an accessory, or appurtenance to it.

To make out the first position, two things are necessary for the plaintiff. *First*, to shew that

the conveyance to Poeyfarré, bounded him on the water.—*Seeondly*, that he gave this boundary to P. Bailly ; for I admit, that P. Bailly, conveyed all his right to the plaintiff, as far as he could convey it, being out of possession.

The principal question is on the construction of Gravier's deed. Does this give the river or does it give any other object or line, as a boundary?

To prove that the trapezium extended to the river, from the words of this deed in their common acceptation, or from the plan to which it refers, would have been a hopeless task. The expression 415 *feet of front to the river*, would no more give a right to go to the river, than the expression *front to the north*, would extend the land to the pole; or (to come nearer the case) than the expression in the same deed 188 *feet in depth on the side of the city*, (*del lado de la ciudad*,) would extend that side to the bounds of the city. Indeed, this expression would be much more favorable for carrying it to the boundaries of the city, than the words *frente al rio*, would to the river. For let us suppose, that this trapezium had changed its front, that the garden or other land, lay between it and the road; and that the side next to the city bordered on a street, and became the *front*. The expression would still be the same, only substituting *city* for *river*. And instead of *del*

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lado de la ciudad, we should have *de frente a la ciudad.* Will it be seriously contended, that this would carry the grantee 300 feet out of the trapezium, to the bounds of the city? Yet, where is the distinction between the two cases?

There is an essential difference, between the expressions *front or fronting to*, and *fronting upon.* The market house fronts the magazine, on the other side of the river: but it fronts upon the levee, on this side. The Cathedral fronts the public square and the river; but it fronts upon Chartres street. The expression then *front or front to*, only means the exposure, the direction of that boundary of a lot or house, in which is the principal entrance. How many houses, lots and farms, on the heights around the harbour of New-York or Naples, front those delightful bays, which are yet miles distant from the water?

To exemplify this more strongly, let us take a diagram of the part of the plantation, that was divided in 1788 into streets, according to the plan of L. Trudeau.

Suppose the trapezium sold had been situate on the right hand side, (going up the river) of Camp street; and that no other street had been laid out between it and the river. Would the words *frente al rio*, have carried the proprietor to the river? The plaintiff must answer *yes*

or *no;* if he says yes! then he supposes that Gravier, when by the express words of his deed he conveys a piece of land, limited by certain precise lines, which contain and are said in the deed to contain 2386 toises, 4 feet and 6 inches square measure, shall be intended by implication to have given four times the length of lateral line that he has expressed, and consequently to have conveyed four times the number of square toises which the deed says he conveys. If this should be found, as I presume it would, rather too violent a construction even for the plaintiff, he must then answer, no! The expression would not in that case, carry to the river's edge; and then he must either give up this part of his argument, or discover some distinguishing feature, between the actual case, and the one I suppose—and this, I think, it will be difficult to find—if he says that he would not go to the river in the supposed case, because there was a quantity of land unconveyed, lying between him and the river, I answer, and I think I answer conclusively, by saying that the same thing exists in the real case. That there is *first*, the road which, according to law finally settled by this court, belongs to the public.—*Secondly*, the levee of which the use is in the public, but the property in the original owner of the soil.—*Thirdly*, the batture, which being formed prior to the sale, became an integral part of the

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farm, and was as much the property of the vendor, as the parcels of land which in the supposed c[illegible] lie between the trapezium and the road. Should he reply to me, that this road, levee and batture, in the real case form no impediment, because they were conveyed by his deed, I have surely a right to declare, that so evident a *petitio principii* should not be received as argument. Indeed, how would it ever be possible to escape from the circle, "it forms no impediment to my "going to the river, because it is conveyed by "my deed.—And it is conveyed because it forms "no impediment."

I think, I have heard another distinction; but, though much relied on, I hesitate whether I should occupy the time of the court in answering it.

The intervening objects, to wit: the road, the levee, and the batture then existing, it is said formed no impediment to the extension of the lines of Poeyfarré's lot to the river, because they were not *possessed* or *improved*, and were of *trifling extent*. And they had *no assignable value*, says the petition, with a perspicuity that defies elucidation. But I apprehend that none of these objections will, in point of fact, apply to the road, it is *possessed* and *improved* by the public, who have the right of way: it has the usual *extent*. Its value is certainly very great to those who travel

on it and to the state. But whether that value be assignable or not, I must leave to those who understand the term to decide.—The same observations will apply in part to the levee, of which the public have the use. And as to the soil of the levee which was retained by Gravier, (because he did not sell it) and the soil of the batture, I apprehend, that the fact of their being *possessed* or *improved*, or the circumstances of their *extent* or *value* can have very little influence on the decision of this question. Did they *exist?* is the only inquiry. If they existed they formed a bar to the grantee's extension to the river: whether *possessed* or *derelict* they must have been owned. There is no derelict property of that description; every inch of land in the state has its owner: and whoever was that owner, his property intervened between the lands conveyed and the river; and of course, no words designating the exposure of the front of those lands could deprive the owner of his property.

Thus, I think, I have proved that the words *frente al rio*, or *front to the river*, would not in their common acceptation carry the plaintiff's grant to the water's edge.

Anticipating the force of these arguments, the plaintiff has, by parol proof, attempted to give a signification to these words, different from their general import.

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To the introduction of this species of proof we excepted on two grounds: *first*, because the words were clear and unequivocal, and that parol proof shall not be admitted to explain them. *Civ. Code*, 310, *art.* 242. *Secondly*, that the proof offered on their construction of it went to contradict the words of the deed, and the plan which we will shew to be a part of it; the deed and the plan giving the road, the parol proof (as they construe it) the river, as the boundary.—The court overruled these objections and heard the testimony.

Let us examine it.—It consists of the testimony of three surveyors—in substance they agree in these points.

1. That when lands, situated on the river, were granted by the French or the Spanish government; the words *face au fleuve*, *frente al rio*, or *face* alone were used to designate the boundary on the river.

2. That the breadth on the river or the number of acres front, was generally measured by a line drawn at right angles to one of the sides, and at the nearest convenient distance from the river which sometimes happened to be within the levee and road.

3. That the surveys began from the edge of the water, and that the depth was measured from the water line.

4. That in all cases where a piece of land, really bounded by the river was measured, the side lines were continued to the river on the plan.

5. That in the re-surveys of land, increased by alluvion since the original grant, the surveyor did not stop at the place where the original side lines terminated at, the place where the river then ran; but continued them down to the water's edge where it now is, so as to include all the alluvial soil contained in the prolongation of the side lines to the river.

This is, as I believe, a full statement of the parol testimony of the customary or practical explanation of the words in question. In concessions for lands on the river and subsequent sales of these lands, these words are used; and they are construed to give a front on the river.—The reasons for this are plain—all the lands in this country were laid out, not as in most other countries, by describing the metes and bounds, and giving the contents of the ground in square acres, but by giving a certain extent on the river, measured by acres, and with an uniform depth of 40 acres. So that when the words "so many acres front," or even "so many acres" alone, without the word "front," (as we find in many of the French grants,) by the ordinary depth, were mentioned, nothing more was necessary to designate a front on the river; and if nothing was said as

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to the angle of the lines, they ran parallel to each other and at right angles to the river. But as this description in words could not give the exact situation of the lands, with respect to the surrounding objects, both the French and Spanish governments elucidated the general words of their grants, by a particular reference to a process verbal and plan ; though the two nations adopted different means of making this reference.

Under the French government, when new lands were applied for, the party petitioned the governor stating the number of acres he desired, and very loosely describing their situation, "about so many acres from the city," "so many acres in such a bend, *anse*, of the river," or other words equally indefinite : to this sometimes, but not invariably, the magistrate of the place adds his certificate that the lands are vacant.

On this the governor issues his grant in which the lands are described still more indefinitely than in the petition, to which, however, the grant refers ; for it always begins *vu la pétition de*—from the petition in the grant, however, it would not, in one instance out of ten, be possible to locate the land, or discover its boundaries : to remedy this, in all the French grants this clause is introduced.—*Quant aux aires de vent qui doivent borner ladite terre, ils seront règlés par les bornes qui seront plantées, dont il sera dressé un procès*

verbal qui sera annexé à la présente, après avoir été enrégistré sur le livre des concessions. "As to the lines which are to bound the said land, they are to be regulated by the *bornes* (stakes,) which shall be planted—of which a proces verbal shall be made and annexed to these presents, after being registered in the book of concessions." After these lines were run and the survey made and enregistered, a second grant or confirmation was made; but this was not frequently done, and where it was, the survey was always referred to.

Under the Spanish government, there was rather more regularity. The governor, instead of issuing a grant on the petition, directs a survey to be made of the land, and on its being returned to him, he makes the grant, but always in the same general words "so many acres front by so much depth," referring, by the words *vistas las antecedentes diligencias*, for particulars to the survey. This survey, the witnesses tell us, always began at the edge of the water; and on the plan the side lines were extended to it, so as to leave nothing apparent on the plan between it and the river.

Thus, I think, we may discover the reason why the general words under consideration were deemed sufficient in the French and Spanish concessions, without giving those words any signifi-

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cation different from their general import. It was, because the plan and process verbal were always referred to for the boundaries. And the words *face au fleuve*, or even *face* alone were deemed (general as they are) sometimes unnecessary; and in many instances they are omitted, and the land is described only as consisting of so many acres (meaning of course front acres,) leaving every thing else to be settled by the process verbal and plan—when these concessions came to be conveyed by the grantees, they described them as *so many acres front, which had been granted him*, referring always to the original concession—and as all grants on the river were bounded by it, there was no occasion for any other expression in the *sale*, than that which was used in the original grant. So that whenever the grantee from the crown sold the whole of his grant, or dividing it into any determinate number of acres front, conveyed it by the general term *so many acres front to the river* or so many acres *front*, or even *so many acres* without expressing *front* at all, if his deed gave no boundary, referred to no new plan and made no calculation of the superficial contents, the purchaser would take the number of front acres expressed on the margin of the river. And this on account of the reference (either expressed or implied) to the original concession which went there—not by vir-

tue of the term *front to the river*, but because of the known situation of the land which the deed purports to convey.

But when the grantor first shews his intention of selling distinct and definite portions of his original grant, in the shape of town lots: and departing from the terms of that original grant refers to another plan, whereby he describes the portion he intends to sell, as contained within certain lines, and calculates the proportion of the concession which he means to sell by a certain number of square toises; and more especially when he negatives the implied boundary on the river, by expressing in the process verbal, that that boundary is the road; in such a case, to say that the grant was bounded by the river, would be to say that a slight presumption should contradict positive proof—or rather it would be to shut our ears against positive proof, in order to admit a presumption that could exist only in the absence of such proof. For instance, when the grantee sells his original grant without any reserve or any reference to a new boundary, he shall be presumed to have sold in its full extent to the water's edge. But where he sells with a reference to such new boundary or to a plan operating as such, the presumptive proof *does not exist*, because it can only exist where the party has given *no expression* of his will on that point. See

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the distinction between a sale *ad mensuram* and one *ad corpus*. 2 *Covarrubias*, 3, *n.* 3, 4 & *passim*.

With one other remark, I close my observations on this head.

It appears to me, that the terms *front to the river* are used in all the deeds, as well of concession as of sale, to designate *the breadth of the land on the side nearest the river*, not to shew that the river is the boundary.—In order to prove this, look not only at the sale now before the court, but all the grants and sales, without a single exception, contained in the books of records. And we shall find that the land is never described as being a piece of land *lying face au fleuve, containing so many acres ;* but always a piece of land containing *so many acres of front to the river* or *of front* alone—preserving the same phrase, both in the French and Spanish grants. *Tant d'arpents de face* or *de face au fleuve—tantos arpanes de frente* or *de frente al rio.*

The whole phrase evidently intended to mark, not the extension of the lands towards the river, but that which they have in a rectangular direction to that extent, that is to say in breadth.

The words in question, therefore, neither in their original or common acceptation, nor in the sense given to them by witnesses, can be so construed as to designate a boundary, still less as

to have the magic power of overleaping those which nature and the stipulation of the parties had fixed.

But it is said, that I ought not to draw this conclusion, because on a former occasion I admitted and argued for the construction put on these words now by the plaintiff.—If this were true, I do not well see how it would avail him; if the counsel suppose that the same argument which they use with so much ingenuity, would derive any additional weight from the mode in which I have formerly urged it, they have surely too much modesty; and they have too little, if they think themselves capable of convincing the court, that I have used them.

In the publications which they quote, I was combating not only the claim of the United States, but also all the others made against my title, and among others the very one which they now prosecute. I should then ill deserve not only the compliments which they have been pleased to pay, but even a reputation for common understanding and a regard for truth, as I understand it, if I had used that argument in the unqualified sense in which they now do—I have made it a principle in this controversy, from its commencement to assert no fact that I did not believe, and to use no argument that I supposed irrelevant or unsound; and to an undeviating adherence to

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this rule I think I owe the success, that in spite of *oppression*, *violence*, *persecution*, *slander* and *delay*, has attended, and I hope, will attend my efforts to resist them. A reference to the passages quoted will shew the extent of my former argument, and that it is precisely that which I now use. *Rep. of the batture case*, 17 & 18 is cited. And what is the position there, as laid down by the witnesses? Precisely that for which I now contend: that *lands on the Mississippi*, would pass to the water's edge, by the general words *face* or *face au fleuve*, provided the deed did not express some other line of boundary.

But never could I so far forget what is due to truth and sound argument, as to say, that although the deed gives or refers to another boundary, or its establishment appears to have been the intent of the parties, that these words would yet carry the grantee beyond such boundary to the river; in other words, that because by grant, I may convey the whole or any part of my property extending to the river, that yet, if I use those general terms, I cannot by any precaution I may take, or the use of any other phrase so restrict them as to carry into effect my intent of giving a limit towards the river.

Is the intent to establish such boundary apparent, in the case before the court?

I think most clearly, from several concurrent

circumstances, either of which would be sufficient to establish it:

Because, at the time of making the deed, there was a parcel of land, already formed between the levee and the river, which the length of the side lines given by the deed will not include; and which, if included in the conveyance, would give more than treble the contents, calculated by the deed. It is not very easy to suppose then, that the vendor intended to convey, or the vendee to purchase, a different quantity, contained in totally different lines from those expressed in the contract.

This difficulty is got rid of, by denying the existence of the alluvial soil at the time of the sale; and by saying that, if it existed, it was of no value.

Its existence, however, is proved by its being designated on maps made by a sworn officer, prior to the time of sale, and one of those maps signed by the grantee and made at his request.

These proofs, the defendant supposed, were so conclusive that he did not think proper to give any parol testimony on the subject. And, indeed, he took the opinion of the court below on the legality of the plaintiff's being allowed to gainsay by parol evidence, the written proof contained in the plan, which was introduced by the plaintiff and was admitted by the defendant, as a copy of the

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one signed by Poeyfarré and referred to in the deed : the exception was not taken to the plaintiff's being allowed to prove the *height* of the batture, but to his being allowed to disprove its *existence,* as witnesses have attempted to do.

Its non-existence is sworn to, by two witnesses evidently biassed by their having been—one the proprietor of the lot now held by B. Morgan, the other, of a lot similarly situated ; both swearing to a fact, which could not have existed (if it were ever true) at the time to which they refer it, that's to say, that there was fifteen feet of water, at the foot of the levee—a thing utterly impossible, if there were any batture at all, as is expressed in the maps, or even the commencement of one, according to their other witness, Mr. Caisergue.

I will not stop to compare the relative weight of the testimony, on this point. The reasons for preferring the written, and even concluding the plaintiff by the signature of the person under whom he claims, are too obvious for me to doubt of the decision of the court. But, the report of the case of Gravier against the corporation, having been repeatedly referred to by the plaintiff, perhaps I may be permitted to use it, so far as to shew three things :

1. That the title of the front proprietors was set up as a bar to the plaintiff, in that case.

2. That the existence of the batture was then proved and admitted.

3. That its existence was recognized by the court, and made the ground work of their decision.

As to the objection that is drawn from the small value or extent of the batture, it appears to me, too loose to be admitted in a legal discussion. This argument has more than once been used and published : a word is sufficient to refute it—I grant to you a square of 100 feet of land, containing 10,000 superficial feet. I have as much more lying between this square and the river ; you tell me it is included in your grant, because I am mistaken as to the quantity, there being in truth only 5000 square feet, because it is of little or no value, and because I did not improve it.—To this I have a short reply, whether there is much or li.tle, there is something. That something I did not convey to you, it is therefore mine. If it was not of sufficient value for me to keep, it was not of sufficient value for you to buy ; and my property is not the less my property, because I do not choose, or cannot afford to improve it.

The *existence*, therefore, of this property between the lot sold and the river, which cou·d not be included in the length given to the side lines is fully proved, and so one reason, and in itself a

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sufficient one, to negative the construction of its going to the river.

The second circumstance attending the sale, to shew that the establishment of a front boundary line was intended, is,

That the vendor had prior to the sale, caused a plan to be made for the division of a part of his land, into town lots; of which lots the trapezium in question formed one, and was designated as no. 7. That it is particularly referred to, as being to be sold as it stood under fence, *avec ses entourages*, and that the *front line* of this, as well as the other lots, coincides with the line of the public road which runs in front of it.

It is admitted, that if the conveyance to Poeyfarré had been of a lot in an established town, the words used in it would not bound the grantee on the water. I wanted no admission to prove this, and if any other evidence was wanted to prove it, than the plain dictates of common sense, we should find it in the grant which is made to one Winter, in the register of the land office, where the same general word *frente* is used, which would carry him according to the plaintiff's construction to the river: we should find it in the map of the lots on Royal street, which are designated as *frente al rio*, and in all the title deeds of the lots on Levee street, some of which have

been before this court in the case of Blanc—in all these cases, the property being town lots, and reference either express or implied to the plan of the city, caused them to be considered as limited lots.

Now, is there any difference in this respect, between a sale made by the proprietor of a lot situate on Levee street, between Blanc's lot and the Custom-house, in a town laid out one hundred years ago, and a sale made by Gravier of a lot opposite his batture, in a town which he had just laid out? In the first case, the seller may convey his lot *front to the river*, and yet the purchaser cannot get possession of the land between Levee street and the levee; nor can he sue him for the loss of it—why? Because the presumption that the words *face* or *face au fleuve* intended to convey to the river, cannot arise in the conveyance of a town lot; because that lot is given by precise admeasurement on all sides, and because the public street forms an impediment to the passage of the lines across it.

All the reasons apply in the case of Gravier's sale.—His plan was made out previous to the sale, it was done by a public officer; and we find it with his certificate of its accuracy in the public archives of this city. As to all questions between Gravier and the purchasers of his lots, it has the same effect as the plan of the city had,

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between the Mississippi company who laid it out, and purchasers of lots in the city.

The same consequences must follow a purchaser in both cases, and the lot in Gravier's town is as much a limited lot, and for the same reasons, as a lot in the city, established by the company and afterwards taken by the crown.

But, I am the greatest blunderer in the world; I am eternally furnishing, in the same cause, arguments and authorities against myself I must submit to this reflection, or I must shew that the plaintiff's counsel have been drawn, by a cruel dearth of argument, and authority applicable to their cause, to make use of such as, like the jest that was spoiled in the repetition, were very good when they heard them, but are perfectly flat and stale in the mouth of my adversaries, because they are perfectly inapplicable to their cause.

In the controversy between Gravier and the city, the latter claimed the batture on *this*, among other grounds; that it was *appurtenant* to a city and that, when Gravier erected his farm into a city, that very act, like the *hocus pocus* words *frente al rio*, vested the batture in the corporate power, wherever it resided of that city. To this I answered, that Gravier though he could divide his land into town lots and sell them as such, could not, without the consent of the king, make a city or create any such corporate power; which

it was contended (and, I thought, some what absurdly) would deprive him, without his consent of his property, and I cited the law to this effect.

Now, I cannot well perceive, how this argument or this law can meet me, when I try to establish no privilege or corporate right; but only contend that the division, which a master makes of his property, shall bind the purchaser as well as himself; and that when he lays out his lots by his plan upon streets, those lots shall be forced to keep quiet there, and not, by the aid of a talismanic word, fly over streets, ditches and dikes, to the river.

A third proof to shew the establishment of a front boundary is the calculation, made of the superficial contents. This operation must be utterly impossible, without giving the length of the side lines, if they go to the river; and even then extremely difficult, if the sinuosities of the water line are to be the boundary.

This is so conclusive an argument, that there are authorities to shew that the single circumstance of a sale by superficial measure, turns a piece of land into an *ager limitatus*, which is actually bounded on the water; and which, but for this circumstance would have enjoyed the right of alluvion. I was not fortunate enough to discover how the authorities, cited below, could

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applied to this part of the argument; and yet, the counsel seemed to think, and, I believe, asserted very positively, that they were unanswerable.

These authorities were, from Pothier and other authors, that there were two modes of describing the thing sold. One by the acre, in which the vendor says, "I sell so many acres, in such a field, at so much the acre." The other, in which he says, "I sell a field under such boundaries, containing so many acres, for a certain gross sum." That, in the first case, if the field contain more acres than is calculated, the buyer must pay for the excess—but in the latter case, he will enjoy such excess, if there be any, with the rest without any augmentation of price. Now, all this is sound sense and good law: and if there had been more square toises contained in the trapezium, than is calculated by the deed, and Gravier had sued for the surplus, this doctrine and these authorities would apply.

But I seriously repeat, that I know not how they can be brought to bear against the argument that a true calculation of the contents, shews the intent of the parties to limit the purchase to the land contained within the lines—if their authorities are applicable at all, they shew that in the second case put, of the sale of a field under certain limits, the intent of the parties was to sell what was contained in those limits, but *no more*; if it

exceeded the quantity calculated, so much the better for the purchaser. But nothing in either of the cases shews that the purchaser would have a right to go beyond the limits, to look for any deficiency in the calculation; he would have a right to a deduction, if he had not paid, or a restoration *pro ratâ*, if he had. Here Poeyfarré does not complain that the trapezium did not contain the quantity specified in the deed: therefore, having got all he stipulated to receive, he can look no further.

The existence of a public road is an untrovertible proof, that the front line of this trapezium was intended as a line of boundary.

Not only the use, but the soil, of the public road is vested in the public; this has been decided after a solemn argument, and confirmed after greater efforts to shake the decision, than were ever made in this court. *Renthorp & al.* vs. *Bourg & al.* 4 *Martin*, 97.

The king then, at the time of the grant, owned the soil of a strip of land, of 40 feet wide, running between the river and the trapezium sold. Gravier then could not sell the road, but if he had designed to sell what lay between it and the river, the land sold would have consisted of two parcels: one, that which we acknowledge was sold, lying within the levee and road; another,

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which the plaintiff claims, lying without. But the deed speaks of but one, and the full contents of acres sold are found in this one : therefore but one was intended. In sales *per mensuram*, *ff* 28, 6, 7, § 1, what is sold ought to run into the measure of the land, unless the contrary be agreed, but, what cannot be measured, as public ways, lines of boundary and hedges, must be expressly mentioned by the seller, if the intention be to convey them--but, if nothing is said about them, they are not presumed to be sold—therefore, it is usual to provide expressly that the hedges and public ways, which are in the premises shall be measured. 2 *Hulot*, 596.

To remove this difficulty, recourse is again had to parol proof, and we are told that the testimony of the surveyors informs us that, in making the survey of lands bounded on the river, the extent of front is measured on a line, drawn at right angles to the sides, at some short distance from the river, and on this foundation they reason thus :—All the lands surveyed on the river have their front extent, measured on a line, called a line of admeasurement, or *ligne de conduite*, drawn within the road. This line is never considered as a line of boundary. The lot in question has a line drawn across its front, within the road ; therefore, that line is a line of admeasurement, therefore it is not a line of boundary,

and by virtue of the *face au fleuve*, the lot must go to the river, which was to be demonstrated. This may be very good reasoning, but at the risque of being said to utter *gross nonsense* (which I take to be the translation of a phrase that was used, retracted, and then repeated) I must take the liberty to controvert and, which is worse perhaps, have the temerity to refute it.

All the lands, bounded on the river, have their fronts measured on a line drawn, at right angles, from one of the side lines to the other. Why? Because the measurement, if made on the natural boundary (the river) would never, on account of its sinuosities, give the true extent. And indeed, such a line could never be accurately drawn; for it varies almost every hour, as the water in the river rises or falls, or is agitated by the winds. There is, therefore, a physical necessity, as well as propriety, in measuring the extent on some other line than that of the natural boundary, where the lands border on the river.

But in a regular figure, bounded by four lines, the line of admeasurement and the line of boundary is the same; or, in other words, the measurement is made on the line of boundary.

To exemplify this, look at all the plans of land, copied in the register book in evidence. In all those that are bounded by the river, the line of measurement being, as I have shewn, necessarily

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different from the line of boundary, that line is expressed by a succession of dots, while the side lines, and that in the rear, which are really lines of boundary, are designated by a strong black line, and those of the sides are continued to the river. On the contrary, in the same book, in all plans which represent town lots (such as lots in New-Orleans, in Galvestown and elsewhere, where lands are granted by superficial measure) the whole are enclosed by the same black lines on which also the distances are marked—a striking example of this, is in the concession to Decuir, at *Fousse Rivière*, page — of the register, for a certain number of superficial acres. He is bounded *by the bank* and not by the river. Consequently he stops, when he arrives at the bank; a black line is drawn as his front boundary, on which the distance is marked, and the calculation is made, on the plan, of the contents in square acres. But on every plan of a concession of land, really bounded on the river, there is besides the line of admeasurement (expressed as I have said, by dots) a real line of boundary, which is the marginal line of the river, which, by the extension of the side lines to it, shuts it in, and encloses the tract. But, in the case before the court, the front lines being certain and unvariable, not depending on the situation of the river, there was no occasion for any other line of admeasurement;

and the extent of the front is accordingly measured on it.

The parol proof of the surveyor, therefore, will not avail the plaintiff, on this occasion, more than it has done on others. But I invite the attention of the court to it, as strongly supporting the arguments I have used.

My own arguments, on a former occasion, are again pressed into the service of the plaintiff here. But those arguments will be found to differ in no one point from those I now use. I then stated, and now state, that in lands bounded on the river, there was a *line* of *admeasurement* distinct from the *natural line of boundary*, which line of admeasurement, my then adversaries wished to change into a line of boundary.—I should, indeed, have changed sides, had I now contended that on a plan, where these two lines are laid down, the inner one should be the boundary—but, the facts do not warrant either me or the plaintiff to say so. Here is but *one line*; and of course that line is both the line of boundary and admeasurement.—I may be permitted to remark that this mode of quoting my arguments on former occasions, is not extremely forensic. Lawyers, from a sense of mutual liability to attack, seem to have entered into a tacit agreement, like the line of centinels in the land, or the top men in the sea, service, not to fire at each other.—But I re-

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peat, and I do it seriously, that here I am glad the course has been pursued, not because it gives me an opportunity which I scorn to use, to retaliate on their client, but because I feel myself invulnerable to the charge of inconsistency; and that, the more the court will do me the honor to attend to the whole course of my reasoning, on the former occasion, the more they will be convinced that I have never varied my ground.

Legal authority is next resorted to, to shew that the intervention of a public road is no proof that the land is not *arcifinius*, and not entitled to alluvion. The examination of these authorities will prove that there is less contradiction in this division of jurisprudence, than in any other; that one simple principle governs the whole; and that, with a single exception, which I shall note, in every case, and under all circumstances the land bounded by the river, but no other, enjoys the right of alluvion. And that from the definition of the word, alluvion is the land *added* to your land by the imperceptible action of the water.—The water can add nothing to property which it does not touch. Therefore, the land which touches the water, is the only land, that can be increased by alluvion—with this preliminary observation, let us examine the authorities cited on the subject of the intervening road.

The first is the case of T. Attius. *ff.* 31, 1, 23. —Titius Attius had a field on the public road, opposite to him on the other side of the road, was the field of L. Titus and then the river. The river, by degrees, eat away the land Lucius Titus, and afterwards the road itself, and came up to the land of Titius Attius. Attius then became the proprietor of the water's edge. The river after this began again to recede *by means of alluvion*, that is by a new deposit in the place of the land it had swept away, and gained nearly its former position—here the question arose: who shall have this new increase? T. Attius or L. Titus? and what is to become of the ground over which the road ran?—All this is decided in perfect conformity with the principles for which I contend. The *use* of the road returns to the public, or, as it is somewhat loosely expressed in the text, was gained by no one; because (as we learn from the conclusion of the case) it was a service due from the lands of Attius, and the land between the river and the road, instead of being declared the property of Titus, whose lands lay within the road—and whyall this? Because, when the river had destroyed the land outside the road and the road itself, then Attius became the riparious proprietor, and whatever was added, belonged to him. No matter who had originally owned the soil, that had been swept away by the river in the

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space now occupied by the alluvion. The use of the road returned to the public, for the very reason that it belonged to Attius ; because it was a service which was due from his lands. And the road formed no impediment to his gaining the alluvion between it and the river ; because, says the authority, " the way was a part of his land."

No case could be imagined better calculated to shew that the principles I contend for do not give way even to the claims of strong equity—and if Titus was not restored to the land which had arisen, in the very space which his former field occupied, it must be because there is no case, in which the land added by alluvion is not decreed to the owner of the unlimited soil, to which it is attached. But it also shews that, in order to gain this accession, nothing must intervene ; for, in this case, the road itself was first detroyed before the river came to the land of Attius ; and when it began to *add*, the addition was made to his soil.

The only other authority on this point is taken from *Brillon*, 280—I have not the book before me to quote the very words, but I recollect that the reason, given for saying that the intervention of a road formed not impediment to the acquisition of alluvion, was that the soil of the road was the property of the owner of the adjoining land, in which the public had only a right of way. This

case then forms no exception to, but confirms, the general rule : that, unless the accession be upon the very land of the claimant, incorporated with it without the intervention of any line, so as not to be distinguished from it, it cannot be deemed his property. This is done, in the case supposed by Brillon of an alluvion formed upon a road, which is my property, but which owes a service of way to the public—it retains its service over the usual breadth, but I acquire what is added, unincumbered with the service, because it is added to my soil.

But these cases, cannot, I think, be applied to establish a claim like the plaintiff's—because he never was the proprietor of the road.

Because the road is *public property* and, if the alluvion had been formed *even upon the road*, it must have belonged to the king.

And, because the case is stronger here by the intervention not only of the road, but of other objects, the levee and the batture.

I add an authority of the greatest weight on subjects of this nature : " There is no reasonable " foundation for the opinion that a public road " forms no impediment for the acquisition of " alluvion ; *unless it be private property which* " *owes a right of way to the public.*" If any respect be paid to this high authority, and indeed to those produced by the plaintiff himself, we

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must believe that the intervention of a public road would form (as reason and the definition of the term teach us) an impediment to the acquisition of land by alluvion. 2 *Grotius* 2, § 17.

To the same effect is the authority of *Heinneccius*. *Quod agro publico, viæve publicæ adjicitur publico cedere debet. Heineccius* 1, 9, *n.* 54.

The same thing may be said of the intervention of the levee: even if that had alone stood between the property sold and the river. It is precisely the case, put by the authors just above cited, of a piece of private ground, over which the public have a right of way, and where the alluvion is to be gained by him, who owns the very soil.

The same argument, that was used with respect to the batture already formed, is on this head repeated. That altho' the lines and true contents of the trapezium are given, yet something more must be included in the grant than is expressed; because *that something* is of too little value to be retained by the seller; because it is no advantage, but a burthen to him to keep it; because he could not improve or use it and because (I may possibly have mistaken the counsel and if it is not relied on, I shall willingly believe that I have) because it was not susceptible of being considered as property,—all this was applied to the batture in its then state, to the levee and

road. Let us consider their weight as applicable to all.

It is a principle of law, that whatever is not given in a grant is retained. We want no other authority than the dictates a plain understanding to be convinced of this. I have the whole and give 19 999 parts of that whole, without saying any thing of the remaining ten thousandth part; that portion, be it ever so small or insignificant, is still my property, because it requires all the parts to make the whole. It is admitted that, when Bertrand Gravier owned the whole plantation, he owned the levee subject to the use of the public as a tow path; and the plaintiff contends that the road also was not public property, but was held by the same tenure (for the sake of argument be it so) but, he sold a part of this plantation. If therefore the levee was the thousandth part in extent of the plantation, and Gravier had sold the 999 parts, by such boundaries as to exclude the remaining thousandth parts, that part would continue to be his, without any express reservation—because the right of property supposes the right of disposing of it, in any manner his fancy may direct, even if that mode should be contrary to his interest.

If this be true in the supposed case of a sale of all but the levee, it is certainly much stronger, where the only sale in evidence is that of a very

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inconsiderable portion, compared to that of the whole farm. Out of 520 acres (13 by 40) the contents of the whole farm, the owner sells about 2 acres and a half, the residue, including road, levee and batture, not being conveyed, remains his. Now, of this residue why select the levee and the road, rather than the cypress sivamp, the prairies or any other part of the plantation, as included in the sale of the two and a half acres? Because these objects are more convenient to him, than the others? But their *use* is the only convenience they can afford him, and this use, we acknowledge, he in common with others had a right to. The soil itself, subject to this public use, is not of sufficient value to make it the subject of reservation—if so, I ask them seriously is it of sufficient value to make it the subject of *sale*—if there was no motive in Gravier to reserve, was there any in Poeyfarré to buy? I speak of the *soil*, not the use of the road and levee. If it was a burthen to Gravier to repair the road and make the levee, was it not equally so for the purchaser? And if this burthen was so heavy as to make us presume that Gravier intended to sell these objects, altho' he has said nothing about them, was it not heavy enough to induce us to believe that Poeyfarré, who is equally silent on the subject, did not intend to take it upon himself?—No, it is said: Poeyfarré had an interest

in leaving the front of the lot open, and therefore he had a motive for intending to be the proprietor of the road a levee in front.

But then, the plaintiff must concede to me, that which no body but himself disputes, that the alluvion, formed on the levee and road, would belong to the owner of the soil of that levee and road; no matter who owned the lot adjoining the road. Because unless he concedes this, his reason will not apply; for no body could build on the levee and road, whether he himself owned the soil, or it was left in Gravier—but they could build on the batture; therefore, if he had any motive for intending to become the owner of the levee and road, it must have been in the anticipation that a batture would be formed there, of sufficient height to build upon, which he wished to secure to himself, by becoming the owner of the soil of the levee and road,—if then Poeyfarré could anticipate that a batture would be formed in the 15 feet of water, their witnesses speak of, or that the incipient one then shewing itself, as they alledge, would increase to be reclaimed and to be improved by buildings, that would shut out his view from the river: if Poeyfarré could foresee this and the probability of the event was so great as to make us suppose that he did foresee it, and did intend to buy the road and levee, where is the absurdity in supposing that Gravier

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could look and did look as far into futurity as Poeyfarré, and had as strong an interest to retain, as Poeyfarré had to buy these objects.—Yet the gentlemen who made a solemn abjuration of all false reasoning and declamation, these very gentlemen consider it as a sound argument to say that their cause could rest on the absurdity of supposing that Gravier *could*, and that Poeyfarré *could not*, intend to be the proprietor of the levee, with a view to the formation of the batture; these very gentlemen, in the district court, exhausted themselves in sounding the bathos of oratory to find opprobrious epithets and contemptuous terms, as applied to the levee and the batture. The one was a miserable strip of worthless land; the other a heap of filthy mud, too worthless to be improved, too insignificant to become the object of property, too vile in short to be named.—Therefore, Gravier never intended to reserve this insignificant *non entity* (for they absolutely tell us it is nothing, unconnected with the rest of his farm)—to this I answer: *first* that he does not appear to have retained it, *unconnected* and *distinct* from the rest of his farm. When this sale was made he held all the rest of the plantation (except the trapezium) of which plantation the levee and the batture formed a part, he was interested to keep up the levee and obliged to do it for the preservation of the unsold land on the road and

all that lay back; some of it in the rear of this narrow lot which he had sold.—And even though he had the intention of selling all the lots on the road, as appears from the map, yet he continued to be interested in keeping up the levee to preserve that part of the plantation, which being the lowest would most suffer from a *crevasse*; and of which his heir is still the owner.—It is objected (and this appeared to me a favourite argument with the plaintiff's counsel) that the proprietor of a plantation might by selling it in distinct portions, and bounding it on the road, render it doubtful who was under the obligation of making the levee, while he received the advantage of any alluvion that might be formed; this is an inconvenience; and the legislature by applying a remedy have shewn that the inconvenience might legally exist. By a law passed 23d March 1810, 2 *Martin's Digest*, 592, it is enacted that where a plantation, not within an incorporated town, shall be laid out into lots, then each lot shall pay *pro rato valoris* for the making of the levee and road. This court need not therefore legislate, as the gentlemen seem to think they ought, in order to remedy this evil.

I think, however, that this intent, even if we could plainly discover it, would be of but little avail unless it were expressed in the deed; and all I have said, on this subject, must be set down

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to a determination, in this cause so important to my fortune, that nothing should be left unanswered. Unless example be an excuse, then I shall have none: because if it is irregular to look for intent, when none is expressed, in the act, how much more so, to seek intent *contrary* to what is plainly and manifestly expressed? For independent of the five reasons I have given to shew that the parties intended to establish a line between the trapezium and the river, the last I shall use, is, I think, conclusive—it is no less than,

The clear and unequivocal declaration of the parties that the trapezium, even altho' it should be "*front to the river*," should be bounded on that side by the public road.

The expressions in the deed to describe the land granted are in the original, "un pedazo de "tierra, formando un trapezio, situado fuera de "la puerta de Capitulas, compuesto de 415 pies "de tierra de frente al rio; de 188 pies de pro- "fundidad por el lado de la ciudad; de 411 "pies y quatro pulgadas del lado del jardin de "los vendedores; y por el lado de arriba, de "229 pies y ocho pulgadas. El todo forma "dos mil tres cientos ochenta y deis toises, "quatro pies y dies y seis pulgadas de tierra "de superficie, como lo manifesta el plan de

"Don Carlos Trudeau, agrimensor publico, "de fecha nueve del corriente, que firmaron las "partes, y quedo en poder del comprador." Which I translate thus: "a piece of land, form- "ing a trapezium, situate without the Chapitou- "las gate, composed of 415 feet of land, of front "to the river; 188 feet in depth, on the side of "the city—411 feet 4 inches on the side of the "garden of the sellers; and on the upper side "229 feet 8 inches. The whole forms 2386 toi- "ses 4 feet and 6 inches of superficies, as is "shewn by the plan of Don Carlos Trudeau, "public surveyor, dated the 9th instant, which "the parties have signed, and which remains in "the power of the purchaser."

The plaintiff has produced, in default of the original, a copy of the plan mentioned in the act of sale. This plan gives the lines of the trapezium, with the same distances and calculations of contents, as are mentioned in the deed: it lays down also the position of the trapezium, with respect to the road, batture and river in front; the bounds of the city on the side, and the garden of the sellers in the rear. Annexed to the survey is the process verbal made by the surveyor and admitted, as the court will see by the endorsement, to be a copy of the one signed by the parties, at the time of making the sale. This process verbal states *first*; that the survey was made, at the

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request of Poeyfarré. It then gives in writing what is expressed by lines in the plan, "a piece of land, &c."

The plaintiff feels that this decides the cause, and a struggle is made to shew that there is no reference to this plan, except for the purpose of shewing that the calculation of square contents was really made by Mr. Trudeau—that the words *como lo manifesta el plan*, as is shewn by the plan, relate to nothing more than the words immediately preceding them, to wit: the calculation of contents.

If so, it must strike every one as somewhat surprising that a copy of the plan and process verbal should be made; that it should be referred to in the deed, that the solemnity of signing it, by the parties, should be gone through for a purpose that was utterly useless. The land, in the deed, is said to be a trapezium and the exact length of each of the four lines is given.—Now we want no plan to demonstrate whether the calculation of the contents be true or false—the plan cannot aid us in the least in that calculation. The geometrical part, to wit: the nature of the figure, whether square, triangle, &c. and the length of the lines being given, as they are in the deed, the rest is mere arithmetic; and the error or accuracy of the calculation of the superficial contents may be better tested by a few figures, in the margin of

the deed, than by all the plans that could be drawn. Besides, on this construction, the deed would assert what is not true. The deed says "as is shewn by the plan." But the plan does not shew that the trapezium contains so many square toises; it shews the length of the lines and the nature of the figure. The deed itself shewed the same thing. The plan has the sum of the contents written upon it, but does not shew the contents, it shews the surveyor's calculation of them; so does the deed. In other words, it is impossible for any geometrical plan to shew the contents, merely by giving the outlines, and it can never be said to be shewn or manifested by the plan, unless on that plan the surveyor had traced out, on the interior, the number of square toises or feet commensurate with the actual contents; which it is not pretended has been done in this case.—Therefore, the reference to the plan for the purpose of shewing the square contents would be *useless*, because already shewn by the deed; *ineffectual*, because not done geometrically by the plan—besides, if the intent was to refer to the authority of the surveyor general, for the precise contents, the reference would not have been to the plan, but to the calculation (if any reference at all was necessary) and they would simply have said, as is ascertained by the surveyor general who has calculated the same. But a rule of con-

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struction is given us, taken from *Pothier on Obligations, no.* 102, which, if it had occurred to me, I should have used in my favour, without the slightest suspicion that it could be turned against me.

"What is at the end of a phrase," says Pothier, "generally refers to the whole phrase and "not to that only which immediately precedes "it; provided, nevertheless, that this end of the "phrase agree, in gender and number, with the "whole phrase."

The end of the phrase is here, *as appears by the plan, &c.* now in English, there could be, no doubt, that, according to Pothier's rule, this would apply to the whole phrase, which begins with a description of the figure and extent of the thing sold, and continues immediately before the words of reference, with the calculation of contents; because, in English, the same expression *as appears*, or more literally, *as it is made manifest by the plan, &c.* would have been used, had there been one or many previous numbers to the phrase. Does the Spanish language require a different construction? I think it can proved, as well by example as reason, that it does not—*como lo manifesta*—"*lo*," here is the pronoun relative of the neuter gender which is used, as is also *lo quel*, when there are various antecedents; as in the following examples: *habiendo sido antes blasfemo y*

persequidor y injuriador; mas fue recibido a mise-ricordia, por que LO *hice con ignorancia*—LO, here refers plainly to all the antecedents *blasfemo, persequidor, &c. Epistol Pablo a Timotheo.* 1, 13. And clearly not to the last *injuriador* only; and is used in the same sense as *lo quel, which*, as is also in the following example, "pues dixo el "cura, tomad, senora ama, abrid esa ventana "echadle al curral, y de principio al monton de "la hoguera que se ha de hacer; hiso*lo* asi el "ama, &." "*lo*" here again, without dispute, agrees with and refers to all the different things, directed to be done in the preceding phrase, and not to the last of them only; so again in the very act of sale, under consideration. En precio de quatro mil pesos fuertes del cuno mexicano, que nos ha pagado de contado; de cuya cantidad nos damos por entregada a nuestra voluntad, y por no ser de presente la entrega, renunciamos, &c. y otorgamos formal recito, mediante lo quel nos apartamos.

In means whereof (mediante loquel) of what? Of the renunciation, the receipt of the payment the parties transfer their property: *lo quel* here agreeing with and referring to all these antecedents and not to the last of them only—*lo* or *lo quel* then, as far as I have been able to discover, from my own research, or from the information of per-

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sons better acquainted with the language, answers precisely to our English relative, *which*.

Suppose, in a history of the late war, the author in giving an account of the battle of New-Orleans, in describing the position of the American army, should say: "general Jackson's line on "the left bank, extended from the river to the "wood, with a redoubt on the right next the ri- "ver. The line was nearly at right angles with "the river, and straight, until it came to the "wood, where it receded by a very obtuse angle: "There were four batteries advantageously pla- "ced, at unequal distances from each other. The "first at six toises from the river; the second at "twenty, the third towards the middle of the line: "the whole being 816 toises in length, *as ap- "pears* or (to come nearer the Spanish phrase) *as "is made manifest* by an accurate plan made by "major Latour, to which I refer." Would one reader, in ten thousand, imagine that the reference was made merely to shew the length of the line, which the author could better do in words; and not to shew the angles and position of the redoubts and batteries, of which no words would give an accurate idea. Now, translate this passage into Spanish; and though, perhaps, different phrases might be used by different people, to render the sense of the words of reference, yet I am greatly mistaken if those, used in the deed,

"*como lo manifesto el plan*," would not be deemed the most natural.

I have been forced into this verbal discussion, by the manner in which my construction of this part of the deed was treated. It was pronounced to be *gross nonsense ;* and this epithet, or an equivalent one, in the language in which the counsel addressed the court, was supposed to be a sufficient refutation. His good sense and urbanity, however, rather than the notice I took of it, induced him to acknowledge its impropriety, and he attempted a refutation by argument, rather than invective. Whether he succeeded so much to his own satisfaction, in this attempt, as to be convinced that the opprobrious terms, he had paplied to my unfortunate arguments, were the only ones they deserved; or whether, sensible of his own failure, he found it easier to stigmatize than confute, I cannnot tell: but certain it is, that he ended where he began, by repeating the phrase. Independent, however, of grammatical construction, and supposing that even to be against me, the intent of the parties is apparent, not only from the consideration that the reference for the contents only would have been useless and ineffectual, as I think I have shewn, but also because a general reference was useful, and even necessary to the understanding of the deed.

I have already shewn, by the form of conces-

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sions, both French and Spanish, that the precise situation of the land could only be discerned from the plan, never, or very rarely, from the grant itself —The same practice seems to have prevailed in private deeds, but whether generally or not, it is clear, that it has been adopted in this. —Forall the expressions, relative to the boundary lines, are evidently intended to describe their extent and situation, *with respect to each other only;* leaving the position of the whole lot, *in relation to other objects,* or its situation and boundaries, to be settled by a reference to the plan. Thus we find, in the deed, no other description, than that the land lies outside the Chapitoulas gate; its front towards the river; one side towards town; the rear on the side towards the garden; and the other side has no other description than that of the *upper line.* But at what distance is the lower line from the town? How far is the rear from the garden? Where is the upper line? And what is the distance between the front line and the river? None of these questions are answered by the deed, and all *of them* are necessary to give it validity. For, no one could locate the land, but for the reference to the plan, where all is satisfactorily explained. The garden is given as the rear, the road as the front boundary, and the interval between the lower line is distinctly marked.

Thus, I think, I have shewn (as well from

grammatical construction, as from the evident intent of the parties extracted from what they have said in the deed) that the reference to the plan is in order to render that certain, which the deed had left doubtful.

But it is said (for I will leave nothing unanswered) that, if the reference to the plan be admitted, it will contradict the deed; and that this shall not be permitted, even admitting the premises. If it be acknowledged that the deed refers to the plan, for what purpose is such reference made? Clearly for "greater certainty:" which phrase is sometimes expressed but is always understood. If the plan then contain greater certainty, it must and ought to control the deed which has *less*. And, when the object is boundaries, position of lines, and the relative situation of land to surrounding objects, no one can doubt that a plan, from its nature, is more certain than a deed can be. Therefore, if there were a contradiction between the boundaries, as expressed in the deed and the plan, the deed must yield, as being the less certain of the two.—But here, there is no contradiction; there can be none. —For this plain reason: the deed gives no precise boundaries, and all, of the general terms, it contains, are consistent with the more precise description contained in the plan—it is in the plan situate *outside of the Chapitoulas gate*, although

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the interval between it and the city is laid down. *The lower line on the side of the city*, although its position, with respect to the city, is described. The rear is still *on the side towards the garden*; though the plan tells us that the garden is the boundary, and *the front is still to the river*, altho' the plan tells us it is bounded by the road.

There is then no contradiction between the act and the plan—if then the plan be generally referred to by the deed, I must consider all controversy, as to the boundary of the lot, at one end; for, in as express terms as language can afford, that boundary is declared affirmatively to be the road; and the river is as expressly declared *not to be* the boundary, by the interposition of the several objects of the road and the levee, between it and the lot, not only by the surveyor, who laid out the lot, and made the plan, but by both the contracting parties, who *signed* it.

But the survey, it is said, was made some days before the sale. It was: and I think it would have been extraordinary, if that operation had not been performed some time before, because in order to determine the price it seems reasonable, that the extent should be known—and what inference is drawn from this? Why, that though Poeyfarré caused the lot to be surveyed, as being bounded by the road, with a view to the purchase, on the 9th of February; he might before the 27th

have changed his mind, and determined to purchase with the river as his boundary—he might so: but would he, when he passed the act, have referred to the plan, bounding him on the road? Would he have signed that plan? Would he not have made some more precise expression of his change of intent, than the insertion of the loose expressions *frente al rio?*

Having discussed the plaintiff's first position: "that the sale to Poeyfarré, was bounded by the river," and urged the reasons which induce me to believe, that he has totally failed to establish it; let us examine another question, no less essential to his success, even if the first should be decided in his favour. "Did Poeyfarré when "he conveyed to Bailly, under whom the plaintiff "claims, give him the river as a boundary?"

He claims under two deeds, the first from Poeyfarré of which the description words are "a lot "*(a terreno)* belonging to me, situate out of the "city, consisting of (compuesto) sixty feet of "*front*, and one hundred and eighty in depth "*conformably to the figurative plan* of Don Car- "los Trudeau, public surveyor of this city, "bounded on one side by land of the seller, and "on the other by those of Bertrand Gravier" and then recites that it was part of the land he bought from B. Gravier and his wife, by the deed

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we have examined ; but does not, as is untruly stated in the petition, convey in all respects as the same had been by him acquired.

The second deed to Bailly is not produced, but is recited in his deed to Morgan. It is no otherwise material than to shew why the deed from Gravier to Poeyfarré, and that from Poeyfarré to Bailly, bei g now a corner lot, are stated to be bounded on both sides by land of the grantor, B. Gravier. There was, until Bailly purchased it from Gravier, a triangular strip of land, running to a point in the high road, and having a base on the rear of 14 feet, which at the time of Poeyfarré and Bailly's purchase, separated the lot of the former, from Gravier street —The sale fr m Poeyfarré, therefore, is the only material one in this enquiry—as we have seen, it is described by a lot (terreno) not a word is said of the river, it consists of 60 feet front, without telling us where that front is ; and it has a reference to the plan which takes away the quibble that was raised on the other : it is, *conforme al plan.* The reference here, then is not for the calculation of the contents, because—there is none. It is then to render the loose expressions of the deed more certain—What plan ? Clearly the one signed by Poeyfarré and Gravier, at the time of the former purchase. That plan, gives the road as the boundary. Poeyfarré then

bounds Bailly on the road by this reference. And he does more: he shews most unequivocally that this plan was intended to shew that the road was his own boundary; for, he could not refer Bailly to this plan for a boundary, if it had been intended, merely to shew the square contents of his land. Poeyfarré then, by this practical construction, not only shews his intent to bind Bailly by the road, but also, that it was his own boundary, and that the fine spun idea of the reference to elucidate the calculation, never entered into the minds of the contracting parties.—It is worthy of remark here, that Poeyfarré, who best knew the intent with which he purchased, does not appear to have claimed any part of the batture, opposite to the residue of his trapezium; but, that this suit should be first instituted, after a lapse of near thirty years, by one who became the proprietor of a small part only, three years ago.

Here ends the discussion of the material fact in this case; "the boundary of the land." If they have proved that boundary to be the river, they are entitled to the increase by an alluvion, unless the sale by the square toise should make it a limited field: a question that will be presently considered—if, on the contrary, the result should be, that their boundary is not the river, it would seem, necessarily to follow, from the nature of the claim, that they are not entitled to

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such increase. But, on the trial of this cause, I have first heard it asserted, "that land not bounded "ed by the water, but having other boundaries "which separate it from the edge of the water, "may yet be entitled to the alluvion."

"That the lot in question, bounded by a road "which is public property, separated from the "water, not only by the road, but by a levee, and "another parcel of land, which was already formed by alluvion—when that lot was sold, should "carry with it, *as an appurtenance*, the land then "formed and all which has accrued since."

The act of sale gives the land with its *entradas, y salidas, derechos, usos y costumbres*. The English terms we should use, in common parlance, to translate these words, will each of them give a correspondent legal meaning: *ingresses, egresses, rights, uses* and *customs*—Can any of these give a right to a detached part of the grantor's property, never used with this particular part, which is conveyed, not necessary to the enjoyment of it, and not mentioned or alluded to in the act of sale? The *ingresses* and *egresses*, are given by the front boundary on the road. *Rights (eo nomine)* will convey nothing but such as shall be proved to be attached to the soil; such as a right of way, &c. but to give effect to this the right of servitude must be proved, and then it will pass under the general word *rights*—it is not

sufficient to say: a servitude is a *right*; *rights* are given me, therefore, I am entitled to the servitude. This species of logic will surely not carry conviction; and yet this rather worse is attempted in the present case. It is first assumed, contrary to the fact, and even inserted in the petition, that the lot was conveyed with its *appurtenances*, (meaning, I suppose, that it was so expressed in the act) whereas no such word appears in the deed. The reasoning is such as might be expected from such a foundation.—This is the abstract: "we are entitled to the appurtenances, alluvion is an appurtenance; therefore we are entitled to the alluvion." But, gentlemen, admitting the land is conveyed with its appurtenances, and that alluvion is an accessary, which I deny; you do nothing unless you shew it to be an appurtenance of this particular lot. How do you prove this? Why, they prove it by again repeating that they go to the river; but that account we have already settled. If you go there, I acknowledge that without your doctrine of appurtenances or accessories, you are entitled to it. If you do not go there, prove that it is an accessory in some other way.—But to this we can get no other answer than the old one; "that alluvion is an accessory; that they are entitled to the accessory, therefore, they are entitled to alluvion."

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But, the truth is that alluvion, in the sense they use the word, *land gained by alluvion*, is not an appurtenance—the *right of profiting by alluvion* is appurtenant to lands bordered by the water which causes the increase. But, when the increase has taken place, that increase is no appurtenance to, it is incorporated with, the original field, and becomes a part of, not a right appurtenant to it.

Incrementum latens alluvionis nobis acquiritur eo jure quo ager augmentatus primum ad nos pertinebat, nec istud incrementum censitur novus ager sed pars primi. Dumoul. Com. art 1. (5) *no.* 115. *Febrer. (Contratos* 1. 10 § 2 *n.* 81.) The authority cited by the plaintiff, tells us the same thing, in the same sentence with that quoted, to shew that it is an accessory: *sigue la naturaleza del fundo, aque se agregua y se tiene por uno mismo.*

Denisart, tit. alluvion, no. 5 & 5 is to the same point. *L'augmentation qui nous arrive dans un héritage par alluvion, est une seule et même chose avec l'heritage accru—fundus fundo, accresscit sicut portio portioni.*

Encyclopédie. "Alluvion is an increase, &c. "which becomes so consolidated with the conti- "guous land, that it forms a whole with it an "identity.

If, "the portion of land thus added, is not con-

"sidered as new land; it is a part of the old, "which becomes possessed of the same quali- "ties, and it belongs to the same master, in the "same manner, as the growth of a tree forms part "of the tree, and is the property of the master of "the tree."

I might multiply these quotations without end, but enough have been made, to shew that there is no question as to the nature of this property, when once formed. That it is an integral part of the original field, and therefore, no accessory, appendage or appurtenance to it.—The very author, relied on to shew it to be an accessory, clearly uses the word as applied to the *right;* because I have shewn he, in the same sentence, expresses the incorporation in very strong terms: *se tiene*, he says, *por una mismo.*

To prove that an integral part cannot be an accessory, or appurtenance, would seem an useless task.—But from the beginning of the controversy, relative to this property, through all its stages, during a period of thirteen years, and with all my adversaries, from Thomas Jefferson down to Benjamin Morgan, I have found first principles denied, and have been forced to undertake the demonstration of axioms. Therefore, (not because I think it necessary to the conviction of the judges who are to decide, but to give myself the satisfaction of exposing the nature of the ar-

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guments that are used to deprive me of my property) I proceed to support by authority this almost self evident proposition.

Let us see what an accessory is. This word is not used, I think, as a substantive in English jurisprudence, except in the criminal law—at our bar and particularly in this cause, it has been taken from the French *accessoire*, and used as synonimous with appurtenance. What is its definition? *Denisart, tit. accessoire.* "When one "thing is united with another, upon which it de- "pends, either by its *origin*, its *nature* or its *use*, "the first is called the principal, the second the "accessory, without any regard to their relative "value. A thing is said to depend upon another "by its *origin*, when that thing has produced it "by its *nature*, when it cannot exist when sepa- "rated from it—and by its *use*, when it is desti- "ned to ornament or be of service to it."—Now, see whether land made by alluvion will square with either branch of this definition—it is, clearly, *not produced* by the original land (as are the examples he gives of trees, grass, &c.) it is from its definition, produced by the water; and would be created if a stone wall, instead of the edge of the field, were the point at which the increase began.

It is not by *nature* so united, as not to exist if divided from the principal, as the *rents* are, which is the second example. The alluvial soil

forms as perfect a lot, when divided from the principal, as the principal itself does.

Nor lastly, is it destined for the *use* of the principal soil. Therefore, it comes within no branch of the definition, and is not an accessory—an acre of land in the east end of a field is no more an accessory or appurtenance, although it may have been formed by alluvion, than another acre in the west end, which was original soil: and it depends absolutely on the owner, in the one or the other case, to include it or not in the sale. If the field contain 21 acres, including that formed by alluvion, and he sells by metes and bounds 20 acres, beginning at the west end, the alluvial land cannot be included, under the general description of appurtenances; nor, if he sells in the same manner, beginning at the east end, will the acre at the west end pass.

See the examples of appurtenances, that are put by Denisart and by the 28, 29, 30 and 31 laws of the 5th partida, tit. 5. which have been quoted by the plaintiff, and we shall not find land gained by alluvion among any of them—land, thus gained, then cannot, with propriety be called an *accessory* or an *appurtenance*; even when attached to the soil, the owner of which claims it. —What shall we say to its being claimed as such, to a lot which is divided from it, by land belonging to the public, occupied as a road, and by a

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levee, belonging to the seller? Really, the pretention is so extraordinary, that it seems to put a regular refutation at defiance, and to deserve the short mode of reasoning, which was applied to my construction of the reference in the deed. If the plaintiff establishes his doctrine, that the alluvial soil is an inseparable appurtenance to the owner of that on which it was formed, let him take care of his title, to that which he calls the principal: for that principal is itself alluvial, and the owners of the lots on St. Charles street, would have a right to claim all between them and the river. On this head, however, I think I heard something like this reasoning. "The alluvion "belongs to the riparious proprietor, who is op- "posite to it. Poeyfarré is the riparious pro- "prietor, because there is no proprietor between "him and the river; therefore, he is entitled to "the alluvion as an appurtenance." But the first position here is unfounded, the alluvion does not belong to the proprietor of the land which is *opposite* to it; but to the proprietor of the land *on which it is formed*, to which *it is added.* The second position has been over and over refuted. There is no property without a proprietor; the *road* is property: the *levee* is property: they both have owners. That owner is not Poeyfarré; it is not pretended that he owns the road. And though they talk of the levee being an appurte-

nance to their lot, yet they have failed to shew that it had a single feature of one. The batture, whether high or low, whether incipient (as they call it) or finished, was *property*, and had an owner and that owner was Gravier—for it is surely idle to say that it was not, then capable of being owned; it must either have *existed* or *not*. If it did *not* exist, it of course had no owner; if it *did*, its height or extent is of no consequence. Is it not speaking in paradoxes to say that there *is* a thing, which is so inconsiderable as to have no being? When the river has formed a deposit annexed to my land, sufficient to raise its bed above the surface of the river "in its natural "state, when it is not swelled by rain or other "causes," then an alluvial soil is formed; and as soon as it is formed, it belongs to me, as the proprietor of the soil to which it is attached. No matter what its height or its extent; there is no other scale, nor has the plaintiff given us any to determine at what degree of altitude it shall become the subject of property.

But there is conclusive evidence, as I think I have shewn, that it was at least in this state, at the time of the sale. The surveyor general has certified it; Poeyfarre has attested it by his signature; the late superior court have confirmed it in the reasons given for their judgment, in a case introduced and read by the plaintiff *Gra-*

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vier vs. the Corporation. I care not, therefore, whether it was only sixty feet broad, as the counsel say it was, or whether it was only six —The surveyor general, I say, has certified it. He has declared that it was covered at the time of high water, and it is so yet—but this, it seems, is written only on one end; and therefore, he did not intend that it should apply to the other. This is just as reasonable as it would be to say, that because he has written *road* on one end of the map, it does not extend to the other, although the lines designating it are continued—here the lines designating the extent and shape of the batture, are marked on the plan distinctly; they are continued fronting the premises, and the words, to designate what those lines meant, are written in the part most convenient for receiving the inscription. The late superior court, I say, have confirmed it by their decision, and have also pronounced against the plaintiff's claim, because it appears by the same report, introduced by the plaintiff, that this title was relied on as a bar to Gravier's recovery; which as he was plaintiff, it would have been, had the claim been good.

As I have not shewn the present plaintiff, or those under whom he claims to have been parties to that suit, the judgment is no bar; but as a *precedent*, it has weight, even in point of fact. This court in the case of *St. Maxent's syndics*

vs. Puche, 4 *Martin*, 201, say, "certainly the "proceedings, under the Spanish and *territorial* "governments, evidence that the tribunals who "passed on Segur's claim for indemnification, "considered this point [the establishment of "Gayoso's line by Dubreuil's declaration] in the "same light that we do; and the fact is corro- "borated by a number of witnesses." Here the decision of the territorial court, on a point of fact between other parties, is properly considered as persuasive, though not conclusive evidence. —*Vide* also, 2 *Covarrubias*, 549 (4) where we have precisely the same doctrine: "that a sen- "tence in favour of one shall be cited by ano- "ther as a presumption, in his favor."

Some alluvial land then existed at the time of sale—is it pretended that this was an appurtenance? Not that I have heard; among all the extraordinary positions which have been taken, this I believe is not numbered. Then, even if the no less extraordinary claim be allowed, that the levee was granted as an appurtenance, it would not avail, for the land then formed, outside the levee, being Gravier's, all the alluvion attached to it afterwards must be his.

Under this head also, let it be remarked that the small lot, then first erected into a separate property, could have no such appurtenance, as arise from the circumstance of their having been

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used with or appropriated to the service of a lot that has acquired certain rights by the continued enjoyment of them, connected with that lot. To explain by an example: if the proprietors of Gravier's farm had always occupied with it a certain right of common or servitude of pasturage in the lands of another; this would be an appurtenance to the whole farm. But the sale of two acres out of 520, certainly would not give the purchaser the same rights, because it was neither a *use*, *custom* or *right*, attached to that *lot* prior to the sale.

And when the right, whatever it be, is to be taken out of, or claimed as due from, the other lands of the grantor; that right or service must be plainly expressed in the deed, that first erects the land into separate property—how else can it exist? While in the hands of the original owner, one acre can owe no servitude nor be an appendage to another—and this like a servitude must be created either by grant or long usage—now there can be no long usage, because the lot was first erected, as a separate property by this sale, and, there is nothing in the deed, declaring that the alluvial soil, between the levee and the river, should be an appurtenance to the thing sold—it is sold with all its *rights*, &c. and we will suppose *accessories*, which mean the same thing, to have been also implied. But as no new

rights or accessories are granted, the particular portion, carved out of the farm, could have no separate rights—it shall carry with it none but such as all lots of land would have, to wit: a right of ingress and egress, over the land of the grantor, if none other were provided—the natural right, which the position gives, of receiving or turning off water, the fruits of the earth growing on it, its enclosure, if any, &c. There is then, as little foundation for the claim as an appurtenance, as there is for the river as a boundary.

A feeble attempt was made, to shew that the plaintiff was entitled by prescription; without pleading it, without shewing it, and contrary to the allegations in his non-descript petition, which alledges no other act of possession, on the part of Bailly & Poeyfarré, than that the care and expense of repairing the levee were, *for a time*, supported by them; which, in no part, states Morgan to have been in possession for a moment; and on the contrary, alledges, in two places, that the defendant pretends to be the owner, has offered to sell, and has *exercised various acts of ownership*, on the premises, to the great disturbance, and injury, not of the plaintiff's *possession;* but of his *right* and *title*; which acts (it is afterwards stated) are continued, to the great, continued disturbance of the plaintiff's *title*.

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If my acts of ownership have injured and disturbed his *title*, they must amount to a *prescription*; because though temporary, or occasional acts of ownership might injure a *possession*, or injure the *property*, or injure the *owner*; yet, to injure the *title* of the one claimant, they must give a title to the other.—Thus the plaintiff, instead of proving his own title by prescription, has acknowledged and established mine.

I have been diffuse, in answering the plaintiff's allegations and arguments—I shall be concise in establishing the principles, on which I rely, because truth is single, error is infinite; the first requires little elucidation; but, to pursue the latter, through all its ramifications, necessarily leads to prolixity.

Being defendant in this cause, and knowing the weakness of the plaintiff's title, I did not think it necessary to exhibit my own. If I shew, that the land claimed was not conveyed by Gravier to Poeyfarré, the plaintiff cannot prevail. The principles, on which I expect to demonstrate this, are simple.

It cannot be denied, that the land sold to Poeyfarré, with or without reference to the plan, is described as contained within four lines, of which the respective lengths are given, as well as the square contents. If these four lines had been

found to contain more than the calculation expresses, the excess would have belonged to the grantee; because the whole trapezium is sold. But there is no difference; the calculation is just, therefore, no question can arise on this subject. This is the *ager limitatus* of the Roman law, in both senses of the word: *first*, as contained within certain artificial lines.

Second, as having the contents calculated.

The *first* of these would *certainly*, the second *most probably*, according to the weight of authority, constitute an *ager limitatus*, or field bounded by another boundary in front, than the river; and of course, be a property not entitled to the right of alluvion.

The *first*, I say, *certainly*; because it depends not only on the opinions of lawyers, or the decisions of courts, but on the immutable principles of reason—the law of alluvion is expressly referred to this source. *Inst.* 2, 1, § 20. *Præterea quod per alluvionem agro tuo flumen adjecit, jure gentium tibi adquiritur.* The *jus gentium* above referred to, is not what we call the law of nations, but natural law—*quod verò naturalis ratio inter omnes homines constituit, &c. id vocatur jus gentium. Inst.* 1. 2. § 1.—*Ait imperator jus gentium esse quod naturalis ratio inter omnes homines constituit, unde sequitur jus hoc, &c. quam ob causam*

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& ipsum quoque jus naturæ passim appellatur et æquum & bonum, & naturalis equitas & natura.

This natural law dictates the definition of alluvion to be: "an addition to the soil imperceptibly made by the deposition or retiring of the "water." Now, if there be any limit between the water and a given portion of land, that land can never be augmented by alluvion, in either way: The water cannot *augment* land, that it does not reach; it can *deposit nothing*, where it never comes; it cannot be said to *retire* from a line which it never reached.

We want no positive law then, to enforce the doctrine that there can be no increase by alluvion to a limited field.—The civil law, however, leaving very few cases to be decided by induction, has given us this rule.

"It is clear *(constat)* that the right of allu-"vion, does not take place in limited lands." *ff.* 41. 16. This was ordained by the emperor Antoninus Pius.

What is this limited field, *(ager limitatus)* that has no right to alluvion? ——— The conquered lands, which were divided among the Roman soldiers, says one of the plaintiff's counsel—and this he infers from the latter part of the authority I have just quoted, *agrum manucaptum limitatum fuisse, &c.* This, to be sure, tells us

that conquered lands were limited; but it surely does not teach us that no others were.

1. All lands which are conveyed by artificial lines of mensuration, or by fixed boundaries, are, as the term imports, *agri limitati;* whether the contents in superficies be set forth or not.

2. All lands which are conveyed by measurement or quantity *(ad mensuram)* come under the same denomination, and for the same reason; because lines of measurement must be drawn, to ascertain those square contents.

These definitions exclude the idea of the river touching the land: the distance that separates it is of no consequence; an inch is as effectual as a mile. To constitute alluvion it must be *added to*, it must be *incorporated with*, it must *make a whole* with, the land that claims it—and the addition must be deposited by the water, or must be made by its retiring from the land. But, as I have before observed, the water can deposit nothing *in*, nor can it retire *from*, a place where it has never been—and I repeat here the observation, which we should never lose sight of in this cause, that the law of the *ager limitatus*, being inseparably connected with the general law of alluvion, an inherent part of it, is derived as that is, from natural, confirmed by positive, law.

Let us see, whether my definition of the *ager limitatus* be just.

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"Quæ presumptio (that of a grant of the right of alluvion) cessat in agris limitatis certo descriptis, vel mensurâ expressâ comprehensis, quibus ultra eorum limites nihil incremento concessum videtur." 1 *Huberus*, 123, 33

Vinnius, in his notes to the Institutes, 2. 1. § 20. *note* (1) commenting on the definition, contained in the text, says: "arcifinio scilicet qui non alium finem habet quam naturalem, id est ipsum flumen: nam agros limitatos alluvionem non habere" He then refers to the text, from the digest and says; "we may collect from it, that lands conquered from the enemy and given by the prince, or the people to individuals, were possessed in such a manner, that the right of the possessor should be circumscribed by certain *bounds* or *limits*—were called *limited lands*, in order that it might be known, that whatever remained beyond those bounds was public, and that the subsequent increase belonged to the people. Of the same nature are lands comprehended by a *certain measure*, which in this respect are governed by the same law; not having the right of alluvion, because their possessors can hold nothing beyond the quantity assigned."

1. Heineccius, page 110, 111, Jus Nat. & Gent. lib. 1. cap. 9. sec. 25 4." Ita nullum est dubium quin id quod agris nostris hoc modo (by alluvion) accedit nobis, quod *agro publico*,

viæve publicæ adjicitur *publico* cedere debeat." Where, he remarks in a note on this passage, "and on this foundation, rests the distinction made by lawyers and surveyors, between lands called *arcifinios*, which are bounded by no other than natural boundaries, and *limited lands*, which are confined to a certain number of perches or feet." He then cites the digest, and several commentators; and closes with a sentence that must, unless refuted, decide this cause. "But whatever lies between limited fields and the river, there is no one who does not understand that this belongs either to the *public*, or some *individual*; and in neither case, can any thing be added to the limited field"

The same doctrine is repeated in a stong language by the same author. *Elementa Juris, lib.* 2 *tit.* 1. § 358, *in notis.*—See also *Grotius de jure bell & pac. lib.* 2. *cap.* 3. *sec*: 16; where the definitions I have given will be found, and the same, chap. 8, sec. 12, where the same is applied to the lands of individuals; with the difference; that, in cases of doubt, the lands of individuals shall be deemed to be limited. Voet also is to the same purpose. 2*d. vol.* 728. *lib.* 41. *tit* 1. *no.* 15.

It was felt that these authorities decided the cause, and a very ingenious and bold attempt was made to get rid of them, by denying that the

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law of the digest, upon which it was asserted that they were founded, was law in this country.

"The recopilacion of Castilla, says the plaintiff, interdicts the use of the Roman code, as authority; it only permits, it so far as it may be considered the opinion of wise men illustrative of points, which have not been decided by the laws of Spain. The law in question is not the opinion of a Roman jurisconsult, but a positive edict of a Roman emperor; and the case is already provided for by a positive statute of Spain. Therefore, this law comes within the interdicted part of the law of the recopilacion, and is not included in the exception."

This is, I think, a fair statement of the argument—let us examine the truth of the different positions which compose it.—*First*, as to the assertion, that the law of alluvion applied to limited lands is created by positive statute. The passage of the digest, if closely attended to, will not countenance this opinion.

"In agris limitatis jus alluvionis locum non habere constat." The last word here means *it is apparent, it is certain. There is no doubt*, that such is the law? Now, why? If the text had said, "because that the emperor Antoninus Pius enacted it;" it might then have rested on that foundation—but no such language is used—after declaring that it was apparent that limited

fields had not this right, we have the corroborative observation, in another branch of the sentence: "idque et Divus Pius constituit." *And* the same thing was *established* by the emperor Pius: or, as I think, the construction demands that the sentence should not finish here, as it is printed; but that, instead of a period, we should only have a comma, after *constituit;* and that what follows, "et Trebatius ait," should be connected in the same sentence. I think so, because I do not grammatically know otherwise, what to do with the two conjunctions "*que* and *et*." If the sentence ends where it now does, one of them is certainly superfluous. If we connect them, they both find their place; and they would read: "id que et Divus Pius constituit et Trebatius ait &c." which would be rendered into English thus; "and this was not only established by Pius, but Trebatius says, &c."—Be this, however, as it may, the first sentence, whether single or connected, shews that the law was certain: not because it had been enacted by the emperor Pius; but that it was apparent, clear law, and as such had been confirmed by him. The subsequent part of the section, however, clearly shews that it was at least as old as Julius Cæsar, and therefore, not first enacted by Antoninus: for Trebatius is referred to, as asserting the same principle drawing the very distinction we draw in

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this cause, between lands granted *in gross*, which have the right of alluvion, and lands parcelled out by metes and bounds, which have it not. Now Trebatius, we learn from Godefroy, was the preceptor of Labeo (the founder of one of the sects, that divided the Roman advocates) and Labeo, as Tacitus tells us, in his annals, died in the reign of Augustus. The first part of the argument then, which supposes the law to depend on a positive edict, and not on principle, is ill founded.

The next member of the argument may, as conclusively, be shewn to be specious only: Spain, it is true, has legislated on the subject, but not in such a manner as to exclude the exception of the *ager limitatus*, declared by the Roman law, but to confirm it. The third partida, tit 28. law 26, is the statute alluded to: it gives the same definition of alluvion, that is contained in the Roman law. The operation must be imperceptible; it must be carried on by the *water* and it must be *added* to the field that claims it.

The 30th law of the same book, enacts that, where the alluvion is formed by the retiring of the water, it shall belong to the owner of the adjoining land.

Now can it, with any shew of propriety, be said that the Roman law of the *ager limitatus* is contrary, either to the spirit or the letter of either

of these laws? Does it not on the contrary, come within both? These laws declare that land *added to a man's field*, imperceptibly by the water, shall be his; the law of the "limited field" is a corollary from it: "that if it be added to something, without the land, it shall not belong to the owner of the field."

But, it is said, that the silence of the Spanish law on this point is conclusive, that the Spanish legislator, when adopting the Roman code, re-enacted so much, in the partidas and other codes, as he thought proper, and that having this passage in the digest under his eye, his not re-enacting it proves that he determined it should not be law in Spain. But, if I have shewn that it is a natural consequence of the law he did adopt, I shew *enough*; and surely the plaintiff would shew *too much*, if he could establish this argument: for it would exclude from our courts all reference whatever to the Roman code—for to establish such parts as are re-enacted we need no references; and, if they are not re-enacted, they stand in the same predicament, in which the plaintiff's argument puts the law of limited lands, and cannot be referred to all. But by the authority he relies on, the Roman law may be quoted in *certain cases*, (and I will assert without fear of contradiction) is, in point of fact, as frequently quoted, by every writer on Spanish

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jurisprudence, as the *partidas* themselves.—Therefore, the silence of the Spanish lawgiver on this point (as well as in many thousands of others which are not transcribed from the Roman code) is no proof that he intended to exclude its provisions.

If I have succeeded in shewing that the laws which govern this subject are derived from the laws of nature and reason, and are not the creation of positive statute; then the authority of eminent writers on that subject to illustrate the case has been referred to with propriety, and this authority is decisive.

I might rely on this course of argument, I think, with safety, but I have something more decisive. If I shew by writers of acknowledged authority, that the law of the ager limitatus is the rule in Spain, surely something more than the general reasoning, which has been employed, will be required to shew that it is not. I mean some direct authority, the opinion of some juridicial writer, on the Spanish law, declaring that this part of the Roman law did not apply in Spain.

The digest of Rodriguez purports, in a short commentary on every law, and an introduction to every title in his translation of the digest, to give information of the agreement or discordance of the two codes. On the law in question

he merely repeats its substance, from which we should infer that it is law in Spain.

The laws of *Fuero Real* have in like manner, and with the same view, as we learn from the title page, been commented upon, by Alonzo Deas Montalvo and a learned doctor of Salamanca.

These authors, in a note on the lib. 3. tit. 4. law 14. page 48, note (d) expressly declare it to be law, that the ager limitatus should not be entitled to the increase by the rising of an island opposite to it, which the "ager *non* limitatus" would have been entitled to; not merely, as was asserted at the bar, referring to the digest to shew that such was the Roman law, but quoting the text of the digest, to shew it to be in accordance with the laws of Spain (which, as we have seen, was one of the objects of the work) for they say: *ut in* ff. *de flum.* lib. 1.

We have not many of the Spanish commentators on this title of the digest. But I have been fortunate enough, to discover the opinion of the most celebrated among them in a work of great authority; which, after consulting Cyriacus, Bartolus, Mascaredo, Garcia, Hermosello, expressly decides the question, that by the laws of Spain the bounds of "*agri* limitati" are not changed by alluvion. *Curia Phillipica illustrada*, 45. *n.* 95. 3. 45. See also 2 Covarrubias,

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500. at the end of the first column. He is enquiring whether if a grant be made of, or a privilege or exemption granted to, a town, by certain metes and bounds, and that town afterwards becomes enlarged, whether the increase shall belong to the grantee, or the exemption or privilege be extended to the part added. And he determines that it shall not, referring expressly to this law in *agris*, which is the d. 41. § 1 16. the law under consideration *secuti deducitur* (he says) *ex lege in agris*. Now if the law *in agris* could not be referred to in a Spanish court, to shew the very case for which it provides, could it be (as it here is) referred to, to illustrate a similar case.

Not desiring therefore, to understand the laws of Spain better than the authors, I have quoted, and willing with them to incur the heavy penalties of citing the Roman law, in a court of justice governed by the Spanish code, I might rest my case on the branch of the argument alone. This is a *limited lot* and *limited lands* are not entitled to alluvion.

This was the ground on which the late superior court overruled the objection which was made to Gravier's recovery, as appears by the report; which let it not be forgotten, was introduced as authority by the plaintiff, in the argument in this court. And I really have heard no reason why

it should not have as much effect now as it had then.

I may flatter myself then with having shewn:

1. That the land, sold by Gravier to Poeyfarré, did not extend to the river. Because of the intervention of three objects, either of which would have been sufficient to prevent that effect: the *road*, the *levee* and the *alluvion* already formed, —*Because* it is called a trapezium and, if it extended to the river, it would cease to have that figure, as the side next the river would be divided into a number of curve lines.

2. That the said lot is a *limited field*—because it was laid out as a *town lot*, prior to the sale.

Because the contents are calculated and the intent of the parties to give and receive no more is clearly expressed.

Because the reference to the plan clears up all doubt, (if any could have existed from the deed alone) by giving the road as the front-boundary.

3. That as well from the nature of this species of increase, as from the authority of express law, limited fields can not be encreased by alluvion.

4. That neither the *road*, *levee* nor *alluvion* then existing, passed as an accessory or appurte-

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nance to the lot—because it has no one characteristic of an appurtenance or accessory.

Because, being first created into a separate property by this act of sale, the trapezium could have no rights or appurtenances, but such as are incident to all lots of land—and because the law, I have quoted from the digest, shews that these objects must have been specially inserted in the deed, in order that they might be considered as accessories.

5. That the claim of prescription is unsupported by any evidence, is contradicted by the statements in the petition, and has never been pleaded by the plaintiff. But that the admissions, in the petition, rather tend to establish such title in the defendant who has pleaded it.

6. That, even if the batture were conveyed to Poeyfarré, he never conveyed it to Bailly.

Because the objections, that are made to the reference in Gravier's deed, do not apply to Poeyfarré, who refers to the plan, without any of the words that give rise to the plaintiff's objection.

7. That nothing passed by Bailly's deed to Morgan as, by his own shewing, he was out of possession and the sale was of a litigious right.

Before I conclude, I will notice one error which seems generally to have prevailed, and

which would seem to give the plaintiff an equity, to which he cannot pretend.

The law of alluvion is said to be founded on principles of consideration, and to be supported by the maxim: "qui sentit onus, commodum debet sentire."—This, however, is not the fact. If we look to the Roman code, where we first find the principle, we shall find also the reason. It is not on account of the risque, which the riparious proprietor runs of loss, that he is entitled to the benefit; but because, from the nature of the increase, it is impossible for any one else to claim it. It is *imperceptibly* added; it is *incorporated* with the other field, forms a *whole* with it—it results from this: that where there is no other boundary but the river, no other but the proprietor of the old field can claim it, because the precise line before occupied by the river can never be accurately ascertained.—This is further confirmed by the doctrine of *avulsions*, which the old proprietor may claim, because the line distinguishing the old field from the accession, may then, (in the very rare cases where such things have happened) be easily marked; in alluvion, however, it is different; where the original line, eternally varying its sinuosities, can never be accurately marked by the hand of art.—The proprietor, therefore, gets the increase, for two reasons:

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First, because it is impossible to distinguish the new soil from the old.

Second, the river being his boundary, he must always go to it, even if its course varies.

It is true, that compensation sometimes takes place in this species of accession and loss; that persons, who have suffered by the encroachment of the river, are afterwards indemnified by the accession it brings —But this is an *effect* of the law of alluvion, not the *cause of establishing it.* If it were the cause, it must have gone further than it goes, and proportioned the gain to the risk, which it does not. The man, whose lands lie in the bend, runs all the risk of loss by encroachment, while his opposite neighbour on the point, who is at little or no expense in raising his levee, has all the gain by alluvion. *Again* the proprietor of a riparious lot, which perhaps may be only 50 feet deep, is entitled to the alluvion, he then has all the gain; but sure he does not run all the risk; his lot may, by an encroachment of the river (not unfrequent here) be lost, and that of the proprietor immediately behind him, may follow or go with it, as whole acres sometimes disappear at once. The proprietor of the back lot, then (if the principle was compensation of risk, by the chance of gain) ought to have a part of the alluvion, in proportion to the risk he runs; but there is nothing

like this established by law, and the equity, arising from this assumed ground, disappears with the refutation of the argument, by which alone it was supported.

Ellery, in reply. In one point, I agree with the defendant in this cause, that its merits lie within a very narrow compass.—The facts, though important, are happily not obscure; and the law arising from them, is believed to be admitted or settled. The wide range of objections, however, taken by the defendant, and the numerous codes and commentaries that he has put in requisition, have given to the argument an unexpected, perhaps, an unnecessary expansion.

In following the defendant, I shall endeavor to come at the merits of the cause; noticing by the way, such objections as may seem to be material, with as much brevity, as will be consistent with the importance of the pending decision; important, not so much on account of the large amount of property at stake;—but on account of the extensive, and very serious consequences, that, in our humble opinion, must result to proprietors of riparious lands, throughout the state.

The plaintiff and appellant claims to be the proprietor of a lot of land, situate in the [illegible]burb St. Mary, and bounded in front by [illegible]iver

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Mississippi, by purchase, 3d January, 1816, from Pierre Bailly, who purchased, 30th October, 1789, from J. B. Poeyfarré; who purchased, 27th February, 1789, from Bertrand Gravier and wife:—and he annexes to the petition the respective instruments of sale. He avers, that at the period of sale from Bertrand Gravier and wife to Poeyfarré, and from the latter to Bailly, no batture or alluvion existed, in front of this land; and, even if any so existed, no act had been done by said Bertrand and wife, reclaiming or converting it to their use and benefit; nor was it then of sufficient magnitude, in breadth or elevation, nor of sufficient worth or importance, to be so reclaimed or converted; that whether there were, or were not, an incipient batture then existing, it was the intention of the parties, the one to convey, and the other to acquire it, as well as the right of alluvion; which by law belonged to the owners of land, bounded by navigable rivers:—that subsequently to this period, a batture or alluvion, to a very considerable extent, has there been formed; which he claims as a legal accessory to his land:—that this land so situated was sold by Bertrand Gravier and wife to Poeyfarré and by the latter to Bailly, for a full price as such;—that thenceforward, the care and [redacted]penses of maintaining the levee in front of this [redacted]erty, devolved upon the vendees, and

the vendors were wholly released therefrom ;— that thenceforward the vendees also incurred the risk of the diminution of their land, by the washing and encroachment of the river ; that notwithstanding his right and title to the batture, thus formed in front of his land, the defendant and others, claiming title from John Gravier, or otherwise, have given out and pretended, that they were owners and possessors of this batture ; and have offered it for sale, wherefore he prays to be adjudged and decreed the lawful proprietor of the said batture or alluvion, and that the defendants be perpetually enjoined not to disturb the right and title of the petitioner ; and that he may have every other and further relief, &c.

In his answer, the defendant and appellee, after a variety of demurrers and exceptions to the form and substance of the petition, process of the clerk—jurisdiction of the court, and competence of the judge, proceeds to plead the general issue, and puts the plaintiff upon the proof of the allegations, contained in his petition. He pleads also the prescription of 10, 20, and 30 years ; he states, that John Gravier, being disturbed in the possession of the batture, of which the premises form part, instituted a suit at law, against the mayor, aldermen, and inhabitants of the city of New-Orleans, the judgment in which, he pleads

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in bar, as *res judicata*;—he states, that John Gravier owned and possessed the premises, under a legal title from Bertrand Gravier; under whom the plaintiff also claims; and that he transmitted his title and possession to Peter De La Bigarre, whose executors, by deed of partition and sale, conveyed and released their title to defendant; he also notices the inconsistency of plaintiff, in entertaining and expressing, at different times, different opinions in relation to the title of the batture; calls upon him to answer certain interrogatories, and to admit certain documents: he also calls upon him to produce the several plans referred to in the conveyances, annexed to the petition, from Gravier to Poeyfarré, and from Poeyfarré to Bailly.

As these different demurrers and exceptions were not argued in the court below, nor relied upon here, they may be considered as abandoned, and the cause as depending upon the general issue.

With regard to the inconsistency, sought to be fixed upon the plaintiff, for having entertained and expressed, at different periods, different opinions in relation to the title of the batture, and which is made to occupy a conspicuous station, both in the answer and argument, as it is not a point at issue in this cause, we are not here to discuss it. Were it necessary or regular

it would be most easy to vindicate him from the charge;—to shew, that he has been actuated but by one motive, in relation to this subject, *that of keeping open the batture;* and that he has of course favored all legal efforts, whether on the part of the city, or United States, directed to this end;—and that his present suit, standing on no mercenary grounds, is singly directed to the same object. Nor shall we examine how far the charge of inconsistency may be made to recoil upon the defendants; we wish to argue the cause abstracted from the parties, and wholly to confine ourselves to the question of our title. I say emphatically *our* title; since the defendant in the court below did not think proper to produce any. No proof whatever was offered, in support of the numerous allegations, contained in his answer; neither did he produce the judgment, which he had pleaded in bar; nor the title, upon which he relied. He, therefore, in this cause, stands without title, claim, or pretension.

The principal questions arising in the cause are:

1. Did Poeyfarré, by virtue of the conveyance from Bertrand Gravier and wife, become the riparious proprietor of this land?

2. Has his title as such been by him conveyed to Bailly, and by the latter to the plaintiff?

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I. The answer to the first question depends upon the *intentions* of the parties, as expressed in the instrument of sale. What are these expressions? By referring to the deed, we find, that B. Gravier and wife sell Poeyfarré, "un pedazo de tierra formando un trapezio, situado fuero de la puerta de Chapitoulas, compuesto de 415 pies de tierra de frente al rio," &c. A piece of land, forming a trapezium, situate without the Chapitoulas gate, composed of 415 feet, *front upon the river*. And lower down, we find this land sold, "con todas sus entradas y salidas, uses, costumbres, derechos y servidumbres," with all its ingresses, egresses, uses, customs, rights, and servitudes.

These are then the two clauses of the deed, to which the attention of the court is invited, in order to ascertain the intentions of the parties.

The *first* expressions give the river as the front boundary; and the *second* convey all and every singular accessory, whether in law or fact.

De frente al rio. It seems hardly possible to question the meaning of words, so unequivocal; or to attribute to them a signification, other than that giving the river as a front boundary? By what logic or criticism, are they made to signify a limit short of the river?

A distinction is sought to be taken by the defendant, between *face au fleuve*, (translation of

frente al rio) and *face sur le fleuve;* and it is contended that the latter phrase alone carries us to the river, while the former is represented as altogether loose and indefinite ;—indicating rather the aspect or exposure of the land, than its actual boundaries. And to support this distinction a variety of cases are put by the defendant;—property is made to front the cardinal points.—Suppose your deed makes you front north, where then, it is asked, is your northern boundary? And the defendant is drawn by the magnetism of his fancy to the north pole, where we are invited to follow him, in pursuit of our boundary.

But are gentlemen serious in attempting to sustain so hopeless a distinction between the prepositions *to* and *upon*, when used in this connection? A distinction too, only attempted to be supported, through the medium of a literal translation of a phrase, both idiomatical and technical.

In the Spanish language, the phrase, *frente al rio*, has always in this country, in conveyances of land upon the river, been considered equivalent to, and translated indifferently by, *face au fleuve*, or *face sur le fleuve*. The idiom of the Spanish language does not admit of the discrimination attempted by the defendant between the French phrases. *Frente sobre el rio*, the literal translation of *face sur le fleuve*, would be a barbarism.

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Frente al rio, therefore, is truly translated into French, *face sur le fleuve* or *face au fleuve;* into English, *front upon the river.*

Neither, in describing river boundaries, we venture to say, does the least shade of difference obtain between these two French phrases; and translated into English, they are both rendered by the expression *front on the river.* Thus, in the defendant's report of the cause of Gravier vs. the corporation, we find *face au fleuve* translated by him (*doctus utriusve linguæ*) *front on the river.*

The preposition *de*, in the phrase *de frente al rio*, has also been made the subject of criticism; and has been supposed, by one of the counsel, to be of singular force in restraining our front boundary.

Our deed has in truth been treated, rather as a bill of indictment, upon a motion in arrest of judgment, than an instrument of sale. Fortunately, however, this philological assault has been confined to the *two prepositions* in the phrase; while the two substantives have had the luck to escape unhurt. Horne Tooke himself could not have better conducted a *preposition war.*—One gentleman takes in hand the preposition *of;* while the other encounters the preposition *to;* of which they give as good an account, as he did of the two obnoxious prepositions,

which were objects of his hostility, and had the immortal honor of giving birth to the *Diversions of Purley.*

But, how are words of conveyance to be taken, unless in their most known and usual signification, regarding less the niceties of grammatical rules, than their general and popular use *Civ. Code* 4, *art.* 14, 15. And accordingly we examined witnesses, in the court below, touching the known and usual signification of this phrase and the sense in which it had been invariably employed in grants and deeds of land upon the Mississippi. To this end, we also exhibited the record of French concessions and register of land claims: all concurring to establish this fact.

In the court below, the defendant took an exception to the introduction of this species of proof, as inadmissible, upon two grounds; 1. Because this phrase, *frente al rio*, was clear and unequivocal.

2. Because it was said to be inconsistent with the plan of survey, referred to in our deed.

Here we cannot but invite the attention of the court, to the variety of the degrees of force and clearness, that has been attributed to this phrase by the defendant, in the course of one short argument. First, for the purpose of excluding important testimony, these words are termed *clear and unequivocal;* afterwards, when he wish-

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es to restrain our boundary, they are diluted into *general and loose*, and at length stigmatised as *magical and talismanic*.

But our parol proof was not introduced in contravention of the principle cited from the digest; but to shew,

1. That there was a popular and appropriated signification, affixed to this phrase.

2. The practice of surveyors and general usage of the country, in relation to surveys and plans of land upon the river.

To such ends, has not parol proof always been admitted? In 8 *Term. Rep.* 379, it was admitted to explain the words *serve* and *learn* in an indenture. See also to these points, the following authorities, *Vaughan* 79—1 *Hen & Mum.* 177.—6 *Mass. Rep.* 440.

In the late territorial court, we find, on the trial of Gravier against the corporation, these very points established by parol testimony. "To the first point of defence, says the report, the plaintiff replied, that the expressions, *face au fleuve* or *face* alone, were, in the general understanding of the country, testified not only in common parlance, but universally in acts of sale, equivalent to the most explicit terms of boundary on the river. To establish this, they cross examined Laveau Trudeau, the recorder of the city, one of the defendants in this cause, who

had been introduced by them as a witness, in pursuance to the law of the territory for that purpose.

He had performed the functions of surveyor general twenty-eight years; and produced Mr. Lafon, the deputy surveyor general of the United States, who had performed the duties of surveyor, and resided in the territory long before the transfer. Both these gentlemen declared, that the words *face au fleuve*, or *face* alone, in a deed or grant of land on the Mississippi, universally were understood to give the river as a boundary; unless the deed expressed some other fixed limit or line of boundary;—a great number of the defendants' witnesses, were also interrogated to this point, who all concurred in declaring, that to be the expression, universally used to convey an idea of boundary upon the river, as well in conversation as in sales. P. Pedesclaux, who kept the records of deeds and mortgages for 30 years, testified, that this was the expression invariably used. Indeed, this point was not attempted to be disproved by the defendants.—As to the stake fixed within the levee, as the place of beginning the survey of the Jesuits' plantation, and the line drawn thence in front of their land, the same witnesses, Mr. Laveau and Mr. Lafon, being examined on this point, also declared, that in surveying lands on the river,

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it was the universal practice, and had been from the first settlement of the country, to place two or more stakes, at an arbitrary distance from the river, in the side lines, to mark the direction into the country; but that these stakes, called in French *bornes* or boundaries, were never intended to mark the extent or termination of the lateral lines towards the river —That all the said concessions or sales express their breadth on the river, by so many arpents front, (180 French feet) and that to ascertain this front a right line is drawn, either parallel to the course of the river, when it can be done, otherwise by a perpendicular to one of the side lines, on which the number of acres, which the farm is to have in front, is always measured—that this line is called in French, *ligne de conduite*, or base for the admeasurement of the number of acres in front:— that *every plantation*, without a single exception on the river, has its *front* measured upon *such a line;* but that in *no instance does it serve as a boundary* between the farm and river. That were a grant is made of a farm or land on the river, the line of admeasurement *(ligne de conduite)* is drawn correctly across the front, from one bay to the other; and, of course, leaves a considerable part of the land between the river and this line, but that such parcel *so excluded*, is

always considered as part of the farm."—*Rep.* 16, 17, 18.

We therefore, hold our front boundary upon the river, by virtue of the same expressions which have given it to all the riparious proprietors in the state of Louisiana; which gave it to the purchasers of the confiscated property of the Jesuits;—which gave it to Bertrand Gravier, under whom both plaintiff and defendant derive title And, if in the conveyance to *him*, the words carried *him* to the river; will not the same words in his deed to *us*, carry *us* also to the river? Will they convey *to* him that which they do not convey *from* him *?*

What could have induced the parties to this instrument to adopt the technical phrase, *frente al rio*, front upon the river, if it were not intended to have its known and usual signification of a river boundary ? And why not, if such were the case, give it at once the nearer and more convenient limit, the road or levee—if these, as the defendant contends, be obstacles not to be overleaped, since they would unequivocally have expressed the *intentions* of the parties. Here, the utmost that could be contended for against the plaintiff is, that the *intention of the parties*, as to the front limit, is *equivocally and obscurely* ex, pres-ed; in which case, nothing would be gained by the defendant; for it is settled law, that ob

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scure, ambiguous, and even repugnant clauses in a deed, are always to be construed against the vendor. *Civ. Code*, 340 *art.* 23, 9 *East, Rep.* 15, 3 *Johns. Rep.* 387. 8 *Johns Rep.* 406.

But a variety of *circumstances* are resorted to by the defendant, to shew, that notwithstanding the use of this known and settled phrase in the deed, the parties *intended* to establish *another* boundary than the river.

In the first place, it is objected, that at the time of making the deed, *there existed a batture already formed in front of the land;* that its existence is proved by its being designated on maps made by a sworn officer, prior to the time of sale, and one of them signed by the grantee, and made at his request.

Reference is here made by the defendant, to the plans of the plantation by B. Gravier, both dated the 1st April, 1788; and also to one purporting to be a copy of the plan of the plaintiff's land, dated 4th February 1789.

To know the weight, which ought to be attached to these plans, it will be necessary to examine their character, and the nature of the proof they afford.

From witnesses (themselves surveyors) we find, that it is usual with surveyors, in order to

relieve the nakedness of their operations, to add to their plans, a perspective view of the neighbouring objects, introduced and coloured according to their fancy. In this respect has a batture been exhibited on these plans. It did indeed then exist, to a considerable extent, in the *upper part* of the faubourg St. Mary and had been, for several years, gradually extending toward the city. It might, therefore, be readily enough imagined to be, where, according to the common course of its increase, it was approaching, and would probably in reality soon be. But never before was it attempted to convert the exhibition of *neighboring objects*, real or imaginary, into *authentic* evidence of their indisputable existence, sufficient to overthrow the positive testimony of three old, respectable, and uncontradicted witnesses. It certainly made no part of the operations of the surveyor, nor was it in any degree the object of his official certificate. As well might they attempt to realize and locate the various groves, canals, and tivolis, by which the plans of the different faubourgs in the neighborhood of the city are environed and ornamented.

We need hardly remind the court, that on the 4th of February, and 1st of April, the respective dates of these plans, a batture, had it even then existed in front of our land, could not have then been a very *visible* object.

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Much stress seems indeed, laid upon the circumstance of these plans being made by a *sworn officer*, as he is repeatedly termed by the defendant; and we are almost led to believe, they were actually made under oath. But what duties, if it be worth while to inquire, was the surveyor general *sworn* faithfully to perform? Those only which he owed to the government, whose officer he was, and not to individuals. But had the question here been even in relation to a concession or grant from the king, his master, of what importance would his oath of office be, in regard to the fact of existence of a thing, not the subject of his operations, nor the object of his certificate? In relation to a plot or survey, made for Gravier or Poeyfarré, he certainly stands upon the same footing with any other surveyor, or any other individual, selected for that purpose.

The defendant aware of the slight presumption raised, by this species of proof, of this fact, wholly contradicted by positive testimony, endeavours to help it out, by calling to his aid, his own report of the cause of Gravier vs. the corporation; contending, that the existence of the batture was, in that case, "proved and admitted," as well as recognised by the court.

To this we answer:

1. That this is the first time, the defendant has seemed to feel safe in referring for evidence or

law to the proceedings in that case. In the court below the plaintiff's counsel were constantly restrained from making further use of it, than they were entitled to make of any report.

2. That the existence of a batture, in front of *our* land, was in that case, neither proved nor admitted, nor recognised by the court.

By referring to the testimony of the surveyor general in that cause, we find, that on the plan of Gravier's plantation, which he himself terms, a *first sketch or draft*, he only measured the batture in the *upper part* of faubourg; but that *towards* the city, he laid it down, according to his judgment. *Exam. tit. of U. S.* 58, 59, *note E.*

Now it will be recollected, that the question then before the territorial court was not the existence of the batture in front of our land, but its existence in front of the faubourg, *in general;* an extent of thirteen acres; in the *upper part* of which only was it measured, according to the testimony of this *sworn officer.* Hence we may safely infer, that *lower down*, it was not susceptible of measurement; neither is it made by him to extend *to*, but only *towards*, the town.— How then can it be asserted, that either his *sketches*, or his testimony, are in contradiction to that of our witnesses in this cause? Or, that in the face of positive testimony, it proves the existence of a batture in front of our land, and in the

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lower part of the faubourg, and near the upper gate of the city ?

From the testimony of the same witness, if we must be referred to his testimony, does it not equally appear, that B. Gravier invariably acknowledged his abandonment of it to the proprietors of the lots fronting the river : and, in 1796, after its formation in front of our land, that he equally acknowledged its abandonment in our favor ?

But even admitting, that the defendant has by these plans raised a *presumption* of the existence of a batture in front of our land, ought this presumption to outweigh the concurrent and uncontradicted testimony of three unimpeached witnesses ? None of them biassed by any interest or influence ; two of them, from their living, one upon, and the other near the spot, necessarily having a full knowledge of the fact ; and one of them, having been the owner of this land, necessarily also having an accurate knowledge of dates.

Caisergues, who was alcade and procureur general, under the Spanish government, says, that the batture, in front of the plaintiff's land, began to form, *somewhere about thirty years ogo.*

Brumo says, " when Bailly first went to this lot, there was no batture at all, but there were 15 feet of water :" and recollects to have seen one of the largest ships in port in front of Pov.

dras' and his own lot, in the place where the batture is now situated; and when interrogated to this point, says *his own lot was about* 400 *feet above Bailly's lot;*—and in support of his recollection of the depth of water, states the circumstance of his having there *a raft of wood, drawing ten feet of water*!

Bailly, whose release was tendered in the lower court, and whose competency was admitted, says, at the period of his purchase from Poeyfarré, 30th October, 1789, "there existed no batture in front," that he has been fifty-five years concerned in the wood trade upon the river, and lived on this land from the time of his purchase, from Poeyfarré, 30th October, 1789, until he sold it to plaintiff, 3d January, 1816:—that at the time of his purchase from Poeyfarré, a batture began to form higher up in the faubourg, "shortly after he made this purchase, he made an avancé; other owners did the same; from which time the batture began to form in that part."

If this fact, established by the concurrent testimony of these witnesses, admitted of doubt, why were they not contradicted or impeached by the defendant in the lower court? Why was not counter-testimony exhibited? And if it could, would it not have been eagerly procured?

Instead then of the defendants shewing that a

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batture had already been formed in front of our land, we have incontrovertibly disproved its existence.—And if no batture then existed, it could not have been withheld nor reserved; and the cause must be decided in favor of the plaintiff.

In the next place, it is objected, that the vendor had, prior to the sale, caused a plan to be made for the division of a part of his farm into town lots, in which the trapezium in question, was designated, as included in lot no. 7;—that it is particularly referred to in the said plan, as being to be sold, as it stood in fence, *avec ses entourages*, and that the front line of this, as well as the other lots coincides with the line of the public road, which runs in front of it.

It is said by the defendant, that it was admitted, that if this conveyance had been of a *town lot*, it would have excluded the right of alluvion. We are not disposed to retract this admission, nor dispute the difference legally existing, in this respect, between the urban and rural proprietor. To the city belong, as necessary appendages, its commons and shores;—its lots are all bounded by streets; and are sold, whether so expressed or not, according to its plan. Winter's lot, adduced by the defendant as an instance, lying within these limits, must necessarily be subject to the same rule. When we find, however, that

the river is not even mentioned in the *procès verbal*, and that the plan itself of that lot shews a street, with a range of tobacco stores, intervening between it and the river, we cannot think the instance happily chosen.

But all this does not turn Gravier's plantation into a city, nor anticipate the date of its incorporation—nor even the execution of his speculative plan; neither would the actual execution of that plan, make the subdivisions of his farm *town lots*. But still less can it be relied upon, where the deed gives a different boundary, and when, as we shall conclusively shew, there is no evidence whatever arising out of the plan, or otherwise, that it had been carried into execution by any actual survey and subdivision of his plantation in conformity to his plan. This plan was introduced by the defendant, as proof that B. Gravier had laid out his plantation into a faubourg and that our land was sold in conformity to the plan of that faubourg.

Let us notice, by the way, that this is contradicted by the title of the plan itself, to wit, "a plan of the plantation of Bertrand Gravier," from which it is clear, that, at least at its date, it was still a plantation and not yet a faubourg! Where is the evidence of any ulterior step in the conversion of this plan into a faubourg? Is it to be discovered in the plan itself? If so, let it be

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pointed out. That evidence, it would be to be imagined, would naturally be the certificate of the surveyor of his operations of survey. If it can be supposed to consist of any other indication on the face of the plan, or by any supplemental proof in this cause, testimonial or otherwise, there was not wanting ingenuity or research on the part of the defendant, to bring it to light. Its incorporation with the city has not been shewn to have been, and probably was not, prior to the cession. 1805, *c.* 12. Under the Spanish government, it could not be so laid out and incorporated, without the express permission of the council of the Indies. *Recop. Ind.* 4, 8, 88. No such permission has been shewn or alledged.

In default of evidence on this subject, the defendant has resorted to the more convenient resource of giving it himself a name; and accordingly has been pleased to denominate it *Gravier's town.* But, notwithstanding the magic of a name, we beg leave to assert, without fear of contradiction, that, at the period of our purchase, neither was the plantation of Gravier a suburb of the city, nor had it then set up as a town by itself.

1. Because this trapezium of land, designated as part of lot no. 7, on this speculative plan, in its side and rear lines, is cut off from *three*

streets by narrow strips of land, of unequal breadths, shewing clearly, by the relative direction of the respective lines, that it was sold according to a plan, very different from the projected one of the then uncreated faubourg of the city: and it would seem, it could only be by a miracle, that it could have existed in its true shape in this projected plan, without having been previously surveyed and sold by Bertrand Gravier.—No proprietor, not subject to a most perverse and unprofitable fancy, would so have disfigured and mutilated his lot; and no purchaser, in his sound senses, would have thought he was making a speculation, by purchasing a square in a city, with the exception of only just *so much land*, as would serve to shut him out of three streets in four.

2. Because, in our deed it is not said, that the breadth of the front extends 415 feet from the *street* (since called Gravier street) on its lower side, to the street, (since called Poydras' street) on its upper side, as would naturally have been the case, if the *projected* plan had *then* been *executed*; and further, because most obviously it would also have been described as part of lot no. 7 of this projected plan; whereas, in our deed, it is merely described, as situate outside of the Chapitoulas gate, consisting of 415 feet front upon the river—so many feet deep upon the

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lower side—so many feet on the side of the garden of the vendor, and so many feet on the upper side;—it is not even called *un terreno*, a lot, but *un pedazo de tierra*, a piece of land.

But after all, what is the character of this projected plan? a slight inspection shews it to be what it is justly termed by its maker, the surveyor general, a mere *sketch or first drait*— a *projet*, rather than a *plan;*—dealing altogether in prospective. All its *applications* (which by the way, are the work of B. Gravier, and not of the surveyor) refer, not to what has been, but to what is *to be* done.—Thus lots no. 13, 14, &c. are described, as *devant etre vendus, après la mesure faite;* a further proof, if necessary, from the face of the plan itself, that the thing had not then been executed.

Again, this plan exhibits neither the survey, *proces verbal*, nor operations, of the surveyor, was made at the request, in the house, and principally in the hand writing, of B. Gravier;—delivered to him subject to his control, and altered by his directions; shewing, in one part alone, according to the *sketch*, above thirty lots expunged.

All plans of the different faubourgs, laid out in the neighbourhood of the city, amounting to nearly a dozen, are, without exception, deposited in the offices of the different notaries, be-

fore whom the sale of lots are executed, and to which these sales all refer ;—but this plan was of a more domestic turn, and appears never to have left the house of its owner, not even to visit the office of Pedesclaux, his own notary, until long after the purchase of our land.—As to what time it found its way to the archives of the city council, we are equally in the dark ; but certainly not before the year 1796.

On the reduced, or *second* plan, bearing still the same date of 1st April, 1788, we find a marginal note, with the signature of the surveyor general, under date of 1796, certifying the addition to the plan of three ranges of streets in the rear, and the conversion of a square of intended lots in the centre of the projected faubourg, into a public square. We have then, *on the face of the plan itself*, incontestible proof, that the plan of these three ranges of streets and this public square, (in extent one half of the faubourg,) were not formed *prior to the year* 1796 —Now it is most manifest, from the slightest inspection of the whole plan, that the several parts of it were finished in *one operation* ; it is manifest from the color of the ink—the course, shape, and perfect unity of the lines ; there not being the slightest appearance of junction of lines, made at one time, to lines made at another ; or any novelty or alteration whatsoever on its face as would be una-

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voidable in a plan or a picture, one half of the surface of which was executed eight years after the first.—However perfect might be the skill of the artist; the strokes of the finest or the boldest pencil could not crush out the corroding traces of times.

Finally, these plans are only the separate and, at least *then*, the unpublished acts of B. Gravier, the original vendor or of Trudeau, his agent for that purpose, by which, we, having neither knowledge of, nor participation in them, are not to be affected.

Another proof urged by the defendant, to destroy our front boundary upon the river, is what he terms, the clear and unequivocal declarations of the parties, that this land, even although in the deed it should front upon the river, should yet be bounded on that side by the public road; inasmuch as it was sold according to a plan, by which it was so bounded; which plan was signed by the parties, and made part of the deed; and of which a copy was produced in testimony.

As great stress is laid by the defendant upon this argument, and as it is repeatedly urged by him, with some air of triumph, let us examine it attentively; and as the plan is referred to by the parties, see what is the just connection, in which it is to be taken with our deed of conveyance.

We have already considered it, so far as the depicting of a batture, on the water edge, could with any shew of reason, be insisted upon, as authentic, incontestible proof of the fact of its existence there, when not a subject of the operations or certificate of the surveyor; and shewn that, under these circumstances, if it do not fully amount to authentic, indisputable proof of such fact, then that it is wholly insufficient to overthrow the mass of testimonial proof in the cause: of that testimony, we have already noticed its positive and circumstantial nature;—the concurrence of the witnesses; their age, their disinterestedness, the impossibility of their being in an undesigned error; their unimpeached veracity. And yet, in our view of it, in so far as it has been considered, it is not necessary to disbelieve the witnesses, in order to establish the authenticity of the plan, for the true purpose for which it is referred to in the deed.—Now in what connection, and how far is it, by fair reasoning, to be taken with reference to the *words of conveyance*, in our deed? Why, so far as it can conduce to its greater certainty, and no further.

It is expressly referred to in the deed only for *greater certainty*; not to control or alter without necessity, what has been already certainly and absolutely expressed, but to make clear, what

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from its generality, may be in need of ascertainment.

We lay it down as a general position not to be denied, that when in a deed, there are words of conveyance and description, which are positive and unequivocal, (and more, especially, if they be also technical and idiomatical) they are to be taken according to their known and usual, and proper import; unless the subsequent introduction of other phrases render it *indisputable*, that they were intended to have a different signification.

Now in our deed, there are words of conveyance, that are also words of description and location, in themselves clear and certain, beyond dispute; we mean the words expressive of our boundary in front, to wit, 415 *pies de frente al rio*. There are in it other words of conveyance which, as words of description and location, are loose and obscure from their generality;—we mean the words relative to our boundary on the right and left and rear; and there is afterwards a general reference to the plan of survey, exhibiting the line of breadth of our front, running (as is usual) within the road;—and the other lines of survey, as they separate our land on the right and left hand, from lands of the vendor, and from his garden in the rear; and subjoined to the plan, a *process verbal* of the surveyor, stating in

substance, that he had run the lines exhibited in the plot, (describing his operations) saying, of the land in general terms, bounded on all sides, (that is except the front) by land of the vendor, and in front by the main road.

Now in what manner is such a plan so referred to, to be construed in relation to such a deed?

It is to be taken, in so far as it conduces to its *greater certainty*, which is in the deed itself, the express and sole reason of the reference. Or it is to do more. Is it to bring into doubt words of conveyance in the deed, subsequently executed, in themselves certain, and used in an absolute sense; or rather, is it to work the greater effect in making the deed utterly silent, where it has most distinctly spoken for itself?

Viewing the words of the *proces verbal*, as words of *convenient description of the operations of survey*, and not as precise words *of conveyance* in the deed, all difficulty is at once removed. In this view of it, it coincides with, and renders clear, those clauses in the deed, which vaguely and obscurely indicate the boundaries of the right and front and rear, where lines were perhaps necessary for clearness, in default of any expressed natural and well known boundaries on those sides. On the other hand, they are not in reality in conflict with the words of conveyance

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in our deed, that in clear and absolute terms conveys a boundary on the river in front.

As to the question of our boundary in front, the clauses respectively in the deed and the *proces verbal* of the survey being *applicable to different objects*, it cannot notwithstanding their literal variance of expression, be justly contended, that they are even in conflict with each other. As well may it be said of two vessels, on the same ocean, the one going east must of necessity run foul of the other going west; though they may be sailing on different parallels of latitude.

The *one* clause is used in the deed of conveyance, and intended by the *party* to convey to us our boundary on the river, the other had been used in the *proces verbal*, and intended by the surveyor only to describe the running of the lines of his plot. Possibly too the words of the surveyor may have been loosely employed, with reference to the place, then actually used and enjoyed, instead of to the extent of rights to be conveyed, with which he had nothing to do; or may have derived their colour from the known opinion of the surveyor, since testified by him in the cause of Gravier vs. the corporation, that the road, and all outside of it, belonged to the public. But, at all events, not having been *words of conveyance*, and therefore not being *material*, as to the rights to be conveyed, the

parties may be presumed, not to have scrupulously examined and weighed them, as the words of a deed; and especially, when a deed was yet to be executed between them, by a very different hand.—This idea may more readily be adopted, since the parties were mentioned, in the *proces verbal* of the survey, as present at, and consenting to, *the operation of survey;* but it does not at all purport, as in a deed, that they were present at, and attending to the particular couching of the *proces verbal* itself. His *proces verbal* is his own account of his operations of survey, as exhibited on the plot or plan; which plot or plan, was doubtlessly the predominant or sole object of the attention of the parties; and it is all that a purchaser so situated would be solicitous to attend to, in order to avoid being brought into collision with his rear and right and left hand neighbours.—The surveyor general might have been an excellent surveyor, without being any thing of a notary. Conveyancing not being his vocation in general, nor his employment in this instance in particular, one would hardly look to his *proces verbal* of survey, for the nature and effect of the conveyance of the land to be purhased, where that was yet to be drawn by the kilful and clear head of a notary public; *through whom accordingly were afterwards conveyed to he purchaser, in clear and absolute terms*, 415

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pies de frente al rio—four hundred and fifteen feet front on the river.

But we are turned round by the defendant, and required boldly to adopt the surveyor's *proces verbal*, not as intended by him to be merely descriptive of, and have reference to, his *operation* of survey, but as *words of conveyance*, and as of greater force as such, than the precise, considered, and technical expressions of the notary, in a deed, *subsequently* made; and thus, by a forced interpretation of the reference to the plan, to render it, through the medium of the surveyor's *proces verbal*, instead of an elucidation of the deed, a source of impenetrable obscurity; an obscurity, for which we must be indebted, or the defendant's scheme of reasoning, to the unaccountable stupidity or wicked obstinacy of the notary public, in thus foisting into his deed so vigorous a phrase as 415 *pies de frente al rio*, and which the defendant, in the different stages of his argument, has honored with so harmonious and suitable a variety of epithets.

After all, what is the true question for the consideration of the court? To keep this clearly and steadily in view, it will be acknowledged must greatly conduce to a sound decision of the cause. We will endeavor to present it to the court naked and apart from all extrinsic circumstances, and in order to this, first, it may help u

to determine what it is to ascertain, what it is *not*. It is in the first place then evidently *not* a question, properly and abstractedly speaking, of mere *location* of our front boundary; considering the nature and effect of the words of conveyance in the deed are admitted and settled.

For, if the nature and effect of the words of conveyance of our front boundary were admitted and settled, there would then be no longer any question about the location of our front. If it were, indeed a question of mere location, there might be more color of reason in resorting to the plan, so far as the deed is silent or obscure. But can it be pretended, that a plot or plan, a proper enough resource on a question of *doubtful location*, can be reasonably appealed to, on a question merely of the *effect of words of conveyance?* Or rather could it be perverted from its real use, to destroy the effect of words of conveyance in a deed, of the meaning and effect of which, without such inadmissible appeal, there could be no question? Yet it is, when the deed itself is under consideration, and the inquiry is, what is the meaning and effect of words of conveyance in it of our front boundary—words clear in themselves, and used plainly in so absolute a sense, that the defendant, sensible of their force, and which in a former occasion, and with a different interest himself had triumphantly shewn,

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invokes the plan, not to fix an uncertain location, but to derogate from the deed.

It is not even pretended by the defendant, among the variety of resources, to which he has resorted for aid, that the mere circumstance of the front line of the plan being drawn within the road, constitutes the road a front boundary—our witnesses all concur in testifying, that in all plans of land, sold *frente al rio* or *face au fleuve*, the *front* line is never drawn to indicate the *boundary* of the land, but solely to ascertain the breadth of the front; and that it is never termed a line of *boundary* but solely of *admeasurement.* Neither is the parcel of land so lying without the plan, on the side of the water, considered as excluded from the grant, but as making part of the granted premises. Why then should our land, lying at that time outside of the city, and making part of the plantation of B. Gravier, and fronting the river, be made an exception to the general rule?

It is indeed said by the defendant, that in the book of land claims, lateral lines of plans of land, lying upon the Mississippi, generally extend to the river, and therefore indicate the river as the front boundary, and that such is now the practice of surveyors, and that those of our land are not thus produced. Admitting this, will the mere extention of the lateral lines vary at all the

character of the front line, drawn, as it invariably is, *within* the levee and road, which, as well as the batture, are necessarily excluded from the plan? How is it, in this respect, with the Jesuits' plantation, from which both plaintiff and defendant claim title? From *the procès des Jesuites*. (149) we find, that their front line begins at the distance of " 6 toises 5 feet from the middle of the levee at the point A " A proof, not only that the front line was drawn within the road and levee, but that the *lateral* line was *not* prolonged to the river—and in the sale of their confiscated property, no new boundary was fixed between the front of their plantation and river; and all the subdivisions of the property were sold in conformity to this admeasurement.

It is also objected by the defendant, that the line of *admeasurement* of the breadth of our front is a *strong black line*, and that therefore it must be a *boundary;* since, as he contends, as a line of admeasurement, it ought only to have been *dotted*. Certainly, upon the idea of fencing and inclosure, the dots might afford to a restless grantee a greater facility of advancing upon the river; but perhaps the coarse and unskilful hands, of which, as is evident from inspection, the copy of our plan is a production, may in some measure account for the heavy pressure of the pen; and may raise a considerable presumption, that

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they were not versed in the scientific difference between strokes and dots.

But, upon what foundation of fact does the defendant erect so mighty a distinction? No proof was introduced of any usual practice of surveyors, to indicate the nature of their lines by the particulars of their form, color, and strength.—And even if well founded, in this fact, yet, upon what principle of law could this fact be made, to bear upon our title to a river boundary founded upon our deed.

It is next said, that in a regular figure, bounded by four lines—a trapezium for instance, the line of admeasurement and boundary is the same, and the right of alluvion is made much to depend upon the geometrical properties of the figure. But are there not numerous plantations on the river, having these quadrilateral proportions, where this unhappy consequence has not resulted? The Jesuits' plantation, for instance, of 32 acres front upon 40 deep, formed, without any injury to its front *boundary*, a perfect parallelogram; and yet the right of alluvion seems to have survived the regularity of its figure.

But it is further objected, that we have purchased a trapezium of land, as throughout the whole argument it is geometrically termed by the defendant, and that by extending its front line

on the river, and breaking it into curves, its shape will be utterly spoiled. But will not this objection equally apply to all lands lying upon the Mississippi, of so many acres front by so many deep? Yet notwithstanding the regular and rectilineal nature of their *plans*, how many riparious proprietors fearlessly go to the water edge; and come into actual contact with the river.

Another proof of the intent to establish another boundary in front than the river, is said by the defendant to be found in the calculation made by the surveyor of the superficial contents of our land; and that the single circumstance of sale by superficial measure, turns a lot into *ager limitatus*, though bounded by a river: and which, but for this circumstance, would have enjoyed the right of alluvion. Had our land been actually sold by superficial measure, though, as we shall presently shew, that circumstance alone would not have divested the right of alluvion, yet it would have rendered the objection more plausible. But it was *not* sold at the rate of so much the measure;—so much, for instance, the square toise or foot; but for one entire sum or price; it was not sold *ad mensuram*, but *per aversionem*; and should it exceed the caluclated amount, we are not held to refund the excess. *Pothier, contrat de vente, c.* 3 *art.* 1. *no.* 25[illegible]

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But it is replied, that this principle is not applicable, as no dispute exists in relation to what is contained within the lines of this trapezium; and even were there a deficiency, we should not be permitted to look for it out of these *limits*. True, if the *front lines* of the plan were actually a *limit;* but the contrary has abundantly been shewn, and here lies the fallacy of the defendant's whole scheme of argument; whether in relation to the construction of phrase —the location of lines—the calculation of contents—or the intervention of road and levee; his whole system of reasoning is grounded on this false assumption of our *front line* being one of *limit* and not of *admeasurement*. Our land is called *ager limitatus*; because it is inclosed within *artificial limits;* again, it is made *ager limitatus*, although bounded on the river, *a natural boundary*; because the superficial contents of *those limits* have been calculated; the right of alluvion is denied, because we cannot exceed these *limits;* the interposition of the road and levee obstruct the acquisition of this right; because they run outside of these *limits*. Having thus gratuitously provided us with these *limits*, he endeavours with his magic wand to keep us forever within this charmed circle; but the front line of our plan being shewn, (as it most conclusively has been) not to be a *limit*, this powerful spell is at

once dissolved, and we are released from this enchanted spot.

The calculation of the surveyor gives the superficial contents of the *plan*, and not of the *land*; and the front line of the plan being one of *admeasurement* and not of *boundary*, we are not concluded by this calculation, or curtailed by the limits of the plan. The surveyor was not called upon by the parties, nor permitted by law, to include in his plan the road and levee. *Pothier*, *cont. de vente*, *c.* 3, *art.* 1, 15, § 9, *n.* 251. And no batture then existed to be the subject of measurement; making therefore no part of the *measurement*, it necessarily makes no part of the calculation. The surveyor calculated only the superficial contents of the plan, of what he had actually measured; he made no provision for a future batture, and had it even then actually existed in front, it would not have been included either in the *plan* or *calculation*. In none of the plans of plantations, lying upon the river, (the front lines of which are invariably drawn within the levee and road) does the surveyor think of calculating the excluded portion, whether road, levee, or batture. If he did, how would he begin? Would he begin with the end of the short leg or of the long leg, to calculate the depth? A full concession of 40 acres front upon 40 acres deep, makes always a perfect square, or at least a parallelogram;

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but was it ever heard, among the infinity of plans of grants of land on the Mississippi, of a serpentine line boundary, the depth of a grant, as represented by the plan. But does this circumstance deprive the grantee of his rights, as a riparious proprietor, or render the quantity sold more ascertained and limited, than when the length and breadth of the lines are given? Can it be supposed, (where property is not expressly sold at the rate of so much the measure) that the mere act of calculation, the simple reduction into figures of the superficial contents of the *plan*, can, in any degree, alter its *boundaries?* In giving the length and direction of the lines, the surveyor gives the certain means of calculating the contents; and does it require much skill in arithmetic to make out the area inclosed?

The Jesuits' plantation, for instance, contained 32 acres front, upon 40 deep, and surely the most simple of all processes would give us the square acres, and according to this principle, necessarily exclude the right of alluvion. Uncalculated, however, by the surveyor, they go unobstructed to the river; but let him multiply but the one number by the other, and they are stopped by the quotient—so long as these magic numbers exist in an unmultiplied state, they are perfectly harmless; it is only working the sum, that charms us out of the alluvion.

It is next objected, that the intervention of the public road, of which not only the use but the soil is in the public, divests us of the right of alluvion.

But with whom, upon this point, lies the weight of authority? Certainly with the plaintiff; shewing clearly, that the interposition of the public road forms no impediment to the enjoyment of this right. Not relying merely upon the case of Attius, mentioned in the Digest, 23, 1, 4, where this principle is fully established, we find it generally supported by all writers on the subject. Gronovius, an authority highly respected by defendant, says, *si meum inter agrum et flurium interjaceat via publica, tamen meum fieri quod alluvio adjecit;* if a public road lie between my land and the river, what is added by alluvion shall belong to me. *Grot.* 2, 8, § 17, *in notis Gronovii:* and even Grotius, in the very passage cited by the defendant, from the same section, acknowledges the fact of the decision of Roman Jurisconsults, "that the public road does not take away the right of alluvion;" though he complains, that it is not founded on natural reason, unless, he adds, "the owner of the land is bound to furnish the road." But here as our land, like all others in the country, was held upon this condition, even the cause of Grotius' complaint is removed

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But admitting, for a moment, this objection as put by the defendant, is he aware of its extent; and that it will be as fatal to his pretensions as to the title of plaintiff? The soil of the public road is in the public; but alluvion belongs only to proprietors of the soil, upon which it is formed; and therefore, if formed upon the public road, it goes, not to the defendant, but to the public. Will the interposition of the levee relieve him? Hardly can it be contended that this was reserved by B. Gravier, for the sake of the prospective alluvion; or for the comfortable service of keeping it in repair. Will he call the batture in front to his aid? This, by positive testimony, has been proved not then to have existed. If the intervention, therefore, of the public road form this insuperable bar to the acquisition of the right of alluvion, the title to it is then exclusively vested in the public.

The whole question, however, as to the loss of alluvion by the interposition of the public road, turns upon the mere fact of *boundary*, and is indeed put as such, in the very passage quoted by the defendant, from Heineccius; who there says, that the alluvion formed upon *our* land belongs to *us*, and that formed upon the *public land or road*, to the public. "Quod agro nostro hoc modo accedit, nobis: quod agro publico viæve publicæ adjicitur, publico cedere debeat."

Heinn. jus nat. et gent. l. 1, *c.* 9 § 254—*vol.* 1, *p.* 110, 111. This passage, with the note, unless refuted, says the defendant, "will decide the cause." But far from wishing to refute it, we are anxious for its confirmation; it proves conclusively the reverse of the preposition it was cited to support, by shewing, that land which goes to the river, or, as Heinneccius elsewhere, as well as Huberus, expresses it, *usque ad flumen* or *(frente al rio)* acquire the alluvion formed upon it, whether public or private property—whether road or farm.—*Vid.* 2 *Voet, in pand.* 41, 1, § 15 *Hub.* 2, 1, § 39.

In our case the alluvion was added not to the road, belonging to the public: but to the banks of the river belonging unquestionably to the adjacent proprietor. *Institutes* 2, 1, § 4. *ff* 4, 1, § 1 and 18. *Partida*, 2, 28, 6. *Civil Code.* 106, *art.* 13 *Renthrop & al. vs. Bourg & al.* 4 *Martin*, 138.

The interposition of the levee is also made a distinct head of objection to our claiming the right of alluvion; but it has already been sufficiently answered. The truth is, that at the time of sale, neither party probably dreamed of the future formation, extent, and value of the batture in front. Our land was sold *frente al rio*, with all its chances of loss and gain; and from its price

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alone, considering the utmost nominal value of real estate in the place, at that period, under the anti-commercial and despotic government of Spain, we might strongly infer, if indeed the express words of conveyance in the deed, did not render inference and construction useless, that the purchaser intended to buy *front upon the river*, and that the advantages of air, prospect, and other benefits of that situation entered fully into the consideration.

As a further proof of the views and intentions of the parties, in this respect, we may adduce the conclusive fact, that after the sale, the vendor and his heirs were delivered of the burden of maintaining the levee, which thenceforward was exclusively supported by the *vendees*.

This fact is established by positive and uncontradicted testimony. Bruno, one of our witnesses, when questioned as to those who kept up the repairs of the levee, answers, the front purchasers; and Bailly, interrogated to the same point, says, that after he purchased from Poeyfarré, in 1789, he kept the levee in repair himself in front of his lot; and afterwards, when further questioned, as to his obligation to repair the road and levee opposite to his lot, at the time he was in possession, answers, "by order of the governor, through his adjutant, Mr. Metzinger."

Upon what principle is the right of alluvion vested in the front proprietor? Because he alone is exposed to loss by the encroachments of the river, and to expense in guarding against them; not surely, as the defendant labours to shew, on account of the nature of the increase, which, prevents the new soil from being distinguished from the old, and renders it impossible therefore for any one else to claim it.

If the alluvion be imperceptibly added to the original soil, the addition, though not discoverable at every successive moment, may surely be distinguished in a short series of months, or years. The ancient boundaries of the original grant being fixed and certain, the subsequent addition of foot, toise, or acre, is certainly as the original soil; as well might it be urged, that in the floods of the river, its increased height could not be distinguished on account of its gradual rise.

The fact then of the degree of increase being certainly eventually discoverable; next as to the supposed impossibility of finding any other person who might have the right to claim it; and here we will accompany a moment the defendant back to "first principles," to observe, that all private rights of land, having originally emanated from the state or nation, there could be no difficulty in finding who would have a right to

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claim the alluvion, if the hands of government were not tied by a very different principle from that of the impossibility of finding out the degree of increase, or a party who could have a right to claim it.

Neither does the second reason adduced by the defendant, seem to carry with it more weight, viz: that the river, being a boundary, the riparious proprietors must always go to it, even if its course vary.

This appears to be rather an assertion than an argument; the question is not, as to the existence, but the reason of the principle, which thus authorises him to follow the river. This will be found to rest exclusively upon the fair and settled ground of compensation. *Qui sentit onus, sentire debet et commodum.*—He who is exposed to the chance of loss or expense, ought reciprocally to be entitled to the chance of profit or gain; in the language of Blackstone, "this possible gain being the reciprocal consideration for such possible loss or charge." 2 *Blk. comm.* 262.

The right of increase by alluvion is grounded upon the maxim of law, which bestows the profit and advantage of a thing upon him, who is exposed to suffer its damages and loses. *Encyclop. verbo Alluvion.* "Secundum naturam est, ut cujusque rei eum sequantur commoda, quem

sequuntur incommoda; quare cum amnis de agro meo sæpe partem deterat, æquum esse ut ejus beneficio utar. *Dig.* 1, 17, § 10. *Grotius de jur. bel. et pac.* 2, 8, § 16 *Puffend* 4, 7, § 12

The defendant must, therefore, consent, notwithstanding his evident reluctance, to leave us with all the equity, which he confesses is supposed to recommend our legal demand.

It would be strange, that the Spanish government should depart, in this instance, from a principle recognised by its own laws; and would impose a duty without bestowing the correspondent right; and still more incredible, that B. Gravier alone should be the favored object of so remarkable an exception.

Suppose the river, instead of augmenting our land by alluvion, had been gradually washing it away; would B. Gravier, or his heirs, make good this deficiency? Could we compel them to do so yet? If they are to reap the profit, ought they not also be exposed to the loss?

This obligation alone then of maintaining the levee, after the sale, seems conclusive as to the right of alluvion; and from the performance of this obligation, imposed exclusively upon the front proprietors, was B. Gravier only delivered by this sale; the vendee, the one under the charge of making the levee, must have been a riparious proprietor. *Case of Gravier vs the corporation*, 20.

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The silence and absence of all pretentions, for so long a period after the sale, on the part of B. Gravier, who best knew his own intentions, and who lived and died here, is a circumstance somewhat remarkable, if, after the sale, he had not dismissed all thoughts of remaining a riparious proprietor in our front; a silence not a little prolonged by J. Gravier the heir and purchaser of his estate; a silence profound and unbroken, until the change of government awakened him to a knowledge of the extent of his rights.

It is next said, that we have no right to claim the alluvion in front of our land, because it is not expressly conveyed in our deed, and that whatever is not granted, is reserved.

True it is, that the alluvion itself is neither conveyed nor reserved in express terms, in the deed; but if it were even necessary to our argument, is not this silence sufficiently accounted for, by having shewn, in the first place, by conclusive evidence, that *in point of fact*, it did not then exist? But if it had then actually existed, was it necessary, in *point of law*, to have been expressed, in order to be conveyed? In a deed of land upon a navigable river, does not, (not merely the right of alluvion) but the alluvion itself pass, as an accessory to the principal estate, by the general words of conveyance? The prin-

ciple of law cited by the defendant applies to land itself and not accessories, and is accompanied by this other principle; that the accessory, if not specially reserved, follows its principal; "accessorium sequitur naturam sui principalis—sublato principale, tollitur et accessorium," accessoria sequuntur jus ac dominium rei principalis Whatever, says Domat, makes part of the thing sold, or is an accessory to it, is included in the sale, unless it be reserved. 1 Domat, 1, 2, § 4, *art.* 9.—And by our digest, the right of ownership. *Civ. Code.* 102, *art.* 3—2 *Febrero de escrit* 7, § 1 *art.* 35. *Pothier: Oblig. c.* 1, *art.* 3 § 6, *Part.* 5, 23.

A passage from Huberus is next referred to by defendant as proof that in private lands, comprehended in a certain expressed measure, the right of alluvion is not to be presumed. But the contents shews that Huberus had in his eye Grotius' triple classification of land, and was there speaking of military or public lands assigned by the Roman government to individuals; where he says, this presumption, as against the government, was not admitted; but in the very next sentence, he adds, if the lands go to the sea or river, *(usque ad mare vel flumen)* the right of alluvion shall obtain. *Huberus* 2, § 33. (a) And Puffendorf, upon the same subject, says, if in designating the boundaries of land assigned

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to individuals, the river is simply named, the right of alluvion shall be presumed. *Puff.* 4, 7, § 12.

In our conveyance, the river being not only named, but the land described as fronting upon it, *frente al rio*, or going as Grotius expresses it, *usque ad flumen*, the right of alluvion, even supposing it a public grant or military assignment, would be necessarily presumed At the same time, we are by no means satisfied, (supposing it still a public grant) that without such description the same presumption would not obtain: such grants or assignments being, according to the principles of construction of the Roman law, most largely to be interpreted in favor of the grantees, on account of the supposed liberality of the prince. "Beneficium imperatoris, quod a divina scilicet ejus indulgentia proficitur, quam plenissime interpretari debemus." *ff* 1, 4, § 3.

In our deed, however, it is not left to mere presumption or legal construction; but is provided for by an express clause, conveying every accessory, whether in fact or law. Our land is sold con todas sus entradas, salidas, usos, costumbres, derechos, y servidumbres, with all its ingresses, egresses, uses, customs, rights and servitudes. Is not this clause sufficiently com-

prehensive? If it convey every right, that of alluvion is of necessity included.

But alluvion is denied to be an accessory, and by one of the counsel it is made land; and Viner is quoted to shew that land cannot be appurtenant to land. 2 *Viner's abridgm* 536. If alluvion itself be denied this character, the right of alluvion unquestionably will not.

We claim the alluvion however, not as having an existence independent of the soil, upon which it is formed, but by virtue of the right of alluvion, incident to all lands bounded by the river. We claim our land as increased by alluvion.

This objection, or at least, the latter branch of it, seems grounded on the difference between the popular and technical meaning of the word.

In common parlance, alluvion is generally spoken of, as land; but in a technical sense, it cannot be so described—from its slow and imperceptible increase it cannot be known in what portion or periods it has been incorporated with the original soil; and when so incorporated, it is not considered as new land added to the old; but, from the date of its incorporation, makes part of the old land; in the same manner, says the Encyclopædia, as the growth of a tree forms part of the tree, and is the property of the proprietor of the tree. If then we have purchased the old land, we have purchased its alluvion,

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which, as it incorporates itself, became a part of it;—if we have purchased the tree, we have purchased the growth of the tree, and as well might the defendant contest, in the one case, our right to the additional circumference of the tree, as in the other, our right to the alluvial increase of the land. But, why is not alluvion itself an accessory to the soil, upon which it is formed? Because, says the defendant, according to the definition of Denisart, an accessory must be connected with the principal, upon which it depends, by its origin, when it has produced it; by its nature, when it can exist separately from it; or by its use, when it is destined to ornament and be of use to it; and alluvion, (not to change the figure of the defendant) is said, squares with neither branch of the definition.

This classification of accessories appears hardly so logical, as that adopted by Heinneccius, into natural, artificial, and mixed; but taking the defendant's own division, is not alluvion still marked with all the features of an accessory? It is not connected with the ancient soil, by its origin, nature, and use? Can it be produced or exist separately from it? Does it not naturally originate, or take its rise, from that part of the shore, that by its configuration, is fitted to collect, form, and retain the numberless particles of soil, that imperceptibly settle upon it? Will it be said, that

they pre-existed separately, floating in the water, before they adhered to the shore? If so, was their pre-existence, in the form of alluvion? Or did they become so, until the shore had collected and incorporated them with itself? Will it be replied, that though alluvion grow upon the shore; yet, as it is through the means of augmentation afforded by the water, it does not owe its origin to the shore, exclusively of all other causes, and therefore is not connected with it by origin, or nature? What would then become of all the other examples, put by the authorities cited on this subject, to illustrate their definition of an accessory? Might not the defendant, on some other occasion, when his argument might require it, assert, with equal accuracy, that a tree, or a blade of grass, is not connected with the soil by origin or nature, because they are dependent for their growth, not on the soil alone, but also on the light and heat of the sun, and the chemical properties of the atmosphere? And, what is more, deprived of which, they must perish; which cannot be said of alluvion, in reference to auxiliary cause of its existence.

But no one link of connection is enough for us, in order to establish the character of alluvion as an accessory, let us ask, if its connection with the original soil, be not a connection by *nature*? What is the meaning of a connection of one thing

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with another by nature, unless it signify a connection, not formed by the art or industry of man? Are not the ancient soil, the water, and the gradual and imperceptible subsiding of the particles upon it, all of them the work of nature? And if two things, both of them the offspring of nature, be brought together and made one by the process of nature, does it not require some fortitude to assert, and gravely adhere to the assertion, that they are not connected by nature? But, as the defendant has been pleased to denominate our claim to the alluvion, upon the footing of its being an accessory to our principal estate, "an extraordinary pretension, putting all regular confutation at defiance," and has condescended to attempt an irregular, as it certainly is an insufficient confutation, and attempted we presume, because he has said, "he would leave nothing unanswered;" let us turn, as we cannot agree, to the authority of civilians upon this subject.

Wolff, after classing accessories into natural, artificial, and mixed, expressly enumerates alluvion, as an accessory connected with the original soil by nature "Dicitur autem accessio *naturalis*, quam natura facit; *artificialis*, quam faciunt homines; *mixta*, adquam natura et industria humana concurrunt." *Ins jur. nat. et gent. p.* 2. *c.* 2, § 242. "*Alluvio* dicitur *ac-*

cessio naturalis, quâ vi fluminis fundo adjacenti insensibiliter adjiciuntur particulæ quædam terræ, ut is successive, sensibile capiat incrementum." *Id.* § 251.

Heinneccius, adopting a similar classification, adduces *alluvion*, as an accessory by nature. Accessio a jurisconsultis accuratioribus in *naturalem, industrialem,* et *mixtam* dispecitur. Sic naturæ solius beneficio debemus fœturam animalium, *alluvionem*, novam insulam, alveum derelictum." 1 *Hein.* 109.

Voet follows also the same division of accessories into *naturalis, vel industrialis,* vel *mixta,* and cites alluvion, as an instance of the *first* class. 2 *Voet, in pand. l.* 41, *t.* 1, § 15. Huberus also makes it an accessory by nature. *Huberi Prælect. vol.* 1. *l.* 2, *t.* 1, § 32, To this effect, see also *Vinnius ad Inst. l.* 2, *t.* 1, § 20. *Comm.*

Renusson, speaking also of what is added to an estate, as an accessory by nature, instances the insensible increase of alluvion. And Pothier, treating of the natural union of one thing with another, gives, as his first example, alluvion. Selon les principes du droit naturel et du droit Romain, ces terres, à mesure que la rivière les apporte et les unit à mon champ, devenant des parties de mon champ, avec lequel elles ne font qu'un seul et même tout, j'en ac-

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quiers le domaine par droit d'accession. *Pothier, traité de prop.* 1, 2, § 3, *art.* 15, *n.* 157. And afterwards he adds, "les alluvions que la mer ajoute aux héritages voisins de la mer, appartiennent aussi par *droit d'accession* aux propriétaires, qui peuvent faire des digues pour se les conserver." *Id.* 159, see also 1 *Domat, l.* 3, *tit.* 7, § 2, *et* 12. Febrero, in like manner, considers alluvion as an *accessory* to the principal estate. 2 *Febrero de escrit. c.* 7, § 2, *art.* 8.

Our own digest recognizes also this principle, and defines the *right of accession* to be the right, which the owners of a thing have to what such thing produces, and to what unites itself to the same, by a kind of accessory incorporation, whether naturally or artificially, *Civ. Code*, 102, *art.* 3, and in a following article, adds, that "the right of ownership gives in general to the owner, by right of accession, all that unites itself with his property. *Civ. Code* 104, *art.* 8.

If we may be permitted the observation, it seems, indeed, to us, that in the present suit, we stand in every respect, upon the same ground, formerly occupied by the defendant, with this trifling exception, that the defendant then claimed the *accessory*, without owning the *principal estate;* whereas we, owning the *principal estate*, only claim the *accessory*.

In this connection, it may be well, briefly to notice the defendant's claim of prescription in his answer, of ten, twenty and thirty years; but in support of this plea, no proof was offered, unless it could be found in the pleadings of Gravier vs. the corporation; which, although interdicted to us, are freely used by the defendant, as a source of convenient reference. But how stands the question of prescription between us? Instead of a shadow of proof in support of the defendant's prescription, though pleaded in form, we have shewn, by positive and uncontradicted testimony, a quiet and continued possession of nearly thirty years.

Bailly, who lived upon our land from 1789, up to his sale to us, in 1816, was almost the whole of that period, viz: from the commencement of its formation, in possession of his batture; nor was his possession merely *constructive*, but an *actual* possession and enjoyment. Witness his *avance*, or little wharf, projected into the river, after which as he expressly testifies, he first began to observe the formation of the batture. Witness his fifty five years' pursuit of his wood trade upon the river, continued throughout his residence upon our land, by which the batture was used from the moment it rose above the surface of the water and was of sufficient consistence for unloading, piling, and

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vending his wood. When questioned as to the alledged fact of the defendant's possession, he answers, " no," (though) he has seen him carrying on works on other parts of the batture, opposite to Girod street. Bruno and Caisergues, interrogated to a similar point, also testify, that no act of ownership, to their knowledge, was ever exercised th re, by Bertrand or John Gravier.—Caisergues, an Alcade of that period, as well as procureur general, and Bruno, residing throughout that period, on the water edge, at the distance of four hundred feet, from the premises in question.—

But, says the defendant, you have not pleaded prescription.—True, not in terms ; but prescription, by our law, is not a plea *stricti juris*, and may be brought forward on the appeal, and in any stage of the cause, *Civ. Code*, 488, *art.* 67. By pleading and shewing therefore a title (itself alone importing a delivery of possession of the principal estate) and an uninterrupted actual possession of it and its alluvion, for nearly thirty years, prescription follows as a conclusion of law.

Will the defendant seek for proof of an adverse possession in his report of the proceedings of the cause of Gravier vs. the corporation ?—If, under the decision of that cause, or otherwise, he did get a possession of any part of the

extensive batture in front of the whole suburb St. Mary (any thing, concerning which, is not in evidence in this cause) would it not be incumbent on him *also to shew*, that he had taken possession of *that* which is in front of our land? And besides, as the general batture is claimed and owned by different proprietors, a possession, *pars pro toto*, can hardly be pretended; or that possession, in such a case, against the proprietor of one part, could be available against the proprietor of another.

With his own report of these proceedings in the same cause of Gravier vs. the corporation in his hand, the record of which, if thought useful to him might easily have been produced in a complete state, the defendant has made a feint of shewing, that the front proprietors generally, as intervening parties, were barred by the judgment in favor of Gravier vs. the city. If the defendant had hazarded the production of the record itself in that cause, among other things, that would have amounted to evidence, not very serviceable to his interest, it would have appeared, that the intervening parties (in a petition of intervention, by the way, perhaps in itself essentially a nullity) did, with the formal leave of the court, and before the trial of the cause, discontinue their suit of intervention, and that discontinuance was accordingly recorded.

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Finally, the defendant has endeavored to deprive us of the alluvion in front of our land by a kind of syllogism, to wit : by endeavoring to shew by a profuse exhibition of learning, that an *ager limitatus*, or limited estate, does not enjoy the accessorial right of alluvion ; then by asserting the fact, that our land is *ager limitatus*, *ergo*, that we cannot, by virtue of our asserted title, from the very nature of it, lay claim to the right of alluvion.

While at the very threshold, let us ask one short question, where is the defendant's foundation of facts, upon which so vast a superstructure of learning is erected ? Has he shewn, in point of fact, that we do not go to the water's edge ?

But to begin, the defendant, in reasoning on this head, relies upon the following text in the digest ; and endeavors to support his construction of it by the opinions of sundry commentators.

" In agris limitatis jus alluvionis non habere constat. Idque et Divus Pius constituit. Et Trebatius ait, agrum qui hostibus devictis ea conditione concessus sit, ut in civitatem veniret, habere alluvionem, neque esse limitatum ; agrum autem manucaptum, limitatum fuisse, ut sciretur, quid cuique datus esset, quid venisset, quid a publico relictum esset."

This text, which on a former occasion, the defendant considers, as having put to flight a score of adversaries (*Gravier vs. the corporation*, 50, *note*,) leads to the following inquiries.

1. What is *ager limitatus*, or a limited estate? And whether, upon the principles of any of the commentators upon this text, our land can be brought within this description?

2. Whether the text does not rest exclusively upon the authority of the constitution of the emperor Antoninus Pius—or have any other application than to the distribution by the Roman government of *military* lands—and be not in derogation of the general or common law of Rome?

3. Whether it have ever been incorporated into the Spanish code?

What is *ager limitatus* or a limited estate? and whether, upon the principles of any of the commentators, our land can be brought within this description?

It is contended by the defendant;——

1. That all lands which are conveyed by artificial lines of mensuration, or by fixed boundaries, are, as the term imports, *agri limitati*, whether the contents in superficies be set forth or not.

2. That all lands, which are conveyed by

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measurement or quantity, come under the same denomination, and for the same reason; because their lines of measurement must be drawn to ascertain their square contents.

The defendant is here going over his former ground; but we trust, we have abundantly shewn, that our deed, in positive and express terms, gives us the river as a boundary. Has any authority been produced to shew, that there can be *ager limitatus*, a limited estate, when in point of fact, the water, and not something else that is short of the river, is on that side, the boundary of the estate? For has it not been over and over again admitted, as settled law, by the defendant himself, in the course of his argument, —admitted as the law of Rome, and Spain, and France, and England, that the alluvion formed upon the shores of navigable rivers, belongs to the proprietor of the adjacent land? And has not the defendant endeavored to shew that this pervading principle lies deep in the foundation of the law of nature;—in the reason and nature of things; and has he not endeavored to trace this very last root of the principle to this; that, as the alluvion is increased by imperceptible degrees, it is impossible to tell what as added at one time, and what at another;—and that, therefore, it would be impossible to find any other person than him, upon whose land it was form-

ed, who would have a right to claim it? Though we think, we have succeeded in tracing the principle to a better root; in shewing, both by argument and authority, that it is because of the obvious equity, that he, who is exposed to the loss and the charge of the encroachments of the river, shall enjoy the gradual imperceptible accessions it may bring.

How then can it be contended by the defendant, that this law of limited estates can be applied to trench upon our accessorial rights, if we be bounded in front by the river? If, in point of fact, we be not bounded in front of the river, we make no pretensions to the alluvion: for it is, by its nature, an accessory.

Here we cannot but notice the ingenious composition and confusion of terms by the defendant in the outset of his reasoning. The respective phrases, "artificial lines of mensuration and fixed boundaries," are evidently put as equivalent to each other. By fixed boundaries are, we presumed, meant, though not expressed, artificial boundaries; for, taken as intended to signify all certain *natural* boundaries, the two phrases are not equivalent to each other. Now, if the defendant would exclude from the right of alluvion, all lands sold merely by artificial lines of mensuration, he would at one sweep deprive of this right all lands granted on the Mississippi.

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For, we venture to assert, that they are all granted with reference to lines of mensuration. They are granted so many acres front, upon so many deep, as appears by the plan, &c. of survey; making in all cases, of necessity, by the very terms of the grant, a regular *mathematical figure.* Now, the lines, to enable the grantee to run from one *course* (now by the defendant called boundary) to another, to ascertain the breadth of front, and the length in rear, are *artificial lines.* Was, ever any line run by a surveyor, in the exercise of his art, other than an artificial one? Now, if land granted or sold, according to the plan of a surveyor, have never, until now, been denied the right of alluvion, (if the grant itself gave in clear terms a boundary on the river) on what new principle can it be contended, that ours be made an exception to the general rule? We must flatter ourselves, therefore, that the grant or sale of land by, or with reference to, *artificial* lines of mensuration, does *not*, by the mere import of the term (as the defendant assumes for the basis of his argument) in any case where the grant or sale itself expressly gives a boundary on the river, constitute the land *ager limitatus;* and if not, the defendant's whole argument, on this head, is but a castle in the air, the baseless fabric of a vision; for it wants the essential foundation of fact, of fixed boundaries

—or artificial lines of mensuration—or a certain something, be it what it may, else than the land, interposing between it and the river—so that this certain something else, beyond these fixed boundaries, or artificial lines of mensuration, instead of our land, will touch the water, and be the parent of alluvial increase.

Even, if the authorities relied on by the defendant, would support his doctrine of *ager limitatus*, (and we will undertake to shew that they do not) still the immemorial usage of the country, in this respect, in relation to lands lying on the Mississippi, would make the case of our land an exception.

Let us now proceed to examine some of the defendant's authorities to this point.

To begin with Grotius, the authority upon which the defendant seems chiefly to rely. This author, on the subject of alluvion, considers three classes of land, as known to the ancients: the first two of which, he thinks, have not this accessorial right. Our land has the luck of being ranked by the defendant, in *both* of these classes, who has thus endeavored, by a kind of double disability, to deprive us of this right.

This triple classification of Grotius is as follows. 1 *Agrum divisum et assignatum;* including *agros limitatos* (limited estates) so cal-

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led, from having artificial limits. 2 *Agrum assignatum per universalitatem ;* lands assigned in mass, and contained within a certain measure. 3 *Agrum arcifinium :* lands having natural boundaries ; as rivers, &c. To the last of which only he allows the right of alluvion. *Grotius* 2, 3, 16.

Grotius, by the way, is here speaking of public and military lands, distributed by the Roman government, as is evident both from the context, and very terms of the classification, as well as from the following authorities 1 *Gronovii not. Puffendorff* 4, 7, 11, *Barbeyrac's note*, *Frontinus de re ag.* 217 —The correcteness of his classification has also been impeached ; and he has fallen, in this respect, under the lash of his own commentators, Gronovius and Barbeyrac.

Admitting however the correctness of it, under what head ought our land to be placed ? Having in front the river, a natural boundary, can it fall under the first division, which is confined to lands, having *artificial* limits ? Will it be better received into the *second*, of land assigned by the government in mass ? Must it not then, of necessity, take its rank in the *third* divistion, as *ager arcifinius ;* entitled by fact, and also by this classification, to the right of alluvion ?

Voet, another authority adduced by defendant, in the very next sentence, succeeding that

quoted by him, for the purpose of shewing, that limited lands do not enjoy the right of alluvion, expressly states, that this exception does not extend to land bound by a river 2 *Voet, in pand. l* 41, *t* 1, § 15, atque hinc illi quibus agri concessi *usque ad flumen* jure alluvionis gaudent, tamquam possidentes agros *non* limitatos, ut in agris ad Mosam et Isaram sitis, olim in Hollandia judicatum fuisse commemorat Hugo Grotius: *l.* 2, *c.* 8, § 12.

A word or two upon this authority. Voet is here commenting upon the very text in the digest, upon which the whole doctrine of limited estates depends; and the above comment shews pretty clearly his apprehension of it; that it does *not* apply to lands, bounded on the river, the proprietors of which are left to enjoy the right of alluvion—jure alluvionis gaudent; and, as he afterwards adds, "tanquam possidentes agros *non* limitatos"—In other words, notwithstanding the *artificial* lines of mensuration, or the calculation of their superficial contents, if the estate touch the river, if it be *frente al rio*, — or go, as Voet says, *usque ad flumen*, the artificial measurement yields to the natural boundary—the estate becomes an unlimited one, invested with all its alluvial rights —The instance also adduced by him of the decision to this effect in relation to lands in Holland, formerly si-

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tuated on the Meuse and Isere, loses none of its force, when applied to those lying upon the Mississippi.

To this effect, and even the stronger, is the authority of Huberus, contained in the succeeding part of the sentence quoted by defendant, where he adds, "nam si possideantur agri simpliciter usque ad mare vel flumen, tum alluvio obtinebit, etsi venditores numerum aliquem jugerum profiteantur." *Huberus* 1, 2, 33.

But to leave commentators and come to this formidable text; let us next inquire; 2, whether it do not exclusively rest, as we think we have successfully urged, upon the constitution of the emperor Antonius Pius;—and have any other application, than to the distribution by the Roman government of *military* lands, and be not in derogation of the general or common law of Rome.

The defendant contends, that it was previously known to the Roman law, at least as far back at the time of Julius Cæsar, and this he infers, from the phrase, *et Trebatius ait*—Trebatius having been the contemporary of that emperor. And to give greater weight to the *dictum* of Trebatius, thus called in aid of the imperial constitution, we are reminded, that he was the preceptor of Labeo, the founder of one of the sects of Roman advocates.

But we learn from the digest, that notwithstanding his reputation and connections of his works compared with those of other jurisconsults, *minus frequentantur*, were less consulted; and also that many of his laws were rejected. *ff* 1, 2 § 45.

The authority of Trebatius, however, whatever may be its weight, does not by these means second the defendant in his interpretation of the text, nor support this reference of its antiquity; on the contrary, Trebatius is here speaking (as is evident on a mere inspection of the text) not in general of the question, whether limited estates be, or be not, entitled by their nature, to the enjoyment of alluvial accessions; but exclusively of *military* lands, granted by a conquered enemy for the purpose of forming a Roman city, and which, he says, enjoyed the right of alluvion, and are not limited. His *dictum*, so far then from coinciding with the constitution of Antonius Pius, is put rather as a kind of exception to it.

This difficulty the defendant ingeniously attempts to get over, by proposing to reform the punctuation of the text, in the following manner, viz: by striking out the period, after the word *constituit*, and inserting in its place, a comma; and putting a period in the room of the comma after *et Trebatius ait*: and then, by employing

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et conjunctively, to convert, in this manner, into one sentence, the first and beginning of the second sentence. Thus, he supposes, will be also grammatically located one of the conjunctions, which, according to the present reading, the defendant deems superfluous. The Latin conjunctions seem to lie as much in the defendant's way, as the Spanish prepositions; and he has an equally happy felicity in getting rid of them. But may we not leave the punctuation as it stands; having at least a presumption in its favor, and consider *et* employed *not* conjunctively to make one sentence of two, by the addition of one idea to another, of the same kind; or one authority in support of another, to the same point; but as an adversative conjunction, to introduce a new sentence, and to mark some opposition between it and the preceding one; and properly translated into English by the conjunction *yet*. And does not the sense obviously require this construction? "In agris limitatis jus alluvionis non habere constat. Idque et Divus Pius constituit. Et Trebatius ait, agrum qui hostibus devictis ea conditione concessus sit, ut in civitatem veniret, habere alluvionem neque esse limitatum," &c. "It is certain that in limited estates, the right of alluvion does not take place. And this has also been decided by a constitution of Antonius Pius. And Trebatius says,"

—What?—The *same* or a *different* thing?— That lands, granted by a subdued enemy upon the condition of becoming city, *have* the right of alluvion, and ought *not* to be considered as limited, &c. It is manifest, that this sentence, beginning *et Trebatius ait*, should be translated, "yet or though Trebatius says."

But go the length of adopting the reformed punctuation, proposed by the defendant, by taking away the period after *Divus Pius constituit*, and replacing it with a comma; and inserting a period after *et Trebatius ait*, and deposing the comma—and what then becomes of the remainder of the sentence? It is set loose from the rules of syntax, and the substantive *agrum* is found in the accusative case, without any verb to govern it.

For our translation of the conjunction *et*, we need but refer to Entick's or Ainsworth's dictionary.

This text must, therefore, notwithstanding the emendatory criticism of the defendant, be left, so far as it is to be viewed as a general law, to rest singly upon the constitution of the emperor Antonius Pius.

But has this text in truth any other application, than to the distribution by the Roman government of military lands?

It is not to be denied, that by the general or

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common law of Rome, founded on the broad and equitable principles of *natural* law, the right of alluvion on rivers belongs to the private riparious proprietor. "Preterea, quod per alluvionem agro tuo flumen adjecit, jure gentium vobis acquiritur. Inst. 2, 1, § 20, *ff.* 41, 7. § 31.

The text in question evidently does not amount to a repeal of the general or common law of Rome, on the subject of alluvion; for besides, that it is too compendious and solitary to be supposed to operate so great an effect, its terms, though general, still are expressly applied only to *limited estates.* But the text itself does not give a definition of limited estates; nor contain within itself any general principles, or particular rules, by which they are to be distinguished from other lands. All lands that are granted or sold by the state to individuals, or transferred from one individual to another, are, in one sense, *limited;* that is to say, the grant or conveyance shews them to be confined or limited within certain boundaries, either natural or artificial, which separate and distinguish them from lands of other individuals, or of the state. The text cannot be said to have application to lands, in this sense limited; else its application would be universal; and it would amount to what it is not, nor is pretended to be, an absolute total repeal of the whole general or common

law of alluvion. The phrase *limited lands* having then a technical signification, to what class of lands was its application confined? Though the first sentence of this section of the digest be expressed in general terms, and, if standing alone, might be taken in an independent sense, yet the context requires, that the first sentence (in agris limitatis jus alluvionis non habere constat) should be read with reference to the ensuing ones. The second sentence, connected with the first by a copulative conjunction, assigns the authority for the text it contains; idque et constituit Divus Pius. The third (connected in sense with the two preceding ones, by a conjunction used adversatively) in stating, on the authority of Trebatius, an exception to the rule in favor of cities to be founded, speaks clearly of the kind of lands in question; to wit, "taken from the conquered enemy;" and in giving the reason why individuals among whom they were divided, do not obtain with their shares a right of alluvion, by an allusion to the mode of distribution, plainly shews them to be public and military lands.

If, therefore, we were called upon to judge from the naked text, unassisted by the lights of commentators, should we not reasonably infer, that lands of this description were deprived of the right of alluvion, not in virtue of their being

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confined by *artificial*, instead of *natural* limits; but from the peculiar mode of assignment on the one hand, and reservation on the other.

With the Romans, it was an usual practice to partition out among their veterans, conquered or confiscated lands; and to this, it is believed is confined the law of *ager limitatus*.

This is apparent, not merely from the classic authors of ancient Rome, but from a succession of commentators.

To begin with the gloss, a work comprising up to its date, every valuable note and scholium upon the Roman law—the appearance of which superseded all former glosses—and which still remains an unshaken authority—and a monument of the industry and learning of its authors.

After giving the text (in agris limitatis, &c.) the case put by the gloss in exposition of it, is, as follows. "¶ Casus. Jus alluvionis non habet locum in agris militibus assignatis. ¶ Secundo dicit; hostes, devicti a Romanis, agrum ut esset civitatis Romanæ dederint. Dicitur quod in isto agro habet locum alluvionis. ¶ At si ager hostium sit captus à militibus, et is militibus sit assignatus, iste ager dicitur limitatus; et ideo in eo non habet locum jus alluvionis. *ff.* 41, 1, § 16. *Gloss*, 1741.

But the text is here divided, as marked, into three parts or paragraphs. The constitution of

the emperor Antonius Pius, contained in the *first*, is explained as follows. *Case.* The right of alluvion does not take place in military lands. The *second*, comprising the dictum of Trebatius, speaks of enemies conquered by the Romans (and who) gave land for the purpose of its becoming a Roman city. It is said, that in this land the right of alluvion takes place. The *third*, taking in the remainder of the sentence, is thus explained: but land of the enemy, taken by soldiers, and assigned to *them*, is called limited, and therefore does not enjoy this right.

This general exposition of the gloss seems sufficiently conclusive upon this point; but its subsequent annotations upon the different phrases in the text, leave no room for doubt. In these is given a definition of *ager limitatus* and *ager non limitatus*, of limited and unlimited estates.

Text. In agris limitatis. Gloss;—id est militis assignatis; vel, id est, inter veteranos divisis; secundum R. "Limited lands, that is—lands assigned to the soldiers; or, according to R. (probably meaning the commentator Rogenius) divided among the veterans."

Ager non limitatus, under the words of the text, neque esse limitatum, is afterwards explained, viz: "land not assigned to the soldiers; id est, non militibus assignatum. And

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the phrase in the text, agrum manucaptum, is defined in the gloss, to be land taken by the *soldiers* and assigned to *them;* and therefore not enjoying the right of alluvion.

The fullness and particularity of the gloss, upon this text, leaves therefore no doubt of its exclusive application to military lands Have the Spanish commentators adopted a different construction ?

Rodriguez referred to by the defendant, is perhaps one of the most respectable and distinguished. But his encomium will come better from the mouth of the defendant. "His digest," says the defendant, "purports in a short commentary upon every law, and introduction to every title in his translation of the digest—to give information of the agreement and discordance of the two codes. On the law in question, he merely reports its substance: from which we should infer, that it is law in Spain."

What is the substance of this law as reported by this valuable commentor ? Let him speak for himself.

In his commentary upon this text, he says, " el derecho de alluvion que dice el parafo de la instituta y la ley de partida no tiene lugar, en los predios que se senaralon a los soldados, como expresa esta ley. 15 *Rodriguez* digest, 41, 1, § 16. Part. 3, 28, 7. The right of alluvion mention-

ed in the institutes and the law of the partidas does not take place in lands assigned to soldiers, as this law expresses."

The commentary of Rodriguez is then in complete unison with that of the gloss; both concur in confining this principle exclusively to military lands. Vinnius is also boldly appealed to by defendant; but to us he speaks a very different language: in the very passage referred to, he tells us, that, in allusion to this very text, *ager limitatus* is land taken from the enemy; *ager limitatus* dictus fuit, *ager ex hostibus* captus; and distributed by the Roman government. *Vinn. ad Inst.* 2, 1, *text* 20, *comm. fo.* 176.

After this it will be thought almost a supererogatory task, to produce or examine additional authorities in support of this construction. We will therefore briefly refer to that section of Grotius, already noticed containing his threefold classification of lands; in the first of which, he places *agros limitatos*. This section, taken in connection with the notes of his two commentators, Gronovius and Barbeyrac equally shews that *agros limitatos* were military lands.

Gronovius *(note 57)* describes this class of land to be that assigned to veterans and colonists. Divisum et assignatum. Qui veteranis et colonis per centurias et jugera modo certo adscripti datus est. Frontinus, cited by Grotius in the

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margin, says nearly the same thing. Ager divisus et assignatus est coloniarum. *Front. de re agrar*, 277. For the use of the expression *ager limitatus*, Grotius refers to the jurisconsult Florentinus, meaning probably Franciscus Accurfius, author of the gloss, a native of Florence, and from that circumstance, called Florentinus; and whose definition of *ager limitatus*, as well of *ager non limitatus*, in the gloss we have just exhibited—*Vid.* 5, *Heinneccius*, *El. jur.* 2, 1, § 358. *Puffend.* 4, 7, § 11, § 12. *not. Barbeyrac.*

But lastly, if the first sentence of the text, *in agris limitatis* be detached from the other parts, and suffered to be taken in an insulated and independent sense;—and even if (contrary both to reason and authority) under the term *agros limitatos* other than merely ancient Roman military lands be intended, still it cannot be urged by the defendant as authority, until shewn to be recognised, by the Spanish code.

The Roman law has no intrinsic authority in Spain; on the contrary, forensic use of it was formerly interdicted under heavy penalties. *Fuero jus.* 2, 1, 8. 1 *part.* 45, *Part.* 1, 1, 15, *Part.* 3, 4, 8, *Aut. accord* 2, 1, 1. *Nuev. Recop.* 2, 1, 3. Now indeed it is permitted, in certain cases, to be cited, viz:—where the Spanish law

is silent, or where the Roman law coincides with, or is explanatory of it; or where it is founded on natural law or reason; and in these permitted cases, it is not cited as law, but as containing the opinions of wise men.

"Las civiles no son en Espana leyes ni deven llarmarse sino sentencias de sabios, que solo pueden sequirse en defecto de lei, i enquanto se ayunden al derecho comun, i no al de los Romanos, cuyas leyes ni las d mas estranas ni deven ser usadas ne guardadas."—*Aut. accord.* 2, 1, *Nuev. Recop.* 2, 1, 3. *Berni, Inst.* 8.

The prohibition of the Roman law in Spain remains therefore still unrepealed; though it is not denied, that the Spanish legislators have enacted at different times, into its various codes, such of its principles as were found analogous, to the situation of Spain, deriving their authority solely from such enactment. Thus, upon the subject of alluvion, Spain has transplanted from the Roman code into her own, the general principle, as one founded in nature and reason, and has by positive statutes given to the adjacent proprietors the right of alluvion. *Part.* 3, 28, 7.—Thus far then, and no farther, has Spain legislated upon this subject; and it is now incumbent upon the defendant, if he wish to avail himself of the exception as authority, to shew

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(which is not pretended) that it has been specifically enacted.

How is this difficulty attempted by the defendant to be surmounted?

He first wishes to infer the adoption of the exception of *ager limitatus*, into the Spanish code, by citing some authorities, which we shall presently notice.

But when it is manifest, that the principles of the Roman civil law, so far as they have been introduced into Spain, have not been introduced by any sweeping clause, adopting generally, and by way of reference, the body of the Roman code—subject only to exceptions in favor of such subsequent laws of Spain, as might be found to conflict with it—but so far as they have been made a rule of action in Spain, they have been introduced under the form and authority of Spanish ordinances.—We are not permitted to infer, from the adoption of one part of the Roman code, the adoption of another, but the contrary.

If, in the face of Spanish law, we were permitted to resort to inference, in order to determine what has been adopted and what omitted, we think it can be shewn, that the inference of the defendant is forced and unnatural.

This inference the defendant attempts to draw first, from the commentary of Rodriguez

upon this text, already noticed. Of him, the defendant says, he merely reports its substance, from which we should infer that it is law in Spain, inasmuch as it fell within his plan, to point out the agreement or discordance of the Roman and Spanish codes.

But the very commentary itself destroys the inference, attempted to be drawn from the supposed silence of the commentator. Though already quoted, we beg leave, in this connection, once more to invite to it the attention of the court. Translated, it reads as follows: "the right of alluvion, mentioned in the institutes, and a law of the Partidas does not take place in lands assigned to soldiers, as this law expresses." 15 *Rodrig.* 41, 1, 16.

We freely yield to the defendant, all the advantage he derives from the authority. Whatever interpretation be put upon it, his exception evidently applies exclusively to military lands, in which class the plaintiff's land, though the subject of much legal warfare, has not yet been ranked.

The laws of the Fuero Real are next introduced, for the purpose of referring to a note, the joint production of Alonzo Dias Montalvo, and a learned doctor of Salamanca, said by the defendant, expressly to declare, that the *ager limitatus* should not be entitled to the increase

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by the rising of an island opposite to it. *Fuero Real*, 3, 4, 14.

The law of the Fuero Real referred to treats of the partition of a newly formed island, in the middle of a river, separating different riparious proprietors, and adjusts their claims to this new acquisition in proportion to the extent of their respective fronts. It is not pretended, that any thing is here said in relation to limited or unlimited estates ;—it is not the text itself, but the opinion of these learned commentators, as contained in note (d) by which the law in *agris* is to be introduced into Spain. But upon examining this wonder-working note, we do not find any such opinion expressed by them ; in the conclusion in it, they indeed inform us, that Azo (an Italian jurist of the thirteenth century) held such an opinion ; but without any marks on their side of approbation or adoption : and the reference to the pandects subjoined, in which much virtue is supposed to reside, to us appears the work of Azo ; but whether they or Azo have the credit of this reference, one thing is certain, that the section in the paudects referred to, is as silent, as the Fuero Real itself, upon the subject of limited lands. *Loc. cit. ff. de flumin. l.* 1, 1 § *insul.*

The ponderous work of Covarruvias is next put in requisition (2 *vol. p.* 500, *no.* 1.) But

the learned bishop is not there speaking upon the subject of alluvion, but considering the question, in case a town, granted to an individual, should subsequently be increased by new buildings and inhabitants; when, and how far the jurisdiction of the government shall be exercised over such subsequent increase. And we confess ourselves unfortunate in missing both in the text and notes, any passage in support of the purpose for which it was adduced.

The mere fact of the law in *agris* being referred to by way of argument or illustration, by Spanish writers, either lay or ecclesiastic, seems to us to afford but slender proof of its incorporation into the Spanish code. By the same process the Mahomedan law, noticed by sir William Jones, might be converted into English law, and the Gulistan of Sadi, favorably cited by Puffendorf, become authority in this cause. *Puff. de jur. nat. & gent.* 5, 2, 1.

The opinion also of Covarruvias, as it respects jurisdiction over the subsequent increase of a town, granted to an individual, seems little analogous (so far as the two things can be compared) to the principles of the Spanish law, in respect of the subsequent alluvial increase of lands; which expressly declare, that the amelioration of the thing bought, will be for the benefit of the buyer, even though it had not yet pas-

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sed under his power; and in the partidas, the very case is put of a field, thus increased by alluvion. *Part.* 5, 5, 23,

Not having the good fortune to possess or procure the Curia Felipica Illustrada, and the passage referred to by the defendant, not being extracted, I am unable to conjecture its degree of pertinence or force. In the Curia Felipica itself, I am not aware, that the subject of alluvion is introduced. But, giving the defendant credit for the full weight of this authority —would it not be going a little too far—when the law in *agris* has been refused admission into the various Spanish codes;—when we look in vain for it in the nueva recopilacion, autos accordados, siete partidas, ordenamiento real, fuero real, and leyes de estilo, that it should be received as such upon the faith of a single and unsupported note of a posthumous publication.

From this brief view of the defendant's authorities we feel safe in asserting, that if the existence of the principle of *ager limitatus* be permitted to be inferred into the Spanish law, nothing has yet been shewn to warrant such inference.

Is the defendant better founded, when he attempts to infer it as a natural consequence of the general principle ?

In what sense is it to be so inferred? The general principle is, that owners of all lands bounded by navigable rivers, have, as an accessory, the right of alluvion; now, if by limited lands, the defendant mean broadly the mere converse of the proposition, viz: that lands *not bounded by the rivers* do not enjoy the right of alluvion, what does the inference amount to but the mere begging the question of fact? And is it not reasoning in a circle to say, that our deed does not notwithstanding express words to that effect, convey to us a boundary upon the river, because our land is *ager limitatus*;—and it is *ager limitatus*, because it is land not bounded by the river?

II. Has his (Poeyfarré) title, as riparious proprietor, been by him conveyed to Bailly, and by the latter to plaintiff.

Upon this question I shall not long detain the attention of the court. From the inspection of the respective conveyances, it is obvious, that the land was successively transmitted, with all its original rights; and if Poeyfarré by virtue of his title, became a riparious proprietor, in like manner did Bailly, and afterwards the plaintiff, become riparious proprietors;—nothing was excepted or reserved in either of the instruments of sale.

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The defendant lays hold of the expression *frente*, employed in the two latter deeds, instead of *frente al rio*, used in the first, as restrictive of our front boundary. But the testimony puts this objection to rest; *face*, the French translation of *frente*, our witnesses, as well the record of French concessions and of land claims, shew, was indiscriminately employed, with *face au fleuve*, in designating a front boundary upon the Mississippi.—If the parties intended to establish not a boundary on the *river*—but on the *road*, for instance, as the defendant contends, why did they insert in their deeds of sale, drawn off by an experienced and skilful notary—expressions invariably and immemorially used to give a river boundary?—Why not at once name the *road*, *frente al camino*, or *face au chemin?*

It is objected also by the defendant, that we are not in possession, and have not so declared by our petition. But the petition is grounded on the very fact of possession and ownership; and we complain, that the defendant and others have given out and pretended to be the owner, and possessors. It will not be contended, that any ceremonies, like livery of seizin, or investiture by twig and turf, need be superadded to the delivery of a title, in order to a legal possession, *Civ. Code* 380, *art.* 29. Nor will it be contended, that an actual or continued residence

upon the spot is necessary for this purpose; nor that the plaintiff cannot possess by his tenants;—nor that the possession of the principal estate does not imply that of its accessories.

In respect to the right of the riparious proprietor to the alluvial increase of his land, the law is both settled and admitted, and a reference to the following authorities perhaps unnecessary. *Febrero de escrituras*, 7, § 11, *n* 81. 3 *Part.* 28, 6—8, *ff* 41, 1, § 1. *Inst.* 2, 1, § 2. *Rodriguez in ff.* 41, 1, § 1 & 16, 5 *Hein El. jur.* 2, 1, § 358, 2 *Voet. in pand.* 41, 1, § 15 *Front. de re agr.* 217, *Wolff's Inst. jur. nat. & gent.* 2, 2, § 245—251, 1 *Domat*, 3, 7, § 12, 1, 2 *Denisart*, 74, *verbo alluvion*, *Puffend* 4, 7, § 12, *Civ. Code*, 102, *art.* 3, 106, *art.* 13, *Blacks. Comm.* 261, 3, *Mass. T. R.* 352.

Thus have I gone through the two principal questions arising in this cause;

1. Did Poeyfarré, by virtue of the conveyance, from B. Gravier and wife, become the riparious proprietor of this land?

2. Has his title, as such, been by him conveyed to Bailly, and by the latter to the plaintiff?

In discussing the first question, I invited the attention of the court to the two clauses of the deed, upon which rested the title of the plaintiff

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as riparious proprietor; shewing that his land was purchased *frente al rio*, and con todas sus entradas &c. and the first expressions, being used absolutely, gave the river as a front boundary; and that the second conveyed all and singular its accessories, whether in law or fact.

Under this head, we have also shewn, that the distinction attempted by the defendant between the two phrases *face au fleuve* (translation in French of *frente al rio*) and *face sur le fleuve*, was unsupported either by grammar or use;—and that they were indiscriminately employed in grants and deeds of land upon the Mississippi, to give the river as a boundary.

That words of conveyance were to be taken in their usual and known signification; and parol proof was admissible to shew what is their usual and known signification.

That the defendant's first objection, viz: the existence, at the period of sale, of a batture already formed in front of the plaintiff's land was not founded in fact, and that the contrary was proved;—that the evidence, urged by the defendant of its previous existence, from its being found figured on the plan of survey and the other plans, instead of authentic proof of such a fact, amounted to but *presumption*—weak in itself, and still further enfeebled by the character of those plans—and wholly overthrown by the

positive, concurrent, and uncontradicted testimony of three old and respectable witnesses:

In answer to the defendant's second objection, that B. Gravier, prior to his sale to Poeyfarré, had made a plan of his plantation, as laid off into a faubourg or town lots, in which plaintiff's land was designated as included in lot no. 7—and the whole bounded by streets, we have shewn, that it was not only *not* published at the period of sale, but that there was no proof whatever, arising from the plan or otherwise, of its being ever carried into actual execution, by survey, or subdivision of his plantation, according to a projected plan;—much less of its being incorporated as a suburb of the city. That it could not have been executed at the period of sale, appeared conclusively from the following reasons. 1. Because plaintiff's land, said to be included in lot no. 7, was cut off from the three streets by narrow strips of land, of unequal breadths; shewing, by the relative directions of the lines, that it was sold according to a plan, very different from the projected one of the then uncreated faubourg; and that no purchaser, in his sound senses, would have purchased a square in a city, with the exception of only *just so much land*, as would shut him out of three streets in four.

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2. Because, in describing the breadth of the front, no *streets* are mentioned in the deed, plan, or *proces verbal* (as would have been the case, had they then existed) as marking the beginning, and end of the front line; and because, most obviously, this land would have been designated *as part of lot no.* 7, and been called a lot, and not merely, as in the deed, a piece of land.

That the plan also of this faubourg appeared from inspection, a mere projet; or, as termed by its maker, a *first sketch or draft*, exhibiting neither the *proces verbal* nor operations of the surveyor; was made at the request, in the house—and principally in the hand writing of B. Gravier; not deposited, as is usual, in the office of a notary, but kept in his own possession, and afterwards altered at his pleasure. That this, as well as the reduced or second plan (the latter from a marginal note made on it by the surveyor, of the date of 1796, shewing even at that latter period, it had not yet been executed) being the separate and then unpublished acts of B. Gravier, the original vendor, or of the surveyor general, his agent, could not affect our title.

Under the *defendant's third objection*, that the land was sold according to a plan, bounding it

by the public road ; we considered, in what connection, and how far, this plan was to be taken with the deed—that the words *frente al rio* giving, as we contended, a boundary upon the river, were words at once of conveyance and of description and of location—that they were technical, clear, and used in an absolute sense ;—that being already certain, they did not need elucidation, and could not be made more certain by reference to the plan ; which was referred to only for greater certainty ; much less could their signification be altered by the surveyor's *proces verbal* of his operations—a reference properly enough made in a question of doubtful location, but wholly inadmissible to destroy the effect of words of conveyance of known and settled signification. We also shewed by testimony, that by the practice of surveyors and usages of the country, the *front lines* of all plans of land upon the Mississippi, were drawn, as in our plan, inside of the road and levee, not to indicate the *boundary* of the land, but to ascertain the breadth of its front ; and are not called lines of boundary but solely of admeasurement.

The fourth objection of defendant, that the plaintiff's land makes by the plan a regular figure, the regularity of which by extending its front to the river, would be spoiled, we have

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shewn to be founded upon the gratuitous assumption of the fact of the identity of the lines of admeasurement and boundary; and that all lands upon the Mississippi by their plans, and if their plans were lost, by the very terms of concession, make *regular mathematical* figures without restraining their right of alluvion.

The fifth objection of the defendant, viz: that the calculation of the superficial contents of the plaintiff's land, turned it into a limited estate, and destroyed the right of alluvion;—we have answered by shewing,

1. That the land was sold *per aversionem*, and not *ad mensuram*.

2. That the calculation of the surveyor gave only the superficial contents of what he *actually* measured;—that the surveyor is never called upon to measure the road and levee; and that no batture then existed to be the subject of measurement; and even had it then actually existed, would not, according to the usages of the country and practice of surveyors, been measured; that the mere act of calculation was immaterial; that wherever the length and directions of the lines of a figure were given, they afford the sum of their contents, with all the certainty of a mathematical theorem;—that the principle of the defendant, even if shewn to exist, was not ap-

plicable to lands in this country, where the front lines of the plans were not boundary lines.

In answer to the sixth objection of the defendant, viz: that the interposition of the public road, divested the plaintiff of his right of alluvion;—we endeavored to shew, that the whole question on this point turned upon the mere fact of boundary, already discussed; inasmuch as the alluvion belonged to the *owner of the soil*, upon which it was formed.—if, therefore, we purchased to the river, *frente al rio*, we were entitled to the alluvial increase of our land; and that the public road running *through* it did not divest us of that right; and, in no event, could we be so divested of the alluvion, unless the road went (which was not pretended) to the water edge; in which case, the alluvion would then belong neither to the plaintiff nor defendant, but to the public, in whom was vested the right of soil.—That in our case, the alluvion was not added to the public road, but to the banks of the river, belonging the plaintiff, as holding *frente al rio*, front upon the river. That the fact of a front boundary upon the river also answered the defendant's 7th objection; viz: as to the supposed intervention of the levee. By conveying to us a front on the river, the levee was necessarily included in the conveyance.—

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That this land was unrestrictedly sold with all its chances of loss and of gain;—and that on this point, it was in evidence, and conclusive, that after the sale the vendor and his heirs were wholly delivered from the burden of maintaining the levee, which thenceforward was supported exclusively by the vendees; that this charge, of itself, constituted a riparious proprietor. That the principle, upon which the right of alluvion was founded, was not, as the defendant contended, on the manner or degree of increase making it impossible to find another owner than the adjacent proprietor, or the mere right to have always the river as a boundary, but clearly on the better ground of equitable compensation; to wit: that he, who is exposed to the charges, and chance of loss from the encroachments of the river, ought reciprocally to have the benefit of the change of increase. That if the river, instead of augmenting our land, had washed it away, we could not call upon the vendor or his heirs to make good the deficiency; neither ought we to be held good to refund the increase;—to the objection we had no right to claim the alluvion, because not expressly conveyed in our deed;—we have shewn in *point of fact*, it did not then exist; and even if it had actually existed, *in point of law*, that it was not necessary to be expressed, in order to be conveyed; that, as an

accessory to the principal estate, it would pass by the general words of conveyance; that it was not, however, in our deed, left to mere legal construction, but provided for by an express clause, conveying every accessory in law or fact; todas sus entradas, &c.

To the objection that alluvion was not an *accessory;* the contrary was shewn both by reasoning and authority.

In discussing the defendant's eighth objection, viz: that the plaintiff's land was *ager limitatus* or a limited estate, and therefore debarred from the right of alluvion; on an examination of the section of the digest adduced by the defendant, *in agris limitatis*, &c. we have shewn, both from its context and a variety of commentators and civilians,

1. That the technical signification of the phrase *ager limitatus* was simply and exclusively that of military lands.

2. That if used in a more extended sense, or considered as a general law, it must be taken to rest exclusively upon the constitution of the emperor Antoninus Pius, and was in derogation of the general or common law of Rome: that the support claimed by the defendant of the authority of Trebatius, to his broad and general inter-

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pretation of this text, by shewing the equal antiquity of Trebatius with Julius Cæsar, wholly failed him; inasmuch as the *dictum* of Trebatius, alluded to in the sequel of the section, is confined expressly to military lands, and speaks merely of the exception as to them, of the law of alluvion; and that the defendant's proposed reform of the punctuation, however required by his argument, was unnecessary in itself, and involved in it a violation of syntax, and the dismemberment of the text. That the term *ager limitatus*, taken merely in a literal sense, as land bounded or limited, from its universality, would comprehend *all* lands, with *whatever* boundaries, whether *natural* or *artificial*; that so construed, the text would be made to operate a total repeal of the general or common law of Rome on the subject of alluvion, though resting on the broad principle of the law of nature;—a text, rather too compendious and solitary, to operate so vast an effect.

Lastly, we have shewn, giving the defendant his own interpretation of the text, that he could not avail himself of it as authority, without also shewing it had been adopted into the Spanish code.

Under this head, we have shewn, that the Roman law had no intrinsic authority in Spain; that

even its forensic use had been interdicted; and was now only permitted to be cited in cases, where it coincided with the Spanish law, where the Spanish law was merely silent. and where the Roman law was grounded on reason and nature; and *then* only as containing the opinions of wise men. That notwithstanding this unrepealed prohibition of the Roman law, many of its principles had been ordained as law by successive Spanish legislators; but they derived their authority, not from any general adoption of them as Roman law, but solely from their being embodied in the form of specific Spanish ordinances. That Spain, adopting into her code, as founded in nature and reason, the general principle of the Roman law, had enacted by positive statute, that the adjacent proprietors should enjoy the right of alluvion —That if therefore the defendant could derive any advantage from this peculiar exception in the Roman law, (which was not perceived) he was clearly bound to put his finger on the royal ordinance, by which it had been made a rule of action in Spain.

That it could not therefore be impliedly adopted; and that no Spanish authority had been adduced to give color to such implication. That the *inference* of its adoption, merely as a *natural consequence* of the general law of alluvion, seem-

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ed to be equally unsupported by reason, and inapplicable to the case before the court. That by the general law of Spain—founded on the law of nature, the right of alluvion belongs to lands *bounded on the river*; and if by limited lands, the defendant meant merely the converse of this description, viz: lands not bounded on the river, his denomination of the law of *ager limitatus*, a natural consequence of the general law, was illogical, and an abuse of terms; and the application of this natural consequence to the case of our land amounted to begging the question of fact. On the other hand, if he spoke of *ager limitatus*, in its proper and technical sense, as military lands—lands of a conquered country, divided and assigned by the Roman government among the soldiery; then, instead of a natural consequence, it was a peculiar exception to the law of alluvion; and whether introduced or not into Spain, it was wholly inapplicable to the case of our land.

After all, the whole controversy between us is obviously reducible to the single point of boundary. We *are*, or we *are not*, bounded on the river—if we in fact be *not* so bounded we make no pretentions to the batture. But if in fact we *we be so bounded*, the doctrine of limited estates, either in their literal or technical sense, the calculation of the superficial contents, the

artificial lines of mensuration, run either by a *sworn* or *unsworn* officer, the mathematical denomination or regularity of the figure—the alledged interposition of roads and levees—all yield to this natural boundary; and alluvion, by nature, by reason, by the code of every nation, is the accessorial and inseparable right of our land.

In discussing the second question—whether Poeyfarré's title, as riparious proprietor, had been by him conveyed to Bailly, and by the latter to the plaintiff—we have shewn, by an exhibition of the several conveyances, that the land had been successively transmitted with all its original rights;—that *frente*, the word employed in the two latter deeds, was, according to all the testimony in the cause, indifferently as well as immemorially used with *frente al rio*, to express a front boundary on the river Mississippi. To the objection of our not having declared ourselves to be in possession, we referred to our *non descript* petition; to the fact of possession to our witnesses: and to the mode of acquiring and continuing it to our digest. In this connection, we noticed the claim of prescription set up by the defendant in his answer, of ten, twenty and thirty years, and have shewn, so far from its being founded in fact, that, on the contrary,

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the plaintiff, and those under whom he claims, had been in actual, quiet, and continued possession of the premises, for nearly thirty years :— that even before the batture rose above the surface of the water, it was employed by our vendor for the purpose of supporting a little wharf (or avancé) run out into the river ; and when of sufficient height and consistence, was probably used by him for unloading, piling, and vending his wood ;—and that from that period up to the present, such possession had not been interrupted by any act, either by John Gravier or the defendant ; that the batture in front of the suburb St. Mary, being claimed and owned by different proprietors, no possession, on the part of the defendant of *pars pro toto* could be alledged ; or that possession obtained against the proprietor of one part was available against the proprietor of another.*

THE COURT, when they were prepared to deliver their opinion, observed that, as a considerable time had elapsed since the conclusion of the oral argument, if any of the counsel had any thing to add to what had been said, or to the

* The argument, in this case, was heard in May, 1818—it was not inserted with the cases of that term, in order that it might be presented to the reader, in the same volume, with the opinion of the court.

written argument, with which the judges had been furnished, he would be listened to.

Duncan, for the defendants, declared his clients had nothing more at heart, than to hear the judgment of the court.

The counsel of the plaintiff said they had nothing to add.

MARTIN, J. delivered the opinion of the court.* The plaintiff claims a batture, which he alledges to have arisen in front of his land. The defendants pleaded the general issue; and several other pleas and demurrers were inserted in the answer, but have been since abandoned. They further claim the batture under Jean Gravier, heir of Bertrand Gravier, from whom the plaintiff alledges that the land before which it has arisen, was purchased by J. B. Poeyfarré, under whom he claims.

As evidence of the title of Bertrand Gravier having passed to him, he introduces a notarial act, executed on the 27th of February, 1789, by Maria J. Delhonde and B. Gravier, her husband, for a trapezium of land, and another notarial act of the 30th of October, of the same year, by which Poeyfarré conveyed sixty feet in front,

* DERBIGNY, J. did not join in this opinion, having been consulted in the case, while at the bar.

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with one hundred and eighty feet in depth, of the trapezium to P. Bailly, who, in the year 1816, it is admitted, conveyed his right thereto to the plaintiff.

Batture is, according to Richelet and the French academy, a marine term, and is used to denote *a bottom of sand, stone or rock mixed together, and rising towards the surface of the water:* its etymology is from the verb *battre*, to beat: because a batture is beaten by the water. In its grammatical sense, as a technical word, and we believe, in common parlance, it is then an elevation of the bed of a river, under the *surface of the water*, since it is rising towards it. It is, however, sometimes used to denote the same elevation of the bank, when it has arisen *above* the surface of the water, or is as high as the land on the outside of the bank.

While this case was before the parish court,* the defendants endeavored to establish, that the batture, in dispute in the present case, existed, and was a batture of the latter kind; a batture *above* the surface of the water: while the plaintiff endeavored to establish that there was no batture at all, or that if there was one, it was of

* This case has been erroneously stated, in the beginning of it, to be an appeal from the court of the first district.

the former kind, viz: a batture *under* the surface of the water.

For this purpose, the defendants introduced a plan, of the trapezium acquired by Poeyfarré, annexed to his act of sale, in which a batture is marked before the trapezium, and the word batture written thereon. They produced a plan of the plantation of the vendors of Poeyfarré, under whom the defendants' claim the batture, made on the 1st of April, 1778, in the front of which a batture is marked, extending along the whole plantation, of a considerable width in the upper part, but gradually narrowing towards the city, in which the trapezium is marked, so that it has there one fifth only in of width in the upper part; where is written, *large batture, which the waters of the river cover in its utmost height.*

The plaintiff offered witnesses, ancient inhabitants of the neighborhood, to disprove the existence and height of the batture *above* the surface of the water.

The defendants' counsel resisted the introduction of this testimony, which was however received, and a bill of exceptions was taken to the opinion of the parish court in receiving it.

The plaintiff's counsel contends, that the representation of a batture before the trapezium, on the plan referred to, is no conclusive evi-

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dence of its existence—that the plan is evidence of the operations of the surveyor, but the batture was not the object of these—that it is usual with surveyors, in order to relieve the nakedness of their plans, to add neighbouring objects, introduced according to their fancy: but that it never was attempted to convert the exhibition of such objects, real or imaginary, into authentic evidence of their indisputable existence: and our attention has been drawn to groves, canals and a statue drawn on these plans, which it is evident never existed but on the paper.

The plaintiff alledged in his petition, that at the time of the sale to Poeyfarré, there existed no batture before the trapezium, or that if one existed, it was a batture under water: and the defendants having put him on the proof of all his allegations, the *onus probandi* lay on him *as to the height of it at least;* and perhaps as negative propositions are not susceptible of proof; the defendants were bound to prove that there was a batture. Admitting (what it is useless now to determine) that the plan is conclusive evidence, of the *existence* of a batture, it is no evidence of its being a batture *above* water. If neither of the parties had produced any other evidence than this plan, referred to in, and which the defendants' counsel insists ought to be considered as

a part of, the act of sale, as the plan left it doubtful whether the batture was one above or under the surface of the water, the legal conclusion must have been that it was a batture *under* : because in the contract of sale, the rule is to interpret the words of the act against the vendor, in whose power and whose duty it was to use such words as would leave no room for a doubt: *obscuritas pacti potius nocet venditori, quia p tuit re integra apertius dicere, ff.* 18, 1, 21. *Pothier Pandects*, 1, 2, 14, *no.* 70. This distinction was not attended to in the case of *Duncan vs. Cevallos' executors*, 4 *Martin*, 575.

But the defendants having introduced in evidence, a plan which Poeyfarré's vendor is said to have caused to be made, nine months before the sale (without any proof of its genuineness or of its having been exhibited or known to the vendee) in order to shew that the batture was above the surface of the water, parol evidence, under oath, was certainly better evidence, and was admissible to rebut that which resulted from a paper the correctness or verity of which was not proved Indeed it was in every case admissible, on the part of the plaintiff, to shew that the batture was *under* the surface of the water ; and the defendants' counsel admits that he did not oppose its introduction to that effect.

We conclude, that the parish court did not

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err in receiving the testimony therefore; and it properly makes a part of the evidence, on which the case is to be heard in this court.

Another bill of exceptions remains to be disposed of.

The words *frente al rio*, in the act of sale to Poeyfarré, being contended by the plaintiff's counsel, to be in the general understanding of the country, not only testified in common parlance, but universally in plots of survey and acts of sale, equivalent to the most explicit terms of *boundary upon the river*, and the defendants' counsel denying that they were, surveyors were offered to be examined, which was opposed on the part of the defendants; whereupon the parish court overruled the objection, and a bill of exception was taken.

As the words of a contract, like those of a law, are to be understood generally, in their most usual and known signification, and terms of art or technical terms and phrases according to their received meaning and acceptation with the learned in each art, trade or science—*Cod. Civ.* 4, *art.* 14 & 15, the parish court appears to us to have correctly overruled the objection. The same kind of evidence was admitted, to the same purpose, in the superior court of the late territory

of Orleans, in *Gravier* vs. *Mayor and aldermen*, &c. (see the report of that case, 17.)

From the testimony thus received, it appears, that Bruneau deposed, that he arrived here two years before the Spaniards, and is now 75 or 76 years of age; that there were about fifteen feet of water before Bailly's lot, next to the levee, when Bailly went to live there, and being asked, from what circumstance he was able to speak so positively, answered, from that of a raft of wood which he brought there, drawing ten feet of water—that P. Bailly then kept the levee in repair, and Gravier did not interfere therein.

Caizergues, who has been an alcade under the Spanish government, deposed, that the batture began to form itself, before the lot of the present plaintiff, about thirty years ago, 1788, a year before the sale to Poeyfarré.

On the second point, Mansuy Pelletier, a surveyor, deposed, that in original grants, concessions, or deeds of lands, bordering on the Mississippi, the expression *face au fleuve* is employed to express the boundary on the river.

Tannesse, another surveyor, deposed, that in original grants or sales of lands, bordering on the Mississippi, the words *face au fleuve* are a well known and appropriate expression, employed to denote the boundary thereof upon the river.

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In some titles he has seen the words *face, front* only employed for the same purpose.

Pilie, another surveyor, deposed also, that the words *face au fleuve*, or *face* only, are descriptive of an estate on the river.

In the deed to Poeyfarré, the premises sold are thus described —"A piece of land forming a trapezium, situated out of the Chapitoulas gate, consisting of 415 feet of land, *frente al rio*, front to the river, 186 feet in depth on the side of the city, 411 feet 8 inches on the side of the vendors' garden, and on the back 229 feet 8 inches. The whole forms 2386 toises 4 feet and 6 inches of land in superficies, as appears by the plan of Don Carlos Trudeau, public surveyor, of the 9th instant, which the parties have signed, and which remains in the power of the vendee."

In the deed from Poeyfarré to Bailly, the land sold is thus described—" a lot of mine situated out of this city, consisting of 60 feet of front and 180 in depth, in conformity with the plan of Don Carlos Trudeau, public surveyor of the city, bounded on one side by a lot of the vendor, and on the other by one of B. Gravier, which lot belongs to me for having purchased it with a greater quantity of land from B. Gravier and Maria J. Delhonde, his wife."

The deed to the plaintiff from Bailly is not produced, but is admitted to convey the all estate of the vendor.

On this the plaintiff rests his case, contending that he has shewn himself the proprietor of a riparious estate; that an alluvion has been formed before it, of which he is consequently the owner.

The defendants' counsel does not shew their title but contends the plaintiff has not shewn any.

It is said, that the expression *front to the river*, does no more give a right to go to it, than *front to the north* would extend the land to pole, nor thn the expression, 138 feet on the side of the city, would extend that side thereto.

This is attempted to be illustrated by supposing, that the trapezium had changed its position, so that the side next the city had become the front and that the boundary on that side was designated by the expression *front to the city;* and the question is asked, whether it could be seriously contended that this would carry the grantee 700 feet beyond the trapezium? To exemplify this more thoroughly, a plan of the faubourg is presented, and the supposition is made, that the trapezium, instead of being on the side most distant from the river of the first street, parallel thereto, was on the same side of the second,

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without any street being laid out between it and the river;—and the question is asked, whether the words *front to the river* would carry the proprietor to it? So that while, by the words of the deed, a piece of land (limited by certain and precise lines, which contain, and are said to contain, 2486 toices 4 feet and 6 inches square measure) was intended to be sold, one would pass which would have four times the length of lateral lines that had been expressed, and consequently four times the number of square toises which the deed says were conveyed.

There is nothing of magic or talismanic in the words *front to the river*; but whenever they occur in a deed, it is the duty of those whose province it is to pronounce on the different modes in which the parties construe it, to take those words in their known signification. But, if in this way, they lead to none, or a very absurd result, to deviate a little from this received sense. —1 *Black. Com.* 60, 61.

From a very close examination of the books of the land office of the United States, which have been submitted to us, and the depositions of surveyors, examined in this case, it is clear that in French and Spanish conveyances, both public and private, the words *face au fleuve*, *face*, *frente al rio*, *frente*, front to the river, or front, exclusively designate estates bounded by the

river—which in the country are otherwise called riparious, bound to the repair of the road, its diches, bridges and levees, and to supply ground for either or the whole of these, when that which they cover is carried away by the water, We are therefore bound to take the expression, *frente al rio*, in the deed, as evidence of the intention of one of the parties to convey, and of the other to acquire, a riparious estate ; unless, by taking it in this sense, we are led to an incongruous or absurd result.

Such was the opinion of the superior court of the late territory of Orleans, in the case cited, on nearly the same evidence.

If, instead of the expression *front to the river*, that of front to the north had been used, the absurdity of a piece of land, containing nearly 2400 toises, square measure, and lying in latitude 29, being deemed to extend to the north pole, would demand a deviation from the received sense of these words. So if the trapezium had been inverted, and the expression *face to the city* used, and it appeared that a line, which is described, as of 188 feet, must be extended 300 feet farther, to reach the city, so as to include four times the quantity of land, called for in the deed, susceptible of private ownership, we must have deviated from the received sense, in order to avoid falling into an absurd conclusion. But, if

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the whole extent of ground, thus taken within the extended lines, beyond what was within their stated length, was public property, property out of commerce, it would matter but little, whether the expression were taken in one sense or the other, as the same quantity of land and no more would pass in either hypothesis, or if the whole intermediate space had been a commons, the property of the city, the words must have been understood front on the commons of the city. The construction would be the same in the other hypothesis.

We conclude that, on the inspection of the deed, it appears to us the words *front to the river*, used therein, were intended to denote a riparious estate bordering on the river.

The defendants' counsel next presents to us as evidence of the intention of the parties, to give to the land conveyed another boundary, than the river, the existence of the batture between the river and the trapezium.

The existence of the batture, above the surface of the water, is disproved by the uncontradicted testimony of two antient inhabitants of an unimpeached character.

It is not to be presumed from the plan referred to in the deed.

On this point, every tittle of evidence in the cause is against the defendants.

The opinion of the superior of the late territory of Orleans, already cited, is brought under our eyes by the defendants' counsel, who expects to prove thereby, that the batture had risen *above* the surface of the water, at the time of the sale to Poeyfarré. We are of opinion that the record of a suit is only evidence of the facts, which appear thereby, between the parties. As to the rest of the world it is *res inter alios acta ;* it proves nothing. It would lead to the most dreadful consequences, if one could estab ish a fact, in a suit in which he was a party with A. in order to give the record in evidence in a suit between himself and B. This cannot be admitted even on the authority of Bishop Covarruvias. Yet, we have looked a the decision of the court, and if it could be read in evidence, it would be far from proving the fact which it is offered to establish, viz. that the batture before the trapezium, was a batture above the surface of the water, *at the time of the sale to Poeyfarré.* For the decision of the superior court establishes another fact, viz: that, *antecedent to the time, when Bertrand Gravier, ceased to be the proprietor of the land adjacent to the high road,* a batture or alluvion had been formed adjoining to the levee in front of the faubourg upon the river ; that it was of a

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sufficient height to be considered as private property. Now, at the time of the sale to Poeyfarré, it does not appear that his vendors had yet parted with an inch of land adjacent to the road.

We conclude, that the existence of a batture above the surface of the water is not proved, and rather disproved by the plan, annexed to Poeyfarré's act of sale—that the plan, made by Lavau Trudeau for the vendors, nine months before the date of that act, is of no legal evidence in this cause, and that if it was, it does not prove the height of the batture above the surface of the water; that the decision of the superior court cited, is not legal evidence against the plaintiff, who was not a party thereto; and that if it was, it proves nothing as to the height of the batture at the date of the sale. Finally, that the uncontradicted testimony of two witnesses proves that the premises in dispute did not exist, as a batture *above* the water, when Poeyfarre acquired the trapezium of land before which it stands, and therefore that no proof results (as is contended by the defendants' counsel) from the batture, of an intention in the parties to give to the land sold, another boundary than the river.

One is presented to us in the existence of the levee between the trapezium and the river.

B. Gravier, under whom both parties claim the batture, in his plan of the faubourg, introduced as evidence in this case, calls the levee a *dike or mound containing the waters of the river in its utmost height*, a real, though not a natural bank.

The bank of a river is defined to be *that which contains the river in its utmost height; ripa autem definitur id quod flumen continet* ff 43, 12, 1, 6,—*Ripa putatur esse quæ plenissimum flumen continet. l. pen. eod. tit.* 1. The bank is part of the river. *Tribus constant flumina, aqua, alveo & ripis. ff.* 43, 12. 1, § 1 *no* 2.

The bank is that space which the water covers when the river is highest in any season of the year. *La ribera se entiende todo quanto cubre el agua del rio quando mas crece in qualquiero tiempo del ano.* 3 *Cur. Phil. ill. cap.* 1. *sec.* 2, *Ribera, no.* 112.

The levee then, as well as the batture, under the surface of the water, is a part of the bank, and the bank is a part of the river, which consists of three things, the water, the bed and the bank. If these two objects, the levee and the batture, form a part of the river, they do not exist beyond the river, and consequently not between the river and the trapezium.

We cannot therefore give our assent to the proposition of the defendants' counsel, that the exis-

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tence of the levee between the trapezium and the river, is a proof of the intention of the parties, that the land sold should have another boundary than the river ; because we are of opinion that the levee did not so exist.

The intervention of the public road, the counsel for the defendant contends, is a proof of such an intention.

If the trapezium had been immediately on the river, and no road had intervened, the qualified property which riparious owners have in the banks, before their fields, would have passed to Poeyfarré, as an accessory of the trapezium ; because, in the sale of a field, the sale of the bank, is understood as a part or accessory of the field. En la venta del fundo se entiende vendida la ribera como parte de el ; si se vende el fundo que esta immediato a la ribera, tambien se encluye como appendice del mismo fundo. 3 *Cur. Ph. ill. loco citato, no.* 113.

The banks of the river are not sold, but rather pass as an accessory of the land sold. *Ripæ non venduntur, sed magis accedunt rei venditæ*, Cæpola de serv. rust. The property of the banks belongs to those whose fields they are contiguous. *Proprietas earum (riparum) est quorum prædiis hærent. ff.* 1, 8, 5, *Code Civil*, 96, *art*, 8. They must be the property of the riparious own-

ers, without being included or mentioned in their grants, for if they were only when included there would be no use for the provision in the law; it would be idle.

If, therefore, when the sovereign grants land, contiguous to the river, without mentioning the bank, this passes, it must do so as an an accessory—If the bank pass as an accessory in the grant of the sovereign, it must also in the deeds of private persons.

The bank passes with the field, even when there is an intervening public road. Ripa cedit fundo, l. riparum ff. rer. divis. Inst. eod. tit. ub. gloss. dicit verum si via est media. Ripæ respectu proprietatis sunt illorum quorum prædiis hærent, sed quid si via esset in medio, interflumen et agrum vel domum? Responde idem ut ripæ sunt eorum. Cæpola, tract. 11. de serv. rust. cap. 26, in ripa.

If there be a public road between a field and the river, still that which is made by alluvion accrues to the field. Si meum inter agrum et fluvium interjaceat publica via, tamen meum fieri quod alluvio adjicit. Grot. de jur. bell. et pa. 2, 8, 17. Gronovii nota, 68.

But the defendants' counsel urges, that this must be understood of a private road—one of which the soil belongs to the owner of the field, and is burthened with a right of way, and he re-

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fers us to the law, Attius. *ff.* 41, 1, 38, and to Grotius, who holds that there is no principle of natural law which justifies the position that the owners of estates, separated by a public road from the river, have a right to alluvion, and admits that the field has the allavion, if it be a private one which owes a road, *qui viam debeat. Grotius de j b. e p.* 2, 8. 17, so that the soil of the road be the property of the riparious owner.

The expression, used by the writers whom Grotius condemns, is *via publica* a public road.

A public road is that of which even the soil is public; it is not in a public road as in a private one, the soil of which does not belong to the public, while we have only the right of walking and driving over it; the soil of a public road is public.—Viam publicam eam dicimus cujus etiam solum publicum est, non sicuti in privata via ita esse in publica accipimus: viæ privatæ solum alienum est. Jus tantum eundi et agendi nobis competit: viæ autem publicæ, solum publicum est *ff.* 43, 8, 2, § 21.

Gronovius, a learned commentator of Grotius, construes this debt of a road, of which his author speaks, to be an obligation to repair the road and protect it by embankments. Nisi domino agri istius viæ muniendæ et reficiendæ munus incumbat. Grot. j. b. et p. Gronovii nota, 67.

Here the burthen of repairing the road and protecting it by a levee is a charge upon the trapezium.

We conclude, that in the present case the intervention of the public road, between the trapezium and the river, cannot be considered as a proof of the intention of the parties to give the land conveyed another boundary than the river.

Our attention is next drawn to the lateral lines of the plan referred to in the deed, and we are desired to notice that they stop at the road, and are not continued through the road, levee and batture, as is said to be ordinarily done, when the land conveyed extends to the river. We are of opinion that the lines of a plan, especially one made to ascertain the quantity of land sold, ought only to include the ground which is measured, and not the public road, nor the levee, bank, or batture under the surface of the water, which pass as an accessory to a riparious field: this need not be surveyed. Littora et via publica non mensurantur cum re vendita. Cæpola de serv. rus. loco citato.

If the parties to the deed to Poeyfarré meant that a riparious estate should pass, their intention might be carried into effect, by conveying as far as the river by express words, or by conveying every thing susceptible of absolute pri-

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vate ownership between the line of the trapezium most distant from its front and parallel to the river, till the bank. In the present case both methods appear to have been adopted. The land is sold, front to the river; an expression which, in the general understanding of the country, is equivalent to the most explicit terms of a boundary on the river; and it does not appear that the vendors, who, by the pleadings are admitted by both parties (since they both claim under them) to have been riparious owners, have retained any part of the ground between the trapezium and the river.

Another circumstance is relied on by the counsel for the defendants as a proof of the intention of the parties to give to the land conveyed another boundary than the river, viz: that the vendor, prior to the sale, caused a plan to be made for the division of his land into town lots, of which the trapezium in question formed one, and is particularly referred to in the margin of the plan, as being to be sold, as it then stood, with its fence.

Of this fact there is no legal evidence; such a plan was indeed produced, with a date anterior to Poeyfarré's deed, and from no circumstance can it be inferred, that the vendee ever had the least knowledge of this plan, nor the

least intimation of the intention of the vendors, of which it is said to be evidence.

Admitting it, however, to prove such an intention in the vendors, would such a latent intention suffice to infer the necessary concurrence of the vendee ? Had the sale been that of a lot, according to a known plan, would not some part of the deed have referred to it ? The shape of the trapezium, aukward and incongruous in the plan of a town, repels the idea that it was shaped with a view of its being a town lot. It was apparently a field of an irregular and accidental shape, of several arpents of superfi cies.

Conceding, however, every thing that seems to be asked, let us enquire whether, even if the trapezium had been sold as a lot of an intended faubourg or town, the same consequences would not have followed.

Under the Spanish government, no town or city seems to have been erected by legal authority ; that of New-Orleans was the only one that existed. It is true that in it the owners of the lots, nearest to the river, have no part of the bank as accessory thereto. These lots are not charged with any of the burthens attending rural riparious estates : the levee, road or street were made and kept in repair at the joint expense of the owner of every lot in the city. The farthest from the water contributing as much thereto as

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the nearest; no riparious duties are imposed on a lot in New Orleans, either by the law or any clause in its grant. Not so, with regard to rural estates; the law and a clause in the original grant burthen those contiguous to the river, with the confection and the repair of a road, its ditches and bridges, and the levee. If any part of the soil which is covered by these, be carried away by the stream, the riparious estate must yield a quantity of land equal thereto. The bank of the river is to them alternately an onerous and a beneficial accessory. Riparum incommoda pertinent ad vicinos: si modo ripæ latiores fiunt, ergo secundum naturam est ut commoda et incommoda sequantur eos. Cæpola, tract, 2, c. 26 no 10.

On the morning of the day on which Bertrand Gravier sent for a surveyor, to make a plan of his plantation into lots and streets, the land covered by it was rural property, burthened with riparious duties in his hands, and when the plan was finished, by the division into lots and streets, no alteration was wrought in these burthens. When, nine months after, Foucyfarré purchased the trapezium, he purchased a rural estate, burthened with riparious duties; having the portion of the bank of the river before it as an accessory. The sale discharged the vendor from, and imposed on the vendee, the duties of repairing the road

and levee along the land conveyed. If any part of this portion of the road had been found out of repair, the syndic of the district would have compelled the vendee to repair it, without the least enquiry into the circumstance, whether his deed bounded him on the road or on the river; if he was really owner of the land and separated from the river by the road only. The banks of the river, opposite to the trapezium, passing to the vendee cum onere, must have passed cum commodo; for it is according to natural law, that the advantages of every thing should belong to him who bears its burthen. Secundum naturam est commoda cujusque eum sequi quem sequuntur incommoda. ff 50, 17, 1.

Had every lot in the faubourg been sold, the liability of the land, which they covered, would have continued the same. Whether the riparious burthens be considered as imposed by a clause in the grant of the land, or by law, the proprietor could not get rid of them, in the first case, without the approbation of the grantor; in the second without an act of the legislator.

It is true the vendor had retained the land behind the trapezium, and might, in the event of the road and trapezium being carried away by the water, become liable to suffer as riparious owner:—but, as appears by the law Attius, when the field of Titius and the road which separated Attius's

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field from the river, were carried away, Attius became entitled to any increase or loss that would then attend the contiguity of the river. But, as long as the trapezium stood, it would be the only estate susceptible of being diminished or increased as the riparious estate.—Neither could Poeyfarré have compelled his vendor to indemnify him for, or to contribute to, the labors or expense of keeping up the levee or repairing the road. Indeed the vendors were under no moral obligation to share in the labor or expense—neither was there any in the vendee to share with them any increase of land, which the situation of his property might procure.

The calculation of the contents of the trapezium does not offer any proof of an intention in the parties to Poeyfarré's deed, to give to the land conveyed any other boundary than the river.

Almost every tract of land on the Mississippi is granted by a description of its contents; so many acres in front on so many in depth; a tract described by ten arpents in front and forty in depth, is a tract of four hundred arpents, square measure, if its line be parallel and rectangular; if they be not so, the bearings give a clue by which the contents are to be ascertained, and, in law, *id certum est quod certum reddi potest.*

The reference in the deed to the plan, does not

afford any proof of an intention in the parties to the deed to give another boundary than the river. For the plan itself, if it be referred to, does not contradict the deed: were both the words 'front to the river' and 'front to the road' omitted, yet the deed and plan would present to the mind the idea of a riparious estate. For, whether the boundary be the river or the road, the quantity of land conveyed is precisely the same, lies precisely in the same manner, is precisely alike bound to sustain the riparious burthens, and in either case the whole estate of the vendors, as riparious owners, passes with regard to the trapezium.

Further, the deed does not refer to the plan for any thing else except the quantity of land sold. It begins by describing the premises; this being done, a second phrase begins, "The whole forms, &c. "as is shewn"—The phrase is perfectly grammatical and complete without implying a reference to the plan for any thing else besides the contents of the trapezium.

Taking both the plan and deed together, the expressions 'front to the river' in the deed, and 'front to the road' in the plan, are not at all contradictory, and if they were and left any doubt, it would be our duty in construing it, to adopt the construction most favorable to the vendee.

Upon the whole, the result of our examination of the deed and plan, with the objections stated

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by the defendants' counsel, is a conviction that Gravier and wife did not retain any property between the trapezium and the water, and so the bank of the river opposite to the trapezium passed to Poeyfarré as an appendage or accessory to it.

But the defendants alledge that although Poeyfarré may have acquired a riparious estate, he did not convey such a one to Bailly.

Poeyfarré here conveys a lot "situated out of this city, composed of sixty feet in front and 188 in depth, conformably to the figurative plan of Don Carlos Laveau Trudeau, public surveyor of this city, bounded on one side by a lot of the vendor, on the other by one of Bertrand Gravier, which belongs to me, for having purchased it with a larger one from Don B. Gravier and wife," &c. referring to his own deed.

Now the surveyors inform us, that in conveyances of land on the Mississippi, the word front is used indifferently with the words front to the river, and we have seen that the latter are equivalent to the most explicit terms of boundary on the river. The lot is described as making part of a larger, bought by the vendor from B. Gravier and wife, which by the date appears to be the trapezium.

The impression on our minds is irresistible, that Poeyfarré sold to Bailly, as he had himself purchased from Gravier, a riparious estate; one

bounded by the river, or separated only by the public road.

Lastly, the defendants' counsel contends that neither Poeyfarré nor Bailly did acquire an estate with the right of alluvion, but an *ager limitatus*.

As both parties, according to the pleadings, claim the batture under Bertrand Gravier, either must be precluded from denying that the plantation of which the trapezium made a part, before the sale to Poeyfarré, was a riparious estate, entitled to the benefit of any alluvion that might be formed before it.

Poeyfarré bought the trapezium, with all its rights expressly, *con todos sus derechos*. If the right of alluvion was one of these, why did it not pass? We are answered: because the trapezium was a limited field, *ager limitatus*.

The defendants' counsel contends that the law of alluvion is not founded on principles of compensation and to be supported on the maxim, *qui sentit et onus debet sentire et commodum*, but that the riparious owner is entitled to the profit, because from the nature of the increase, it is impossible for any one else to claim it. He illustrates his position by the doctrine of *avulsions*, when a distinguishable piece of ground is at once taken from a field and added to another. Grotius is the only authority, in support of the position of the defen-

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dants' counsel in this respect. His commentators do not adopt his opinion. But the current of authorities in ancient and modern times supports the position of the plaintiff's counsel. When the land removed from a field to another is discernible, the principles that no one ought to enrich himself at the expense of another, *neminem opportet alterius damno locupletari*, or that he who seeks to avoid a loss, *certat de damno vitando*, is to be favored before him, who seeks to make a profit, *qui certat de lucro captando*, are clearly applicable ; and justice requires that the sufferer should recover his property, before the law should give it to another. But when the loser cannot possibly be ascertained, every principle of natural law demands, that he, who is exposed to the loss, should reap the casual advantage, before the fisc, who ought not to be enriched by the misfortune of individuals, or before the first occupant, in order to avoid as much as possible that contention and strife which would result, if the law did not assign an owner to every thing susceptible of ownership.

Alluvion is a mode of acquiring property by natural law, *jure gentium*, by those principles or maxims which regulated the conduct of men, before the formation of civil society. *Quod per alluvionem agro nostro adjicitur, jure gentium nobis acquiritur. Inst.*

The Roman jurists, as Grotius informs us,

proved this to be a natural right, from the maxim it is just that the advantages of any thing should belong to him who supports its disadvantages. *Eum sequantur commoda, &c. L* 20, *ff.* 2. *de reg. jur. Grotius de j. b. & p* 2, 8, 16.

This opinion of the Roman jurists seems to prevail in France. "Equity, says Brillon, requires that he who suffers the incommodity, should reap the advantages. As nothing is more prejudicial than the vicinity of a river, which inundates, submerges, and deteriorates the neighboring fields, nothing is more just than that the proprietor, to whom the stream has often borne prejudice, should conserve, in exclusion to all others, when it becomes beneficent, a gift, less a gain than a reparation, less a present than an exchange." 4. *Nouv. diction. de Brillon*, 278.

The right of increase by alluvion is grounded on the maxim of law which bestows the profit and advantages of a thing upon him who is exposed to suffer its damages and losses. *Dictionaire de Jurisp. Encyclop.* vo. *alluvion.*

Inasmuch as the adjoining fields frequently suffer great damages from rivers, by floods, because the increments we speak of, advancing by slow degrees, seem to be of little consequence to public revenue, many governments have thought it a reasonable favor and bounty to grant these im-

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provements to the persons on whose lands they happen to fall. *Puff law of nat. and nat.* 4, 8, 12.

In Italy, alluvion is supposed to have been granted to the riparious owners for the same reason. The inconveniences of rivers are borne by riparious owners: if their banks are increased, it is just, according to natural law, that they should have both the advantage and disadvantage. *Riparum incommoda pertinent ad vicinos, si modo ripæ latiores fiunt, ergo secundum naturam est ut commoda et incommoda sequantur eosdem. Cæpola,* 2 *Tract de serv. rust. c.* 26, *de ripa,* 11, 10.

So, likewise in England. As to land gained from the sea by alluvion, by the washing up of sand and earth, so as a in time to make *terra firma* or by dereliction, as when the sea shrinks back below the usual water mark; in these cases the law is held to be that, if this be by little and little, it shall go to the owner of the land adjoining: for de *minimis non curat lex:* and, besides these owners being often losers by its breaking up and at charges to keep it up, this possible gain is therefore a reciprocal consideration for such possible charge and loss. 2 *Black. com.* 262.

In Spain, a positive law has been passed on the subject. "Rivers swell sometimes, so that they take away and diminish from the inheritances that are situated on their banks and they give to and increase others which are situated on the op.

posite side. Therefore, we say that whatever is carried off, by little and little, so that the quantity cannot be perceived, because it is not taken off in a body, this shall be gained by the owner of the inheritance to which it is added and those from whom it may have been taken shall have nothing to see therein." Part. 3, 28, 26.

Lastly, the defendants' counsel urges that whatever may be the right of the plaintiff, in the batture or alluvion, he is excluded therefrom by the law *in agris*. The words of this law are, "it is apparent that the right of alluvion does not take place in limited fields. Divus Pius has ordered it so; and Trebatius says that a field, taken from the enemy and granted on the condition that it should be the property of a city, has the alluvion and is not limited; but that the field, which, since it was taken, has been limited, in order that it might be known what was given to any one, what was sold, and what remained to the public, has not the right of alluvion." *ff.* 41, 1, 16.

This Roman law appears to us an evident modification of, an exception to, natural law, introduced by positive statute. In the first part, we are referred to a constitution of the emperor and as to what is given to us, under the authority of Trebatius, it is evidently introduced also by a

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positive statute, for it refers wholly to military land, assigned to soldiers. It is impossible to see, upon what moral principle, an exception to their disadvantage should be made to the natural law, as it stood in regard to the rest of the community. The rapacity of the fisc made likely the first attempt on the pittance of the soldier, and the way being thus paved, a succeeding prince extended this modification of the law of nature to every case of a limited field.

In Spain, the Roman law has no intrinsic force. So much of it as has been drawn from the law of nature is followed, not because Roman legislators have ordered it, by appropriating it to themselves, but because the principles of natural law are binding on all men. That part of the Roman law which is positive, and has been confirmed by the laws of Spain, alone is in force; what has been abrogated cannot be binding, and that which has been passed over is not law, because the Roman law, jus Romanum, is generally abrogated in Spain. *Ordinances reales* 1, 4, 1—Leyes de Toro 1—*Nueva recop.* 2, 1, 3, *Recop.* 1, 7.

But the defendants' counsel has drawn our attention to Rodriguez's digest; the laws of the *Fuero real;* the *Cur. Phil. illustrada* and *Covaruvias.*

Rodriguez, in his translation of the digest, adds the following note to the law in agris. The

right of alluvion, of which the paragraph of the institute and the title of the partidas speak, does not take place in lands which were assigned to soldiers.

The editors of the Fuero real add the following note, to the part of the text in which an island, rising in the middle of the river, is said to belong to the owner of the riparious estate on each side. "But Azo, in *summa inst. de rer. div.* § *Habet etiam locum*, understands what is here said, as to this mode of acquiring property, as to unlimited fields; if they be limited they do not acquire any part of the island on account of their vicinity. *ff. de flum. l.* 1, § *insul.*" Now, the author referred to by these editors, as holding that limited fields have not the right of alluvion, Pontius Azo was an Italian jurist, who flourished in Bologna about the year 1290, and died in 1320 *(Lampriere's Dictionary)* and who consequently cannot aid much in construing the partidas of Spain, first published nearly two centuries after his death.

If these learned editors had no other ground to conclude that the law in agris is in force in Spain, they cannot command much of our attention. If they had other reasons and did not express them, the consequence must be nearly the same.

The author of the Cur. Phil. illus. in the part

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referred to by the defendants' counsel, is inquiring whether the boundary of territories, districts or parishes, follow the changes of a river. He cites, indeed, all the authors enumerated by the defendants' counsel, but the principal reason presented, seems to be that, owing to the nature of their boundaries or mounds, this is impracticable : attendida la calidad de los terminos o mojones de su natura immovibles : esto es impracticable. Of the authors there cited, Peregrinus and Tonduti, only speak of the law in agris and neither of these is a Spanish jurist. We have in vain sought, in the part of this book quoted, for the author's express decision of the question that by the laws of Spain, the bounds of agri limitati are not changed by alluvion. 3 *Curia Phil illust.* 45, *no* 95.

Covarruvias is examining nearly the same question, viz : the extention of the boundary of a city and determines against it. The learned bishop, indeed refers to the law in agris.

Were it necessary, in the present case, to determine whether the law in agris is in force in Spain, we would not deem ourselves authorised to say so, on the authorities produced by the defendants' counsel. We would rather think with the plaintiff's that, as the Roman law can only be resorted to in Spanish tribunals, as to a system of ethics, illustrative of the natural law, the law in

agris, which is an exception and encroachment on natural law, is one of the last parts of the corpus juris civilis, which is to afford to a Spanish tribunal a legitimate rule; as it appears to us diametrically opposed to the positive institutions of Spain.

This subject should have passed unnoticed by us, if we had not deemed it proper, in the present case, to express an opinion upon every point stated at the bar.

Admitting the law in agris to be in force in this country, it appears to us that the present case does not come within it.

The land is expressly sold with a boundary on the river and though its contents are calculated and stated, yet it is sold per aversionem, not ad mensuram; that is to say, in the gross and not by the measure, or so much the acre.

Those to whom fields are granted as far as the river (an expression equivalent to the one face au fleuve, front to the river) enjoy the right of alluvion, as well as those who possess fields without limits. *Illis quibus agri sunt concessi usque ad flumen jure alluvionis gaudent, tanquam possidentes agros non limitatos. Voet*, 605, *no.* 16.

A nation may assign its land to individuals, with the rights attending it in its hands, that is to say, so that they be bounded by the river, in

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which case riparious owners enjoy the right of alluvion. This was determined several centuries ago in Holland, in regard to certain fields on the Meuse and Iser, because in deeds and grants on record it appeared, it was always said they were bounded by the river.

Fieri posse ut populus agrum assignaret, eo jure quo ipse occupaverat, id est, ad flumen usque, et si id appareat jus esse alluvionis : quod in Hollandia, ante secula aliquot, judicatum est de agris ad Mosani et Isam sitis, quia et in literis mancipationis et in libris annalibus semper dicti erant ad flumen attingere. Grot. de j. b. et p. 28, 12, no. 2.

When such fields are sold, although in the contract of sale some mensuration is expressed, provided they be not sold by the measure (at so much an acre) but in the gross, they retain their nature and the right of alluvion, which was the case by the Roman law and is every where observed.

Et tales agri si vendentur, quamvis in lege emptionis mensura aliqua nominata fuerit, dummodo non vendentur ad mensuram, sed sui corporis nomine, naturam suam et jus alluvionis retinent, quod Romanis quoque legibus proditum est et passim usurpatur. Grotius, de j. b. et p. loco citato.

Grotius refers us to ff. 19, 1, 13, § 13, in which we see that the alluvion is enjoyed by a field ex-

pressly sold, as of a given quantity of land; centum juggera.

After a most close and minute examination of all the arguments and authorities, offered by the counsel of the defendants, we conclude:

1. That the land sold by Gravier and wife de facto extended to the river, as much as any tract on the Mississippi extends thereto, which has not been created by alluvion since the original grant; that the batture, existing then as batture under the surface of the water, was, as well as the levee a part of the bank, and the bank being part of the river, neither can be said to be without it or between it and another object: that the intervention of a public road does not prevent the owner of an estate, which it separates from the river, from having an interest in the bank and enjoy the alluvion, as well as he whose estate is washed by the river.

2. That the land sold is not what is technically called a limited field, ager limitatus. From any thing that appears, it was sold in gross and not by the arpent, toise, or foot.

3. That the bank, including the levee and batture, such as it is proven to have been, passed to Poeyfarré as an accessory to the land conveyed.

4. That Bailly acquired from Poeyfarré all his estate, in the part of the land sold to the former.

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5. That Bailly, as is admitted, conveyed to the plaintiff all his estate in what he purchased from Poeyfarré; and it appears that he took possession of his lot and repaired the levee. And there is no allegation in the pleadings, nor any evidence that the right so transferred was a litigious one.

It is, therefore, ordered, adjudged and decreed, that the judgment, of the parish court be annulled, avoided and reversed; and this court proceeding to give such a judgment as in their opinion ought to have been given below, do order, adjudge and decree, that the plaintiff be declared the lawful proprietor of the alluvion, or batture, now existing in front of the lot of ground he purchased of P. Bailly; and that the defendants be perpetually enjoined not to disturb or injure his right and title thereto; and that he may be henceforth quieted therein. And it is ordered that the defendants pay costs in both courts.

On the day after the judgment was pronounced, *Duncan*, for the defendants, read a petition, praying that the judgment might be declared null and void, on the ground of its having been pronounced more than fifteen days after the close of the argument He relied on the fourth section of the act of 1813, ch. 47, which provides that "in no case

shall they (the supreme court) delay more than fifteen days the pronouncing of their judgments. 2 *Martin's Digest*, 144, *n.* 7.

THE COURT refused to receive the petition, stating that the judgment had not yet passed *in rem judicatam* and the case might be reheard, if good reasons were shewn, on the application of either party, under the general rule of March term, 1814, 3 *Martin*, 280. That it was doubtful, whether the recourse of nullity against final judgments of any court, as it prevailed, under the Spanish government, before the court rendering the judgment, was still a part of the judiciary system of the states—that, admitting that it was, such a recourse was not allowed, in Spain, in regard to judgments of courts of *dernier resort*. *Meeker's assignees* vs. *Williamson & al. syndics*, 4 *Martin*, 625, *Williamson & al.* vs. *their creditors*, 5 *id.* 618, *Recopilacion*, 4, 17, 4.—That, if this recourse still existed, it was to be sought in a distinct suit, the adverse party being served with a copy of the petition and cited.—That the court had often found it impossible to come to a determination, till after a fortnight from the close of the argument—that, in a particular case, in the western district, *Seville* vs. *Chretien*, the court being composed of two judges only, the junior one having been of counsel in it, found it impossible to come

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to a determination, without consulting authorities not within their reach at Opelousas, and the judgment was accordingly postponed till the following year—that, in such cases, the court thought it their bounden duty to pronounce, as soon as possible, after they had formed an opinion—that the opportunity was, however, always afforded to counsel who imagined that their arguments might have been forgotten, to be heard—an opportunity which, in this case, was offered, and of which the counsel thought it needless to avail themselves.*

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* The argument in court began on the 12th, and was concluded on the 25th of May. The judges took no note, being informed that each party would furnish a written argument, containing a note of all his authorities. Several days after the close of the oral argument, the defendants' counsel handed his, which was immediately transmitted to the adverse counsel—a reply was prepared by the latter, and on its being handed was sent to the defendants' counsel. On its being returned the judges began the consideration of the case, but the adjournment of the court, in the eastern district, took place without their having been able to come to a satisfactory result. The counsel asked and were permitted to resume their respective arguments and that of the plaintiff employed the vacation in extending his researches, and on the opening of the court, in the eastern circuit, handed an entire new brief. This rendered a submission of it, to the defendant's counsel, necessary, and when it was returned, the judges began the consideration of the case anew: but a figurative plan of the land of the Jesuit's bought by Gravier's vendor, according to the proces verbal of the French surveyor general, referred to by the opening counsel, *ante* 21 and 22, which that gentleman had offered to obtain, appeared useful in the investigation of the case and he was requested to procure it. It was sent to the defendants' counsel, with a request that he might point out any inaccuracy, or produce a more correct one. The letter of this gentleman sending it back with an intimation that it was immediately returned, lest his "keeping it might be made a pretext for delay, by the opposite

When the delay fixed by the general rule for the application for a rehearing was nearly expired, *Livingston*, for the defendants, prayed for an extension of it, stating that various causes and among them his indisposition had prevented him from attending to the draft of a petition, for a rehearing.

Whereupon the delay was extended till the end of a week, and a longer time was offered, if thought necessary. Before the expiration of it,

Livingston, for the defendants, prayed for a rehearing on the following grounds: *

1. That the court have referred in their judgment to a number of authorities, which counsel believes can be rebutted by others,

2. That the court gave an incorrect definition and etymology of the word batture.

3. That the court, in the definition of the bank of a river, did not attend to the exception in cases in which it goes over its bank—*sale de su madre.*

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party," bears date of the 22d of January. On the third of the following month the judgment was pronounced, twelve days after the judges were enabled, by the production of the arguments and all the evidence, to proceed to the final consideration of the case.

* Before this application for a re-hearing, Mr. *Livingston*, on behalf of himself and his co-defendants, presented a petition to the legislature, complaining of the refusal of the supreme court, "to listen to the argument and authorities by which they could have shewn, that the judgment was void, or to receive their petition," and praying, "that some legislative provision might be made for the relief of the petitioners, &c." The house of representatives rejected his petition

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4. That the court overlooked the testimony of Bourgeois, who deposed that the plan of the faubourg produced, came out of the archives of the archives of the city, and so ought to have been considered as an authentic document.

REHEARING REFUSED.

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A witness, who testifies against his own insterest, is not liable to any objection.

APPEAL from the court of the second district.

DERBIGNY, J. delivered the opinion of the court. In the year 1807, the plaintiff and appellant, Antoine Peytavin, partner and representative of the late commercial concern of Reynaud and Peytavin, being then absent from this country, appointed L. M. Reynaud and Auguste Peytavin his agents here, to administer the property of the said concern and collect its debts. Under this power of attorney, the agents of the appellant received from one Alexander Millet, of the parish of Assomption, a note of hand of 17,427 dollars, payable in March, 1810, and a mortgage on his property to secure the paymant of that sum; and, when the note became due, Millet having failed to pay, they instituted a suit against him for a balance of 12,387 dollars 50

cents, and caused the plantation, on which he lived, and three slaves to be seized and sold.— At that sale, Stephen A. Hopkins, their attorney, bid on the plantation and one slave, and had them struck off to himself, for the sum of 5,900 dollars.—This sum, with the interest thereof, is now demanded by Antoine Peytavin, against Hopkins's widow, curatrix of his estate; she answers that, although her husband appears to be the purchaser of the property, the truth is that he bought it, at the request and for the use of his clients, and that he ever was, and his representatives now are, ready to reconvey it to them.

The first thing to ascertain is, whether Hopkin's really bought for the use of his employers. If so, we shall then have to examine whether he was duly authorised to that effect. In the sheriff's sale, Hopkins appears to have bought in his own name, and to have paid the purchase money; so that, if this instrument stood unconradicted by him, the recourse of the plaintiff to obtain that money would have been against the heriff. But, Hopkins has endorsed on the back f that sale, that although he appears to have aid the price of the property bought, the fact is, iat he paid nothing, because the purchase was ade at the request, and for the benefit and acount of Reynaud and Peytavin. Such a declation from the prosecuting attorney having dis-

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charged the sheriff, the plaintiff has thought fit to demand from the estate of Hopkins that same money, denying that he bought the property for his employers, and further contending that if he did so, he acted without authorisation.

To prove that Hopkins had really purchased for his own account, notwithstanding his declaration to the contrary, the plaintiff has produced evidence of his conversations and of his conduct in relation to the plantation and slave, struck off to him. But, both his conversations and conduct, in that respect, were so various and contradictory, that but little can be presumed from either. His written affirmation that he bought for his employers stands, therefore, unimpeached—and the question now is whether he was authorised to that effect.

Since this case was remanded for a new trial with instructions to the judge to admit certain evidence, which had been refused, other testimony was offered on the part of the defendant which was again excepted to; 5 *Martin*, 438 Auguste Peytavin, one of the agents of the plaintiff, was called as a witness, and the plaintiff objected to his admission on the ground, that he was interested as answerable to him, in case it should turn out that he had exceeded his powers. But the testimony of Auguste Peytavin so far as it might establish that he had authoris

ed Hopkins to buy for the firm of Reynaud and Peytavin, was a testimony against his own interest and of course not liable to any objection.

Auguste Peytavin declares that both he and the other agent of the plaintiff did instruct Hopkins to "bid off for the firm of Reynaud and Peytavin as much of the property as to him should seem proper, and to let the same remain in his (Hopkins's) name until certain difficulties were adjusted." He further swears that he (the deponent) took possession of the plantation, and that it is now possessed by L. M. Reynaud, the othes agent, who considers it as his property: as to the slave, he says, that Hopkins was authorised to keep her, in payment of what was due him by his employers.

It is then very clear that Hopkins was directed to act as he has done, and that if responsibility lies any where, it lies at the hands of the plaintiff's own agents. Whether by causing the property seized to be struck off to their constituent, they have exceeded their powers, is a question to be settled between them, but which we see no necessity to investigate, in the present case. All we find necessary here to decide is, that the estate of Hopkins is not liable to the plaintiff for the price of the property, he purchased by the order of his agents, for his use or theirs, as the case may turn.

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

Moreau for the plaintiff, *Turner* for the defendants.

DONALDSON vs. *RUST.*

One whose thing has been sold, as part of an estate, has a claim against the curator for the price, and is not to be classed among the creditors of the estate.

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

Turner, for the plaintiff. The plaintiff was owner of a slave, and left him in the care and possession of Alsop. This is proved by a counter letter. As between the plaintiff and Alsop, he belonged to the plaintiff, and must be delivered, on demand. This is the nature and force of the counter letter, as established by this court in the case of *Greffin's ex.* vs. *Lopez*, 5 *Martin*, 145.

At the death of Alsop, this slave was in his possession, and was taken by the defendant, as curator of Alsop's estate. At that moment, he formed no part of the succession. The heirs or the creditors of Alsop had no right or demand on this slave. Had the slave remained unsold, when the plaintiff made his appearance, on his return from Virginia, he must have been delivered by the curator to him.

But he was previously sold by the curator, supposing him to be part of the succession. This act was prejudicial to the plaintiff, and gave no right to the curator nor to the heirs or creditors of Alsop on that property, nor could that sale deprive the plaintiff of his action, against the curator for the value of the slave.

It is possible a purchaser, without notice of the plaintiff, might be protected in his purchase of this slave; but if he should be so, probably that effect will result from the clause of the statute. *Civil Code*, 304. *art.* 221. But the right of the purchaser forms no question in this suit; he is no party to it. This is a suit brought by the true owner of the property, against the curator of the other contracting party. His right, therefore, to recover the thing, if in possession, or the value of it, if parted with, is not to be doubted. That value is to be ascertained, in the same manner as the value of other things when sued for; it is fixed by the proof of witnesses. In this case, that value is fixed at $1300, and the plaintiff is entitled, to judgment for that sum and his costs. The plaintiff's claim to be paid by privilege, and he grounds his right on this simple, though undeniable principle: that the owner of the slave was entitled at the time the slave was sold, to have him in kind, and that right would have been enforced, but for his absence; being entitled to the thing, its price

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can never be confounded with the mass of the succession. Had the slave passed into the hands of the heirs, instead of the curator's, they must have surrendered him.

Had they sold him, they must have paid his value.—The duty of the curator, before he parts with the property of the succession, is the same as that of the heirs, so far as it regards the payment of money, and the delivery of things to persons claiming them, by rights antecedent to the death of the ancestor or intestate.

At the moment this suit was instituted, if the curator had not the slave, he had the proceeds, which represent the slave, and they belong to the plaintiff and not the mass of his creditors.

Therefore, the plaintiff shall claim the payment of the price of his slave against the curator: not as a creditor of the succession, but as owner of a property, which the curator has by mistake claimed as a part of the succession.

The parish judge erred in not giving the plaintiff judgment for the price of his slave, to be paid by the defendant as a privilege. He erred in supposing the plaintiff, to be a creditor of the succession of Alsop: he was not so at the time of his death.

The act of the curator cannot make the plaintiff a creditor of that estate; he must be so (if at

all) in consequence of some act done by the intestate—as by sale of the slave.

But here, that was not the case, the slave was left by plaintiff with Alsop for safe keeping: Alsop died, and the slave remained—he was then sold, the property of the plaintiff.

How then can he be made a creditor, and to be placed on the tableau for a distributive share? I contend, the plaintiff is entitled to be paid the value of his slave, without any regard to the amount of assets or the claims of creditors.—The slave formed no part of the assets of that estate, before he was sold; therefore, his proceeds can form none, after the sale. The creditors had no right on the slave for the payment of their demands, nor can they have any on the proceeds.

I contend, therefore, that the judgment of the parish court ought to be reversed, and that judgment be rendered for the plaintiff.

Carleton, for the defendant. But two points present themselves to me in this cause. 1. Whether the court of probates, is not the only tribunal before which the plaintiff can appear with his claim, if any he has? And 2. Whether he be a creditor at all of the succession of the deceased, and if he be, for how much, and whether he ought to be paid pro rata or by priviledge?

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I. As to the first point by refering to the civil code, it will appear that the court of probates and no other court can have original cognizance of this cause. The defendant is curator to the vacant estate of John Alsop, deceased, appointed by the judge of that court. He can pay no debt due by the succession until "he has previously obtained the authorization of the parish judge by whom he has been appointed; that authorization, shall even be necessary, in case there were money enough in hand, to discharge all claims on the estate; but should there not be sufficient property to satisfy all demands, it shall be his duty to cause the parish judge, to regulate the classes of the priviledges and mortgages, and thus to establish the rank in which the creditors shall receive payment." *Civ. Code*, 178, *art.* 137.

In the following article, the curator is required to give public notice of the authorisation or sentence of the judge, which settles the rank in which the creditors must be paid, and by *art.* 139, this payment will accordingly be made after ten days notice. But "if any opposition is made to the payment as ordered, the parish judge by whom the authorisation of making payments and the classing of priviledges has been made, shall determine in a summary way, on the merits of the opposition, saving the right of the parties, to bring an appeal from such judgment to the

superior court." That is, to the supreme court by a late act of the legislature.

Hence, it plainly appears, that the plaintiff ought first to have gone into the court of probates with his claim, if any he had. The law so declares it, and it is reasonable it should. The administration of vacant estates is confided to such persons, as that court may, in its discretion, select. They are responsible for their administration to no other judge ; he alone, can call them to an account, and hear and discuss claims against the succession of the deceased, or settle the rank in which they shall be paid If any other court could hear the claim of a creditor discussed, it could, likewise, settle the order in which he should be paid. This might contradict the decision of the court of probates, upon the same claim, or the rank in which it might decree the claims of all the different creditors should be paid. This is an inevitable consequence, unless every creditor of the deceased could appear, at the same time, before the supreme court; this they cannot do, unless by appeal from the final account rendered by the curator before the court of probates, where they must have all appeared in the first instance.

There is necessarily a gradation of priviledges among the claims of the creditors of every person deceased. This court cannot assign a rank

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to any one, without first hearing them all discussed: otherwise manifest injustice would be done to some of them. Their claims must then all accumulate, as in cases of bankruptcy, in one court only, where they can be all alike heard and discussed, and that court is none other than the court of probates. The curator may be, at this moment, before that court, rendering an account of his administration. The claims of all the creditors may be finally determined and paid, before judgment is rendered in this case. What then would it avail the plaintiff to have a decision in this court, after the estate had been paid away under a final sentence of the court of probates, settling the rank of claims against the succession of the deceased? And if he be in time with his judgment, he must, nevertheless, go with it into the court of probates, by whose order alone he can obtain payment.

II. It is admitted by plaintiff's counsel that the purchaser of the slave, at the sale of him at auction by the curator, is protected by that provision of the code, which declares that counter letters can have no effect against third persons. *Civ. Code*, 304, *art.* 221.

If then the plaintiff has no right, whatever, to the slave, has he any claim for his value, and how much? The slave was conveyed, as it is agreed

in the statement of facts, from Donaldson to Alsop by an act, regularly executed before a notary public for value received. Alsop then, whatever might have been his private agreement with Donaldson, appeared to every third person, as the true bona fide proprietor of the slave. From the possession of that property, he probably derived some consideration, among those with whom he transacted business. Would it then, be acting in good faith towards third persons, to take from them this security, upon which they may have been induced to credit him? Domat, after declaring that counter letters can have no effect whatever, against third persons, puts the following forcible case.

Ainsi, par exemple, si un père, mariant son fils, lui donnait en faveur de ce mariage, ou une somme d'argent, ou une terre, ou une charge, prenant de lui une contre-lettre que le don ne vaudrait que pour une moindre somme, ou que le fils rendrait sur la terre, ou sur la charge quelque somme, dont ils seraient convenus entr'eux ; cette contre-lettre n'aurait aucun effet à l'égard de la femme, et des enfans qui naîtraient de ce mariage, ni des autres personnes tierces, qui pourraient s'y trouver intéressées, *comme des créanciers de ce fils.* Car cette convention serait une infidélité, qui blesserait les bonnes mœurs, et la foi dûe, non seulement à la femme et a ses

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parens, qui n'auraient pas consenti au mariage avec les conditions de cette contre-lettre, *mais a toutes les personnes que cette fraude pourrait regarder.* Et il est de l'intérest public de réprimer le mauvais usage que peuvent faire les particuliers de la facilité qu'ils ont dans leurs familles, de colluder entr'eux, pour tromper par des pareils actes. *Domat*, 1, 3, 6 § 2, 15.

But if the court should think, that the plaintiff is entitled to take any thing by his counter-letter, how much shall it be? Certainly, he cannot pretend to any thing more than the sum for which the slave sold: since he admits, that he was regularly and legally sold at public sale, by order of the court, as a part of the succession of the deceased. This is too plain to be contested. And for this sum, he must come in *pro rata*, with the other creditors, at the final settlement of the account, before the court of probates: unless his counter-letter can give him some secret and unjust preference, over the rights of third persons. But he contends, that he has a priviledge upon the estate of the deceased, for $ 1300, the estimate value of the slave at the time of the trial! And as he sold at auction for only $ 965, the plaintiff, then claims to be paid, $ 335, out of the succession over and above what the slave sold for; that is $ 335, out of the other creditors.

Turner, in reply. It is well known, that the court of probates has no power to decide on the rights of persons—it issues no process—has no juries—it only regulates the affairs of estates, amongst those whose rights are acknowledged.—Our right to this slave, or to his value, is disputed—it must, therefore, be ascertained by the judgment of the ordinary courts—those only, which can be approached in the ordinary way, by petition, &c.—the suit was, therefore, rightly brought.

The rule, quoted from Domat, is not, in fact, the rule, but an exception; as will be seen by what he lays down in the same section, and the two preceeding ones. *Domat.* 1, 3, 6, § 2, 13—15.

Nor does the exception apply to this case—the contract of sale, and the counter letter, affected not the rights of third persons.

MATHEWS, J. delivered the opinion of the court.* The plaintiff states himself to have been the owner of a certain slave, named and described in the petition, and that being about to leave the city of New-Orleans, he made a bill of sale of said slave, for the purpose of having him better protected, during his absence, to a certain John Al-

* DERBIGNY, J. did not join in this opinion, being prevented from attending by indisposition.

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sop, who died before his return, and that the slave fell into the hands of his curator; and was sold by him, as making part of the estate—that he never received a consideration for the slave, and that the feigned purchaser gave, at the time of the transfer, a counter letter, shewing the property still to remain in the plaintiff. He concludes with a prayer, that the defendant be decreed to reconvey the slave, and, if that cannot be done, that judgment may be rendered for the price.

It appears, from the statement of facts, that the feigned sale to Alsop was made by an authentic act, and the statement of facts also establishes the principal allegations in the petition.

On the part of the defendant, it is contended, that as the legal title of the slave was in Alsop, at the time of his death, the sale made by his curator, according to the provisions of the law, gives a clear and indisputable title to the purchaser, under said sale, and consequently no decree can be made for a re-conveyance.

It is further urged, on the part of the defendant, that the plaintiff has no right to recover the price of said slave, belonging to him, as the representative of the thing sold: but can only be considered in the light of any other creditor of the

deceased, to be paid, according to the rank and privileg. of his claim.

The judgment of the parish court being for the defendant, the plaintiff appealed.

It is clear that, if the slave had remained unsold in the possession of the curator of Alsop's estate, he would have been bound to reconvey him, according to the stipulation, in the counter letter. For, the feigned sale, as between the original parties, did not destroy the right of property of the seller. But, after the sale and transfer, in administering the estate of the deceased, in whom was the legal title, to a *bona fide* purchaser, the plaintiff has no longer a right to recover the thing sold, because the fair purchaser cannot be affected by the private and concealed agreement, which existed between the parties to the fictitious sale.

Notwithstanding the plaintiff's right, to recover back the slave, is thus lost, we are of opinion that it would be contrary to justice and equity to suffer the estate of the intestate to be increased, by the price of a thing which did not belong to him. Under the circumstances of this case, the price, in the hands of the curator, represents the slave and ought to be paid over to the plaintiffr

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled,

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avoided and reversed, and this court, proceeding to give such a judgment, as in their opinion ought to have been given in the parish court; it is ordered, adjudged and decreed, that the plaintiff and appellant recover from th defendant and appellee the sum of $967, with legal interest thereon from the judicial demand, being the proceeds of the sale of said slave, by the register of wills.

LABATUT & AL. vs. *ROGERS.*

The special administrator was not entitled to a commission, on property, in the possession of the intestate at his death, but belonging to other persons.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. During the trial of this cause in the district court, several exceptions were taken to the opinion of the judge, but, as they relate to matters of form alone, it is deemed unnecessary to notice them, as no reversal of judgment can take place on account of informalities in the proceedings.

The suit was originally instituted by Labatut, curator of the estate of Chantrel, to recover the amount of a certain per centage, detained by the defendant, as special administrator, who took possession of the estate of the deceased, by virtue of his office.

During the progress of the suit, Neel and others

intervened, and claimed the amount of the property detained, from the special administrator, as surviving partners of Chantrel, and judgment being for them, the defendant and the curator appealed.

The facts in the case shew that the special administrator, in taking possession of the property of the estate of the deceased, possessed himself also of certain property, which belonged to the surviving partners, being about three fourths of the amount which came into his hands—that, on delivering the estate over to the curator, appointed for it, he delivered the shares of the copartners, detaining, as a compensation for his trouble, and by virtue of his office, five per cent. on the whole amount.

This case presents two questions for our decision. Is the defendant and appellant, entitled to five per cent. on property, which is no part of the succession of the deceased, according to the provisions of the ordinance, under which he held his appointment?—Is he entitled to receive any thing for the care and attention which he must necessarily have given to the goods of the intervening party, which were blended with those of the estate?

As to the first of these questions, we are clearly of opinion that the ordinance alluded to (1 *Mar-*

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tin's Digest, 410) contemplated an allowance of five per cent. to the special administrator on the amount of the estates of deceased persons, which were to be administered under it, only: and not on any goods, which might be found blended with those of such estates.

But, where the property and rights of other persons, such as partners in trade are so mixed that they cannot be distinguished, without strict examination, the surviving partners being absent, and all the goods of the concern found, as in the present case, among the estate of the deceased, which rendered it necessary that the administrator should take possession of the whole, perhaps he ought to be entitled to some compensation, in proportion to his trouble and risk, in keeping the goods of the survivors: yet, as he has not kept them, but, on the contrary, has delivered them to the curator, who, as such, had no authority to receive any thing, except the estate of the intestate, and, as there is nothing shewn by which his trouble and risk may be estimated, we do not think that any compensation ought to be adjudged to him, on the amount of that part of the property which belongs to the surviving partners.

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

with costs, and that the appellant pay the costs of this appeal.

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

RODRIGUEZ vs. COMBES & AL.

Altho' the tenant holds over, after notice, to quit, and a declaration that a higher rent will be demanded, no more than the rent previously paid can be recovered, without evidence of the value of the rent or of damage, sustained by the landlord.

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 action to recover an excessive rent, on account of the defendants and appellants holding up certain premises, mentioned in the petition, after due notice to give them up.

The judgment of the parish court having been rendered for the full amount claimed, the defendants appealed.

It appears, from the evidence and statement of facts, that the defendants, as lessees of the plaintiff, held a house, or part of it, at the monthly rent of $ 80, that the plaintiff, wishing to repossess the premises gave notice to his tenants, in two instances, to evacuate them, or he should charge

* DERBIGNY, J. did not join in this opinion, being prevented from attending by indisposition.

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them rent at the rate of $ 300, and the second, at the rate of $ 600 per month.

We are of opinion, that the judgment of the parish court is erroneous, in adjudging to the plaintiff the full amount of his demand. His claim is not founded on a contract, for none such existed between the parties: nor ought that sum, or any other be given in damages, for it is not shewn, that the plaintiff sustained any, by the detention of the house. He is only entitled to recover the amount of his rent, at the rate of $ 80 per month.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and revised, and that there be judgment for the plaintiff, for the rent at the rate of $ 80 per month, with legal interest from the day of the judicial demand and that he pay the costs of this appeal.

Hennen for the plaintiff, *Desbois* for the defendants.

DELACROIX vs. *PREVOST'S EX'RS.*

Writing is not of the essence of a convention to pay a particular rate of interest.

A party's allegations on the

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

MARTIN, J. delivered the opinion of the court. The plaintiff claims the amount of a promissory

note of the defendants' testator, allowing payments, which reduce his demand to $ 1655-12.

He states that, at the maturity of the note, the testator, being unable to pay it, promised to allow interest thereon, at the rate of ten per cent, a year, and gave his note for $ 500 in part payment of the interest, during the first year, that, after his death, the parties, to the present suit, agreed that the note for $ 500 should be considered as the full payment of the interest for the first year, and that afterwards, interest should be paid, at the rate of six per cent. The petition closed with interrogatories to be answered on oath, by the defendants, relating to the two agreements, in regard to the payment of interest.

record, are the highest evidence against him, and the effect of it cannot be affected by any other contradictory evidence.

The answer to the petition averred the full payment of the principal and the interest due.

To the first interogatory, the defendants answered, on oath, that their testator had agreed with the plaintiff, that an interest of ten per cent a year, should be paid, and had given a note of $ 500, for the interest of the first year. To the second, relating to the interest, at six per cent, alledged to have been agreed upon, by the parties to the present suit, they absolutely denied the agreement.

The plaintiff filed a replication to the defendants' answer, claiming interest, at the rate of ten per cent, during the whole time, under a prayer

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for general relief, in his petition; the agreed reduction of the rate of interest, being denied by the defendants.

The parish court was of opinion, that "the verbal evidence of the first interest, at the rate of ten per cent, was not admissible, that the convention to pay it, at six per cent, was denied; but, upon the interrogatories there resulted, in the opinion of the court, some evidence that an interest, since the date of the protest was to be paid, and agreed upon, one way or another, which could not be, upon the evidence in the case, higher than the legal one." And gave judgment accordingly. The plaintiff appealed.

Our statute provides that, "conventional interest cannot exceed ten per cent: the same must be fixed in writing, and testimonial proof of it, is not admitted in any case." *Civ. Code.* 408, *art.* 32.

We are of opinion, that the legislature did not intend to make *writing*, an *essential* requisite, in a convention fixing the rate of interest to be paid, but, that its object was only the exclusion of the *testimonial proof* of such a convention. For, if the *oral* convention was to be absolutely null and void, it would have been absurd to have gone further, and forbid the introduction of testimonial proof of it, since such kind of proof or any other

could not be of any avail. The legislator meant only to afford to a defendant, from whom conventional interest is demanded, a shield to guard him against suborned witnesses. This seems to be all that he can require. If he confesses, that he agreed to pay conventional interest, at the rate demanded, or if he tacitly admits, by forbearing to deny, it, as the plaintiff can then recover without the aid of testimonial proof, no injury is done to the defendant, if he be compelled to pay. Neither is any injury done him, if he be interrogated and required to answer on oath, thereon. No man can be listened to, who complains that he is put in danger of perjuring himself. The truth, as far far as he is concerned, cannot ever come from a less exceptionable channel than when it drops from his lips.

The ordinance of Moulins, which requires that every convention, the object of which exceeds the value of one hundred livres should be *written*, and no *testimonial proof* to be admitted of it—is so understood in France. *Pothier, Obligations, n.* 15.

In the present case, the plea of payment admitted the plaintiff's original claim, as stated in the petition, and put nothing in issue but its reduction or dissolution.

Admitting, as the defendants' counsel contends, that they could not have been compelled

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to answer the plaintiff's interrogatories they ought to have prayed, to have them stricken out. After having voluntarily answered, they cannot say that what they have sworn to, shall not be taken as true.

As to the second agreement about the interest, reducing it from ten to six per cent, although it be expressly denied by the defendants' answer on oath, yet, as it is stated in the petition, the plaintiff must be concluded thereby. A man's own allegations, on the record of a suit, are, the highest evidence against him: *ex ore tuo, te judico*. The effect of it cannot be destroyed or weakened by any contradicting evidence.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that there be judgment for the plaintiff for the sum of $ 1655-12, with legal interest, and that defendants' and appellants pay costs in both courts.

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

GENERAL RULE.

Candidates for admission to the bar, who shall give satisfactory assurances to the court that

they have received a good classical education, although they may not have taken degrees in any college, may be examined, on shewing that they have studied two years, under an attorney duly admitted to practice in this state.

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GENERAL RULE.

GRAVIER & AL. vs. *LIVINGSTON & AL.*

APPEAL from the court of the first district.

An heir may bring an action of partition, against the person who has purchased the whole estate, from his co-heir.

An action of partition is prescribed, by the lapse of 30 years, only.

The plaintiffs, as heirs of Bertrand Gravier, claimed three-fourths of the batture, of the faubourg St. Mary, possessed by the defendants, vendees of John Gravier, a co-heir of the plaintiffs.

The petition stated that the plaintiffs, three in number, and John Gravier, were the only brothers and sisters of Bertrand Gravier, who died intestate, without leaving any lineal relations, possessed of a number of unsold lots in the faubourg, of a plantation in the rear and the batture in front —that John Gravier, the only one of the co-heirs, in the country, took possession of the whole estate and sold the batture to the defendants—that notwithstanding this, the right of the plaintiffs to their undivided fourths remained unaffected, and they prayed a partition of the batture:

The defendants pleaded the general issue, de-

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nying any right of the plaintiffs to any part of the batture, averring that, after the death of Bertrand Gravier, the batture was adjudged to John Gravier, by the judgment of a competent Spanish tribunal, in August 1797, together with the rest of the estate of the deceased, and afterwards the defendants purchased the batture, in good faith, from John Gravier. Lastly, the defendants pleaded prescription.

There was judgment for the defendants, and the plaintiffs appealed.

Mazureau, for the plaintiffs. Most of the facts, a knowledge of which is necessary for the understanding of this case, are so familiar to the members of this court, that to relate them here again, would be abusing their patience. The greater the importance of this cause, the more it is requisite to avoid useless details, that the principal questions may appear unincumbered with any superfluous matter.

The coheirs of John Gravier, demand their share of a property which has been declared to belong to the estate of their common ancestor. They originally had an equal right to it: have they lost that right? Such are the merits of the case. They could ask from John Gravier that share, when he was in possession of the whole; can they not

claim it from the persons who now possess under him? Such is the question of form. This, of course, must be investigated first.

It is not in the laws, which we have made ourselves, for rendering the access to our courts of justice as easy as possible, that we shall find that refinement of tactics, which permits no attack on an adversary, but that which is acknowledged by the rules of art. Instructed by the experience of past ages, and by the example of the evils attending the entangled system of practice, which prevails in some other countries, we have reduced all judicial demands to their simplest expression. "To state the cause of action, and conclude with a prayer for relief, adapted to the circumstances of the case," is all that is required of a suitor, by the act regulating the practice of our courts. Upon what ground are we asked any thing more? On what authority do the defendants pretend to admit us to the subtleties of the Roman pleading? Was it not to obviate the inconveniencies of that practice, that our legislature has provided so simple a mode of demanding redress in all cases?

The defendants endeavour to draw a distinction here between the form and the *nature* of the action. They say they do not object to the form, but to the *kind* of action, which we have chosen to institute against them: yet, what is the

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discrimination between the different kinds of action, but matter of form? We have a right to a part of the property, now in the possession of the defendants, or we have it not. The object of our demand is to recover that share. To attain that object, we must prove a title superior to that of the defendants: but whether our demand is set off in the form of a *petitio hæreditatis* or of an action *communi dividendo*, or of a *revendication*, is, thank God, a matter of no consequence among us. The Roman special pleading has not been transmitted to us. In the first place, it was denied admittance in the Spanish laws and Spanish practice. 1 *Treatro de legislacion, verbo Accion.* And such remains, as might still exist, were finally crushed, since the change of government, by the act regulating the practice of the territorial superior court, according to which nothing more is required of a plaintiff, than to state the cause of his action, and pray for a remedy adapted to the circumstances of his case. Let us see how we have complied with that requisite? We say that we are the heirs of Bertrand Gravier; that, as such, we own a part of the batture St. Mary, which has been acknowledged to belong to his estate; that John Gravier, our co-heir, has sold his share of that batture to the defendants, who now hold it in common with us; and we pray that it may be divided between us and the defendants. In

short, we state ourselves to be the owners of a part of the batture, and pray that we may recover that share. Is not this all that the law requires? Most assuredly.

But let us go further, and suppose that we are to this day tied down to the forms and niceties of the Roman pleading. Can we not, even then, shew that we are in order? We think we can: we think it is no very difficult task to demonstrate, not only that the *kind* of action, which we have instituted, is conformable to the strictest rules of the Roman practice, but that under the circumstances of this case, it was the only proper mode of obtaining a final decision on the merits of this claim.

If it be necessary to give a name to this action according to the ancient nomenclature, we may call it *petitio hæreditatis*: for we ask that which we say belongs to us, as heirs of Bertrand Gravier. To this the defendants object that this kind of action is not given against those, who possess by particular title, and that the heir has no other action against them than that of *revendication*. It is impossible not to be struck with the excessive nicety of this distinction, between two actions so intimately connected; for, what is the *petitio hæreditatis*, against the possessor of the hereditament, if it be not a *revendication*, a claim made as owner of the thing? But it is use-

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less to demonstrate the inanity of that distinction; we have engaged to shew that, even adhering strictly to the rules which derive from this punctilious discrimination, we are in the way which they point out.

The *petititio hæreditatis* is not given against the possessor by particular title: why? Gomez, on the 45th law of Toro, *no.* 1, *p.* 8, will explain that: "quia ille qui possidet cum titulo habet et allegat potentius et fortius jus, quam hæres qui agit petitione hæreditatis: nam possessor conventus nititur et fundatur ex duplici causa, scilicet, ex titulo habili et legitimo, et insuper ex possessione, vel detentione quam habet; hæres vero solum se fundat in suo nudo et simplici titulo hæreditario, et *possessione quam habuit defunctus:* ergo merito possessor conventus præferri debet, et contra eum non habet vires petitio hæreditatis." But this evidently applies to a possessor, whose title does not emanate from the same source as that of the heir: for if both claim the thing as having belonged to the *succession* of the deceased, the distinction between the possessor with and the possessor without title, becomes an absurdity. This is the sentiment of Lopez on law 7, *tit.* 14, *part*, 6, where, after having quoted the opinions pro and con the proposition of Baldo, who thinks that the *petitio hæreditatis* holds good against the possessor with title, when

such title has been acquired since the death of the deceased, he says, "tamen poterit salvari dictum Baldi, cum talem titulum acquisierit ab eo, qui poterat conveniri petitione hæreditatis; et mala fide, seu lite pendente, talis titulus fuit acquisitus, ut colligitur ex verbis Bartoli, &c."

Rodriguez, at the end of his exposition of paragraph 11, *law* 13, *tit.* 3, *book* 5. of the *Roman Digest*, recognises that distinction, in still more precise terms; "lo que se dice, que el que posee con titulo tiene igual derecho que el que pide como heredero, y que en igual causa es mejor la condicion del que esta en posesion, se ha de entender quando se verifica igualdad de causa, pero no quando el un titulo es verdadero, v. g. ex testamento o *ab intestato* y el otro putativo, *como lo es, el del que compro de quien no pudo vender.*"

Besides, why should not the general principles, in matters of sale, be applicable to property proceeding from a succession as well as to any other? If I had against your vendor the right of claiming my share of the thing which he has sold you, why, should I not have it against you? You say I ought to have claimed against you by way of *revendication.* But what is a demand to have one's share of a thing, which another pretends to keep wholly to himself, if it be not a *revendication* of that share? We cannot assert a title to

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the *whole* of a thing, of which we confess that an other owns a *part ;* and to claim only a part, what other means could be resorted to, than asking for a partition of the thing *?* This action then is a *petitio hæreditatis*, so far as it tends to claim that which we say belongs to us as heirs ; but as the whole is not claimed, it partakes of the action *communi dividendo*, which is, as Pothier says, a sort of revendication. " Les actions *familiæ erciscundæ et communi dividendo (Pothier, Contrat de Société, no.* 194.*)* tiennent de l'action réelle, en ce qu'elles tendent à reclamer, à *revendiquer* en quelque façon, et à faire déterminer la part qu'a le demandeur dans les choses communes."

But here arises a great technical difficulty. The action called *petitio hæreditatis* is distinct from that, by which a division of the common property may be obtained. " Non possumus consequi per hæreditatis petitionem id, quod familiæ erciscundæ judicio consequimus ut a communione discedamus : cùm ad officium judicis nihil amplius pertineat, quam ut partem hæreditatis pro indiviso restitui mihi jubeat·" *ff* 5, 4, 7. Hence, it is said, we ought to have claimed our undivided share of the batture, without asking for the partition. Why so ? where is the rule, which forbids to demand both by one action *?* Is not the second a sequel of the first ? If the first is denied, the second falls with it ; but

if it is granted where is the impropriety to decree the second also, without driving the parties to the necessity of bringing another suit? The absurdity of the doctrine, contended for by the defendants, appears in this case in the most glaring manner; for, upon the right of the plaintiffs as heirs, and the portion to which they would be entitled as such, there is no question. Their quality is recognised by the defendants, and the law has fixed their respective shares. Two brothers and two sisters (one of them represented by her only child) are admitted on both sides to be the only heirs: each is therefore entitled to one fourth. Is the decree to go no further than saying so? This would be refinement indeed; but refinement, bordering upon nonsense.

According to the Spanish practice, the division could be asked at once by him who pretended to be co-heir or co-proprietor. If the defendant denied him that character, the action for a partition was suspended, until the plaintiff's quality was ascertained; that preliminary enquiry was considered, as made under the *petitio hæreditatis*. If the plaintiff was found to be really an heir, then the *juicio divisorio* began: " mas no obstante se debe distinguir: si el sujeto à quien se demanda, ò pide que haga particion de la herencia, *ó cosa comun,* niega al que la pretende, la qualidad de heredero, y por consiguiente que

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tenga derecho à la herencia, se ha de proceder ordinariamente; bien que no se tratara del juicio divisorio, hasta que se le declare heredero, sino del de peticion de herencia: y declarado ò concluido este, se incoharà, ó no aquel, segun sea la declaracion. 1 *Febrero de Juicios*, 2, 1, *n.* 22.

Is not that precisely the situation of our action? We call ourselves owners in part as coheirs, and pray for a partition: the defendants admit that we are heirs; but plead other matter in avoidance of our claim. This must be cleared up, of course, first; but if their plea does not avail them, then the partition is to be decreed. Can any thing be plainer than this?

But leaving aside all that has been alledged above, we say that it is impossible here to decide the question of form, without enquiring into the merits of the case; and this is demonstrated as follows: the plaintiffs are the acknowledged coheirs of John Gravier, in the estate of Bertrand: as such, they originally had the three undivided fourths of every thing that composed that estate. They have admitted that John Gravier sold to the defendants, his share in the batture of the suburb St. Mary. If John Gravier had really declared to sell them no more, there is no doubt that the plaintiffs would have a right to institute the action, which they have now brought. What difference ought to make, in the rights of the

parties, that act, by which he sold, not only his share, but ours? This question is intimately connected with the merits of the case; if the act was a valid one, we have nothing to claim of the defendants; if it was not, then we have not ceased to be joint owners of the batture, and we have a right to demand our shares in it, and of course the partition of the whole.

Finally, should this be deemed insufficient to demonstrate to the court that the question of form here is inseparable from the investigation of the merits, there is another reason which, however disagreeable, it is our duty to mention to carry conviction to their minds. The action called *petitio hæreditatis* is given, not only against the possessor by particular title, who holds under the person against whom the action might have been brought, but *against all mala fide possessors*, whatever be their title. Upon this point all the authors agree. How then are we to know whether the defendants are *bona fide* possessors, unless we go into the merits of the case? They alledge a sale; but is that sale an honest one? They say they have bought *all* the batture; but did they believe that the individual, of whom they bought, had a right to sell it *all?* They call themselves purchasers in good faith; but is it not necessary to ascertain that fact, before it can be decided, whether the action brought against them

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is or is not legal? Upon this doctrine we refer to *ff* 5, 3, 13, and particularly to Rodriguez's exposition of the 4th. paragraph of that law. "Se ha dicho que regularmente no se da la peticion de la herencia contra el que posee con titulo particular; pero si posee en los terminos que se expresa en este parrafo, se dara contra el la accion ùtil; *y con mas razon, si compró la herencia al que sabia que no era senor de ella, y es poseedor de mala fé;* porque en estos casos es tenido por poseedor, como expresa la ley de partida, y se dira despues."

To resume, we say, first, that our action is well instituted, because those, of whom we claim, bought of the person against whom we could bring it. 2°. That the question concerning the legality of this action, is connected with the merits of the case in two ways; first, because it must be ascertained whether the vendor had a right to sell; and secondly, because the alledged good faith of the defendants must be proved.

And now, after having shewn that we are strictly in order, even according to the subtle distinctions of the Roman practice, we must return to our laws, and repeat that they do not require that technical precision, which was once considered necessary in the legal warfare; that with us where the citizen may appear and defend his rights in person, it is sufficient to state the cause of action.

and pray for relief according to the circumstances of the case; and that, provided the judge is made to understand the subject matter and the prayer of the plaintiff, he is bound to decide, without regard to defects of form or imperfections of pleading. Here we state ourselves to be heirs of Bertrand Gravier, and, as such, owners in part of the batture St Mary; we state that John Gravier, our co-heir, has sold his rights to others, and we pray that this property be divided between us and those purchasers. They answer, that the whole of the property is theirs, and that we have no right to any part of it. Are we not fully at issue, on the respective rights of the parties? Cannot the court decide on them, and so decide, as to render it unnecessary, hereafter, to bring any other suit? Most certainly. We will now approach the merits of the case.

We have admitted that the defendants bought from John Gravier all that he had a right to sell them, that is to say, his share in the batture of the suburb St. Mary.

The defendants have answered:

1. That John Gravier was proprietor of the whole by virtue of an adjudication to him made of all the estate of Bertrand, which adjudication has now against the plaintiffs the force of *res judicata*.

2. That they have bought from him all the bat-

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ture, *bona fide*, and under a belief that it belonged to him by virtue of that adjudication.

3. That the rights of the plaintiffs, if they had any, are now prescribed.

The parties are at issue on those allegations, according to the practice of the district court, which permits not any written replication.

To the first ground of defence we reply ;

1. That the adjudication relied on, is null, as against us ;

2. That were it valid, the batture was not included in it.

The adjudication is null for two principal reasons :

1. Because the plaintiffs were not made parties to it ;

2. Because it was made in violation of the laws.

I. It is unnecessary to observe that a want of citation of the parties is of all the defects the greatest, and that no lapse of time, however long, can cure it. A suit without suitors, a partition without parties, are monstruosities, which have no name in jurisprudence. To reason upon this, would be losing our own time, and treating the court disrespectfully.

But the defendants maintain that the plaintiffs were legally represented in the adjudication, on

which they rely. That is the fact which must be enquired into.

At the time of Bertrand Gravier's death, there was here but one of his heirs. That heir caused an inventory of the estate to be made ; and a *defensor* to the absent heirs was appointed. Although it might be reasonably contended that the heirs themselves ought to have been called personally to the inventory, we will not insist upon that right, because we may do without it, and it is our wish to leave out every thing, which is not strictly necessary to the elucidation of our claim. The inventory and appraisement were measures conservatory and usefull to all ; we have no objection to admit that a *defensor ex officio* could represent the absent heirs thus far. But, was it not indispensable to call the heirs to the partition ? Could any measures be taken in their absence, tending to the alienation of their property ? There are, no doubt, circumstances, where the alienation of the property of an absent person is proceeded to against a *defensor ex officio ;* but that is a violation of the natural law, which must be confined to the cases of absolute necessity. Was there in this instance any such absolute necessary ? No. Could the heirs be called personally ? Yes. Let us see what was the practice of the Spanish courts in such cases.

Ayora tells us, that the absent heirs must be

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cited at the place of their domicil and by means of advertisements posted up (edictos) before any curator or *defensor* can be appointed to them; but he adds that this formality was but little attended to, so that judges used to appoint a *defensor* to the absent, so soon as the absence was ascertained. *Ayora*, 5, *n* 16 & 7. Such was, perhaps, the looseness of the practice in the time of Ayora; but in more modern days, that abuse had been corrected; for *Febrero*, *Juicios*, 1, 2, *n*. 7, lays it down as a positive rule, that the absent must be called, when the place of their residence is known. He expresses himself as follows: "if any one or more of the heirs be absent, those who are present may demand the partition, and it may be made at their request; but the judge must *inform the absent heir* of their pretension, and grant him the necessary delay to represent thereupon what he may think fit, because his interest and prejudice is here treated of. The judge must also cause them to name accountants (contadores) and if it appears that the absent has not been called, he ought not to proceed in the case until he is cited, because it is his duty to see that the proceedings be conducted legally in every thing substantial. He should therefore provide the absent with a *defensor*, jointly with whom the partition and its incidents may be gone through; bnt it must previously be ascertained, not only

that the person is absent, but that there is no expectation of his returning shortly, and that on account of the distance, it is not easy for him to come, *nor to send his power to some one to represent him ; for, if his fixed residence is known and he can be cited by dispatches* (requisitorias,) *they must be sent to that effect.*"

Let us now apply this authority to the facts. Was the residence of John Gravier's co-heirs known? He had himself declared under oath, that he had a brother residing at Bordeaux, and a sister residing at Bergerac. Had it been ascertained by a previous information that it was difficult for them to come, or to send their power of attorney ? The decree of the Baron de Carondelet ordering them to be called, is an answer to that.

It is said, that they resided in a foreign country, out of the jurisdiction of Spain, and that the Spanish government had no authority to send any citation there. But a citation is not an order: when a party, even within the jurisdiction, is cited to appear, he is not obliged to obey. If he does not obey, proceedings go on, and he is condemned by default; that is all the consequence. So, the *requisitoria* which is sent abroad is nothing more than an invitation to the party to come and assert his rights. For that invitation, it is not necessary, that the person should be subject

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to the jurisdiction by which it is sent. The invitation is made with permission of the government, under which the absent lives, and is forwarded through its interposition. The practice of the Spanish court, was therefore, to send *requisitorias* abroad, as well as within the kingdom. Should there remain any doubt on that subject, it will be removed by looking at the formules of addresses, which *Frebrero, Juicios*, 3, 1, *p.* 18, *note* 2, recommends, according as the *requisitorias* were to be sent to Italy, to France, to England, &c.

To return, the residence of John Gravier's coheirs was known; the rules of practice of the Spanish courts required them to be *called*: a solemn decree rendered in conformity to those rules, ordered them to be *called:* were they *called?* No. That decree was trampled upon eight days after, by the successor of the baron de Carondelet! But after trampling under foot that decree, and the rules on which it was founded, did they, at least, observe the sham-formality of appointing some person to defend the property of the absent heirs? No. The same individual, who had been formerly named to represent them, was applied to with a notice of the demand by which John Gravier requested the whole estate to be adjudged to him at the appraised value.— But that *defensor* was no longer their representa-

tive. His functions not only *were* at an end, because he had done what he was commissioned to do, but they *were declared to be at an end* by the decree ordering the heirs to be called in person. To make them now perform a part in the partition (if we honor the adjudication with that name) it was necessary to appoint over them another defensor, or rather *curador*, with further powers, that is to say, with a special authorisation to consent to the partition, or in other words, to the alienation of the property of the absent. Such is the rule which both Ayora and Frebrero lay down in the articles above quoted. Even these appearances have been neglected. The defensor, formerly named, received the notification of John Gravier's demand: he answered that he acquiesced in what the court would determine, persuaded that it would do justice; and the deed was consummated! The estate was adjudged in a lump, for little or nothing, to John Gravier! And they dare tell us, that we are bound by that adjudication! That we are, forever bereaved of our property! God forbid! Not for the interest of the plaintiffs, but for the good order of society, that such doctrine should be sanctioned in any time.

To resume, we say that the practice of the Spanish courts required that the co-heirs of John Gravier, should be called to the partition of the

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estate of their brother, and that they were not called; that admitting that such partition could be proceeded to without them, they ought to have been represented therein, by a defensor or curator *ad hoc*; that the defensor formerly named, and whose functions had expired, could not represent them in the partition or adjudication, without a new authorisation and *another oath*; and that nothing of this has been done. We conclude, that the co-heirs of John Gravier, having been neither cited nor represented, are not, in any manner, nor according to any law, bound by the adjudication, which is here opposed to their claim by the defendants.

The above grounds of defence are common to all the plaintiffs. The minor, Jane Bordier, has to alledge a defect of representation which is particular to herself.

According to the constant practice of the Spanish courts, no proceeding can be had against a minor, unless a curator *ad litem* be appointed over him. This is rigorously required in all cases, but a *fortiori* in cases of partition, where the alienation of his property is treated of. *Febrero*, *Juicios*, 3, 1, *n.* 13. "If he, who is to be cited, is a minor, he must be provided with a curator *ad litem*, whether he is, or not, in the place, &c."

It has been vaguely asserted that the *defensor* of the absent heirs ought to be considered as representing them all, whether minor, or of age : we say no ; because the minor must be represented specially.

But John Gravier, it is said, knew nothing of this minor. That is hard to believe : for John Gravier knew that he left in France two sisters and a brother ; he declared in the mortuoria, that he had one sister and one brother ; he was, therefore, informed of the death of one of his sisters : but by the same channel, he must have learned that she had left a daughter. Besides, what of that? Whether he knew that this minor lived, and did not cause her to be represented, or actually was ignorant of her existence, the fact is, that she was not represented, and the consequence is, that the partition is null as to her. *Ayora*, 1, 5, *n.* 18. *Febrero de Juic.* I, 2, *n.* 8.

It has been asserted, that the title of John Gravier, to the whole of the estate, left by Bertrand, has been recognised and assented to on the part of this minor, in a certain suit instituted in her behalf by her tutor ; but, the proceedings carried on by that tutor, waving any other objections to their legality, are not binding upon his pupil ; because by the laws under which he was invested with the tutorship, he could neither accept nor refuse the inheritance accrued to his minor,

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nor enter into any compromise respecting her rights, without the authorisation of the meeting of her family, which protective and salutary provision, has been totally disregarded here. *Code, Napoleon, art.* 461 & 467.

We shall now take up the other ground of nullity.

II. In Spain, as any where else, the laws know but of two modes of making the partition of an estate, by lots or by auction. When the partition cannot take place otherwise than by sale at auction, the law authorises the judge to strike off to one of the heirs, *not, indeed, the whole estate*, but the thing which is not susceptible of division, or which, by being divided, would lose much of its value, such, says the law, as a house or a vineyard. *Part*, 6, 15, 10. But in no case does it permit to adjudge to one heir all the property of which an estate is composed. An inheritance consisting of distinct and separate immoveables, of slaves and other property, could not be adjudged in a lump by virtue of that law, nor of any law in the world.

Even in the case where, on account of the loss which the division of a thing would occasion, it is made lawful to adjudge it to one heir, the judge must, says Lopez on that law, strike it off

to the one who bids highest, *qui vicerit in licitatione*: Such is likewise the opinion of the authors whom he cites. And how could there be a different opinion? Who is the lover of justice, whose reason does not revolt at the idea of an arbitrary adjudication in favor of one of the co-proprietors, without regard for the offers which the others might make of a higher price?

But no such thing here was in question as the necessity of a sale or licitation; there was no occasion to deliberate whether the estate could be conveniently divided; no one did, and no one could suggest the inconveniences of a division. And how could it have been pretended? The goods of the estate were ready divided. There were 56 slaves: that was 14 for each: there was a number of lots in the suburb: four parts could be easily made of them: the moveable property, the money all could be readily distributed; the plantation alone was liable to be divided, or struck off at auction in a body, according to the direction of the judge. But the adjudication in a lump of the slaves, or the lots, of the plantation, and in one word of every thing which the estate consisted of, and that to the only heir present, and that, not at auction, but privately, was an arbitrary and illegal act, an open violation of all laws, and as such, null and void *ipso jure*, as declared by law, *Part.* 3, 26, 3. As to the name, which

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it deserves in a moral point of view, we will forbear to pronounce it, out of respect for this court.

Finally, if the heirs of age were legally made parties to the adjudication, if the minor was duly represented without a *curator ad litem*, if the adjudication of all the estate in a lump, was a legal act, it remains for us to shew that the tract of land, of which we claim our share, was not included in the inventory and appraisement of Bertrand Gravier's estate, and therefore, was no part of the property which was gifted away to John Gravier.

The batture was not included in the adjudication. We are now entering a field, in which this case assumes an entirely new aspect, and where the question to be investigated is altogether unconnected with the former enquiries ; for should the court be of opinion that the batture was not comprehended in the appraisement, and made consequently no part of the property adjudged to John Gravier *at the price of appraisement*, then it will become unnecessary to pronounce upon the legality of the adjudication and useless of course to take any notice of the objections raised against the form of this action ; for, if the adjudication (which is *not attacked* here, but *simply repelled*) remains undisturbed, the respective rights of the heirs are to be considered as set-

tled, the partition as made, and the estate as liquidated so far; and the action arising on the discovery of some property, which was not divided, will no longer savour of the *petitio hæreditatis*, but will be a mere action *communi dividendo*, as explained by *Febrero de Jucios*, 2, 9, *n.* 12. An action generally given to all persons, who own any thing in common, no matter how they came by it. "He who *purchases* a share of a right or other thing, belonging in common to several persons, enters into their common ties and engagements without partnership or covenant: and it is the same thing, if several purchasers, purchase every one of them, singly and separately, different shares undivided of one and the same thing." *Domat*, 2, 5, 1, *n.* 4.

We say, that the batture is not included in the adjudication; it ought to be useless to demonstrate this fact by arguments. There is not in the whole inventory and appraisement one word about the batture. And how could there be? The government, whose officers presided there at, considered the batture as public property. That it was not so of right, has been decided; but that does not affect the present question. The public possessed it: the government openly maintained that possession; the batture was, *in fact*, out of the estate of Bertrand Gravier. No won-

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der then, that it should not figure in the inventory and appraisement.

But the ingenious counsel of the defendants are not to be embarrassed by that omission. Truly, the batture is not expressly mentioned in the inventory, that cannot be denied : but it is *tacitly* and *silently* occupying a place therein : it is implicitly included in the article of the plantation ! Are the defendants in earnest ? So they pretend to be. Therefore, we must go into the investigation of that question with as much gravity as we can command.

At the time of Bertrand Gravier's death, this plantation was no longer such as he had once owned it. The fore-part of it had been laid out into a suburb, which occupied the whole front upon a depth of twelve arpents. Bertrand Gravier's plantation was confined behind that. When the inventory was made, the extent of the plantation, being not known, it was mentioned in these words : "item, are placed in this inventory the lands of the plantation, *the extent of which, cannot be immediately ascertained*, because many lots have been sold ; but Mr. Nicolas Gravier, has informed that its limits run as far as the forks of the bayou, according to the titles of the same." This declaration, that no description can be made of the lands of the plantation, refers necessarily to the description, which shall be hereafter giv

en; notwithstanding the opinion of the honorable judge of the district court (be it spoken with due respect and seriousness) who thought that the *description* referred to the *non-description*, or in other words, that the appraisement in which the plantation and the lots are described separately, referred to the inventory, where it is said that the land cannot yet be described. The description then, as it was made, at the time of appraising the plantation, is as follows: "item, about thirteen arpents of land, of which the plantation consists, including therein the spot of the garden, from which land the most useful part has been cut off on the front; so that *there remains of it but the low grounds, which grow narrower towards the depth, and are inclosed with bad fences;* a part of the best land on the side having been sold to Messrs. Navarro and Percy, and the negro Sambo: which thirteen arpents with twelve negro cabbins, have been estimated by the appraisers, at $ 190 the front arpent, the whole amounting to $ 2740."

Such is the article in which the batture must be searched, *as an appendage* of the plantation! a plantation, of which there remained *only the low lands, inclosed with bad fences*, which was confined behind a suburb occupying the whole front on a depth of twelve arpents; which was reduced to thirteen arpents front instead of six-

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teen, which it originally had, because the lateral lines approach each other as they run towards the depth, and are only distant thirteen arpents from one another, at the place where the suburb terminates ; that plantation, it is said, had for an appendage, beyond that suburb, a spot of ground which extended along the river on the other side of the public road ! But see into what a train of absurdities this proposition leads. The batture was an appendage of the plantation hidden behind the suburb, and the lots unsold in the suburb were not ! It was found necessary to inventory and appraise those lots separately, and there was no necessity to inventory and appraise the batture ! That land thirteen arpents broad, had a dependency of sixteen arpents front ! That low and marshy soil inclosed with bad fences, had for an appendage, far from its inclosures, a line of high land in a fine situation ! That tract worth only $ 2740, had a dependency worth at least $ 10,000 ! All this the court must allow, before they can say that the batture was adjudged to John Gravier ; and they must further allow, in the face of the testimony, that the same government, which maintained the public in possession of the batture, did inclose in the inventory of Bertrand Gravier's estate that very ground which they considered as public property.

But let us admit, for a moment, that the bat-

ture was a dependency of the plantation situated behind the suburb; was it such a dependency as could pass of course, with the principal, tacitly and without any explanation? not so. In matter of sale (and this is placing the subject in the most favorable light for the defendants) such dependencies are those, which, by law or custom, are considered as united to and inseparable from the principal thing. Thus, where a house or a piece of land has, contiguous to it, another house or another piece of land, if both went under one name without distinction, and were *inhabited, used and enjoyed, promiscuously and accessorily* by the vendor, the sale includes both the principal and the accessory; *otherwise not.* (Febrero de escrit, chap. 7, sect. 1, no. 35.) In such a case it is thought by some that even the existence of a road between the principal thing and its accessory will not prevent the accessory from passing with the principal; "Si codem nomine nuncupetur domus, vel fundus principalis et accessorius, et in ejus actibus fruendo vel habitando promiscue et accessoriè venditor utroque utebatur, venditio utrumque comprehendit; secus vero alias. An vendita domus intelligatur venditus hortus, vel apotheca? Tiraquello ait, destinatum hortum ad usum domus cum ea transire, etiamsi non sit intra septa ipsius domus, et quamvis inter hortum and domum esset via publica."

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Additions to 2 *Gomez*, *c.* 2, *n.* 14. If the house and the garden, separated from it by a road, are parts of the same whole in such a manner that the vendor enjoyed them promiscuously and jointly, the sale of the house will embrace the garden. This is the utmost stretch of the principle, for which the defendants contend. Let us see how it will bear the application here. In the first place, what similitude can there be, between the situation of a house and its garden, separated, only by a public road, and that of two tracts of land distant twelve arpents from one another, and separated by the property of other persons? Next, did Bertrand Gravier enjoy promiscuously the batture and the plantation thus respectively situated? That was physically impossible. Finally, did he enjoy the batture at all? all the testimony says, that it was then in the possession of others. Thus, supposing the batture to be a dependency of the plantation situated behind the suburb, it was not *such* a dependency as could pass *tacitly* even in a sale of that tract of land. Much less then, can such tacit transfer have taken place in a partition, where the strictest equality between the partakers, is the paramount rule.

But again, the batture, which had been once an accessory of Bertrand Gravier's plantation, when the body of that plantation extended to the river, was no longer so, since he had established

a suburb on the front of his land. An alluvion is accessory to the riparian soil. But the riparian soil had ceased to be a part of the plantation ; it had been severed from it to form the suburb. One of two things had then taken place ; the alluvion had become accessory to the front lots, or it had remained in the estate of Bertrand Gravier, as a tract of land acquired by him while he was a riparian owner, but entirely unconnected with the low lands which are described as his *then* plantation. Hence, independently of the manner in which the Spanish government considered the batture, those low lands must have been appraised, as they were, by themselves. Hence, the lots remaining unsold in the suburb, must have been appraised, as they were, distinctly and separately from the plantation. Hence the then plantation, reduced to thirteen arpents front, and consisting of low and marshy grounds, was to be appraised at the rate of $ 190 per arpent, amounting only to $ 2740 ; while the batture, according to the most moderate estimation, was worth at least $ 6000, and upon an average of the testimony $ 10,000. But to repeat it again, the batture was not included in the description and appraisement of Bertrand Gravier's estate, because the government, by whose order those proceedings took place, did not consider the batture as a part of that estate, but as public property, and

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because the batture, though of right belonging to that estate, was in *fact* out of it at that time. Perhaps this is insisting too much upon a self evident fact.

But if the batture makes no part of the property adjudged to John Gravier, then the defendants intrench themselves within their own purchase, and from thence bid defiance to the rightful owners of the three-fourths of that property. On what extraordinary exception to the usual rules is that confidence founded ? According to what principles is an heir to lose his property in any other manner than all other owners ? The counsel for the defendants think they have found such particular rules of expropriation in the Roman Digest, and that they are supported in their appeal to it by the Spanish jurists.

The law relied on is the 25, 88, 17, *de hæred. petit.* it is expressed in these words ; " item si rem distraxit bonæ fidei possessor, nec pretio factus sit locupletior : an singulas res, si nondum usucaptæ sint, vindicare petitor ab emptore possit ? Et si vindicet, an exceptione non repellatur, *quod præjudicium hæreditati non fiat inter actorem et eum qui venum dedit ;* quia non videtur venire in petitionem hæreditatis pretium earum, quamquam victi emptores reversuri sunt ad eum qui distraxit ? Et puto posse res vindi-

cari, nisi emptores regressum ad bonæ fidei possessorem habent."

Before we come to shew that this very intricate disposition of the Roman Digest is incompatible with the Spanish laws, and therefore of no force in Spain, we have no objection to demonstrate that it is not in any manner applicable to the present case.

This opinion of Ulpian is based on a senatus-consultum (see law 20, p. 6, of the same title) enacted at the request of the emperor Adrianus, for the relief of some persons, who believing themselves to be heirs of a certian individual, had sold the estate, unaware that part of it had accrued to the public chest, and were afterwards called upon for the purchase money and the interest thereof. It was, thereby, provided that inasmuch as they considered themselves as heirs, and had disposed, as such, of the inheritance, before any demand had been made upon them on the part of the treasury, they should not pay any interest of the purchase money which they had received; and *that this should be henceforward the rule in similar cases.*

Ulpian then, reasoning upon that senatus-consultum, observes that it was enacted for the protection of the *bona fide* possessors of inheritances, who happen to dispose of them as such, that therefore its operation ought not to be confined to ca-

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ses of public claim, but ought to extend to private ones. "In privatorum quoque petitionibus senatus consultum locum habere, nemo est qui ambigit, licet in publica causa factum sit." (same law p. 9.) That is to say: because it has pleased the government to release their own claim, in favor of persons who disposed of property belonging to the public, believing it to be their own; therefore private individuals, whose property is disposed of in that manner, shall have to do the same. With due respect for the great name of Ulpian, this is a strange consequence: but let us proceed.

In law 25, p. 17, above translated, when he comes to examine what effect this doctrine is to have with respect to the purchaser of property thus circumstanced, he is of opinion that where the vendor has not augmented his fortune by the sale, the true heir cannot demand the thing from the buyer, if the vendor has bound himself to warrant him against eviction. Ayora and Febrero adopt this principle without comment (see Ayora part 1, chap. 5, nos. 19 to 24, Febrero de juic. lib. 1, chap. 2, nos. 9 & 10.) But Rodriguez, in his exposition of that law, explains the reason of it to be, that if the vendor has benefited nothing by the sale, as, for example, if he has, without his fault, lost part or the whole of the purchase money, or of the things into which he

inverted it, he should have to indemnify the buyer with his own funds, should the buyer be evicted; which would be contravening indirectly the senatus-consultum, which provides that the possessor of an inheritance, who, considering himself the heir, alienates the estate, shall not suffer for it.

Thus are we, by this concatenation, brought to a result directly contrary to the general maxim that, "id quod nostrum est, sine facto nostro ad alium transferri non potest." A thing at which Ayora starts saying: "Quod est mirabile!" And which Febrero calls "violent and shocking."

But admitting this refined aberration from the eternal principles of justice to be law here, how is it to be applied to this case? John Gravier, possessed as purchaser under the adjudication, or as heir. If he possessed as purchaser, the senatus-consultum is not applicable to him. He is in the same predicament as all other purchasers. Those who bought from him, can make no other use of his *good faith* (as they call it) than for the purpose of prescribing, if they have successively possessed the time required by law to prescribe.

If John Gravier possessed as heir, then the defendants, to avail themselves of this law, and of the opinion of the Spanish authors upon it, must bring him within the conditions therein imposed. What are they? First, John Gravier must have

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been a *bona fide* possessor, as sole heir : he must have believed that his co-heirs were dead. (Ayora and Febrero, loc. cit.) How stands the fact with respect to that belief? Let his oath, page 6, of the mortuoria, answer that. Let every page of that document, down to his engagement to pay his co-heirs their shares, say whether he believed the whole inheritance to be his. 2dly. He must have spent or lost the price of sale. Again, how stands this fact? Why, he has not a shillling of it yet : the whole price is locked up in Mr. Livingston's hands ; witness, that gentleman's own declaration in the case brought by Maurian in the name of Jane Bordier's tutor.

But let us see if, in Spain, we were not governed by plainer rules than the law invoked by the defendants. Let us see whether there are in Spain two measures, one to distribute justice to every owner, and one to parcel it out to owners by inheritance.

The Roman body of laws, entitled as it is to our veneration, is not law in Spain. It is consulted with respect as the fountain from which the soundest principles of natural law have flowed into the Spanish code : it is resorted to as containing a vast deal of information on the matters contained in that code. But wherever it treats of dispositions which are of the domain of positive law, and which do not coincide with the

Spanish law, there it is of no authority whatsoever.

With deference then for the authors, who seem to think that the above passage of the Digest is of some authority in Spain (for our respect for the learned must never be a blind and servile acquiescence in any thing they please to say) we do aver, not only that the laws of Spain have established no difference between the goods of a succession and any other as to the manner of acquiring them, but that there is an express law, by which the purchase of the goods of an inheritance from a person supposed to be the heir, and who is not, is assimilated to all other purchases of the same nature. That law is the 7th of tit. 14, part. 6. It speaks in these words: "one can possess the inheritance of another in three ways: the first is, when the possessor thinks that he has a right to it for some reason, and has it not: *and this would happen, if he had bought the estate from a person who had no right to it, believing that he had;* or if one was instituted heir by a will which was afterwards revoked without his knowledge; and in such case we say, that if he, who pretends to be the owner of such property, does not claim it within *ten years*, if he is in the land, or *twenty* if he is abroad, he shall *afterwards* lose his right, &c."

Supposing then, John Gravier to be a *bona fide*

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vendor and the defendants to be *bona fide* purchasers of the property which we claim, here is a law of our own to decide between us.

But again, let us repeat that neither John Gravier nor the defendants are in a situation to invoke the Roman law above examined. Good faith is wanting here not merely on one side, but on both. John Gravier did not think himself to be the only heir: neither did the defendants believe any such thing. John Gravier did not lose any part of the purchase money, for he has not received one cent. So the defendants are welcome to torture the unfortunate senatus-consultum; there is nothing to be squeezed out of it.

But should the court be of opinion that owners by inheritance are entitled to the same protection as other owners, and that this speedy mode of stripping them will not do, the defendants have still abundance of means of accomplishing their object. They can plead prescription in a variety of shapes, and it would be worse than ill luck, if no one of them should succeed.

The first kind of prescription which the defendants invoke is that, by which our action of partition is said to be barred: an easy and commodious way of getting rid of this demand, if under this plea, the defendants should be dispensed, (as

they would have it) from the disagreeable obligation of proving their possession.

The general principle is, that actions of this kind are barred after a lapse of thirty years, during which time the estate, or the different parts of the estate, must have been possessed separately by the heir or heirs against whom the partition is demanded. "Si néanmoins cette jouissance et possession séparée durait depuis trente ans ou plus, et que cela se pût prouver, soit par témoins, soit par écrit, comme par des baux qu'ils auraient faits chacun séparément des héritages qu'ils possédent séparément; en ce cas ces co-héritiers pourraient se maintenir dans cette possession contre l'action de partage qui serait intentée contre eux, par la prescription de trente ans." Pothier, traité de successions, vol. 1, chap. 4, art. 1, sect. 1e. Febrero lays down the same principles in his treatise de juicios, book 1, chap. 2, sect. 1, no 14. But no. 15 he says: "pero para que la particion se entienda hecha entre mayores, no se requiere el transcurso de treinta años, basta el de diez; por lo que si los hermanos despues de la muerte de su padre habitan separados por diez años entre presentes, y veinte entre ausentes, se presume hecha la division de la herencia paternal, y lo propio millita quando los co-herederos, ò socios, callaron por el referido respectivo tiempo; y principalmente, si pose-

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yeron la cosas de la herencia ò sociedad, pues la possession, y su taciturnidad inducen la referida presuncion, la qual transfiere en el que pide la division, la obligacion, y gravamen de probar que no se hizó, sin embargo de que por ser cosa de hecho, no se presume, y debe probarla quien alega estar hecha." *Si los co-herederos callaron por el referido tiempo*, is relied on as the only circumstance necessary to bar the action. We say no: their silence and *your possession* are inseparable ingredients to create the presumption that a partition took place: and if nothing is shown to the contrary, the action will be considered as prescribed. But their silence alone proves not that you have been in possession the length of time required by law; and their silence, though coupled with your possession, will not amount to more than a presumption that a partition was made, and will at best throw on us the obligation of proving that it was not, *el gravamen de probar que no se hizó*.

Now, do you prove that you have been in possession twenty years, and then we shall rebut the presumption arising therefrom, by showing that the partition, *which you exhibit yourselves*, is a nullity; or that if valid, it does not include the property which we claim.

This particular kind of prescription, then,

far from being advantageous to the defendants will finally be found to require of them a possession of thirty years. So they had better rely on the general principles.

According to the general principles in matters of prescription, the defendants will do enough, if they prove twenty years possession with a just title and good faith.

The title of the present defendants to two-thirds of the batture St. Mary is a sale from John Gravier executed in March 1804: it is what the law calls a just title; and so far there is no difficulty. But allowing them to have been in peaceable possession ever since, with good faith, that would make but little more than fourteen years: the balance is to be made up with the possession of their vendor; but their vendor had none, or if any, a very short one.

Thus allowing to the defendants a just title, good faith and uninterrupted possession, they have not prescribed. We could rest here, and dispense with any further discussion; but in duty to our clients, we must not leave unexplored any of the recesses in which the defendants may take refuge. We have supposed good faith and uninterrupted possession. Good faith!!... Was it in good faith that John Gravier sollicited that shameful decree, under which he expected to strip his co-heirs of their

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shares in the common property? Was it in good faith that he sold to the defendants that which he knew did not belong to him? Was it in good faith that the defendants bought from one heir that which they *saw* to be the property of several? Was it in good faith that John Gravier sold, and that the defendants purchased a tract of land for the possession of which they knew they should have to contend? Was it in good faith that John Gravier appeared in a suit against the city after he had sold his rights to others? Was it in good faith that the purchasers kept concealed during that suit, and that possession was given to John Gravier, though he was no longer the owner? Was it in good faith that an attempt was made to obtain, from the court, a judgment for John Gravier alone, as purchaser of the batture under the adjudication? And when the court refused to pronounce upon that, in the absence of the co-heirs, was it in good faith, and as sole owners, that John Gravier and the defendants took possession?

But suppose that all these mysterious bargains were carried on in good faith, on the part of John Gravier as sole owner of the batture, and on the part of the defendants as convinced that he was, where is the possession necessary to prescribe? To begin at the time when Bertrand Gravier died, who had the possession then? Did J. Gra-

vier so much as pretend that he had a right to possess, until after he had sold or was about to sell to Messrs. De La Bigarre and Livingston ? No : his first attempt to take possession takes date from that time. And since then, what possession had the defendants ? Take away the civil and the natural interruptions by which they have been assailed, and what will remain ?

But we must beg the pardon of the court ; any reflection on the want of good faith and of possession might have been spared ; for allowing all that to the defendants, and heaping together all the days that have passed since John Gravier made his first attempt to possess, yet they do not amount to the time required to prescribe.

But the defendants are not yet subdued : they must try whether they cannot make this a prescription of ten years, as between present.

John Gravier lived at New-Orleans, and his co-heirs in France, that is true ; they never sent any agent, nor any power of attorney, nor any one line of authorisation to any person here, until the year 1817, that is all very true. But then, as early as 1807, soon after judgment was rendered for J. Gravier against the city, Mr. Derbigny wrote a *consultation*, advising the heirs that a tract of land of considerable value, not comprehended until then in the inventoried property left by B. Gravier, had been decreed to be part of

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his estate, and that, should it finally remain so, the three fourths of it were theirs. That consultation was delivered to Mr. Pitot to be forwarded to the heirs; Mr. Pitot wrote to his friend, Mr. Otard, in Bordeaux, recommending to forward it; Mr. Otard *probably* forwarded it; Mr. Pitot continued to write to Mr. Otard, keeping him advised how things went on; Mr. Otard *probably* transmitted those informations to the heirs. Now, could not this be so construed as to shew that the heirs w re represented here? True, they had no agents; but then they had some kind of *negotiorum gestores*, gentlemen, who volunteered their services with the odious intention to prevent them from being plundered. Could not these obnoxious gentlemen be considered as the representatives of the co-heirs of John Gravier, ever since their criminal communication? Perhaps they might; the defendants have already done wonders; could they but perform this one more, and their prize is safe. But no: it is not; for they cannot even complete ten years of peaceable possession, nay, of any kind of possession.

We have now done with the discussion of what we think to be the only points of any consequence in this case. But before we close, one more observation is necessary. The defendants after having alledged a title to the whole of the batture, under a sale from John Gravier, have

thought fit to produce a sale only of two thirds, so that J. Gravier appears not to have divested himself of the other third. If this be a *finesse*, to shew that all the proprietors of the batture are not parties to this suit, and that no partition can be decreed, we are willing to meet it with our common sense. Whether John Gravier has sold only his share, or more than his share, or the whole, is a matter which we deem unimportant. He had a right to sell only his fourth, and so far we admit his sale to be good, and to have placed the defendants in his stead. In the two thirds, then, or in the whole, that share is included ; let the court allow the defendants that fourth, and the other three fourths to us, and decree the partition. If John Gravier comes in afterwards, and claims his pretended third, we will debate the matter with him.

Livingston for the defendants. The plaintiffs alledge that they are the heirs of Bertrand Gravier for three fourths of his estate ; that John Gravier their co-heir for the remaining fourth sold his undivided portion in a part of the estate, called the batture, to the present defendants—that they wish no longer to hold in common and therefore pray a partition.

The defendants deny the right of action ; and make title to the whole under a sale from John

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Gravier, to whom they alledge the whole estate of Bertrand was legally adjudicated, by the sentence of a competent tribunal; and they rely on the said sentence as *res judicata*.

Whether the plaintiffs can try their title by an action in the present form and against the present defendants, will be afterwards discussed.

If they can, it must be supported by making good one of their allegations:

1. "That the premises were not included in the adjudication."

2. "That the adjudication is void."

I. To shew that it was not included, they say that it is no where found *eo nomine*, either in the inventory, the appraisement, or the adjudication.

To this we answer: that the premises being part of the plantation, there was no more necessity for its being specified than for the insertion of the Rice field, the Cypress swamp, or any other of its component parts.

Great precautions, were taken, as some of the heirs were absent, that *all* the estate of the deceased should be inventoried. After the appointment "of a person," as is stated in the decree *who may represent them*, and take such steps as are consistent with law, the lieutenant-govenor Vidal is appointed to take the inventory, he

proceeds to do it in person in the presence of the attorney for the absentees, the heir who was present, the deputy of the depository general, and the sworn interpreter—after a most minute enumeration of the most insignificant articles, they come to the real estate ; and the plantation is thus described :

" *The lands of the plantation* the *quantity (extension)* of which can not immediately be calculated, because *many lots* have been sold ; but Nicholas Gravier informs us that its boundaries go to the border of the bayou, according to the *title deeds.*"

If the premises then formed a part of the plantation (and it seems conceded that they did) how can a doubt be entertained that they are included in this general description of the whole ?

The inventory being furnished, and the premises thus included in it, John Gravier, presents a petition praying that witnesses may be interrogated, in order to know whether there is any property not included in the inventory. One of them is *Nicholas Gravier*, (the same person who, as agent of Bertrand Gravier, had shortly before sold different parts of the batture to Foucher, to Girod, to Wiltz, to Escot ;) who consequently knew that the batture was part of the estate of Bertrand Gravier ; yet he declares on oath that he knew of no other property than that inven-

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toried. The deduction is irresistible, that he must have considered the batture as included in the general description of the plantation.

After the inventory, the defender of the absent heirs and John Gravier, join in a petition for the appraisement of the property, and each names two appraisers; and they four an umpire.

This is ordered. The appraisors are sworn, and they proceed to the execution of their duty. In the performance of it, after estimating the personal, they come to the real estate, here they begin with the buildings—they estimate separately *two* lots, and the whole of the rest of the plantation is thus described:

"*About* 13 arpents of land, at which the plantation is *computed, including the garden*, from which the most useful part in front is taken off—the rest consisting of the lowest part bounded by very bad fences; the side being sold to Don Jose Navarro, one Percy and the negro Jamba, a portion of the best. Which arpents with the 12 negro cabins, the appraisers estimate at 190 dollars the front acre."

I was led, at first, into a false translation of this passage, from adopting without sufficient examination that of the plaintiffs. They translate *serrandose*, "growing narrower towards the depth." The word ought to be, and probably is, in the original, *cerrandose*, which signifies *inclosed*. The

word "*serrar*," means to *saw*. "*Cerrar*," to bound, *fines, terminos circumscribere.*" *Dictionary of the Spanish academy.*

On the petition of Gravier, and by the consent of a Guinault, who gives his reasons why it would be in his opinion, beneficial to his clients; the governor decrees, "that in consideration of the consent of a Guinault, defender of the absent heirs, *the estate real and personal*, and slaves which *have been inventoried as belonging to the deceased Bertrand Gravier*, who has died intestate, are adjudged to John Gravier for the price of the appraisement, in which are included the cattle, under the security which is proposed, and under *the obligation of paying the creditors what shall appear to be due to them* and to his other co-heirs the parts that shall belong to them." And he directs that as soon as the security to this effect is given, the property shall be delivered to John Gravier by the depository general.

This is done; and the whole of the property is delivered to John Gravier by that officer.

With these documents before us the solution of the first question is easy—all the estate real and personal of the deceased, *which was inventoried,* is adjudged.

What was inventoried?

All the lands of the plantation, except the lots that were sold—the premises in question formed

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a part of the plantation—therefore they were included in the adjudication.

But it is said, in order to pass by the adjudication, they must also be included in the appraisement, because, the adjudication refers to that for the price. This would be true if no other consideration had existed for the adjudication, but the price of the appraisement. But as one other and important condition, is annexed, that of satisfying all the creditors, the adjudication would operate upon the premises, even if they had been altogether omitted in the appraisement. But they are not:—They are there included in the residue of the plantation, after deducting the lots sold.

It is a mistake to say, that all the lots of which the faubourg consisted, were sold and excluded from the general description: by an inspection of the map it will be found that the number of lots numbered on the map, amounts to about three hundred; those not numbered to perhaps as many more: in all at least 500 lots.

In the record in this cause will be found an account of the sales, made by Bertrand Gravier. They amount to an hundred and six, or only one fifth part of the portion of land laid out into lots —therefore, all the others are included in, and have been held and sold by John Gravier under the general words of the adjudication—in

the record are some of the sales made by John Gravier after the death of B. Gravier. There are in the account 177—but 71 are lots conveyed by Nicholas Gravier to Sarpy, out of the 89, which are contained in the account as being conveyed by B. Gravier to him.

The plantation is computed at 13 arpents, whereas, according to measurement, by the map, it is said to contain upwards of fifteen—if this be so, what is the result? The most unfavorable to the purchaser would be, that he should pay for the surplus acres. But, as the *whole plantation* was sold, and the error is only in the *computation*, the sale could never be avoided, even were the property still in Gravier's hands, but most clearly cannot in those of a bona fide purchaser.

If this should be alleged, in order to shew that the 13 arpents were intended to be taken behind the part, laid out as a faubourg, it is defeated by either of the following:

First: that the description *arpents de face*, when applied to a *plantation having no other boundary designated*, uniformly is construed to carry the plantation to the river, and it is neither candid nor well founded to say that, in any other cause, the defendant has contended for a contrary doctrine—he has always said, that where there was a sale giving a road, a street or a particular line as a limit, the general words could never car-

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ry the grant beyond that limit; but where the land was not an *ager limitatus* they would—now, here, there are no words of limit, no road or other front boundary designated: therefore the words " de frente" relate to the river.

Second: the computation of the 13 arpents (tho' erroneous) can be no proof that they were to be located behind the faubourg, because only one fifth of that faubourg, was then sold, and it is not contended, I believe, that all the farm which was unsold was not included in the adjudication.

Third: the 13 arpents intended in the appraisement, could not have been situated *behind* the faubourg, because the dwelling house, magazins and other outhouses, were situated on these 13 arpents; and the garden and negro cabins are expressly included within them. If these objects therefore are found near the front of the suburb, clearly the land that includes them, cannot be wholly behind it. It will be recollected that there are two maps before the court; one, of the faubourg as it was first laid out, containing only 3 streets parallel to the river, the other, with the addition that was afterwards made. On the first of these maps, the surveyor has placed a note of reference to the house, magazines, garden, outhouses and cabbins; we should, therefore, by this means know the exact situation of these objects, and trusting to this, no parol evidence was

produced of the fact if on inspection, it had not been discovered after the trial, that the surveyor had omitted to mark the letters of reference on the correspondent parts of the plan; enough however, is shewn for our purpose. The note of reference proves, that the house, outhouses and garden were situated, somewhere on the ground delineated by that plan; that is, somewhere within the 3 streets of the faubourg nearest the river. The land, therefore, that *included* them could not lie *behind* it—again, if the court think they have no right to take notice of the notoriety of the fact that Gravier's house and buildings were situated in the *very front part* of the *first* plan of the suburb, they may infer the exact situation of some of them, from the names of the streets—*Rue Gravier* passing by his house—*Rue des Magasins* from the buildings of that description contained in the inventory—and *Rue du Camp* from the negro camp which lay somewhat remote from the house in that quarter.

Fourth: we must look for the 13 arpents somewhere, where there have been sales made on the side: the appraisement says, that a part of the side has been sold to Jose Navarro, Percy, and the negro Samba: now, on the map we find no delineation of such sales behind the faubourg; though we shall see several divisions in the plan

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that answer this description if we locate them as they ought to be in the front.

Fifth: they could not be situated behind the faubourg, because the only exception in the inventory is of the lots sold—" the whole plantation *las tierras de esta habitacion* is put in the inventory, of which the extent cannot be *calculated immediately.*" Why ? *Because many lots were sold.* The evident intention, therefore, was to put in the inventory, all the part of the plantation which remained after deducting the lots that were sold. But the batture formed a part of the plantation, the batture had not been sold—therefore the batture was included in the inventory, and forming a part of the plantation, was appraised with it. Exactly the same idea is expressed in the appraisement. " 13 Acres of land at which are *computed* those (the lands) of this plantation, including that (the land) of the garden ; from which (the plantation) is taken away the most useful part in front, the *remainder* consisting of the lowest part, &c." The remainder after what ? After deducting what was taken off by sales. The batture was always a remainder, because it was not sold. And observe that *the most useful part* only of the front is said to be taken off. There was then some part of the front *not so useful* which remained. That part is the premises in question. I must here guard the court against

an evident error in the translation of this appraisement, in the plaintiffs' brief, p. 21, where the words *de la qual se quitó* are translated "from which is *cut off*," it means *taken away*; evidently referring to the sale which alone could take it away, *cut off* on the contrary might apply to the separation by a road. Again, "consistiendo el sobrante en lo mas bajo," is rendered "so that nothing remained of it but the low ground," changing totally the phrasealogy, so as to get rid of the substantive "lo sobrante" and with it, if they can, of the idea of a "residue" which naturally leads to enquire what was *taken away* in order to know what was left.

But, say the plaintiffs, the premises could not have been intended to be included in the inventory and appraisement, because they were considered by the government as public property; and its officers would not have permitted any inventory to be made that should have included them.

To this, I answer, and I think, conclusively; that if I have proved that they were on a fair construction of the words, in point of fact, actually included, no evidence to be sought for out of that act shall be permitted to have any weight, particularly when the premises have passed into third hands. This is forbidden by the Civil Code, and may have influenced the judge in his

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rejection of Mr. Lafon's testimony, whom we offered to prove that, being one of the appraisers, he had considered the batture as included in the estimation.

If the plaintiffs had alledged that the premises *were* actually public property, they might be allowed to prove the acts, tending to shew it to be such. But let it be remembered, that their action can only be sustained by shewing it to be part of the estate of Bertrand Gravier ; and that they wish from circumstances not contained in the act to infer the conclusion that the parties intended something that they have not expressed ; in other words, to prove something beyond the contents of the deed, if not something contrary to it, which the law will not allow.

If I sell my plantation generally, shall my heir be permitted to shew by parol testimony, that a part of it was reserved, even if I had made such reservation expressly at the time ?—certainly they would not; but if the reservation is only inferred from other circumstances, does it make the case stronger or the testimony more legal ? on the contrary it must make it weaker, and shew the impropriety of the testimony more strongly.

The case of Segur and Marigny is in point—Segur sold to Marigny his plantation, of which a portion had been long in the occupation of the king with the old French fortifications ; and this

part, together with some additional angles were occupied by the new works of the baron Carondelet. In the sale, Segur reserved what had been taken off by baron Carondelet, saying nothing of the rest. When the fortifications were destroyed, Marigny took possession of the ground occupied by them: and Segur brought his suit, as well for the part contained in the old fortification, as for that taken by the baron for the new.—But he recovered only the part he had expressly reserved, the court refusing to listen to any arguments of the plaintiff tending to shew that the ground could not have been intended to be included in the sale, because it was possessed by and supposed to belong to the crown at the time of the sale. They said the only enquiry was, whether it was a part of the plantation: if it was, and had not been expressly reserved as the Spanish fortifications were, then it must pass by the general words with the rest of the plantation.

Thus, here the batture is included in the general words, "*las tierras de esta habitacion*," and no parol proof ought to have been offered or can be considered, tending to shew that it was not intended to be included in the adjudication. If that species of proof, however, were proper, we offered the most certain, that of the only surviving appraiser, to prove that when he fixed the value on the plantation, he considered the batture

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as forming a part of it. This proof was overruled and on reflection, I think, with justice. But it would be odd indeed, to refuse the testimony of the agent as to his intent, when you look for it in the opinion of others, in relation to that very intent. The only legal rule is to examine the instrument itself, and its words, I think, are conclusive.

But if the enquiry should be deemed legal and proper, let us examine what has been the result.

It was not intended, say the plaintiffs to include the batture : *first*, because the Spanish government considered it public property, and would not have suffered it to be inventoried as a part of a private estate.

This they say is proved by the orders issued by Carondelet and Gayoso, to destroy the buildings erected on the premises, and by the refusal to permit Girod and others to improve it. If the government and the Cabildo thought the soil of this land belonged to the public, the plaintiffs must acknowledge that this opinion was erroneous ; because if this were a just opinion, then it belongs yet to the public ; and the U. States, not the present plaintiffs would have a right to recover it from me. If however, they thought, that though the land belonged to Gravier, the public was entitled to the use of it for the purpose of navigation, until it was enclosed by a levee, then

their opinion would have been a legal, and that, which the plaintiffs must acknowledge to be the true, one.—Now, when we can account for the acts of public functionaries in two ways; one which attributes to them legal, and the other illegal motives; we cannot hesitate which to prefer. The governor and Cabildo by these acts in relation to the building upon and outside of the levee, only enforced the general law, forbidding any building there, which might be injurious to the free navigation of the river. The people who saw only the act, would naturally conclude that it was an assertion of title; and thus many of the witnesses who were ignorant of the distinction between the use and the right of property, concluded that the soil itself was claimed by the government, whose acts only tended to secure the use of it to the public.

On the other hand, we find governor Carondelet in 1794, long after the suburb was laid out, directing Bertrand Gravier to repair the levee, afterwards requesting his permission to make use of it, as a place to lay up the royal-masts; and after Bertrand's death, addressing a similar request of John Gravier. This testimony is highly important, not only to destroy the inference drawn by the plaintiffs from the governor's acts; but as shewing expressly that the *governor* at least, thought at that period that the batture was

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included in the adjudication, and had become the property of John Gravier.

That the opinion of its being public property, was not common to all the officers of government, nor to all the inhabitants, is evident by the purchases made of part of the batture by Foucher, Girod, and others; and by these sales being publicly passed in the office of the notary of the government. Mr. Foucher, indeed, says expressly, that he was ordered by the baron de Carondelet to make the road, because he had bought the batture, and that for this reason, he thinks if he had had the funds for the purpose he might have improved the property without opposition.

I conclude, therefore, that the acts of the Spanish officers do not, as is supposed, shew that they thought the premises were public property; that, on the contrary, the facts disclosed by the defendants testimony are inconsistent with any such opinion on their part; but that both may be reconciled by supposing, as we ought in common justice to suppose, that those officers were acquainted with the law which acknowledged the property to be in Gravier, but gave the use of it, in its then situation, to the public.

It is next said, that we cannot believe the batture to have been included in the estimation, which amounts to 2400 dollars only, when they

have proved that the batture alone was, at that time, worth four times that sum.

First, let us settle the fact. What is the proof of the then value, now before the court?

Several witnesses have been examined to state their opinion on the subject, and several of them have stated that they think it would have been worth 10,000 dollars. But this testimony must be received, from the nature of it, with great caution.—The period referred to is more than twenty years since—the property has continually been increasing both in extent, importance and value, and is now worth an immense sum. It is difficult even for the most dispassionate individual to say now what were his ideas of this land at a remote period when it attracted little attention, and when he had no interest in fixing a value on it—but when we add to this difficulty the consideration that the most angry passions have, for fifteen years been excited by the different contests relative to this property, there will be no difficulty in supposing that these passions may have impressed on the minds of very honest men, false ideas of the value when looking back to any given period.

Fortunately we have better grounds for our judgment of the true value at that day, than opinions formed now, of so fleeting a thing as the value of land, during a period of twenty years. We

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have the best materials—the price that was actually given. Gravier sold many of his front lots—the deeds are before the court. Some he sold with the batture in front of them; others without it. If we find any material augmentation of price in the consideration of those sales, where it is included, it will be just to put that augmentation to the score of the batture—if there be none, the fair inference is that then it had no value: in other words, that the cost of reclaiming it from the river would have been as much, or more, than the value, when it was done. And this we shall find most conclusively to be the case.

On the 22d of March, 1794, Bertrand Gravier sells to Girod a lot for 350 dollars, without including the batture—on the 12th of April of the same year, he sells him an adjoining lot of the same dimensions, expressly including the batture in front, for the same price of 350 dollars. And about the same time, he sells to Escott, to Wiltz, *with the batture*, for the same price, 350 dollars; and by another conveyance of the same date a smaller lot of 39 feet front to Girod, for 233 dollars, all including the batture. Now this price of 350 dollars (which appears to have been current at that time for the lots indifferently, with or without the batture) is somewhat less than the value some years before, as appears by the deed to Mr. St. Jean, adjoining Girod's purchase, page

90; to Mr. Vessier, 89; in each of which 1950 dollars was given for 240 feet front, or four lots, without the batture, so that property seem to have been falling instead of rising in price, about that period.

It may be said, perhaps, that the testimony of Mr. Foucher contradicts these facts; but, in truth, it does not. He purchased better than three lots, 185 feet, for one thousand dollars *with the batture*—now this is something less than, as we have seen, was the price of front lots about the same time, with or without the batture. It is true, he says, that two or three hundred dollars was the relative price of the batture in this transaction; but this kind of testimony is, from its nature, uncertain—what is certain, is, that the whole three lots were sold en masse, with the batture, for the usual price of three lots alone, without designating how much was given for the lots, and how much for the batture—and what were the loose declarations and chafferings between buyer and seller as to the value of particular parts of the property, cannot now be enquired into or ascertained.

On the subject of value, we have also another criterion to judge by, resulting from the experiment made by Mr. Girod: he says that his brother undertook to fill up one of the lots on the batture, at a place where, according to all the tes-

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timony, it was most practicable: and that he was obliged to put on it 7 or 8000 loads of earth. Now, this, at the lowest estimate of the labor, would bring the lot to more than the price at which a front lot, which wanted no filling up, could be purchased; no prudent man then, would have given any thing for it, unless he could have foreseen the natural and political changes which have encreased its value—that value, then can raise no presumption that it was not included in the appraisement or adjudication, because it has been proved to have been very trifling.

The plaintiffs are mistaken in supposing that we claim the batture as an appendage to the plantation: we claim it as an inherent part. No authorities are necessary to inform this court that alluvions are incorporated with, and become a part of the original soil, as much as the annual growth of a tree is incorporated with and forms part of the ancient stock. We have said that the right of alluvion is accessory; but that the alluvion, when formed, is a constituent part, and when the lands of a plantation were adjudged, every part of these lands went with it.

"But the batture cannot be included in the adjudication of the farm, because it was separated by lots which had been sold, from the rest of the plantation." Admit, for a moment, this fact,

which I shall presently disprove: let us examine what effect the argument ought to have—Gravier had a plantation, out of which he sold a line of lots extending through the breadth of it; at his death all his property is directed to be inventoried, and the officers who make it say, "we put in the inventory the lands of this plantation, of which we do not know the quantity, because many lots have been sold." Is there not here an intent, well and clearly expressed, of putting in the inventory all the plantation, excepting only what was sold? Afterwards, when the articles inventoried come to be appraised, can we suppose that the appraisers intended to exclude from the appraisement any part of what had been inventoried? If we cannot suppose any such intent, we must believe that by the expression, 'about thirteen arpents of *land* at which *that* [viz. the land] of the plantation is computed," they intended to give an idea of the whole farm: and when they say, "of which the most useful part has been taken in front, they meant to exclude the lots sold, but certainly to appraise the rest. The adjudication then closes the transaction and gives to Gravier all that had been *inventoried*, at the price of the *estimation*, and under the further obligation of paying the debts of the state. No matter then, what division Bertrand Gravier had made in his lifetime, of the planta-

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tion; what parcels he had carved out of it; in what direction they lay; or how they cut the farm; it is inventoried except the parts sold; it is estimated by a computation of the number of acres, and no part of it being excepted but the part sold, all the rest is adjudicated. It is disingenously asserted that all the lots unsold in the suburb, are separately appraised, and are not included in the general words of the sale.—An inspection of the map, the record, and the appraisement will shew the unfounded nature of this assertion. By the map near six hundred lots will be found to have been laid out in the faubourg; by the record the number sold by Bertrand Gravier amounts only to 107; and by the appraisement only *two* lots are *separately* valued, except those *sold* to Nicholas Gravier in trust, which trust was not discovered until the first inventory was closed. These lots were then inventoried for the reasons I have stated: that they came under the exception in the inventory.—They were *actually sold*, and therefor, did not pass by the general words. But the batture was never sold and therefore did pass.—All the other lots, except the 107 sold by Bertrand Gravier, and the *two* specially inventoried, passed by the general words to John Gravier, and have been sold or are now held by him.

The plaintiffs have said that the adjudicatio

is a kind of partition, and that a partition is likened to a sale—be it so. The inventory, appraisement and adjudication then together form an act of sale—put it in this shape and I will venture to affirm that not an individual who is at all conversant with our customs and laws, can have a doubt on this case.—I have a plantation, part of which I have disposed of in lots; and I sell to A. B. the lands of my plantation, of which I cannot calculate exactly the contents, because I have sold many lots; but I estimate the rest at about thirteen arpents, which consists of the lower part, a part of the best being taken off in front; which thirteen arpents I sell for 190 dollars the *front acre*, amounting to 2470 dollars—Is there a tribunal in the state, I say, which at any time (more especially after 20 years) would listen to my heirs who should claim any part of the farm, no matter where or how situated, as not being included in the sale? Mistakes in the computation of the contents give rise to other actions; but none would lie in the present instance where the whole was sold under an approximate calculation of the contents. At any rate it could only lie for the value of the additional number of acres.

II. But, say the plaintiffs, the adjudication is void—and therefore it cannot avail you, even if the premises be included in it.

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Before I examine what are the reasons they alledge to prove this nullity, it will be proper to examine whether the court can listen to the allegation, however well supported.

The distinction between judgments that are null and those that are only unjust, need not be enlarged on. The one, says Febrero, l. 3, c. 1, s. 4, p. 496, is called so when it is given against the form and solemnity prescribed by law—the other (the *unjust*) is that which is given against the right of the parties.

The *unjust* sentence must be appealed from.

That which is *null* may be avoided, either by an action of nullity, or by exception when it is pleaded.

But if attempted to be avoided in either way, either by action or exception, it must be litigated with the party to the original suit. (Febr. ubi supra, no. 503) "previniendo lo primero que la nullidad se ha de controverter en contradictorio juicio *con audiencia del colitiganti.*" This is important and destroys the plaintiffs exception, as opposed to the present defendant. Within the proper time they might have brought their suit against Gravier, to declare the judgment null; or if Gravier pleaded the judgment they might alledge the nullity by way of exception. But as to third persons that exception can never be made, for this reason, that no one but the origi-

nal party can be supposed capable of defending the judgment; and the law, very wisely, will not permit his dearest interests to be discussed between strangers. Among the many causes of nullity enumerated in the books is bribing the judge Would any court permit a discussion of this charge in the absence of the party against whom it is made? Would they impose the necessity upon every person who had purchased under a judgment to defend it against such an allegation? The answer is contained in the authority I have quoted. The nullity of the judgment must first be pronounced in a suit to be brought against the original party.

"Every sentence, says Febr. ubi supra, no. 494, has in its favor the presumption that it has been given according to the form prescribed by law, with a knowledge of the cause and by a lawful judge, with proper jurisdiction, especially if he be a superior judge; and if it be *an ancient one*, the presumption is increased that it has been preceded by all the necessary requisites and solemnities of essence and substance." This is the language of common sense; and the corollary from these positions is, that every sentence, more especially an *ancient* one, must have its full effect until reversed; which, as we have seen, must be either by appeal, if it be *unjust*, or by action or exception of nullity, if it be *void*: and

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in either case in opposition to the original party.

"Quod nullum est nullum potest habere effectum" is not true as respects judgments; every sentence being, in this respect, voidable only and not void, since all sentences are valid until rescinded, and since a sentence which is called void may be made valid by the assent of the parties (Febr. 495) which could not be were it totally void.—The first process then, where a judgment stands in the way, is to pray its rescision; but not to proceed as if it did not exist.

The passions and interests of suitors would lead to endless litigation, if care were not taken to put a period to discussion by a sentence which, after a proper lapse of time, must be final. The authority of the res judicata, therefore, became sacred in the civil law. It was guarded by fixing the period for *appeals* against the allegation of *injustice*; and a limit of 60 days was also fixed for the charge of nullity brought against the essence of the sentence. A distinction was, however, made by the law (3 part. 26, laws 3, 4, and 5,) between notorious nullities and those which were not of that description: the first being avoidable at every period; the others being barred by the lapse of 60 days. A nice discrimination was also drawn by the ingenuity of the lawyers between the suit to avoid a sentence, and the exception to avoid it when it was pleaded in bar.

They made or applied a maxim "quæ temporalia sunt ad prosequendum, sunt perpetua ad excipiendum;" and they said that though a suit in nullity was barred, yet, when opposed as a bar the nullity might be shewn any time; and by virtue of this law and this distinction, the door of litigation was kept constantly open.

To avoid the manifest evils arising from this state of things, a law was passed (Recop. de Castile, lib. 4, tit. 17, law 2.) which declares "si *alguno alegare* contra la sententia que *es ninguna*, puedelo decir hasta sesenta dias *desde el dia que fuere dada* la setencia, i si en los sesenta dias no lo dixera no sea oido sobre esta razon; &c. *y este po' que los pleytos ayan fin.*

This law would seem to put an end, after the expiration of 60 days, to every attempt to alledge any nullity, whether notorious or otherwise, whether by action or by exception. Never were words more clear or precise, or better calculated to remedy the evil growing out of the abuse of the distinction in the partidas or the ingenious device of the lawyers. "Ningun," no party, whether plaintiff or defendant, "alegara" shall alledge, in any way, whether by action or exception—and to avoid all cavil about notice of the sentence, the limitation of 60 days, is to begin from the time in which the sentence is "*given.*" How the plaintiffs can expect that the court

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will listen to their exception in the face of this positive and express statute, I really cannot well imagine.

There is one case, however, in which equity would seem to require some relaxation of the rigorous words of this law. But that case is not the plaintiffs : and even were it presented, I know of no power in this court to dispense with the positive words of a law, in favor of what they might deem its spirit : a mode of decision which they are expressly forbidden by our code to pursue. The case I suppose entitled to equitable relief is the very extraordinary, and perhaps impossible one, of a judgment against a person who was never cited, and who had no information of the judgment or proceedings, until the limitation had expired. Here equity might, perhaps, be required to come to his relief; but the utmost that even the most liberal equity could do, would be to place him in the situation he would have been in, had he received notice of the sentence when it was given, by giving him the sixty days. But this I repeat is not the case of the plaintiffs. If the court could give relief against the words of the statute, would they do it in this case ? What is the plaintiffs equity ? Is not this, on the contrary, precisely such a case as the law intended to bar ? A plain statement of their conduct will answer the question.

Bertrand Gravier died in 1797. They reside in or near Bordeaux, a sea port which communicates more than any other with this country. Yet, from that time until 1807, we hear no more of them, than if they were not in existence; yet, the death of their brother must have been known to them; yet, they must have made some enquiry into his succession, and must have heard of the disposition of his property, and more probably still they must have been minutely informed of it, as soon as the communication was opened by the peace of Amiens, from their attorney, M. Guinault: I say *their attorney*, because he was as much so, being appointed by the court, as if he had been named by the parties—he was sworn to do his duty, and an important part of that duty was to communicate the decree to his clients. Every officer shall be presumed to have done his duty until the contrary appears. If the sheriff, whose duty it is to serve process, shall return that he served a citation; and judgment is given against the defendant by default—he cannot avoid the judgment, but has his relief against the officer: because the court will suppose every officer to have done his duty. On the same ground, it is but fair to argue that Mr. Guinault did his duty, and gave the notice in time. Still the parties are silent for eleven years. Then we *know* that notice was *sent them*—a gentleman, high at

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the bar and now on this bench, gave them full and minute information (see piffs. case 33) of the value of the property and their claims to it. This opinion was given to, and forwarded by the gentleman who now acts as attorney in fact for the plaintiffs, and in that quality has signed the appeal bound for them; I mean judge Pitot, who, about that time, began a very active correspondence with a M. Otard of Bordeaux, who wrote to him every two or three months, in behalf of the plaintiffs, during the ten years that have since elapsed —and in 1817 two powers of attorney come out from the different plaintiffs, one directed to judge Derbigny, who has since transferred it to judge Pitot; the other to judge Pitot himself, who now acts as the attorney in fact for all. These powers arrived in October 1817, and the suit is brought in April 1818. Now, let us date from any of the periods above mentioned, the presumptive notice from their attorney, at the time of the sentence, 21 years ago: the transmission of Mr. Derbigny's opinion eleven years since; or the authentic and notarial evidence of notice contained in the powers of attorney, and the shortest and most favorable of these periods gives more than three times the limitation contained in the law. Therefore there is no equity, arising from their want of notice of their rights (if any they have,)

that would induce the court to dispense with the words of the law, if they could do so.

Is there any from the motives of their silence? It is in evidence that one of the defendants has, for twelve years past, been exerting himself to assert the title of Bertrand Gravier to this property; that he has had to contend against the interest, the passions and the prejudices of the community in which he lives; against the efforts of the territorial government, and the oppressive exertions of the executive power of the Union; that in the contest his fortune was sacrificed, his business lost, and his life repeatedly exposed to imminent danger from popular resentment During the whole course of this struggle, not a word is heard of the claims of the heirs in France. The period was not arrived; the time was not "*propice*," according to the expressive phrase of their agent, to assert their rights—when however that disgraceful scene of oppression had closed; when perseverance, the justice of my cause, and the independence of the judiciary had restored me to my rights; then, it might be supposed, the most timid claimant might venture to appear; the most unreasonable might be satisfied with the extent of sufferings, sacrifices and dangers that had been incurred to prove his title—not so the plaintiffs, the time was not yet sufficiently "*propice:*" the way must be better prepared: the property had

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not yet acquired all the value of which it was susceptible, my exertions were still wanted to overcome two other obstacles before they would dare to intimate that what had been done was for their benefit: there was a claim of the front proprietors that must be tried and defeated: the assent of a jury of inhabitants to the making of the levee, must be first procured. Then was the "propitious time" when every risque had been run, every danger encountered, every sacrifice made, every obstacle removed, every doubt on the title done away, every prejudice overcome; then for the first time they announce their claim: for I pray the court to remark that Mr Pitot, their attorney, declares that he had never given any notice of his constituents' claims to the defendants; although by the record it appears that, for three years past, he had given repeated orders for the assembling of a jury of inhabitants, to determine whether a a levee should be made; and that, on the application of the present defendants acting as, and styling themselves proprietors of the batture; and that two of these orders had been given since he received the powers to commence this suit. What was more natural if concealment had not been intended, than to have told the defendant, "you are taking a great deal of trouble for property that is not your own. It is claimed by the heirs in France, I have the powers in my pocket." But

no ! nothing was to be done that should put a stop to my exertions, the most studious concealment was observed ; and it was not until a few days before this suit was brought, that I had any the slightest intimation that it was intended. I have stated the conduct of the defendants as it appears from the record—I have made few reflections upon it. and those few, with a moderation which the circumstances of the case would have excused me in departing from.

It has been suggested that I make these statements, with the hope of gaining my cause by an address to the feelings of the court. It is true ! But they are the most noble feelings of the heart that I address ; feelings never at war with the soberest dictates of sound judgment ; feelings that must always be alive in the breast of an upright judge.—Love of justice, hatred of oppression, contempt for concealment and art. These are the only feelings I wish to enlist on my side—and these must dictate the decision, on this branch of my argument that there is no circumstance attending the delay of the defendants, that could induce the court (if they had the power) to dispense with the limitation contained in the statute against the allegation of nullity ; that on the contrary, the delay appears to have been wilful, and apparently from motives highly unequitable and unjust.

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But if the two inseparable objections I have stated could be removed; if the allegation of nullity of a judgment could be made in a suit, between others than the parties to the judgment; and if there were no limitation to the time of making such allegation: let us examine whether in reality, there is any such vice of nullity attached to the sentence, which adjudicated the estate of Bertrand Gravier to his brother.

The first cause of nullity assigned is, that the plaintiffs were not parties to the judgment, not having been cited, or represented, in the mortuary proceedings of Bertrand Gravier. They do not deny that a defender for the absent heirs and the goods of the deceased was appointed and sworn: that all the proceedings were regularly communicated to him; and that he expressly assented to the adjudication, and was present at, and approved of, the inventory and appraisement: but they say, that his nomination was illegal: or, at most, could legally extend only to the taking the inventory and appraisement, as conservatory acts. This then leads to two inquiries: are there any cases, in which absent heirs may be legally represented, without their knowledge, by a person appointed by the court? Was this such a case? Both the question are answered explicitly by the plaintiffs themselves, *in the affirmative*.

First, their declaration, page 11 of their case, where they say; "as the inventory and appraisement were measures conservatory and useful to all. We have an objection to admit that a defender ex officio could represent the absent heirs, thus far." There are then cases in which such appointments are lawful: that this is such an one is answered by their conduct in this very cause. This suit is, as the proceedings after the death of Gravier were, according to their own definition of them, a suit in partition. Three of the defendants in this cause are, as three were in that, absentees. One of them is also, to make the parallel perfect, a minor. Now, if the plaintiffs thought that a citation and personal notice were so necessary, as to render the proceedings void, it omitted, they would have proceeded to give that personal notice; if they thought the powers of this court did not extend so far as to name a defender for the absentees, they would never have pursued that course.

Yet, strange as it may appear, they have actually pursued in this cause the very course, which they stigmatize as illegal and unjust in the judgment, which this suit is instituted to set aside.

Three of the defendants in this cause are represented, without any personal citation or notice, by a person appointed by the court to defend their interests—and *this* too under the same law

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which governed the Spanish tribunal; (for we have no statute changing the law in that respect) and on the motion of the same counsel, who now gravely tell us that the first appointment was illegal—of two things, then one; the appointment of the defender for the absent heirs of Gravier was legal, and then your objection fails; or your own suit is infected with the same fault, and you can obtain no relief under it. This example, too, applies to another objection: that in partitions, each party has an opposite interest, and that, though it were lawful to appoint a defender for each, yet one attorney could never legally represent all. The present suit meets this objection in all its points. The same persons who were illegally (as these gentlemen say) represented by a single attorney, before the Spanish tribunal, are here collectively represented in a suit for partition of the same property, by the same counsel; and only one attorney is appointed to represent the separate interests of three defendants, who are absent. It must be confessed that, if the objection be good, it is most unfortunately urged. But greatly as I rely on the authority of the plaintiffs against themselves, I do not rely on that alone I have (they will excuse me) better authority. I have the uniform practice of the courts of this state, of the territorial government, and of the Spanish tribunals which preceded them; all fol

lowing the same rule of practice, under the same law, which has never, in this respect, been changed; and all uniformly appointing *ex officio* defenders for absentees, in cases of 'cessio bonorum,' in common suits where their interests were incidently drawn in question, and in mortuary proceedings like the present. So that to declare all judgments void, where this step has been taken, would unsettle the titles to property and produce incalculable confusion and distress. As this is a rule of practice, if there were even no law on which it is founded, though it might be changed in future yet former decisions under it must stand. But there is law and *positive law*, and the plaintiffs themselves quote it.

The words of Ayora are that, in case of absent heirs, the judge may order the absentee to be cited; and if he do not appear, and *be not found in the country*, nor be expected shortly to return; then, if all this appears by information taken thereof, he may order that he be provided with a curator or defender of his goods, who may do all the acts of the partition. 'But', he says, 'we must observe that, in order to give validity to the acts of this curator of the absent heir, it is required that he should *be cited at his house and by his edicts;* because, otherwise a curator cannot be named so as to prejudice the absentee, *according to Baldus and Salicetti* who lay down *this*

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form of dividing against an absentee—*although this in practice is not observed. For the judges, having first taken information as to the fact of absence, are used to appoint a curator for the goods of the absentee, without any citation; which, I believe, is the true practice and sufficiently correct.'*

This is express law, and of the very highest authority—but this, says the plaintiffs, was *loose* practice, and Febrero has altered it; but in the passage they quote, I think he confirms it. 'He (the judge) [page 12 of their brief] should therefore provide the absent with a defender, jointly with whom the partition and its incidents may be gone through: but it must previously be ascertained, not only that the person is absent, but that there is no expectation of his returning shortly; and that, on account of distance, it is not easy for him to come, or to send his powers for some one to represent him.' Now take these words in conjunction with those emphasized by the plaintiffs, and what do they prove? That, wherever the absentee cannot be reasonably expected to attend, there the judge may name the defender—but that the difficulty of communication is a matter to be decided by the discretion of the judge, who, according to the circumstances of the case, must determine whether the citation is to be sent or not. And if in the present case

he has exercised it *unjustly* it is ground for an *appeal*, not for an exception of *nullity*.

But there was not even injustice. There would have been if the estate had been left in the hands of the depository general, to be consumed by costs and charges; until an opportunity could have been found in time of war, to communicate the case to the defendants, and until they could send their powers to receive it.

The second objection of the plaintiffs to the adjudication is, the adjudication of the whole estate together.

It is difficult to say, at this distance of time, and under the astonishing change of circumstances which this country has undergone, whether a discretion, with respect to property was well or ill exercised. If the country had remained under the government of Spain; if they had extended their restrictions and oppressions in all their force to this colony; if it were in the state of convulsion, that all their colonies now are; then the adjudication for the appraised value would have been highly beneficial, for the property would have been of no value.

But it has chanced to pass under an enlightened and free government, and the estate is now worth more than the appraised value—at the time, the one event was not more probable than the

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other. To do justice to the motives of the tribunal, we must place ourselves in the situation in which it stood. We must know all the circumstances: we must hear all the arguments: we must have data which nothing but identifying ourselves with the judge can give. From all which it results that it is impossible for any one to pronounce whether the judge of a Spanish tribunal, twenty-one years ago, acted discreetly or unjustly in adjudging to one heir the property at a fair appraisement, and directing the price to be paid to the other: common candor and the principles of law, which I have quoted, direct us to pronounce his judgment just. And when we consider that the property was given to the heir on the spot; the price, to those who were at a distance and could not conveniently use the estate, there is additional reason, from fact, to confirm the presumption of law. Fortunately I am not obliged to perform this task. This court has no right even to inquire whether the judge acted wisely or impartially, or even illegally, in making the adjudication. They can only inquire whether the judgment be clothed with the ordinary forms of law To go further, *under any circumstances*, would be to allow appeals from the old decisions of the colony; to revive disputes long since terminated, to unsettle estates, and to introduce disorder and endless litigation. To go even

so far, *under the circumstances of this cause*, would as I have shewn, be illegal.

But as this is a clear case, the task of shewing that the judge had the power to make the adjudication he did make, is easy. I shall proceed to perform it. There are four modes by which a partition may be made: an actual division, a licitation between the heirs, a sale and partition of the price, or an adjudication to one of the heirs at an appraisement with a like partition. The judge must determine which of them is most consistent with justice—in deciding this, as in any other sentence, he may err from ignorance or injure by design; but in either case, there is no nullity. Here the judge, by the consent of the representative of the absent parties, preferred an adjudication; and, at the end of twenty years, we are first told that he had no power. A single authority will shew that he had. *Ayora*, *part* 1, *c* 1, *no* 11 & 12, states explicitly 'that, where the division is *convenient*, he must divide the estate. Where it *is not convenient*, he must adjudge it to one, with directions to pay their share of the price to the others.' But who is to judge of this convenience? The same intelligent and accurate author gives this obvious answer: the judge *no.* 13. '*Quia totum hoc pendet ex arbitrio judicis*,' according to the excellent reasoning of the plaintiffs 'all this depends' '*totum hoc pendet*,' not on the

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discretion of the judge who hears the cause and knows the circumstances, but on that of his successors who never heard the parties, and from the nature of things must be ignorant of the circumstances.

In the same author, *Part 3d, Quæstio 5th, No.* 11. we find the same power in the judge recognized, even more expressly, 'El juez ordinario, es cosa llana, que puede hacer las dichos adjudicationes a uno *enteramente o en parte*, y condenar le, que de la mitad de la estimation al otro coheredoro, quando aquella cosa no recibe commoda division.' The same doctrine is found in Febrero, *part* 2, *lib.* 1, *c* 2, § 2, *no.* 37, where, he says, the judge may make the adjudication 'a su arbitrio', at his discretion.

These authorities and this train of reasoning, induce the defendants to think that the judgment cannot be impeached—and that the premises are included in it.

But, independent of these, the plaintiffs cannot recover.

1. Because they have not proved the allegations in their petition.

2. Because it cannot be brought in its present form against the defendants.

3. Because under the circumstances disclosed

by the proof in this case, no suit whatever will lie for the recovery of this property.

4. Because the action is barred by prescription.

I. The plaintiffs alledge, "That John Gravier, their co-heir, *has disposed in favor of the defendant Livingston and the ancestor of the other defendants of his undivided shares in the premises*, bv virtue of which, transfer the said Edward Livingston, and the heirs of said De la Bigarre, hold the said batture in common with your petitioners." And, inasmuch as it does not suit their interest any longer to hold the property in that undivided estate, they pray for a '*partition.*'

Now if the statement in this petition had been proved, the court might possibly have granted its prayer: but the most material allegation is not only unproved, but negatived by the testimony —*Gravier did not sell his undivided part: we do not hold and never did hold in common with the plaintiffs.* The action for a partition never lies but where all the parties acknowledge a community of interest, and the only question is in what manner that community is to be destroyed by a particular appropriation of the parts. To permit an enquiry of the merits of a separate title, in this form, would be to create confusion and avoid the simplicity and certainty prescribed by the law, which the plaintiffs quote. That law (the act for

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establishing our practice) requires that the plaintiff shall state his cause of action; but will it permit him to state one cause of action and prove another? We need not be told that the law was intended to avoid the difficulties attending the niceties of different actions; and that the plaintiffs are not obliged to give to theirs a technical name. But, it certainly was never meant to enable the party to alledge one thing and prove another—or to obtain a relief inconsistent with the facts they alledge: in asking for a debt, I cannot prove title to land—nor can I ask for land because the party owes me a debt. I cannot alledge a community of title and obtain a division, when no community is proved—a judgment can only be given, in conformity with the *allegata et probata*—when these two differ, no code permits relief to be given.

II. Again, a cogent reason for confining the plaintiffs to the proof of their allegations is this, that unless they do make out the proof, this action will not lie against the present defendants. By this action, I mean one such as this purports to be, for the division of property acknowledged to be held in community. If the defendants had bought, as the petition alledges they have, the undivided share of Gravier in the premises, there would be no difficulty or hardship in calling on

them for a division. They are to be prepared for it: it was an inseparable incident to their title. But the case is widely different, when they have purchased the whole and hold it under a title, which excludes the idea of community. In the first case, the intervention of their vendor in the suit is unnecessary; they represent him completely; he has claimed no right, but such as are acknowledged by all parties. But in the latter case, where he has sold the whole, his intervention becomes absolutely necessary for the purposes of justice. Or rather it is necessary that the affairs of the community should be discussed between him and his co-heirs, before the *purchasers* can be disquieted by suit; *because* there may have been a partition, and the particular part he has sold may have fallen to his share—if no partition has been made, the same part may be included in the portion of the vendor, by a future division, and then the holder will not be disquieted.

Because, if the holder of the land be even permitted to enter into the merits of the adjudication or partition, under which the sale was made, the character of the seller, in case of fraud being alledged for cause of nullity, will be tried in his absence.

Because, if the plaintiff should invalidate the adjudication and recover in a suit ignorantly or badly defended by one purchaser, he might af-

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terwards be defeated in his attempt against another, or against the co-heir himself: and then the tribunal would be under the necessity of giving contradictory judgment on the same title.

Because if the suit be sustained, it leads to a most oppressive multiplicity of actions, each individual purchaser would be liable to an action; each one, however small the parcels of the property he possessed, must submit to a division. Whereas if the partition were sought between the co-heirs, a large division would be made of the whole land; and the holders of all those, at least, falling within the portion of the seller, would be quieted in their possessions. In the present case, the evil would be strongly exemplified, where there are at least a thousand different purchasers, against each of whom separately, a suit would lie, with the same propriety as against the present defendants.

These considerations and others that might be urged, probably induced the Roman jurists to establish, and those of Spain to adopt that rule on which we have insisted: that no action shall be brought against the purchaser of a particular portion of an inheritance, unless the purchase was mala fide, or it was made for an under value, or the seller was no longer to be found: * in all other cases, the action must be directed against the

* 5 *D.* 3, 13, § 4.

co-heir who had sold. But even he was not liable for any encrease of value in the property, nor for any loss of the price in his hands, if he sold *believing that he was entitled to sell.* Not confining the "belief," as the plaintiffs contend, to his *being the heir;* but to his having a right to the inheritance * and by a necessary deduction from this law, the purchaser could not be liable in case there was a warranty. For if there could be a recovery against the purchaser, and he could recover over against the heir who had sold, the provision in favor of the heir would be nugatory.

These are the principles to be gathered from the authorities in the margin, which were read on the hearing, and we are mistaken if any of these positions justify the charge so liberally made of our wishing to revive the subtle distinctions of the Roman practical jurisprudence, or sheltering ourselves from a just claim by the niceties of special pleading.

III. It remains only to shew the good faith of

* 5 *D*, 3, 20, § 14. *J. D.* 3, *laws* 9, 10, 11, 12 & 13. *Roderig, exp of sam· l·ws, p* 114—117. *Ayora.* 64. *No.* 3. *Faria, prac.* 85, *No.* 16, 17, *Ib.* 86, *No.* 18, 24. *Politica Villadiego, p.* 830, *No.* 90. 2, *Hulot, p.* 70, § 1, 2, 3. *Ib. p.* 95, *law* 45. *Hulot Cod. p*, 449, *l.* 20. *Ib. p.* 506, *l.* 9. 2*d. Ib. Dig. p.* 99. 1, 2, 3. 1*st. Ib. Dig p.* 406, § 4. *l.* 13. *Ib. p.* 414 § 6. *l* 20. 424, 17 *l.* 25. 409. 23. 3*d Rod.* 152. § 17. 1 *Feb.* 2*ch*, 9, 10, 11, 12. *Ayora. p.* 1 *ch.* 5. *Nos.* 20 *to* 25.

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the purchasers to bring ourselves within the first; and that of the seller, to bring him within the second of these rules.

The purchasers (the present defendants) were not in good faith, the plaintiffs say, because they had seen the adjudication, and therefore they must have perceived its nullity. This is supposing the defendants to possess the same accurate knowledge of law (which with proper humility they disclaim) that distinguishes the plaintiffs; and has enabled them to perceive nullities, where the plain blunt understandings of the defendants could perceive none. They saw a sentence cloathed with the ordinary formalities of law, rendered by a superior judge with the advice of a most learned assessor; they saw the seller in possession under it, then for near eight years; and they did not possess those lights, which have enabled the plaintiffs, so much to their own satisfaction, to prove that the Spanish tribunals, the Spanish authors, and the American judges have until now erred in the construction of this law.

It was a want of good faith also, say the plaintiffs, in the defendants, to conceal the purchase they made from Gravier, during the suit carried on by him with the city. This assertion is not only irrelevant, but unsupported by evidence and untrue. It is irrelevant, because it does not, were it true, substantiate the charge. An act, to

constitute *mala fides*, must be one that tends to defraud the party complaining of it, or some other. Now, suppose it true that the defendants had bought of Gravier, and that, before he denied possession, the city had disturbed him; and they (the purchasers) had suffered him to prosecute a suit, to be quieted in the possession before he delivered it, and during that time had concealed their purchase: where I ask is the injury? Where the ill faith? Where the slightest inconvenience to the parties or to any other mortal? The act therefore alledged, as evidence of ill faith, is one perfectly correct even if it had been true and they had proved it. But the fact is not so. There was no concealment. The agreement for a purchase was known to hundreds, and might have been to all who chose to make the inquiry. To constitute concealment in the unfavorable sense in which the gentlemen employ it, there must be some obligation in a legal, a moral, or honorable view to make the disclosure, here there was none: nor was it ever denied, where inquiries were made, even to satisfy the idle curiosity of uninterested persons; those who had an interest in the subject were informed of the purchase by matter of record for Gravier, his petition against the corporation states that he had bargained for the sale of the property, but that the pur-

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chasers would not pay in consequence of the claim set up by the corporation.

Having shewn that the concealment did not exist, it is useless to observe the irregularity of the plaintiffs' adverting to that which does not appear on the record.

The other charges of ill faith, are directed against John Gravier, in the shape of a dozen fretful interrogatories, tending to shew that he was in bad faith, because he knew his title was bad, and because he was in bad faith—but neither question nor answer to shew or even intimate one reason, why he should be supposed connusant of the defects of his title or suspect that a sentence rendered by a learned judge, according to the forms of law, was void.

There being good faith then, both on the part of the seller and the purchaser, both the rules of law apply, and the action cannot be maintained. One word on an allegation connected with this, and we have done on this point: page 34 of their case, the plaintiffs say that the defendants have produced a sale of two-thirds only of the property; and they insinuate that we withhold the other sale as a *finesse*. Neither the charge, nor the expression in which it is conveyed are very courteous. We have better means however of repelling it, than by saying we deferred producing the sale *until the time should be more propitious*. We

offered to produce the best evidence of it in our power, and were prevented by these gentlemen, * who now candidly impute the withholding it as an imposition on the court. We actually did produce the next best evidence (p. 269) in the partition deed between the purchasers, and in the delivery of the separate part to one of the defendants by a judgment and execution of the district court of the United States.

IV. The last bar to the action of the plaintiffs is contained in the exception of prescription.

This is a prescription of the action, not a prescription to give a title to the land—Ayora 3, 31, *n.* 13, and Febrero, 1, 2, § 1, (15) fix it at ten years when the parties are present, and twenty when they are absent; if there has been a partition and the parties are silent during that time. This must necessarily mean even a faulty partition, because if it be applied only to a good one, there would be no need of limitation.—Now the plaintiffs tell us that an adjudication to one heir is a species of partition but that this partition has been a faulty one. Then here has been a faulty partition—but it has been submitted to, and acted under, for twenty years and upwards.—Therefore prescription applies. It also comes within the express provisions of one statute, which li-

* *Exception to Lafon's testimony.*

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mits the time of accepting an inheritance to twenty years. *Civ. Code*, 164 *art.* 94. Now the first act of acceptance is the bringing the present suit.

It ought to apply more strongly in this case from the prodigious amount of Bertrand Gravier's debts, and the probability that in the lapse of time, John Gravier has been forced to pay them.

It is supposed that one of the plaintiffs, Jane Bordier, stands in a better light than the others. —But in truth it is, if possible, worse. She is equally bound by the adjudication.—The limitation of the act to rescind it equally applies to her ; or, on the most favorable construction, can give her only the limited time after she came of age ; and that event took place near three years before the bringing this action. The two rules relative to the protection of sales in favor of bona fide purchasers and bona fide sellers, suffer no exception in favor of minors. The prescription of action, it is true will not run against her, though it will against the other defendants ; but though not barred by this branch of the defence, she is barred by her own act.

By her guardian, in 1810, she protested against the sale of the batture, and brought a suit to account against Gravier, not against the holders of the batture : here if she had any right, she took

the proper means to assert it; but being convinced that she had none, the protest was revoked, (pages 66, 71, 74 and 115) and a new petition filed (page 119) to which the purchaser of the batture was made a party and the price was attached in his hands. Nothing could be a more formal confirmation of the sale than this act: for were it void there could be nothing due: but it was attached because it was acknowledged to be due. A formal judgment was rendered that Gravier should account: a time was fixed for that operation; and in the mean time, the sale was confirmed by ordering the mortgage which secured the price to be registered.—All this it is true, was done by the intervention of the young lady's guardian. But she is bound by it since she became of age. The action to account was well brought by the guardian against Gravier. The judgment is binding; but at any rate, if it be not so, it can only be set aside by shewing lesion or fraud—and that too, in a particular suit, brought for the very purpose, and alledging the particular faults of the act; not by an incidental question in any other suit. She is therefore bound by the act of the guardian and the judgment of the court.

But if she were not, she has confirmed them. When these transactions took place she was fifteen years of age—six years afterwards, 1816.

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she of course became of age. During that time, however, Gravier had either not complied with the order of the court to render an account, or rendered it unsatisfactorily.—During all that time, the attachment on the price of the batture was in full force—if this plaintiff had, on coming of age, discontinued the suit, or even, perhaps, if she had done nothing, she might have preserved her right to bring an action of *lesion or restitution in integrum* against the confirmation of the sale, the suit and judgment. But she confirmed them, *impliedly*, by not discontinuing the suit; *expressly* by setting it down for trial; and once, at least, (p. 364) after her power to recover this inheritance had arrived here. She therefore made her election and cannot now revoke it.

I have said that she was bound by the adjudication—perhaps some argument may be required on this head. The universal practice to appoint attornies for absentees, in cases of insolvency and succession, without any enquiry whether they be of age or infants, shews that such enquiry would be nugatory; because if the fact were known, it would produce no change in the measure, unless the plaintiffs think it one to call, as they have done in this suit, the attorney for the absent minor an attorney ad litem—an attorney to defend or prosecute a suit—and what is the attorney without any such appendage to his name, appointed

for the other defendants?—Precisely the same thing. If therefore the appointment of an attorney be efficient, in any case, to bind an absentee, it is so in the case of a minor.

Let the *court* consider the thousand cases of insolvency alone that have taken place here; where in the common course of events, the attorney appointed for the creditors must have represented infants, under his general powers—and they will see the danger of suffering them to come forward to rescind all those proceedings, to declare all sales and adjudications under them void.

Let the *plaintiffs* look to their own proceedings, and remember that I appear here, not only for myself, but as attorney appointed on their motion, for three absentees; of whom one is a lunatic, the other a minor, and the third, by the visitation of God, in perpetual tutelage, being blind.—And then let them chuse whether they will stamp their own proceedings with nullity, in order to destroy those of the Spanish tribunal. Either will be equally fatal to their cause. In all events, if the plaintiff be not bound by the Spanish adjudication on account of her then minority, she has a remedy, but clearly not the one she has chosen. A minor when aggrieved by any sentence, must apply to have it revoked by alledging and proving lesion—neither of which has been attempted here or could be done in this action.

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The plaintiffs err in supposing that the evidence introduced of my services and expenses, in securing the property, was intended to procure a decree of reimbursement in case of their recovery. As I never thought that a probable event, I was far from taking any measures grounded on the supposition that it would take place. The evidence was introduced to shew the motives of their delay, and reject any equity they might endeavor to set up.—They are willing, however, they say to do justice and make proper compensation.—But what can compensate the days of labor and nights of sleepless anxiety, I have passed in defeating the different attempts by legislative oppression, executive violence, and private litigation to destroy the title which, they now say is theirs? Oppression, violence and litigation, excited by the very persons or their agents, who now, that I have proved it my private property, unblushingly call it their own? What can compensate for the mortification of having for ten years (by the prejudices which these very persons have excited) been considered as an aggressor upon public rights, while those who now wish to enjoy the fruits of my labor, gave themselves the credit of asserting them? Can they pay me for the fatigues I have undergone? The dangers I have incurred? The long separation from the friends of early life, eternal as to some who were

most dear to me? Do this! Do the hundreth part of this! And take freely a decree for the land. But in the mean time, do not insult the man you wish to ruin, by an affected love of justice and an offer of pecuniary recompence.

Mazureau, in reply. After all that has been said, it will be found that the defence of the purchasers of the batture reduces itself into this: we have bought from a person who had a right to consider himself as the legal owner of the whole estate and was consequently a *bona fide* possessor of it. The Roman law enacted for the protection of the *bona fide* possessors of inheritances, are applicable to him; therefore, no claim can be brought against those who bought from him with warranty.

That this is a misconstruction (no doubt unintentional) of the Roman law on which bears the whole fabric of the defence, can be shewn in a few words, if our first exposition of this question has not already done away the arguments of the defendants.

The constitution of Adrianus, or senatus consultum above quoted, and the laws predicated upon it, were enacted for the protection of the *bona fide* possessors of inheritances, who have disposed, as such, of the goods of the estate. Who are those whom the law calls by that name? They

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are evidently the persons who have a right to consider themselves as heirs: and according to the 13*th* § *of L.* 20, *tit.* 3, *book* 5. of the pandects, and to Rodriquez's exposition of that law, even all those who have a just title to possess the inheritance, *v. g.* an heir under a fiduciary bequest. Thus, such an heir, or other just successor, or any one who is entitled to the rightful possession *of the inheritance*, must be protected as well as the person who believes himself to be the heir. Be it so.—Will the defendants be able to bring J. Gravier within either of those situations? Evidently not.

In the first place, we lay it down as a fact that the goods left by B. Gravier, so long as they remained in his estate, never were possessed by J. Gravier at all. They were placed in the custody of the law: the depository general took possession of them immediately after Bertrand's death, and kept it until by the adjudication they were transfered from the estate to the purchaser. J. Gravier's possession began then.

Jno. Gravier, therefore, never possessed *as heir*. But suppose he had; then the defendants cannot extricate themselves from this dilemma. Jn. Gravier, as heir, could not be a *bona fide* possessor of the whole, for he knew that he was not alone. Jn. Gravier, as purchaser under the adjudication, was not a holder of the goods of the in-

heritance; for the goods of the inheritance *had* ceased to be: they were become his own goods.

The argument of the defendants, unless they have used it in error, is really a mockery; for it tends to no less than to establish that the goods of the inheritance after their alienation, were still the goods of the inheritance; that after their transformation into a sum of money, they still remained in the estate of Bertrand Gravier, together with their price; that the estate then consisted both of the price of sale and of the goods themselves! Will they disclaim any such absurd reasoning? Then we say, if the goods, which had belonged to the succession of Bertrand Gravier, were no longer in his estate since the adjudication; if the estate, after that, consisted only of the price of sale, in lieu of the goods, how could those goods be possessed still as the property of the succession. And if they were possessed by J. Gravier by virtue of his purchase, how will you apply to him the laws which were made for the relief of the *bona fide* possessors of inheritances, who, believing themselves to be heirs, happen to dispose of the property; and which, so far from protecting the purchasers, expressly provide that, unless the *bona fide* vendor of the inheritance is exposed to their recourse, the property may be claimed from them. "*Puto posse res vindicari, nisi emptores regressum ad bonæ fidei possessorem*

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habent."—Here the vendor was the judge, who sold, of course, without warranty. Jno. Gravier was the purchaser, and the defendants are purchasers from the purchaser: so that if Jn. Gravier could be considered by those laws, there is no reason why the defendants themselves and all other purchasers under them *ad infinitum*, should not enjoy the same advantage?

Such are the laws in which the defendants have pretended to place so much confidence. If they were sincere, they did not understand them, if they were not . . . but we cannot suppose that they misrepresented them intentionally.

It is hardly necessary to say any thing of that very extraordinary part of the defence, which has been addressed to the feelings of the court, those complaints about hardships, persecutions and such like. In any case, such language is at best very useless before the organs of the law, who have no discretion to exercise; but in a case of this nature, it ought, above all things, to have been avoided, for fear of the reaction which it might draw forth between those who have labored to strip the real owners of three-fourths of the land in dispute, and the unfortunate heirs who, after having been deprived of their portions in the estate of their brother, come to rescue at least that which has not been involved in the wreck of his succession.

As to the expences and sacrifices, which have been talked of with bitterness and reproach, though they are also a subject, which this court cannot take into consideration, we beg leave to answer that nothing has evinced on the part of the plaintiffs, any disposition to avail themselves of them without compensation. The plaintiffs ask for justice, and will do justice.

Henry, on the same side. Our reply to the defendants will be short; not that we despise their arguments, for they are very ingenious; but because they are built on false premises, from beginning to end.

To commence with the tenderest question, that of the inventory and appraisement, to which the feelings of the defendants have attracted their attention first, what is the basis on which they have erected their fabric? It is this: the whole tract of land, which Bertrand Gravier owned near the city, was at the time of his death, still a *rural estate in one entire body*, from the river shore down to the back lines; out of which, to be sure, some parcels have been carved, but without deranging the connection of the whole.—Now, what is the fact? The whole front of that tract had been laid out into a suburb, and divided into lots, streets and squares; many of those lots, among others all the front lots but one, had been sold; some were still unsold, and remained in

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the estate of B. Gravier, not as part of his farm, but as town lots, by their meets and bounds and numbers conformably to the plan of the suburb. The plantation or farm, the prœdium rusticum, was confined behind the spot divided into prœdia urbana, and had its front on the last street by which their were bound.

Thus the landed estate of Bertrand Gravier near the city, consisted then, of his farm behind the suburb, of the lots unsold in the suburb, and of the Batture in front of the suburb. The farm was appraised; the lots were appraised; the batture was not.

It has been curiously observed, that whole squares in the back part of the suburb were not appropriated separately, and were nevertheless taken in, by J. Gravier as a part of the plantation. This may, indeed well be the fact:* and so did

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* There is, however, no evidence of the fact. What seems probable, is that the addition of two rows of squares in the rear, marked on the plan as not yet divided into lots and not numbered, was nothing but a project of enlarging the suburb, which had not yet been carried into effect, and existed only on paper. As to the 300 lots contained in the first plan, we find the account of them almost to a fraction.

Sold by Bertrand Gravier himself		107
Appraised in the first inventory		10
Conveyed in trust to Nicholas Gravier 172 1-2 according to his account to 198 of the mortuaria, out of which there remained in his hands agreeable to the second inventory 45 1-2 so that he had sold	127	172½
		289½

J. Gravier take the money and the active debts into the bargain, under the adjudication of what had been appraised. We are disposed to acknowledge that J. Gravier took every thing, and would have taken the batture as well as the rest, had he thought of it and could he have done it.

It is to be lamented that in the same writing, in which the defendants express their contempt for concealment and art, (a sentiment in which we join them most cordially) they should have so far departed from their principles as to mutilate facts to make them square with their arguments.— They say that the plantation was "estimated by a computation of the number of acres and no part of it excepted but the part sold." But, "de la qual se quito en el frente lo mas ùtil, consistiendo lo sobrante en lo mas baxo," means something more: it is an exception of all the highest part of the land; in other words of all the front. Again, they say, that only *two* lots were appraised separately before the first inventory was closed. Two lots are indeed enough to shew that the adjudication of the plantation, did not include every thing except the lots sold. But the truth is, that there are five parcels appraised separately in the first

To which are to be added, the parcels which had been sold previous to the establishment of the suburb. It was, therefore, not disingenuously asserted that all the lots unsold had been appraised separately.

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appraisement, and they amount together to about ten lots, where we shall find by and by more information about the contents of the thirteen arpents.

We must here say something of an important discovery, which the defendants have made in the article of the plantation. It is no less than this: cerrandose is written by a C and not by an S, for if it was written by an S, it would be nonsense. That we grant, were it at the peril of our cause. We will never maintain that the lines of a plantation, no, not even the lines of a saw-mill plantation, can saw one another, or any thing else. We are for the C, by all means; and the gentlemen are very wellcome to draw from thence any inference, no matter how fatal to our interest.—But we humbly pray the court to consider, that when we ventured to say, that "que van cerrandose" signified that the lines shut, or close, or approach one another as they recede, we gave those words in candor, the sense which we thought they had; and when we looked at the plan, we were confirmed in our belief that we had understood them right. But suppose we were mistaken, does it disagree with the fact? Look at the plan, and say.

The conjectures of the defendants about the situation of the dwelling houses, magazines and other out houses of B. Gravier, and the conse-

quences which they draw from them, are very entertaining, and we have no doubt, that they have made a due impression (of that kind) on the minds of the judges. Unfortunately, however, for the defendants, we have *on record* something more than conjectures to shew that those buildings were situated out of the lines of the thirteen arpents, on lots appraised separately and distinctly from the plantation. In the first inventory, the court will find three articles, which we here translate from our notes.

"Another lot behind the preceding, &c. part of which is occupied by fort St. Louis, on which lot is *the house inventoried No.* 7 "

"A parcel of ground, fronting Gravier's street on one side, and the inclosure of the city, Store street and Camp street on the other, the contents of which may be computed and divided into six portions of lots, rendered useless and embarrassed by a large pond, on which lots are situated a *wooden store house*, &c. a *brick store house*, &c. a *pidgeon house*, *another store house*, and a stable, which are to be demolished to open the street delineated, and in which stand other buildings, &c. the buildings are those inventoried under Nos. 4, 5, 8, 9, 10, the whole valued at $ 1200.

"A lot making the corner of Gravier and Camp streets, on which are situated the *brick kitchen*, &c. the *wooden house*, &c. and the *pid-*

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geon house, &c. inventoried under Nos. 1, 2, 3, valued at $ 200, (a pretty good bargain by the bye !) *

Now that we have shewn the places where the buildings were, we will proceed to the next point, the nullity of the adjudication.

The whole train of reasoning of the defendants upon this subject, goes to shew that it is now too late for us to alledge the nullity, or to appeal. But in order to apply to us the rules relied on by them, it must be presupposed that we were parties to the adjudication ; for, if we were not parties we could not appeal. If we were not parties we can alledge the nullity at any time.— Now, we maintain that we were neither cited nor legally represented, which is the same as not represented at all. The gentlemen have said a great deal to prove that absentees can be represented ; we do not deny that ; but we say, *that we were not.* Upon the point we refer the court to our brief.

The defendants further contend, that we cannot recover,

* By the inventory appraisement we see that the house, storehouses and other buildings were situate on lots appraised *separately* from the plantation, and that the negro cabbins and the garden only were comprehended in it. The consequence is clear, that the front line of the thirteen arpents passed between the house and the garden. —Where was, exactly, that spot is a matter of no importance. *The front line of the* 13 *arpents passed behind the house :* that is enough. It cannot overleap that boundary.

1. Because we have not proved the allegations contained in our petition;

2. Because the action could not be brought in its present form against them.

3. Because, by the circumstances disclosed by the proof in this case, no suit whatever will lie for the recovery of this property.

4. Because the action is barred by prescription.

I. Our allegations are, that as heirs of Bertrand Gravier, we own the three fourths of the property in dispute; that Jean Gravier our co-heir has alienated his fourth; and that we now hold in common with the purchasers.

If we have proved that we are heirs, that as such we owned the portion of property which we claim, that our co-heir had no right to sell that portion, and that such sale is as no sale; if we have established that the purchase of the defendants is valid only for the share of Jean Gravier, and that the rest of the property has not ceased to be ours, have we not sustained our allegations that we hold in common with the defendants? Holding in common, does not here relate to possession; it signifies that we have a right in common with the defendants, to an undivided property. If we have shewn such a right have we not supported our action? Can

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it be said that we have alledged one thing, and proved another? But suppose we have alledged possession, and had not proved it, what ought to be the consequence?—This is not a possessory action: it is one about *the respective titles* of the parties. We assert a title to an undivided part; the defendants say that the whole is theirs; that is the issue to be tried. On our side we have shewn our original title to a part, and relied on the defect of the title of the defendants to the whole. If their title to the whole is really defective, is it not clear that the property belongs *to both undividedly?* The truth is that the defendants are playing upon words.

II. The defendants say that our action could not be brought in its present form against them.

The defendants have set forth two exceptions to this action, which must be kept distinct, for they are very different in their object, the one being a *dilatory*, the other a peremptory plea.

By the present, they undertake to show that although we may eventually have a right to sue them for our share in the batture, we could not do it by instituting at once an action of partition against them; that such an action can be brought only against one who acknowledges that the property is common between him and the plain-

tiff; that there is no such acknowledgement,—that we ought, therefore, to have sued J. Gravier first, in order to have the affairs of the community discussed between him and "his coheirs before the purchasers can be disquieted by suit."

To that we object in the first place, that a plea of this nature ought not to have been pleaded specially in the answer.

It is law, not only among us, but probably every where, that dilatory pleas cannot be resorted to after an answer on the merits. Why? Because by answering on the merits, the defendant is supposed to have waived any exception which might tend to protract a decision on the requisite rights of the parties. Apply that rule to this case, and the soundness of it will be striking: the defendants knowing that a partition of the estate of Bertrand Gravier has taken place, and relying on that partition, assert it as the foundation of their title to the property claimed, and put it at issue. Could they, at the same time, have said: the action is premature,—first go and settle the business of the estate with your co-heir, proceed to a partition with him, and when the result of that partition is known, come upon us if you have a right? If they could not say so in such an answer as that which they have

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made, why should they be permitted to say so now?

Again, we assert that John Gravier has sold to the defendants his share in the property of which we claim the remainder. What do they answer: It is all ours: J. Gravier sold it all to us by virtue of an adjudication, by which you are bound, and *by which your rights are settled.* Can they now tell us: "you cannot demand any thing of us, *until you have settled with J. Gravier?*" Will they be suffered to contradict, now verbally, what they have averred in their pleadings? We trust they shall not. The plea which they now set up, is incompatible with and in direct opposition to the answer on the merits. It could not co-exist with it on the same paper; far less can it be listened to at this stage of the cause.

But should the court be so indulgent as to take notice of that dilatory plea now, then we say that it cannot be supported on any ground. *(a)*

The defendants want to send us to discuss the affairs of the community with our co-heir before we disturb them.

The best way to test the merits of this objec-

(a) The gentlemen now disclaim any intention of insisting upon the subtle distinctions established by the Roman laws in matter of actions. Had they been so candid as to say so from the beginning, they would have saved the court, their adverse parties and themselves, a great deal of very unnecessary trouble

tion is to place us where we would be, should the court think fit to dismiss our present action.— Suppose we are now ready to sue John Gravier: What shall we demand against him? the nullity of the adjudication? No: for although we have repelled that adjudication, when it was opposed to us, it may not suit our disposition, our love of peace, our convenience, perhaps our interest, to embark in so troublesome an enterprise. We are willing to let the adjudication alone, and abide by it, as far as it goes. But the adjudication did not include the Batture, and we must have our share of it. We demand of John Gravier to divide with us: What does he answer? Why, that he has sold his rights, that he is no longer a joint owner with us, and that we may go and claim it from the purchasers. Is that to be the result of our attempt against John Gravier? Then while we are where he would send us, let us have our rights investigated, and justice done to us.

But, say the defendants, an action like the present does not lie except where the property is acknowledged to be held in community. Why so? Would it be in the power of any co-proprietor, by denying the community, to defeat the action of the other for a partition, and to compel him to resort to another action first? Where

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would be the justice and the reason of such a rule? The fact is that such a rule exists no where, but in the imagination of the defendants. The plain way is obviously this: Where the defendant denies the community, the plaintiff is bound to prove it. Have we proved that we have a title to three-fourths of this property, and that the title of the defendants is good only for one-fourth? Then we have satisfactorily established that the property *belongs to both* and of course that it is *common* between us. What is the consequence? Why, that a partition may and ought to be decreed.

But the defendants say that in as much as J. Gravier has sold them the whole of the property in dispute, that is to say, not merely his share, but ours, "his intervention was absolutely necessary for the purposes of justice." If J. Garnier's intervention as vender was necessary to the defendants, why did they not call him as guarantee? This case does not differ from any other case of sale. The purchaser and possessor is sued by him who asserts a title to the property, or to a part of the property in his possession. The vendor had a right to sell it, or he had it not; if the defendant choses to try that without calling the vendor to his aid, he may do so: if he is afraid of the issue, he may summon the vendor to come and defend him. But the plaintiff cares not

about that: all he has to do is to show his own title and have it compared with the title of the defendant, when he sets up any. Is the case altered here, because after having alledged a title to a part of the property we pray for a partition? One of two things must take place. Either we have supported our title to a part, and defeated the title of the defendants to the whole, and then the partition is but a *matter of course;* or we have failed to show a good title in us for a part, and a bad title for the defendants for the whole, and then our claim ought to be dismissed.

Upon the whole we are convinced, that the more the question is examined, the more it will appear that the difficulty raised by the defendants as to what they call the form of this action, strikes directly at the merits of the case, to wit, at the respective titles put in issue by the petition and answer.

III. The defendants say that by the circumstances disclosed by the proof in this case, no suit whatever will lie for the recovery of this property.

This is the *peremptory* exception founded on the Senatus Consultum under which the defendants have endeavored to shelter themselves in vain. The exposition of this question in our brief and the supplement to it, are, we think, unanswered, and we trust unanswerable.

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IV. They assert that the action is barred by prescription. We believe that more than enough has already been said to show that this plea is not maintainable.

Upon the sentimental part of the defendant's argument no reply seems to be necessary. But although we are not disposed to follow their example in addressing the feelings of the court, we beg leave to rectify some mistatements which have escaped them in the warmth of declamation against concealment and art.

Mr. Pitot was *not* made the attorney of the plaintiffs until Mr. Desmare substituted the powers to him *in April last.* The powers of two of the claimants were directed to Mr. Derbigny, the other to Mr. Desmare. They arrived here some time at the end of October or beginning of November, 1817. Mr. Derbigny would not act and requested the heirs to send their powers to somebody else. But before he received, or even could receive, any answer, seeing that the levee was ordered, and that the property was *advertised for sale*, he thought it indispensable to do something for his constituents, and substituted Mr. Desmare to his powers. The suit was immediately begun. No reproach ought to attach to the agents of the plaintiffs, if no disclosure of their intention to claim their rights was made sooner; for the agents of

the plaintiffs were themselves informed of that intention no sooner than November, 1817.— Neither are any of the sufferings, sacrifices, and dangers incurred by one of the defendants to be ascribed to them; for one of them was not here at that time, and the other, since his *consultation* was sent on, never heard one word about the co-heirs of J. Gravier and consequently could not, if he had deemed that of any use to the defendants, say any thing of their claim. Finally, the defendants cannot complain of concealment on the part of those who advised the heirs of their eventual rights; for the defendants *knew very well* of the existence of those heirs, at least since the suit of J. Gravier against the city, and particularly so, since the judgment of the superior court in that suit, *where their title is left untouched on account of their absence.*

It is really a delicate subject of reproach, that in which the defendants have indulged: for he who complains that he is not permitted peaceably to enjoy the property of another, can hardly hope to enlist any feeling on his side. If the defendants wanted to secure their hard contested possession of this land, the first step naturally was to buy it from the owners. None was better acquainted with the true situation of the title of this property than one of the defendants. If, instead of relying on the strength of his art to support a

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bad purchase, he had laid out some part of his expences in procuring a good one, the land would now be *his* and we would not be reduced to the necessity "unblushingly to call it *ours*." But, he "never thought it a probable event" that the claim of the plaintiffs could succeed. Is that possible! If so then let him blame his own delusion, and spare the unmerited abuse which he lavishes upon others.*

THE COURT, when they were prepared to give their opinion, observed that, as some time had elapsed, since the oral argument, if any of the counsel had any thing to add to what had been said, or to the printed arguments, with which the judges had been furnished, he would be listened to.

Duncan, for the defendants, declared that his clients had nothing more at heart, than to hear the judgment of the court.

The counsel for the plaintiffs said they had nothing more to add.

MATHEWS, J. delivered the opinion of the court.†

* The argument in this case was heard in December, 1818; it was not inserted with the cases of that term, in order that it might be presented to the reader, at the same time, with the opinion of the court.

† DERBIGNY, J. did not join in this opinion, having been consulted in the case, while at the bar.

The plaintiffs and appellants, in this case, after stating that they and J. Gravier are the only heirs of Bertrand Gravier, deceased, alledge that John has sold to the defendants his undivided fourth part of a certain tract or parcel of land known by the name of the batture, situated in front of the faubourg St. Mary, being a part of the succession of said Bertrand Gravier; and that in consequence of this sale they are owers of said land in common with the defendants. They conclude their petition with a prayer for partition.

The answer of the defendants, who are here appellees, contains a denial in general terms of all the right and title to the property in the plaintiffs; and two pleas in bar, 1st. *Res judicata* under a decree of a competent tribunal of the Spanish government, rendered in August, 1797, by which they say the land in dispute was adjudicated to John Gravier, from whom they hold, as parcel of the plantation belonging to B Gravier, deceased. 2d. Prescription to the action:—

In the course of the trial of this cause in the court below, an opinion of the judge was required by the defendants' counsel, on a question "whether the present action could be sustained against them," and being in support of it, the opinion was excepted to. And now against this action, it is contended on their part, that without calling to their aid the subtilties and nominal dis-

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tinctions found in the Roman civil law on the subject of actions, which have been rejected by modern legislators, it is erroneously brought, even according to the plain and simple mode of proceeding in all cases, as prescribed by our laws, and particularly by the act of the legislative council regulating the practice of courts in civil cases. By this law it is required that all suits shall be commenced by petition which, amongst other things, must "state the cause of action, and conclude with a prayer for relief adapted to the circumstances of the case." To suits thus instituted, defendants are bound to answer, which they may do by a denial of the facts stated in the petition, or by stating new matter in avoidance thereof, or perhaps by both; and on such pleadings, cases are submitted for judgment to our courts, both as to law and fact, either with or without the intervention of a jury, at the option of the parties.

The wisdom of these regulations, evidently tending to simplify the way by which every individual of the community is to obtain justice, and clear it of all technical embarrassments, is obvious not only to lawyers but to all men of common sense.

But, it is true, (as insisted on by the counsel of the defendants) that these rules of practice ought not to receive a construction subversive

of necessary distinctions and productive of confusion in things which, from their nature, are wholly separate and distinct. Nor ought they to be so construed as to violate principles held sacred in relation to the necessity of agreement between allegation and proof.

Leaving out of view the names of actions and all over nice distinctions relating to them, let us test the propriety of the present suit by the act above cited, and by the rules of law which hold in abhorrence a multiplicity of actions and require such certainty in legal proceedings as to put an end to litigation. The plaintiffs, as we have already seen, state themselves to be co-heirs with J. Gravier, and that they are entitled to three-fourths of the estate of Bertrand Gravier; that the land in question is a part of the succession of their common ancestor; that John has sold to the defendants an undivided fourth part of it, and that in consequence of this sale, they now hold the property in common with said defendants, and conclude with a prayer to have it divided.

If these allegations be true, there can be no doubt of the plaintiffs' right of action for a partition of property thus held in common by them and the defendants, who admit their quality as heirs, and that the property, a division of which is claimed, was once a part of the estate of the

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common ancestor of John Gravier, under whom they claim title to it, and these plaintiffs. But they say that John acquired a title to all the estate of the deceased by an adjudication of a proper and competent tribunal, and that the entire property in the land, of which a partition is claimed in the present suit, being in him at the time of his sale to them, they do not hold it in common with the plaintiffs, and to this effect they offer in evidence an act of sale for two thirds of it. This part of the defendants' answer, is clearly a statement of new facts in avoidance of those stated by the plaintiffs in their petition, on the truth or falsehood of which depends not only the correctness of the present action, but the right of the plaintiffs to recover in any form of action; and in our opinion, these rights may be as well decided on in the manner in which they are presented by the pleadings in this suit, as they could in any other form. By proceeding in this way a multiplicity of actions is avoided, and the rights of the parties will be determined with sufficient certainty to prevent further litigation on the same subject. The judge of the district court was therefore correct in the opinion by which he sustained the action.

The inconsistency of the allegata et probata relied on by the defendants, appears not to be well founded. Two of the principal allegations in

the petition are admitted, viz: the quality of the plaintiffs as heirs, and that the property was a part of the estate of B. Gravier, under whom they claim; and it is shewn that John Gravier, who is co-heir with them has sold two-thirds of it to the defendants, which is certainly evidence sufficient to prove that he has sold one-fourth, on the axiom that the greater must include the less.

We come next, in the order in which it is proposed to consider the case, to that objection which opposes all kind of actions for a recovery of property, either against the vendor or against the present defendants. This peremptory exception or plea in bar is founded on a senatus consultum given on a constitution of the Emperor Adrian, in relation to the difference of situation between possessors of inheritances in good or bad faith. From the text and all commentaries on it, Latin, Spanish and French, it is evident that the sole intention of this law, is to protect persons who hold inheritances as owners, with just reasons to believe themselves such, against the claims of heirs who may appear after the property has been sold and alienated by the bona fide possessor; in which case the heir can recover only the price, or so much of it as has enriched the seller.

And it follows as a necessary consequence of the protection given to the possessor in good

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faith, that when he is bound in warranty to the purchaser, the latter must also be protected against any suit brought by the real heir, otherwise the provisions of the law would become nugatory.

In applying this law to the present case, it is necessary to determine on the good or bad faith of the vendor only, for if he held the property now in dispute *bonafide*, being a part of the inheritance of his brother B. Gravier, under whom the plaintiffs claim rights to it, either as sole heir believing that no other heir existed, or having been adjudged to him by a competent tribunal, it is believed the law above alluded to does protect the defendants against any suit for the recovery of the thing sold. But from the circumstances under which the seller to them held the estate of the deceased, we are of opinion that he cannot be considered as a possessor in good faith of that portion of it which is now claimed by the plaintiffs, either on a belief that he was sole heir, or that it was adjudged to him. If it were really adjudged to him, and the judgment by which he claims the entire succession of his ancestor, be valid and unimpeachable on any ground of nullity, the defendants are under no necessity of reverting to this exception to the action, founded on the laws favoring honest possessors, for in that event they hold by purchase from one who

was both owner and possessor; and their title is valid

John Gravier's want of good faith as a possessor, under a belief that he was sole heir to the brother, is so clearly evinced by his own communication to the Spanish tribunal that other heirs did exist, as to leave no doubt in the minds of the court on this point. In testing his faith and honesty, as possessor under the adjudication of the Spanish tribunal, we are brought to a decision of the first question examined by the counsel of the defendants in his brief of argument, and, as we believe, the most important in the cause. Were the premises sued for included in said adjudication? This is a question of fact, and as the parties have submitted it to the court alone for decision, we are bound to examine it, and in doing this, reference must be made to the proceeding which took place before the Spanish tribunal, relative to the succession of B. Gravier, particularly to the inventory and appraisement which form the basis of its adjudication. The inquiry to be made is not only what was inventoried, but what was both inventoried and appraised: the appraisement being, in our opinion, the principal foundation of the judgment; the equivalent for which, one of the heirs was to become owner of the estate of the deceased on condition of paying

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his debts and dividing any sum that might remain among his heirs.

The inventory is minute to an extreme. After describing the moveable property of the succession, the persons engaged in making it proceed to set down the real estate, amongst which "are placed the lands of the plantation, the extent of which cannot be immediately ascertained, because many lots have been sold; but N. Gravier informed that its limits ran as far as the bayou, according to the titles of the same" There is evidently no description by which the quantity, situation or limits of the plantation can be ascertained. But when it became necessary that the appraisers should fix a value on this real estate of the deceased, we find a description which can hardly be mistaken, viz:

About thirteen arpents of land of which the plantation consists, including the garden, from which land the most useful part has been cut off on the front; the remainder being the lowest land, inclosed with bad fences, etc." The front had been taken off by the deceased, or some prior owner; that which constituted it, as appraised, was the rear of the original plantation which ran to the river, and is described as *the lowest land*, such as is generally found at a distance from the river. Is it possible, under such a description as this, confining the land of the planta-

on appraised to the rear of the original tract, the lowest land, inclosed by bad fences, to ave the fences to pass the front already taken f, and to include a parcel of land, which, from its uation on the river, may be considered as the ghest of the original tract? To include in it e batture, by this description, is thought to be possible, on any fair construction of its ex- essions. It was, at the time of the appraise- nt, a spot of ground wholly separated and dis- ct from the plantation, as appraised, and did t pass with it by the adjudication of the Span- tribunal. And it is admitted that it was not udged under any other name. Being of opi- n that John Gravier acquired no title, to any t of his brother's succession, under the de- e, by which it is adjudged to him at its ap- ised value, except that which was actually ap- ised, and being also of opinion that the bat- e never was inventoried or appraised, it is ight useless to enter into any lengthy discus- , on those parts of the defence, which insist all the succession passed by the judgment of Spanish tribunal, because the heir to whom is adjudged was laid under an obligation to the debts of the deceased, and that the land spute passed as a part of the plantation, be- e many lots in the back part of the faubourg transferred as a part of it. As to the first,

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it is sufficient to observe, that, as J. Gravier toc the estate with the benefit of an inventory a appraisement, he could not, under the decree, bound to pay debts beyond the amount of t appraisement.

Whether he has a right to hold any lot whi was separated, by known and established li and boundaries, from the remainder of the pl tation, might be forcibly questioned. But it pears clearly from the inventory and apprai ment, that many were distinctly inventoried a appraised; which shews that it was not belie or understood by the judicial officers of the S nish government, who acted in the case, that the lots in the faubourg, the right to which mained in B. Gravier, at the time of his de would pass by their decree under the descript of the plantation. See the Spanish record, f 157, 158, 159. 160 and 187.

The last means of defence, contained in answer of the defendants, is the prescriptio the action: and, on this ground, it is conten that the present suit can be prescribed agains a lapse of ten or twenty years; ten when the ties are present, and twenty when absent. must be conceded that an action for parti speaking of it in general terms, can be pres ed against only by a lapse of thirty years, not even by this or any other much greater le

f time when the partners or co-heirs possess in ommon an inheritance or property. See the Recopilacion, Febrero, Ayora and other authorities cited on this point.

The prescription of ten and twenty years, above alluded to, takes place in relation to inheriances on a presumption that a partition has been made between co-heirs of full age, who possess and live separate during those periods; but this presumption always yields to contrary proof, and, in the present case, it appears to us to be abundantly shewn that the property, of which a partition is now claimed, was never acted upon by any tribunal, either by way of partition amongst the heirs of the deceased or adjudication to any one *en masse*. The action of the plaintiffs is therefore not barred by prescription. But (as if opposition was never to cease) it is said that although their action is not barred by prescription, yet the right of one of them, Jeanne Bordier, is barred by a judgment rendered in a former suit—commenced and prosecuted on her behalf, at the instance of her guardian, to compel J. Gravier to account to her for her portion of the succession of B. Gravier, their common ancestor. This suit proceeded to a judgment against the defendant to account; and the purchaser of the batture, being made a party, was enjoined from paying over the price to the seller, and this circum-

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stance is now insisted on as a confirmation of the sale and a renunciation on the part of the minor to the thing sold, having elected to take the price in lieu thereof. After the judgment to account and the sequestration of the price in the hands of the purchaser, the suit was discontinued by leave of the court in which it was brought, before any account was rendered by the defendant. We are of opinion that these proceedings, thus carried on by the guardian of the minor, do not affect her right of action in the present case. First—because nothing has been finally determined in the former suit: and secondly—because her guardian had no right to choose for her between the thing and its price, or to enter into any transaction or compromise about her estate, without judicial authority.

Several exceptions were taken in the course of the trial in the district court, by the counsel for the plaintiff, to opinions of the judge relating to testimony offered to prove that the batture was not included in the inventory and appraisement. A witness, offered on the part of the defendants to prove that it was actually appraised, was rejected by the judge, and a bill of exceptions filed in consequence of said question.—Without examining these bill of exceptions in detail, suffice it to observe that we believe the judge of the court below was correct in rejecting

oral testimony as to what was intended by the written documents, contained in the mortuaria of B Gravier, which alone we have taken into consideration in deciding on these facts. Oral evidence was well received on the subject of actual occupancy, but not in relation to title.

On the best examination we have been able to give this case, we feel bound to declare it as our opinion that the judgment of the court below is erroneous, and must therefore be reversed, avoided and annulled, which is hereby ordered. And proceeding here to give such judgment as ought there to have been given, it is further ordered, adjudged and decreed, that a partition of the land in dispute do take place, according to the rules and regulations of law in such cases made and provided; reserving to the defendants, any right which they may have to be remunerated for expences laid out in reclaiming and improving said property. And it is further ordered and decreed, that the cause be sent back to the district court, to cause a partition to be made as herein decreed, by allotting to each of the plaintiffs one fourth part value of said land, being three-fourths, and the remainder to the defendants.

On the day after the judgment was pronounced. *Duncan*, for the defendants, read a petition, praying that the judgment might be declared null

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and void, on the ground of its having been pronounced more than fifteen days after the close of the argument. He relied on the fourth section of the act of 1813, ch. 47, which provides that "in no case shall they (the supreme court) delay more than fifteen days the pronouncing of their judgments." 2 *Martin's Digest*, 144, *n.* 7.

THE COURT refused to receive the petition, stating that the judgment had not yet passed *in rem judicatam* and the case might be reheard, if good reasons were shewn, on the application of either party, under the general rule of March term, 1814, 3 *Martin*, 280. That it was doubtful, whether the recourse of nullity against final judgments of any court, as it prevailed, under the Spanish government, before the court rendering the judgment, was still a part of the judiciary system of the state—that, admitting that it was, such a recourse was not allowed, in Spain, in regard to judgments of courts of *dernier resort*. *Meeker's assignees* vs. *Williamson & al. syndics*, 4 *Martin*, 625, *Williamson & al* vs. *their creditors*, 5 *id.* 618, *Recopilacion*, 4, 17, 4.—That if this recourse still existed, it was to be sought in a distinct suit, the adverse party being served with a copy of the petition and cited. That the court had often found it impossible to come to a determination, till after a fortnight from the close of the argument—that, in a particular case, in

the western district, *Seville* vs. *Chretien*, the court, being composed of two judges only, the junior one having been of counsel in it, found it impossible to come to a determination without consulting authorities not within their reach at Opelousas, and the judgment was accordingly postponed till the following year—that, in such cases, the court thought it their bounden duty to pronounce, as soon as possible, after they had formed an opinion—that the opportunity was, however, always afforded to counsel who imagined that their arguments might have been forgotten, to be heard—an opportunity which, in this case, was offered, and of which the counsel thought it needless to avail themselves.*

* The argument in court began on the 1st and was concluded on the 15th of December. The judges took no notes, being informed that each party would furnish a written argument, containing a note of all the authorities cited. The plaintiffs' counsel, some time after delivered a printed argument to the judges and to the defendants' counsel, who asked time to have an argument or answer prepared and printed. This was not completed till after the Christmas and New Year holidays, and the argument as soon as received was communicated to the plaintiffs' counsel, who returned it about the middle of January and the judgment of the court was pronounced on the 3d of February, the court, composed of two judges only, not having been able to agree, till then. Mr. *Livingston*, on behalf of himself and his co-defendants, presented a petition to the Legislature, then in session, complaining of the refusal of the supreme court "to listen to the argument and authorities, by which they could have shewn that the judgment was void, or to receive their petetition," and praying that some legislative provision might be made for the relief of the petitioners, &c. The House of Representatives rejected the petition.

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BATUT & AL.
vs.
OGERS & AL.

LABATUT & AL. vs. *ROGERS & AL.* *Ante* 272.

APPEAL from the court of the first district.

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MATHEWS, J. delivered the opinion of the court. Our attention has again been drawn to this case, an objection, made to the allowance to the attorney of the estate, not having been pronounced upon. This allowance was ascertained and fixed by the inferior court, upon the principles recognised by this court, in the case of *Morel*, vs. *Misotiere's syndics*, (3 *Martin*, 363) and as it does not appear to us exorbitant, we see no reason for our interference.

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

Cuvillier for the plaintiffs—*Morse* for the defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, MARCH TERM, 1819.

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RION vs. *GILLY & AL.*

Rion vs. Gilly & al.

If he who has goods for sale for another, gives an account which is accepted, he may not, afterwards, be called upon, for the price of any part of the goods, not collected.

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

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellant delivered to the defendants a quantity of coffee to be sold for his account, and he complains that they were remiss and negligent in the transaction: but he admits that they finally rendered him an account, which he accepted. The object of the present suit is to obtain the balance due to the plaintiff, on that account. On the face of it, this balance results from outstanding debts, which the defendants alledge that they have not collected.

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RION *vs.* GILLY & AL.

We are of opinion, that by accepting a general account of the whole transaction, including the commission of the defendants, and in which are expressed what accounts have been, and what remains to be, collected, the plaintiff discharged the defendants—that their agency, from that moment, was at an end, and that he has, now, no right to call upon them for payment of any item, which he complains that they neglected to collect.

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

Seghers for the plaintiff—*Porter* for the defendants.

PIERCE vs. *CURTIS & AL.*

If a slave, sold, remains with the vendor, he is liable to be seized for his debts.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. In this case, the plaintiff and appellant sues for the recovery of a slave, described in the petition.

The action was commenced against Curtis alone, who, at the time, had possession of the slave. Gayles, the other defendant, intervened

and claimed the slave, in his answer, as his own, suggesting fraud, in the transaction, by which the plaintiff obtained his title to the slave. Both Pierce and Gayles claim the slave, under Curtis.

The evidence, on record, shews the following facts. On the 21st of October, 1813, Curtis, by a notarial act, sold the slave in question, to Abner Stanley, and retained a mortgage for his payment. It does not appear, that the sale was attended with any tradition, but Curtis held possession of the slave, till August, 1814, when Stanley, at his instance, conveyed to Pierce, by a notarial act, all the title, which he acquired by the act of sale, in 1813.

After this, Curtis continued to possess the slave, as his own, until, some time in 1816, the sheriff of East Baton Rouge sold him, under an execution upon and against the property o Curtis, and Curtis purchased him, at the sheriff's sale.

On this statement of facts, the only question to be decided is, whether the slave sold, thus remaining with the vendor, and never having been delivered to the vendee, was or not liable to be seized and sold, to satisfy the debt of the former.

The case of *Durnford* vs. *Brooks' syndics*, 3 *Martin*, 222, 269, is relied upon, by the counsel of the defendant and appellee Gayles, and is cer-

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PIERCE *vs.* CURTIS & AL.

tainly completely applicable to the present, except that, in the former, the things sold were merchandize, which pass by a mere verbal agreement and delivery, whereas, the dispute is now about a slave, the title to whom has been transferred by public and authentic acts. But, we are of opinion, that this circumstance cannot operate against third persons, such as creditors, so as to defeat their just claims founded on principles recognised in the above case. There is not any evidence that the slave was ever delivered to Pierce, or that the latter ever exercised any act of ownership over him, except that which is derived from extra-judicial acknowledgments of Curtis, whose interest it is to countenance the forced sale, by which he was to be benefited.

It is true that, according to our statute, the delivery of a slave, who is sold, takes place, when it is really made to the buyer, or by the mere consent of the parties, when the sale mentions, that the slave has been sold and delivered to the buyer, or when he was already in possession, under another title. *Civ. Code*, 350, *art.* 28 But this constructive delivery, does not appear from the expressions of the act of sale, and there is evidence that, that the slave remained the possession of the vendor.

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

Carleton for the plaintiff—*Duncan* for the defendants.

SIERRA vs. *SLORT.*

APPEAL from the court of the first district.

This case turns on a mere question of facts.

MATHEWS, J. delivered the opinion of the court. The decision of this case, depends entirely on the credit to be given to the testimony. The district court, in weighing it, has determined in favor of the defendant, and we see no reason to alter the judgment.

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

Seghers for the plaintiff—*Morel* for the defendant.

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March, 1819.

DAVIS vs. *PREVAL.*

DAVIS
vs.
PREVAL

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

An appeal from an order, submitting accounts to referees, is premature.

MARTIN, J. delivered the opinion of the court. The petition states, that Lachataigneray being indebted to the plaintiff, in the sum of $310, gave him his promissory note, and soon after died,—that the defendant took possession of the estate of the deceased, and namely of a store, which was held in partnership, between the defendant, P. A. Lay and the deceased, without making any inventory,—that the defendant has, thereby, and also, as a partner of the deceased, become liable to pay the said note. The defendant pleaded the general issue.

The parish court gave judgment, for the sum claimed, against the estate of the deceased, the costs, however, to be paid by the defendant, at all events, with his recourse against the estate, and, that the accounts of the defendant, as executor of the deceased, be submitted to reference.

From this judgment, the plaintiff appealed.

We are of opinion, that the appeal is premature: the reference occasioned some delay, but wrought no irreparable injury.

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

Morel for the plaintiff—*Moreau* for the defendants.

FOUQUE'S SYNDICS vs. *VIGNIAUD.*

When an act is attacked as fraudulent, parol evidence is admissible, to prove or rebut the allegation of fraud.

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

MARTIN, J. delivered the opinion of the of the court. The plaintiffs complain, that the defendant detains thirteen slaves, the property of their insolvent.

The answer states, that these slaves were conveyed, by Fouque, long before his failure, to the defendant, for a valuable consideration, by a bill of sale, which bears date of the 22d of June, 1811, under the private signatures of the vendor and vendee.

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

There is not any statement of facts, but the parish judge has certified, that the record contains all the evidence adduced in the case.

Mermet, examined by consent, deposed that, in June, 1811, it came to his knowledge, that

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FOUQUE'S SYNDICS *vs.* VIGNIAUD.

Fouque wished to purchase a plantation, and the defendant unwilling to be concerned therein, proposed to Fouque a settlement of their accounts. The deponent was on good terms with both, and heard the defendant ask from Fouque, the payment of a sum of $3000, and Fouque propose the sale of twelve or fifteen slaves, for which, the defendant offered $7000 dollars, payable, $3000 in Fouque's note, and the balance in cash. On the evening of that day, Fouque told the deponent he had concluded all his affairs, with the defendant, his son in law, and shewed him four bags of dollars, and the defendant shewed him a bill of sale for the slaves. Fouque was then in good credit.

Bideau deposed that, about the same time, he was accidentally in Fouque's store, and saw him deliver a bill of sale of fourteen slaves, to the defendant, asking him whether it had not better be done before a notary; when the defendant answered it was unnecessary. In the afternoon, he assisted the defendant in carrying $4000, which were counted in his presence, and delivered to Fouque, as the balance of the price of the slaves.

Soulie deposed, that Fouque and the defendant lived together, previous to the former's failure; that Fouque's credit began to decline, after the purchase of Harang's plantation, in January,

1812; that the deponent when he heard of this, still thought him in good circumstances, because, at the time he bargained with Harang, for the plantation, he exhibited, to the deponent, the state of his affairs, shewing property, to the amount of 60 or $70,000; that, in that state, there were a great number of negroes, for a person inhabiting the city, his house, a claim on a person in Pensacola, his goods in the store, and other property. Fouque engaged to put his slaves on the plantation and some others, thirty in all, in addition to those shewn. He knows that, about three weeks before his failure, Fouque advertised the loss of thirteen notes, of $1000 each, of the bank of Louisiana, of which the defendant was a director, and knew that no such notes were in circulation. Mrs. Vigniaud, and Fouque, her father, used to sell goods in the same store: and, at times, she bought goods for it. The defendant worked at his trade of watch maker, and kept his shop in Fouque's house. He enjoyed credit and a good character. On the 19th of August, 1812, a violent hurricane did great injury to the plantations.

Lanna deposed that, at the end of November, 1812, he sold, as syndic of an estate, indigo to the amount of 6 or $7000, that the vendee offered Fouque, as his endorser, but the creditors, being consulted, refused to accept him as such.

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Before that time, the deponent thought Fouque in good credit. He always thought the defendant in very easy circumstances, and believed him to be a partner of Fouque, from their living in the same house, and being connected by marriage.

Abat deposed, that Fouque and the defendant lived together, after the latter married the former's daughter. Fouque enjoyed good credit, till he bought Harang's plantation, it being believed that, as he had been always occupied in retailing goods, he would not understand how to conduct a plantation. From that time his credit declined.

The plaintiff introduced the records of two notaries, by which it appeared, that Fouque took authentic bills of sale of a number of slaves, purchased by him in 1811 and 1812.

A certified copy of the inventory of the property, surrendered by Fouque to his creditors, was also introduced, and one of the record of the bill of sale from Fouque to the defendant, as well as the *bilan* of Fouque and the *tableau de distribution*, and the deed from Harang to Fouque.

Cruzat deposed, that Fouque paid taxes, on ten slaves in town, in 1811, on eighty four, on the plantation, in 1812, and that in 1813, the defendant, for the first time, paid taxes on ten slaves in town.

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Fouque's syndics *vs.* Vigniaud.

Girod deposed, that Fouque enjoyed good credit till after the purchase of Harang's plantation—that the great price he gave for it, the high levee, and his reputed inability to conduct the negroes of a plantation, did affect his credit;—that Vigniaud has always been a hard working and frugal man—that, in 1792, at the death of his first wife, he was worth about $7000.

The bill of sale, from Fouque to the defendant, was recorded in George T. Ross's office, on the 12th of July, 1812. The signatures of the vendor and vendee were admitted.

Dubois deposed, that the bill of sale is in the hand writing of Godefroy; that the deponent arrived in New Orleans in 1809, and saw in the newspapers Godefroy's justification; from which, he concludes that he was already dismissed from his office of a notary public—that, in the beginning of 1811, the deponent was employed, for about two months, in the office of Mr. Broutin, notary public, in which Leroux and Godefroy wrote: the latter had one fourth of the profits of the office, and remained in it, 'till he was arrested for debts and committed to prison.

Pollock deposed, that Godefroy, after he was dismissed from office, was employed by Broutin, —that his reputation was bad, it being reported that he had acted improperly in his office.

Duncan reported that Godefroy's character

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was bad. He had been charged with forging the will of an American, who could not speak one word of French.

It does not appear, to this court, that the judgment, in the present case is incorrect. The negroes were purchased, according to the bill of sale, on the 22d of June, 1811: from that instrument, it appears that they were already in the possession of the vendee, and, both the parties to the sale being in the same house, and their families making but one, it is not extraordinary that the slaves were not removed. It does not appear that, at this period, there was any creditor of the vendor, who might be defrauded, and both parties are sworn to have been then in very easy circomstances. About six months after, January 7, 1812, Fouque purchased the plantation, which appears to have been the cause of his subsequent discomfiture, and about six months after this purchase, July 11, 1812, the defendant caused this bill of sale to be recorded, and about two months after, a violent hurricane laid the plantation waste. This disaster entirely destroying the credit of Fouque, which began to decline from the date of his purchase, he was afterwards compelled to surrender his property for the benefit of his creditors.

The plaintiffs' counsel contends, that the testi-

mony of Mermet and that of Bidaut, ought not to be noticed, because they testify to facts, which happened at the time of making the bill of sale. It is true, the law forbids the introduction of parol evidence "against or beyond, what is contained in the acts, or on what may have been said before or at the time of making the acts or since." We understand this to mean that any thing, which may have been said to contradict, take from or add to the stipulations of an act, shall not be heard: but when an act is attacked as fraudulent, or false, parol evidence must, of necessity, be admitted on the part ot the defendants, not, indeed, to alter or modify the contents, but to support the truth of the act and the good faith of the parties. Here, the testimony, so far from going against or beyond the act, has no other object than to corroborate it. The rule then, invoked by the plaintiffs' counsel, receives no application here.

But, independently of this, the witnesses here examined swear not to what they heard *said*, but what they saw *done*. One of them *saw* $4000 of the consideration money, counted and paid.

The counsel further urges, that the bill of sale was not *acknowledged*, but registered, without any proof or acknowledgment of the signatures, at the request or of either of the parties, but of Godefroy, the person who wrote it.

The law provides that acts, under private sig-

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natures, for the sale of slaves, not registered, within the legal time, shall have effect against third persons, only from the time of their being registered. We are of opinion, that as, in the present case, the bill of sale is admitted by the plaintiffs, to be the act and deed of the vendor, the want of an acknowledgment, previous to the registry, if it could avail them, inany case, cannot be opposed by them in this.

There is nothing in evidence, from which a suspicion of fraud can arise against the defendant; nothing from which it may be concluded that the vendor meant to cover his property, or even that he had any creditor that might be defrauded. Neither his subsequent ill conduct, nor the ill fame of the person employed to write or to procure the registry of the bill of sale, can affect the title of his vendee.

There is not any thing, in the circumstance of the defendant not paying taxes on the slaves, till 1813: he bought them in 1811, the taxes of that year, were probably paid by the vendor; those of 1812, were a charge on the vendee, and we all know that, according to the mode of collecting taxes, those of 1812 were not payable till 1813.

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

Seghers for the plaintiffs—*Livingston* for the defendant.

WILLIAMSON & AL. vs. *THEIR CREDITORS.*

In this case, the defendants obtained a rehearing. 5 *Martin*, 618.

After the filing of the tableau of distribution by the syndics of the creditors of an insolvent, a notice to all the creditors, is an indispensible formality, which the syndics cannot wave.

Livingston, for the defendants. The judgment appealed from, was made on a rule, obtained by a judgment creditor of the insolvent, directing the defendants, syndics of Williamson and Patton, to shew cause, why they should not do three things.

1. Rescind the mortgage in favor of the plaintiffs (the assignees of W. P. Meeker.)

2. Convey the mortgaged property to Stephen Henderson.

3 Pay the proceeds of the said house, as well as of the Alabama lands to the plaintiffs.

This rule was obtained on the 6th day of May, 1818, and was returnable the 9th—it was served the 8th, giving one day's notice of the requisition, by which the syndics were called on to part with all the funds of the estate in favor of one creditor, to the prejudice of the rest, and it was made absolute without any notice whatever to the

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other creditors, without enquiring into the nature or rank of their claims or privileges, without the usual publication for them to come in and shew cause, which (it is asserted) was never yet dispensed with, and, what is worse than all, without enquiring into the truth of an allegation that the plaintiffs' demand of a preference was founded on a judgment, not only in itself null, but fraudulent from the circumstances attending it.

It will be necessary to take a view of the facts, as they appear upon the record

On the 28th of April, 1818, the syndics, pursuant to an order for that purpose, filed an account of the estate, by which it appeared, that there was a ballance of not quite $1000 in their hands, and that there were demands upon them, which they deemed priviledged, to more than that amount; for which reason they conceived that, as there was nothing to distribute, a tableau of distribution could not legally be demanded. The present claimants, however, insisting on its being produced, the court made an order for that purpose, and four days after, a tableau was filed, in which the sum of $919 74, the ballance in hand, is divided between the creditors *pro rata*, but, at the same time, it is repeated that that sum is not sufficient to pay the charges for professional services.

At the close of this tableau, the syndics observe that *they submit the propriety of the creditors being notified to prove their debts, that the dividend may be made with accuracy.* This course was the one which not only justice but daily practice required, instead of that, four days after filing the tableau, a rule was taken to shew cause why the whole proceeds of the estate should not be paid to a single creditor. The substance of that rule has been stated. On the day of its return, the counsel for the syndics found themselves obliged, at one day's notice, not only to answer, but to go to trial: a trial of immense importance, both as to principle and amount. The answer, therefore, was hasty and made at the bar, but in substance, it is sufficient. It states:

That they do not think themselves authorised to cancel the mortgage, and they argued on this point; that the provision of the act (which was the only authority relied on in the court below) did not extend to cases of insolvency prior to its passing, but that, at any rate, as the plaintiffs in the action were the obligees in that mortgage, they could immediately cancel the mortgage, without any act of the syndics.

2. They express their willingness to convey the property and to receive and distribute the

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money according to law, as soon as the incumbrance should be removed.

3. They say that the plaintiffs ought not to receive it, because they say, first, that the judgment, under which they claim, is *null*,—secondly, that it does not give the plaintiffs any right to be paid the amount thereof, in preference to the other creditors.

Obliged to go to trial, *eo instante*, we offered (I quote the words of the bill of exceptions) to go into evidence to prove that the judgment, upon which the said William P. Wecker's assignees claim, was *null* and *collusive* and *fraudulent* against the creditors; this the court refused to admit, under an allegation that these facts were not put in *issue by the rule.* But as nothing was put in issue by the rule, I suppose the meaning is that they were not put in issue by the cause shewn —Now let us enquire into this. Presuming, however, that if we are precluded from this important enquiry of *fraud* in a question of bankruptcy, if we are precluded, I say, in this case, it must be by a stricter adherence to the niceties of pleading, than ever yet was known in our courts, and that if it be adopted as to our *cause shewn* in writing, it is but fair, one would think, to apply it to the foundation of this proceeding. The rule of the 6th of May, if the *cause shewn* is to have all the certainty and finish of a plea, the rule ought to have all those required in a petition—

and the court must stop (as they do in deciding on a demurrer) at the first fault in pleading; even if it should have been committed by the party complaining of irregularity.

Now, unfortunately for the plaintiff who requires such nicety from us, it happens, that his rule assigns no one reason why the whole of this estate should be paid to him, except that a judgment in his favor was read, without saying against whom it was rendered, or alledged when it was registered, or giving any reason why this sum should be paid to him, in preference. The time of enregistering is not shewn at all, and yet it is on this only the preference is founded, and I might safely claim the decision of the court, on this defect alone in the plaintiffs' case. But I need not rely on it.

Our return to the rule says that the judgment is *null*, and we offered (as is shewn by the bill of exceptions) to go into evidence to prove that it was so. This court seems to think that, that evidence was something extrinsic of the record: but how does that appear? Evidence is a general term, the record itself would be evidence of its nullity, in some respects, and that was, in fact, the evidence on which we intended to rely, but the court would not permit it to be introduced. Surely, when I alledge a fact and offer, generally, *evidence* to prove it, the court will not *pre-*

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sume that the evidence I offered was such as was not admissible; therefore, the judgment must be set aside, for the court, without inquiry whether my evidence was legal or illegal, would not suffer me to produce it under an allegation that it was not put in issue by the rule, when, in fact, it is expressly alledged in the return, and, *in truth*, was offered to be proved by that very species of evidence which the court thinks was the only admissible testimony, the *record itself.*

But is this the only admissible testimony to prove an act void or null? I think most assuredly not. Fraud and collusion will vitiate a judicial as well as a conventional mortgage. In this very cause, this court has set aside a sale, made of the very property in question, under this identical judgment, that is to say, they have declared it *void*, yet in itself, it was as solemn an act as the judgment, it was a notarial act, clothed with all the forms of the law; they declared it void, because they listened to testimony, which shewed that it was intended to give an undue preference to these above the other creditors. Now, if we can shew the same thing as to their judgment, does not justice to the creditors require that it should be done, ought we not to be allowed to do it, and will not the greatest injustice be done if we are precluded? Are not our offered *probata* in exact agreement with our *allegata*. We al-

ledge that the judgment is *null* and that it gives to the plaintiffs no right to be paid in preference to the other creditors.—And we offer to prove, that it is *collusive and fraudulent*. Let it be remembered too that this is not a regular action in which formality might be required, but a summary proceeding in which what we offered to prove and which is reduced to writing in the bill of exceptions, ought perhaps to have equal weight, that is to say that we might have shewn cause ore tenus, and supported our allegation by proofs. That is supposing the course pursued by the plaintiff to be the proper one, which I think I can demonstrate it was not.

This is a case of *cessio bonorum*, occurring in the year 1811, consequently to be determined by the Spanish law, because the law on that subject, passed the 3d of July, 1805, was repealed by the insolvent law of 25th March, 1808, which itself only related to cases of actual imprisonment, and the only other law of the state on the *cessio bonorum*, did not pass until the 20th of February, 1817.

The author, quoted by the court, is one of the best guides we can follow in the course of proceeding to complete the *cessio bonorum* or *concurso* of creditors. On this branch of it, the mode of setling the rank of the different creditors, he tells us, that after the administrator (syndic) is chosen, each creditor in turn takes the

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autos, and states his pretensions to a preference which being communicated to all the rest, each one may contest the claim and assert his own, if he have any, to be paid by priority The judge then takes the proceedings, gives a term for each one to prove his allegation and settles the rank of the respective claims, by a definitive sentence, which however may be appealed from. 2. *Febrero, Librer. escr.* No. 29 and 32. Here we find that each individual creditor is a plaintiff and defendant against the others, *todos son actores y reos.* The syndic does not represent them here, because their interest is not joint and the syndic can only act for all. From the nature of things, therefore the joint agent of the whole cannot be consistently with his duty, the sole actor in the contestation, that arises between the individual creditors. It may be supposed that by contesting all claims for preference, he promotes the interest of the mass of creditors against that of the claimant—but first, as I shall shew, this is not part of his office or duty, nor is he the person to do it, and secondly this would impose on him the obligation of contesting all claims, just or unjust; or of using his discretion to admit them, and thereby rendering himself the judge, what preferences should be given, without consulting the parties really interested.

It may be objected that this mode of proceed-

ing, laid down by *Febrero*, is inconsistent with our mode of practice, and cannot be carried into execution. I acknowledge that strictly it cannot, but we have adopted a course of proceeding which is analogous. Instead of communicating the *autos*, and suffering each creditor to make a separate *incidente* of his demand, as was done by the Spanish tribunals, our courts established the practice of first filing the *tableau of repartition* made by the syndic, from the best materials in his power, in which he classes the creditors, in the manner he deems agreeable to law. On the filing of this tableau an order is made directing all persons entrusted to shew cause in ten days, why the tableau, should not be confirmed, and the distribution made accordingly: this order is directed to be published—and on its expiration, if any creditor finds himself aggrieved either by not receiving the preference which he thinks himself entitled to, or (if he have none himself) by another being preferred who has no such right he may seek relief, but that must be *by suit*. The judge cannot without violating all law, dispose of questions of this magnitude and legal importance in a summary way on motion, without giving any notice, and here no notice whatever *was given* to the *creditors*, many of whom may have higher priviledges than the plaintiff. The proceeding also must be reciprocal, if the creditor can

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force the syndics to trial on the return day of the rule, as was done in the present case, the syndics have an equal right and then the creditor may be forced to trial, the same moment he has notice of the defence, which would be not less unjust. Besides as these objections turn generally on allegations of fraud, and those questions are peculiarly the province of the jury to resolve, it seems not only illegal but unjust to adopt such a course of proceeding, as must deprive the party of this benefit.—The practice has never been either under the Spanish laws, or since the institution of our courts, to settle the question of priority of credits in a summary way, by motion: in all cases within my knowledge, where the syndics have refused to allow a preference, the creditor has been put to his suit.—Those suits have been received by the district courts and many of them have passed by appeal through this. Among many others, I might have mentioned *Brown* vs. *the syndics of Philips*, *Rousselle* vs. *syndics of Dukeylus*.

Now, the question arising in those cases was precisely that presented in the one now before the court, a preference claimed by mortgage and an allegation of fraud against the creditors; yet, he course of proceeding was diametrically opposite: both cannot be right, and which will the court support? That one which has been con-

firmed by practice, which is agreeable to the spirit of the Spanish law, which still governs us? That which gives the usual time for preparation, which secures the trial by jury, at the election of the party; or that which is contrary to the usual course of proceeding, which is at direct variance with the principles of the ancient law, which gives no time for preparation, hurries the parties at a day's notice into the investigation of most important questions of fact, and the most intricate discussions of law, destroys the right of election to be tried by a jury, and decides on the rights of creditors, without giving them the slightest notice that those rights are drawn in question. I cannot doubt of the question.

I have said that the course pursued in this case, decided on the rights of the individual creditors without giving them notice; in effect, what notice has any one of the creditors had of this claim, which is to take away the whole estate? The syndics have, indeed, had the species of notice that I have mentioned; but suppose some of the other creditors to have privileges or prior mortgages, what opportunity has such creditor had of shewing his right, or of contesting that of Meeker's assignees? No publication has been made, and three days after the tableau was filed, we were ordered to pay the whole proceeds to one creditor; if we had complied with that order, I

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ask what opportunity any one creditor (whatever might have been his rights or privileges) would have had of even knowing how he was classed? No notice, I repeat, was given to him, and before he could seek relief, before he could even know he was injured, the whole sum would be paid to the assignees of a British bankrupt, and immediately put without his reach. I ask, and I ask it most seriously and earnestly, but most respectfully, whether this court will sanction a course of practice that leads to such consequences, from which, I may say, such abuses are inseparable, not to mention, the obvious one of favoritism and collusion between the assignees and a particular creditor. They make out their tableau, classing a favorite creditor in the highest rank, to the full amount of their funds, without giving, any public notice of the existence of this account: the favored creditor obtains a rule similar to the one which was taken in the present case, the syndics either are silent, or make a sham defence; the rule is made absolute, and the funds are carried out of the reach of the creditors, before they have the slightest idea of the contest, and although they could have shewn that the security had been fraudulently obtained, or that their own was entitled to a preference. This danger also will not be lessened, when we reflect that syndics are always them-

selves creditors; and that if they are admitted as competent parties, in questions between the creditors individually, as to their rank, that their own will never be lost.

Those reasons operated, I presume, for they are obvious, with the Spanish legislators, and they have accordingly excluded the syndics from the settlement of the respective rank of the creditors, as appears not only generally in the passages I have referred to in *Febrero*, page 31, 2 *Lib. de Escribanos*, when he says, the syndic has no power "mesclarse en disputarles la calidad, legitimidad, y prelacion de sus creditos." This is the rule by which this case must be governed, except so far as it may be found to interfere with our system of practice, established by the act of the territory or the rules of practice made under it. What that change is, I have already pointed out, and I have shewn that the practice of the late superior court, though it did not formally exclude the agency of the syndics, in questions of preference, yet always required notice to be given to the individual creditors to assert their rights, which was not done in the present instance, and I have also shewn that none of the insolvent laws of the territory or the state, made any regulation on this subject, except the act of 1817, made long subsequent to the failure in question. But if the court will permit, and the

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plaintiffs should persevere in chusing that law as the rule of our conduct, I have no objection. By the 35th section of that act, the practice adopted by the supreme court is confirmed, Notice is directed to be given *to the creditors* by bills or publications, in the same manner as for a meeting, of the filing of the tableau, and that they shew cause why it should not be confirmed.

The 36th section, also, confirms the practice I have stated to have been that of our courts, by directing that the *creditors* (not the *syndics*) shall file their opposition, if any they have in the clerk's office, "and the said opposition shall be decided upon in the manner prescribed by law." What is the manner prescribed by law? As there is no particular law on this subject, these words must mean in the manner prescribed for all other suits. That is, in the manner we contend it ought to have been done, in the present instance.

Thus then, whether we recur to the Spanish law, the practice of our courts, or the statutes of the state, we find the proceedings equally irregular and illegal.

Should it occur to the court, that I am objecting to irregularities which ought to have been assigned as errors. I have a satisfactory answer.

The rule made by this court, declaring that errors shall be assigned within a certain period

after filing the record, or that no advantage shall be taken of them, could only have been founded on the idea that the party should be deemed to have waved all *defects of form* which he did not point out in the beginning of the suit, and that he should not be permitted to avail himself of the want of a form, which he had implied waved any more than if it had been expressly done. Independently of this consideration, the rule would have been unjust and of course would not have been adopted, because it is the duty of a judge to decide *according to law*, this duty he swears to perform. How then can he confirm an illegal judgment, or one not given according to the forms prescribed by law, whether the defect occur *to him*, or be pointed out by the parties, unless in cases when the parties make a new law for themselves by either expressly or impliedly agreeing to wave the defect ?

But, in cases where this implication of consent cannot be made, either because the injustice that must be done to the party in so manifest as to preclude the idea that he *did consent*. Or where the irregularity, if admitted, would so far injure third persons as to shew that he *could not* consent to their prejudice. In both these cases the reason of the rule ceasing, the rule cannot be in force—surely this, nor no other court can tie up their own hands so as to prevent their

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doing justice. No rule can oblige this court, sitting to correct the errors of inferior courts, to confirm a judgment which is manifestly contrary to justice and law. This reasoning is, I think, conclusive, as it applies even to the parties to the suit, but when the affirmance of the erroneous decree would operate, not only on the party who might not have been diligent in his own defence, but must irreparably injure others guilty of no laches, I will not offend the court by supposing, for a moment, they could hesitate in reversing the judgment if they found the proceedings erroneous.

We accordingly find, that all courts, and particularly those of equity, in the last stages of a cause, even on the hearing, and the house of lords, even on an appeal, frequently dismiss the bill for want of proper parties, although no exception of that kind was taken by either of the parties, and the rules of pleading are infinitely more strict in England than they ever were here. But, if the assignees of Meeker will have strict practice, let them point out to the court the part of the record which contains the evidence of their prior claim. Where is their judgment? What is the date of its registry? Why is not the record made a part of the evidence? It is true, the syndics, in their account and in their return to the rule, speak of a judgment, but always

coupled with a declaration that it is null and that it gives no preference to the claimants. If their confession be relied on, that confession must be taken altogether. Will they rely on the preamble to their rule of the 6th of May, which says, "on reading a judgment obtained by the assignees of Wm. Meeker [without saying against whom] ? This surely cannot avail them, first, because it was not evidence on the trial, but only a ground for granting the rule. Secondly, because the judgment ought to have been produced at the trial and this court could then have judged of the nullities apparent on its face, even if they thought the court below right in refusing to let us shew it to be fraudulent, which I cannot suppose.

I have, I trust, shewn in a very irregular manner, that which, if reduced to order, might be arranged under the following head.

I. That the mode of proceeding adopted by the plaintiff is totally illegal and irregular. I have proved this by shewing,

1. That this is a case arising under the Spanish law of the *cessio bonorum*.

2. That by this law the administrator or syndic has no right to appear as a party in the settlement of the rank of the individual creditors, but that each creditor carried on a separate suit or *incidente* for that purpose and produced his own

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proof, and when this was done the judge settled the rank of the creditors by a sentence from which an appeal lay.

3. That after our practice would not admit of the delivery or *trasiado* of the *autos*, our court had adopted the analagous proceeding of calling on the individual creditors, by a summons and an advertisement, to see that they were placed where they ought on the tableau, and to contest the claims of others.

4. That none of these requisites were performed in the present case, that the *creditors* have had *no notice :* that a three day rule only was given on the *syndics*, that it was in *effect* only the notice of a single day : that they were required to answer and try the cause at the same instant, and that the rights of the individual creditors have been decided on, without hearing them or even informing them that such a decision was to take place.

5. That, if our local laws on the subject, though made subsequent to the failure, should be deemed the proper rule to govern it, yet those are analogous to, and confirm the previous practice of the court.

II. I have endeavoured to demonstrate that, if the court find the proceeding erroneous, they are under an obligation to reverse the judgment, al-

though no errors have been specially assigned before:

1 Because it is not a case in which a waver of errors can be implied.

2 Because, if it were, such waver will not be permitted, where it would irreparably injure third persons.

III. I have tried to convince the court that independently of any defect, in the course of proceeding manifest injustice has been done by refusing to let the syndics shew the nullity of the judgment —I have argued on this head.

1. That in a summary proceeding, like the one adopted on this occasion, nicety of pleading cannot take place; that in such proceedings, either the cause is to be heard on the return day, or it is not—if according to such proceeding, the cause is to be heard on that day, then any enlargement of the *probata*, beyond the *allegata* in the return, is of no consequence: because the *allegata* are only intended to give the opposite party notice of what is intended to be relied on, that he may come prepared to contradict it; but it is obvious that this can be of no consequence to him, where the allegation and the proof are to be made at the same moment.

If, on the other, the course of proceeding is not

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to press the trial on the same day, then the whole was irregular.

2. That, on the return of a rule to shew cause, why a certain act should not be done, the court are bound to listen to every legal allegation, whether it be made in writing or verbally by an offer to produce proof—that there is no rule of court, nor any law requiring such return to be in writing, and most certainly, no such rule or law binding the party strictly to the words of such return—or obliging him to set forth particularly in writing the time, place and circumstances which he would be obliged to do in pleading, so as to prevent his amplifying by proof the general assertion in the return That, even if this should be required, there is nothing to prevent the party from shewing two causes, provided they be not inconsistent and are both made on the return day. Here the party has not only stated in the return that the judgment was *null*, and that it *gave no preference to the party*, but he has also in writing stated, that he would prove the judgment to be *fraudulent and collusive*: this he put in *writing* on the return day of the rule, *sedente curia*, and the judge has written, at the bottom of this offer and allegation, that he would not examine the proof.

I have endeavoured to shew, that to confirm this refusal would operate the most flagrant in-

justice and forever stifle an enquiry which the interest of all the creditors requires.

3. I have respectfully suggested that the court have misconceived the facts of the case, when they think that the syndics did not offer to prove the nullity of the record by the record itself—I have shewn that the word *evidence* is general and includes all species of evidence, and that, when the bill of exceptions states that we offered to introduce evidence to prove the nullity of the judgment, the nullities arising from the face of the record were actually, in point of fact, among those to which we wished to draw the attention of the court.—This derives additional strength from the words of the return: they offered to prove it—*null*, and collusive and fraudulent.

4. Under this general head, I have also argued that the general allegation of nullity contained in the return, was sufficient to allow the introduction of the proof of collusion and fraud, for the reasons there alledged, and on which I shall take the liberty to enlarge a little here.

This is the case of one creditor seeking to establish a preference over the others; he calls on the syndics first, to render an account of the estate for a distribution, which they do, but accompany it with a request that the creditors may be individually called to ascertain their rights:

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he next calls on the syndics to shew cause, among other things, why the proceeds of a house and land forming the whole fund, should not be paid to him. To this they answer, that the judgment, under which he claims the priviledge, is "*null*," and (in another part of the return) that it gives him no right to be paid in preference to the other creditors: here then are two separate allegations, one of nullity, the other, that it gives no preference, and to support these, the syndics offered evidence to prove that the judgment was *null* and *collusive* and *fraudulent*. This certainly was not going beyond what was alledged: collusion and fraud render a judgment null, and most clearly shew that the creditor, according to the words of the return, *was entitled to no preference under it*. But (the court say) a judgment may be null in several ways; it may be null from *bribery* and *fraud*, or other extrinsic matter: therefore the party has no notice by a general allegation of nullity, upon what he means to rely, who alledges it; this is most certainly true, but with all the respect which I owe and and feel for the opinions of the court, I would ask, whether this would not rather be a ground of exception to the answer, than of objection to the proof, after the answer is received. I alledge nullity generally, the opposite party would have had a right, *perhaps*, to have except-

ed to my answer, and have asked me to specify what species of nullity; but if he receives the answer and goes to trial on it, he cannot object to any species of nullity I may attempt to shew, because, if he can object to any one, he may object to all, one after the other, and thus the party, alledging nullity, would not be permitted to shew it. Take a similar case from the jurisprudence of a country, whose nicety of special pleading is *proverbial*. By the laws of England, as well as by ours, fraud vitiates all contracts and judgments There are certainly as many species of frauds as there are causes of nullity. therefore the general allegation of fraud gives no more information to the opposite party of the facts that will be relied on, than the allegation of nullity. Yet, if in England a contract or judgment is relied on, in pleading, the party wishing to get rid of it by shewing it fraudulent, has only to alledge *per fraudem*, that being the general replication.

And, even in the present case, if I understood the court aright, they seem to think that if the syndics had alledged that the judgment was fraudulent, it would have been sufficient; yet what additional information would that have given the party? By bribery? By suborning witnesses? By forging papers? By secreting them? Or in which of the twenty thousand shapes in

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which fraud can appear? If, therefore, a general allegation of fraud be good, a general allegation of nullity must be equally so: for the one gives no more information to the opposite party than the other.

Suppose the plaintiff should sue as assignee of a promissory note, or any other instrument, and the defendant, generally, denies the allegations of the petition, would he not be allowed, under this plea, to shew that it was a forgery? Undoubtedly he would—and yet the plaintiff, who was a mere endorser, and knew nothing of the making of the note, might be totally unprepared for such a defence; yet it is an inconvenience under which he must labor, because every person who relies on an act, must come prepared to support it in all its essential parts. Now, the *good faith*, with which an act is made, is of its very essence, and therefore, wherever the act is drawn in question, all the parties, relying on it, must be prepared to prove that it was honestly made.

Will the court pardon me one single reflection on this subject, that our practice is founded on principles of the utmost simplicity; that our courts have hitherto discouraged every attempt towards the introduction of that spirit which has introduced the curious science of special pleading into England, where the practice, now a labyrinth of perplexity, was once as simple as ours,

and that we need go no further than the present case for an example of its mischiefs, if the omission of a single word in a pleading by syndics, should take, from creditors totally ignorant of the proceeding, the whole estate of their debtor, and give it to persons not entitled to a farthing.

IV. I have contended that the record contains no evidence whatever, that the assignees of Meeker are entitled to a preference.

Because, the mention of their judgment, in the syndics' account and return contains an assertion of its nullity, and if their confession be relied on, the whole must be taken together.

Because the statement contained in the preamble to the rule to shew cause, of the 6th of May, cannot be considered as proof, and if it could, does not set forth the necessary parties nor dates.

Smith, for the plaintiffs. On the 27th of July, 1811, the assignees of William P. Meeker recovered judgment in the late superior court of the territory of Orleans (after three years' litigation) against the firm of Meeker, Williamson and Patton for $ 40,711 92 debt, and $ 85 25 costs. In February of the next year (1812) Williamson and Patton, two of the firm of Meeker, Williamson and Patton (which had expired by its own limitation on the 1st of January, 1812)

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petitioned for a meeting of their creditors and filed a schedule of their affairs, and also of the affairs of the said late firm of Meeker, Williamson and Patton; (of which firm the *senior* partner, *Samuel* Meeker, resided in Philadelphia) in which schedule the house and lot in question are exhibited (as in truth they had been) as part of the partnership stock of Meeker, Williamson and Patton, the judgement debtors of the plaintiffs, and in which also the plaintiffs (represented by E. Jones, their agent) are exhibited as creditors for forty odd thousand dollars —The plaintiffs, through their agent E Jones, appeared at the meeting of the creditors, claiming the house and lot, under sale, and made oath to the balance of their judgment debt. Here may be added, as it made part of the oath of debt of the plaintiffs, at the said meeting, though not necessary to the present decision, that the plaintiffs as aforesaid, made oath to a further debt of upwards of $70,000, under assignments from the said senior partner, *Samuel* Meeker, of Philadelphia, of balances of several years profit due him from the other members of the firm of Meeker, Williamson and Patton. *No other priviledged debt*, than that of the plaintiffs, is exhibited on *either schedule* or by the *oath of any creditor*. The sale of the house and lot (on a suit brought by the plaintiffs to recove possession) was after-

wards decreed to be rescinded, as having been made too short a time (January, 1812) before the insolvency of Williamson and Patton. From the date of the failure of Williamson and Patton in February, 1812, until the month of March, 1818, that is upwards of five years, the estate has remained unliquidated, and no step has been taken by the syndics to disencumber, or dispose of, that part of the estate affected by the plaintiffs' judgment, nor had they objected in any form to the validity of that judgment. On the third of March last, then the plaintiffs presuming the estate to be liquidated, ruled the syndics to file their tableau and exhibit their bank book. On the 28th of April they (the syndics) exhibited an account by which, in the *body* of it, they shew a balance of $ 2909 17 (but shew in the *margin* a further sum of $ 2500, product of the Alabama lands, and also a house and lot in St. Louis st. worth $18,000) they add, in the body of their account, as a reason for having made no tableau, that they have promised to their counsel, over and *above* what they have paid him, $1250 more, "*to be paid as may be required in the progress of legal discussion*," and which they hold themselves authorised to retain as a priviledged debt. They add, as another difficulty, "in the way of apportioning any balance they might have," an outstanding demand of *Samuel* Meeker (the *se-*

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nior partner of Meeker, Williamson and Patton, above mentioned) of upwards of $50,000 ! (probably alluding to the assignments above mentioned, for which suits had been brought by the plaintiffs themselves before the failure.) On the 2d of May, they produced what is called a tableau, by which, after deducting all their expenses, and their commissions on the whole amount of property in their hands, from the above mentioned sum of $2909 17, mentioned in the *body* of their account, as the amount of funds, they draw the balance of $938,06 and then bring themselves in debt, by their promised counsel fees $311,94. But add, if they must make a tableau, that "one cent in the dollar," according to the decimal operation, which they make on a sum of $91.974 4 which they take from the schedule, "will give $919.74," leaving (they add) "the small surplus of $18 32 to go towards the next dividend."— They, however, "submit to the court, the propriety of the creditors being notified, to prove their debts, that the dividend" (of this cent in the dollar) "may be made with *accuracy* !" Notwithstanding the singular character of this exhibition before a court of justice, two things clearly appeared from it, and enough for the plaintiffs in this cause, 1st, that there was *no other priviledged debt* against the estate than the plaintiffs' judgment, except costs and expenses of justice,

for which there was an exhibition of ample funds, to wit, not only of the sum acknowledged in the body of their account of $2909 7, but also the $2500, product of the Alabama lands—making together $5409 17, much more than enough to cover that object, on the largest estimate, and supposing it to exceed in its relative proportion all former experience. 2d. That they had not made sale of the house and lot affected by the plaintiffs' judgment, towards satisfaction of it, nor had they even raised the mortgage created by the judgment, nor taken any other step towards effecting that object. Nor had they commenced any judicial proceeding to annul the judgment, as was their obvious duty, if they intended to question its validity. Enough now being before the court to shew, not only the existence of this priviledged debt, in favor of the plaintiffs, and that no step had been taken to effect its payment or annul its force, but also, that there existed no presumptive objection to its satisfaction, out of the proceeds of that part of the estate subject to its priviledge ;—on the 6th of May, on motion in behalf of the plaintiffs, "on reading the several returns made by the syndics, as well as the judgment rendered in the late superior court on the 27th of July, 1811, at the suit of Joseph Peel and others, assignees of Wm. P. Meeker, for the sum of $40,711 92 to-

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gether with the further sum of $85 25 costs, it was ordered that the syndics of the creditors of Williamson and Patton shew cause on Saturday next, the 9th day of the present month of May, why they should not rescind what they term the pretended mortgage in favor of the assignees aforesaid, and why the said syndics do not make sale of the said mortgaged premises to Stephen Henderson, the purchaser thereof, and pay over the proceeds thereof, to the above named assignees."

On the 9th of May, the syndics file a written answer, and therein, for cause, alledge "that they have *no power to rescind the mortgage* on the property sold to the said Stephen Henderson, as they are advised and believe, and that *when the said mortgage shall be legally cancelled, by the persons who claim under it*, they are ready to convey the property, &c." and after some immaterial allegations, add "And these respondents say, that *the judgment*, on which the assignees claim to receive the proceeds of the said house and lot, and the said lands, *is null*, and they further say, that the said judgment *does not give*, to the said assignees, *any right to be paid* the amount thereof, *as a priviledged debt*, in preference to the other creditors of the said bankrupts."

Upon the issue presented by the foregoing rule, with the written return of the syndics in answer

thereto, the case came on for hearing, and it was finally decided by the court, that the cause shewn being insufficient, the rule be made absolute, and that the syndics, within ten days, make the sale to Henderson, raise the incumbrances on the house and lot, and deliver over the proceeds to the plaintiffs, the judgment creditors. In the course of the hearing, the syndics, through their counsel, desired time to *go into evidence* to shew that the judgment was fraudulent and collusive, as well as null; of which however, in the words of the judge, no proof was produced:" right leave to go into evidence (or, properly speaking, further time to seek witnesses) to prove fraud and collusion, was not given, because the matter had not been put in issue between the parties. To which decision they excepted. Upon these facts, the following questions naturally arise:—Have the plaintiffs pursued the right course, to obtain payment of their priviledged debt? And if the first question be answered in the affirmative, then have the defendants raised any solid objection to their success?

The plaintiffs are judgment creditors. At the end of six years after the failure, they heard nothing of payment or any steps taken to effect it, or to shew that it is not due. On the compliance of the syndics with the order of the court, to

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shew what has been done with the estate, it appears, from an *inspection of their tableau*, that there exists *no other priviledged debt* against the estate, except the new costs and expenses of justice, for the payment of which, more than sufficient funds are exhibited, over and above the property affected by the plaintiffs' judgment. It appeared further, that the syndics had, in truth, not liquidated the property bound by the judgment; and, though obliged to notice its existence, as a matter of record for so long a time, no step had been taken by them to effect its payment or annul its force. The plaintiffs then proceed directly to the point of forcing a settlement, by taking a rule in the character of judgment creditors, (naming therein the sum, the date, the parties and the court) for the syndics to shew cause, why they should not sell the property, bound by the judgment, and apply the proceeds towards its satisfaction. Here a direct opportunity was afforded of pleading and objecting every thing that could be urged against the demand, and accordingly this rule, with their answer, presents the questions, the court is called on to decide. Was any new step necessary on the part of the plaintiffs, judgment creditors, to establish their *right*—to make *known* and *certain* their demand against the estate? Could any thing be more certain and final in its own nature,

than a final judgment of a court *without appeal?* And, but for the stay of all proceedings against the insolvents, as to person or property on their failure, would not the plaintiffs have been entitled to an execution against both, as a matter of course? Will it be pretended, that they ought to have resorted to an action of debt on the judgment? This would be deemed a vexatious and odious proceeding; as tending unnecessarily to accumulate costs. Even in England by 43 Geo. III. (*Tidd*, 879) the plaintiff, in an action of debt on a judgment, is deprived of costs. How much stronger, in this country, is the objection of expense to such a proceeding as an action of debt on a judgment, and against an insolvent's estate. But as the court are satisfied on the point of the regularity of proceeding by rule, without the form, expence of petition, and citation, we will confine ourselves to a rapid glance at the further objections of the defendants' counsel, and dwell somewhat on that one which seemed most to attract the attention of the court. With the objection to the mode of proceeding, falls the objection of surprise. By the facts that have been stated, it appears that, from the first moment of the insolvency, they must have been apprised of the existence of the plaintiffs' priviledged debt, not merely from the records of this court, and of the office of the recorder of mortgages, where ac-

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cording to the defendants' own shewing it existed, as an insuperable obstacle to the sale of the property affected by it, but also from the declaration, under oath, of the agent of the plaintiffs, at the original meeting of the creditors. But it is next objected, on the part of the syndics, that they had *no power to destroy the mortgage* created by this judgment, and they add, that *so soon as this shall be done by those who claim under it*, they are ready to make sale, and dispose of the proceeds according to law. Without stopping to notice the congruity of this objection, with the argument of surprise so much insisted on, it need only be answered that this power seems to be necessarily incidental, as has been justly observed by the court, to the larger power, confessedly vested in the syndics, of selling the property and liquidating the estate, and this even, independently of the statute of 1817. But by that statute it is expressly made the duty of syndics among other things to rescind mortgages on the insolvent's estate and to hold the proceeds subject to the lien that existed on the mortgaged property.—But it has been further objected, and that objection hath been both made and abandoned by the counsel for the syndics, that the statute of 1817 is not to govern the proceedings of this case, because, as the failure of the insolvents occurred anterior to the passage

of that act, the first proceedings, in relation to their failure, had been regulated by a different law To this objection, if there were any thing in it, it might be answered it comes too late, after the election and appointment of one of their number [to fill the vacancy, occasioned by the death of E Jones] under this very act, and which had been submitted to by the others, without appeal. But what reason has been alledged, why this statute should not be the governing rule of all future proceedings, as well of cases begun and pending at the time of its passage, and of those of subsequent origin? The provisions are of a general nature, and are evidently intended to be of general application. As well might it be insisted, that after the passage of an act, regulating generally the practice of the courts, all suits instituted before its adoption, should (and merely because they had been previously instituted) be conducted to judgment by a different rule from that which should govern the conduct and termination of new suits; which would afford us the harmonious view of judgments entered up at one and the same time, in one and the same court, one class of which, perhaps, would become final and obtain execution in half the time necessary to the maturity of the others But answering objections of this kind, by more than a simple denial, seems to have all the

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aukwardness of endeavoring to establish by argument a self-evident proposition. But, it is objected, that the *syndics* of the creditors were *not competent parties defendant*, against whom to establish the demand of the plaintiffs, so that a judgment or final order of the court, against them, should be binding on the mass of the creditors, without previous personal notice to them individually; and, in short, that the plaintiffs' priviledged debt, could not be established as against the individual creditors, without having been discussed at a meeting of the creditors at large after personal notice; and that, however, the syndics themselves may be concluded by the answer, by which they have deliberately stated their objections, to the plaintiffs' judgment, and be restrained from introducing proof of fraud, or rather be refused a delay to seek proof of fraud (when fraud was not alledged) that still, as they are only agents, it is not fit that the creditors at large, (who must be taken to be third persons in regard to these parties) should be bound by their acts. But, in order to ascertain, whether the syndics be competent parties defendant, to suffer, for the creditors, the final judgment of the court in question, we have only to turn to the statute of 1817, for the regulation of insolvent proceedings: where we find it enacted in section the 30th, that the syndics are

competent, and the proper parties plaintiff or defendant in all suits, in relation to the insolvent's estate, and the interests of the creditors therein. We will turn also, to the case of *Brown* vs. *the syndics of Phillips and Kenner and Henderson*, 3 *Martin*, 270. By which, in a suit, *against the syndics* and not against the creditors, otherwise than through their syndics, it was finally adjudged that the syndics should pay to the plaintiffs the sum of $2000, with interest and costs—as a priviledged debt against the estate of Phillips. Was that judgment deemed ever afterwards examinable? Would the syndics have been afterwards allowed to come forward anew, and contend that as the creditors had not had personal notice of this demand, and had not been heard individually against it, they should be at liberty to open this judgment and alledge new pleas against the demand, as third persons who ought not to be affected by a decision, to which they were not parties? Need we turn also, to the case of *Ibanez* vs. *the syndics of Bermudez*, *id.* 17, in which the court decreed in favor of the plaintiff's debt, and that he had a lien on the house and land in question, and that it should be sold after the usual advertisements, and that the proceeds of the sale should be applied, first to the payment of his priviledged debt, although there were many other creditors, and the estate was insufficient for their

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payment ? This decree was rendered, because it appeared to the court with sufficient clearness, that there were no *interfering* priviledged debts. The syndics had *not pleaded the existence of other priviledges* of an higher, or an equal degree, which there would be an insufficiency of estate to satisfy. The court, therefore, seeing their way clear, resolved to do justice at once, without exposing the plaintiff to useless delay and idle formalities, before he could realise the payment to which he was evidently entitled. We say, useless delay and idle formalities ; for of what avail, the delay, or to what end, the formality of a citation to creditors individually, to object to, or to acquiesce in a tableau of distribution, before the execution of this decree ; when it was already apparent from the *shewing of the syndics*, that there were no *interfering* priviledged debts ? Finally, are not rules upon syndics to shew cause, why debts of high priviledge should not be paid at once, and without further delay, matters of every day's occurrence ? But why should not the syndics be competent representatives of the creditors, for the purpose of establishing against them the debts of the estate, and the degree of their priviledge ? Syndics are agents, elected by the creditors, and sanctioned by the court ; with reference to fidelity, therefore, they must be presumed, to be worthy of

the utmost confidence; as to their comparative ability to defend the estate—their possession of all the books and papers, and correspondence of the insolvent, affords them the advantage of a more intimate and accurate knowledge of the state of his affairs, the extent of his engagements, and his means of resistence of unjust demands, than could be enjoyed by the scattered mass of individual creditors. Being creditors themselves, without any priviledge to their own claims, arising from their office, they have the same interest, that the individuals of the mass could have, to expose the injustice of groundless demands Elected by the creditors, and appointed by the court, they have the additional inducement of the obligation of their trust, to excite them to vigilance in the discharge of their duty; and finally, the smallness of their number (being usually from one to three) affords them the further advantage of union of counsel, and concert, and vigor of action, in exerting their means of defence. This is a matter of practice, founded on the conbined rules of justice and convenience. The end in view is substantial justice to the creditors, to be pursued by means the least inconvenient; by rules admitting the fewest obstacles, arising from delay, confusion, negligence or ignorance. Now, the inconvenience of introducing here, the ancient Spanish

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practice, of which the counsel of the syndics have become enamoured (of requiring, in order, not merely to the classification of contended priviledges, but, establishing the very existence of every debt, and the nature of its priviledge, a notification to the creditors, individually to appear in a mass before the court, where each one in turn, and in person would be heard respectively as plaintiffs and defendants, to enforce his own, and repel all other demands) has been, perhaps, sufficiently apparent, in considering the benefits arising to the creditors, of their being fully represented by the syndics in all actions, concerning the estate of the insolvent, and the interests of the creditors. But, according to this tumultuous mode of proceeding, there would be some room for the application of the proverb, "that what is made the business of every body, would be soon found, to be the business of nobody." What confusion would be attendant, on the discussion of the budget of simultaneous demands, in the case of every considerable failure? Who should first be heard? Where should be stowed the crowd of witnesses, who might be necessary to establish the multitude of debts? Should *each one*, of perhaps of an hundred creditors, be heard against *every* demand? He, who wants proofs from China, and he who has his proofs in his pocket, how shall they assort their movements?

Shall he, who has been heard in support of his demand, await the return of, perhaps, an hundred commissions to parts beyond the seas, before he can have the satisfaction of knowing the decree which is to determine his rights? In fine, where is the judge, whose patience could support him, through the clamor, confusion, and perplexity of such a scene? Where is the creditor, for a small sum, who would not abandon the contest in despair? Convenience and justice, therefore, concur with the positive authority of our own statute, and the repeated decisions of this court and numerous decisions of inferior courts, from which appeals have not been taken, in establishing the competency of the syndics to represent the creditors in all actions in which either the estate of the insolvent, or the interest of the creditors are concerned; and if they can fully represent them, then they can, as an irresistible consequence, suffer judgments which shall be binding on the creditors. Of what avail then, will it be asked, will be the meeting of the creditors on the exhibition of the tableau, to shew cause, why it should not be homologated? We answer, certainly none, nor will they be permitted to question a judgment solemnly rendered against the syndics, their representatives. If they could, their judgments would be liable to be reversed in some

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other way than by appeal, or a *reconsideration of this court*, on an application made, within eight days after judgment pronounced. As a matter of practice, what then, is the *usual* and *principal* object of such a meeting of creditors ? The existence and the nature of debts against the estate are presumed to have been already established, as is the usual course in judicial discussions with the syndics, as plaintiffs or defendants; in all cases of dispute, and, *at least, wherever it has been done*, it has been *done effectually ;* for the syndics were their representatives. In such previous discussions, questions touching the *absolute right* of the creditors, against the insolvent are settled, and, so established, nothing could hinder the right, from becoming available to the creditor, but the *previous*, seasonable interposition of the syndics, either by the exhibition of a tableau, or otherwise, *shewing, to the satisfaction of the court, the existence of other debts* of an *higher or an equal priviledge*, and an insufficiency of estate to meet both demands. In such case, before payment, and only in such case, the classification of debts by a tableau of distribution might become necessary. And then the *relative*, in addition to the absolute, rights of the creditors, would be established in a discussion, by the creditors to be called for that purpose, of the propriety of the adjustment, adopted by the syn-

dics in their tableau ; as well of the order of priviledges, as of the relative position of the creditors of each particular order. In all cases, that tableau of distribution, on account of the disposition of the funds, must be finally rendered to the court, and the creditors called to shew cause, why it should not be approved. But the necessity of *finally rendering that account of their administration* is no apology for the syndics, for *retaining all the funds of the estate, until that final account be rendered.* They must know, whether there exist, and to what extent, *interfering* claims to hinder the payment of any particular priviledge. The judgment of this court, for instance, would be to them a full justification. And when on a demand of payment from the syndics, of a particular priviledged debt, it is made *manifest to the court* by *the defence of the syndics* that there does not exist any other priviledged debt, of an equal or an higher degree, that is any *interfering* priviledge, to hinder its judgment, out of the proceeds of that part of the estate, on which the creditor has a lien, the court will at once, and without, circuity decree as in the cases of *Brown* and *Ibanez* and a multitude of others, not merely the existence of the debt and its priviledge, but that the proceeds of that part of the estate, on which it attaches, shall be applied towards its extinc-

tion, so far, as they may be sufficient, for that purpose. Would this not be justice? Could the creditors be injured by the effect of this decree? What could be gained by them, *as against this decree*, by previously summoning them to discuss a tableau of distribution, when it is apparent, *from the shewing of the syndics*, that there are no privileged debts, to claim a *competition*, with the debt in question, except the costs and expenses of justice, and which there are abundant funds to satisfy? Is it true, in the sense in which it is objected by the defendants, that the creditors are *third* parties, in regard to this judgment against the syndics? That as to the creditors it is *res inter alios acta?* Were they not elected by the creditors, and confirmed by the court as their representatives? Are they not so made by our statute? And are they not themselves creditors? United in interest with the other creditors, and enabled by their situation to make a better defence, than the mass of creditors could do? But it is said, they might neglect their duty, or abuse their trust! So a man, blessed with the use of his senses, might become a glutton or a drunkard, or otherwise abuse them, merely in licentious pleasure. Would it follow, that they were not the proper organs of life, and rational enjoyment? There is no more reason, why the mere fact, that there

has not yet been a final homologation of the accounts of the syndics, should be an obstacle to that part of the decree which directs a payment over of the proceeds of the mortgaged property, to the plaintiffs, the judgment creditors, that the like fact, could have been objected to the execution of the decrees, in the case of *Brown* against *the syndics of Phillips*, or of *Ibanez* against *the syndics of Bermudez*, or of a multitude of similar decrees; and which was never before imagined. In this country emphatically, the course of justice will not be suffered to be impeded, or entangled by mere forms. And if there be no other objection to this decree, than that the creditors have not been notified personally, to shew cause, why the *accounts of the syndics* should *not be homologated*, as it is apparent, that they would not be able to shew for cause, the existence of higher, or equal, or *any other* priviledged debts (with the single exception, that has been mentioned of costs and expenses) they could have no cause to shew, that could touch the present question; so far as it is objected to this decree, that such a meeting of creditors has not been *previously* summoned. If then, *on the supposition of this judgment debt* having been *validly established, as against the syndics*, it be competent for the court, on discovering from the pleadings that there are no *interfering* priviledg-

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ed debts, to order *at once* the payment over of the proceeds of the property affected by it, as far as they may go towards its satisfaction, the objection resolves itself simply and truly into this, that *the syndics are not competent parties to suffer a judgment which shall be binding on the creditors*, but that before it can become valid, as against them, they also must be cited, and be at liberty to plead to the demand in person. This objection, thus stripped of its disguise, has been already answered, by a reference to the statute and to the repeated decisions of this court and others, shewing the authority of the legislature, co-incident with a settled course of practice, and with reason, justice and convenience.

But it is contended by the defendants, under the *bill of exceptions*, that even, as *against the syndics themselves*, the judgment of the court is erroneous, because, against the recovery by the plaintiffs, under their original judgment, the syndics, on the hearing, offered *to go into evidence*, to shew that it was not merely null, but *fraudulent and collusive* as against the creditors, and were *overruled*, on the ground that fraud and collusion, *not having been alledged* in their answer to the rule, was *not in issue* between the parties. In support of this objection, it is contended—1st. That evidence is a generic term, and, in its *full latitude*, will comprehend, as well

the *record* of the judgment, on which the plaintiff's themselves relied, (and which, they say, was "*in fact*," part of the evidence, they were refused leave to introduce) as proof, by witnesses, or otherwise, which they might have introduced to establish fraud. 2nd. That it was *not necessary*, expressly, to *alledge fraud*, in order to be permitted to introduce proof of it, and that to object to proof of fraud, for want of such allegation, is a nicety, which the liberality of our laws and practice must forbid. 3d. That fraud was *sufficiently pleaded* in the allegation of *nullity*, and in the further allegation that the judgment did *not confer* on the plaintiffs *a priviledge* over the other creditors.

With regard to the first branch of the objection, however extensive may be the signification of the word evidence, taken in its utmost latitude, we are *at issue*, with the defendants, *as to the fact*, that they were, as they now contend, refused leave to open and point out the error and nullity of that document, which was the very foundation of the plaintiffs' demand and one of the records of the court, which is minutely described and referred to in the rule, as being under the eye of the court, and the moving cause of its compulsory proceedings, and final decree against the defendants. If so extraordinary a refusal had been made, if such an arbitrary power had been

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exerted by the court, as to inhibit to the defendants a resort to that evidence on their defence, which was permitted to the plaintiffs, and without which, in the nature of things, the court could have made no decree, and which the court, in its own orders, professes to be acting upon, ought not the fact to be made to appear before this court by affidavit? Ought it not, at least, more distinctly to appear, by form of exception, than by the loose and general words, "*that they offered to go into evidence?*" In reference to which, the court say "*the offer was made by consent,*" and that "*no evidence was produced by them.*" Does not the *very expression* "the defendants offered to go into evidence," obviously imply that *the plaintiffs had* already *gone into evidence* in *support* of their demand? And that the defendants offered to go into evidence, *on their part*, *other*, than *that* which had been gone into on the part of the plaintiffs? If not, for what possible purpose, could the defendants desire to resort to evidence of fraud and collusion? Was it to resist an *unsupported* demand? Was not the "*onus probandi*," in this, as in all other cases, on the plaintiffs? And if they had proved nothing, must it not be presumed they would have recovered nothing, even in the court below? Or, at least, that in this court, the defendants might be sufficiently assured of safety against an imaginary demand.

This *new* idea, therefore, that there was no evidence, even of the original judgment, before the court below, in support of the plaintiffs' demand, but ill comports with the defendants' exception to the refusal of leave to go into evidence, to prove that judgment fraudulent and collusive. And, is not the presumption irresistible, that the record *was* in evidence before the court, when without that fact, the conduct of the defendants' counsel, in taking such exception, would seem to approximate very near to absurdity? Indeed what part of the pleadings leaves room to doubt of the fact, that the record of the original judgment was before the court? Is it not minutely described in the rules of the 3d of March, and the 6th of May, as making part of the records of the court; as having been read before the court—as being the ground work of the plaintiffs demand? And do not the defendants themselves, in their answer of the 9th of May, declare the mortgage, created by the plaintiffs' judgment, an insuperable obstacle, to the sale of property to which it adheres, and that *when the plaintiffs, who claim under it, will remove that incumbrance*, the defendants will be ready to liquidate that part of the estate. Finally, do they not further answer, that, *that* judgment is *null?* We ask, what judgment? If *nothing* were before the court below? But, why have we not something more than pre-

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sumption, to inform us what was before the court below ? Or, at least, a certificate of the judge below, that it was not, after all, in evidence before him ? Is it not according to our rules of practice, the duty of the *party appealing* from the decree, to make out, prior to the prosecution of the appeal, with the consent of the opposite party, ro under the sanction of the court, an exact statement of the evidence, on which the decree is founded ? If he neglect to prepare such statement, is that neglect to be perverted into proof, that there was no evidence ? Or rather will not this court presume in such case, every thing in favor of the decree of the inferior court, and especially, that it was founded on evidence proper to sustain it ?—2d. The defendants contend, in the second place, in support of their bill of exceptions, that fraud need not be specially pleaded, in order to be offered in evidence, and that to object to such evidence, for want of such a plea, is a mere nicety of practice, which our rules of proceeding must always forbid.

3d. That if necessary, to be pleaded in order to be proved, it is sufficiently pleaded in the allegation, that the judgment is *null* and *does not confer a priviledge* on the plaintiffs.

These arguments in support of the *bill of exceptions* shall be considered with the utmost brevity. In the first place, this objection, to the

want of a plea of fraud is not of form but of substance. Fraud, if it exist, whether infecting a contract or a judgment, being a vice that shuns observation, there can be nothing, on the face of the subject matter of the demand, that can awaken the expectation of such a defence. If, therefore, it were not required to be expressly alledged, the party, against whom it is sought to be given in evidence, would be unjustly surprised. And why should it not be exacted of him, who would prove it, that he should first have distinctly alledged it? There is no understanding so obtuse, as not to be able to comprehend the difference between fraud and good faith. There are no talents so humble, as not to be able to express it, so as that it may be clearly distinguished from all others pleas, whether of form, or of substance. It is not required of him who would adduce proof of fraud, that he should have shaped his allegation, according to any prescribed form of words, or subtle rule of pleading. It is required only, that it should be distinctly and frankly expressed without insinuation, equivocation, so as that the party against whom it is alledged, may at once be apprised of the serious a charge, and may be fully prepared to vindicate himself against it. To exact thus much of every party, who would resort to so reprobating a means of defence, is demanding

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merely that plain dealing, that is due from man to man, in the humblest situations and simplest intercourse of life. The condition, therefore, on which a man shall have leave to adduce proof of fraud against his adversary, is not less easy to be fulfilled, than to require it, is but a reasonable shelter against surprise and, often, against the most serious injuries to character and property. It is a settled maxim of law (for which authority need not be quoted) that fraud is not to be presumed. It is especially not to be presumed, against a solemn judgment of a court without appeal, rendered only after years of litigation and long prior to the failure of the insolvents. The subsequent failure, therefore, of Williamson and Patton, two of the judgment debtors, nine or twelve months afterwards, cannot be pretended to take this case out of the operation of the general rule. If, therefore, there be no hardship in requiring the previous allegation of fraud from him who would adduce it in proof—if not to do so, would be an unjust surprise upon him, against whom such proof is sought to be produced—if it be a settled principle of law, that fraud is not to be presumed, with what show of reason, can it be maintained, that such an express allegation is not an indispensable preliminary to the introduction of such evidence? But, it is urged against the necessity of this plea, to open the door to such proof, that even if the allegation

fraud had been expressly made, that fraud has so many forms, that we should be nothing the wiser for it—that such a plea would afford no indication of the particular proof, by which it would be supported, any more than if it had not been pleaded at all. But, if fraud be of so protean a character, that even when it is charged, conjecture cannot easily light on its particular form, how much *more* unprepared must that party be to resist such evidence, against whom it is not alledged at all? The argument drawn from the nature of fraud, therefore, seems to conclude strongly against the defendants, in favor of the necessity of alledging it, before evidence of it shall be admitted? Is the objection then, to silence, on that subject, in pleading, a nice and captious one? Or rather, does it not tend to the detection of artifice, by requiring that fairness and frankness, that is due from one person to another in every situation, and is indispensable to the safety of every one, who is driven to a legal contest for the enforcement of his rights? But, it is added, by the defendants by way of illustration, that in an action on a promissory note, the defendant, under a plea of general denial might prove a forgery, and that forgery is as serious a charge as fraud; but the defendants' counsel answer their own argument (so far as it is helped by this illustration) by observing that it

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is incumbent on every plaintiff, to make out his own cause of action by proof, and the very first step of his proof, in such case, must be sufficient evidence of the genuineness of the hand writing of those who have signed or attested the instrument, and which, of course, may be contradicted by the defendant. We leave this part of the subject, with this single observation, that by our rules of practice, every answer must fully and freely disclose the nature of the defence, with every proper explanation of time, place and circumstance.

It is urged by the defendants, in the third branch of argument in support of their bill of exceptions, that if, after all, fraud and collusion must be alledged, in order to justify the introduction of proof of it, it is sufficiently pleaded in the allegation that the judgment *is null*, and does not confer a priviledge *?* As to the latter branch of this plea, it seems to be merely a conclusion from the first, and, as such, surplussage. In any other point of view, it amounts to the untenable position, that a judgment debt, by its nature, does not confer a priviledge; or, is it meant to be said, that this is that part of the plea in which fraud is sufficiently pleaded *?* If so, then *nil debet* or *nul tiel record*, or any thing else, would be a good plea of fraud, in other words, that fraud would be sufficiently pleaded when it

is *not* pleaded: *id est*, that it is not necessary to be pleaded at all, which is getting back to the first branch of his argument. But to return, are fraud and collusion sufficiently pleaded in the allegation that the judgment *is null?* If so, then fraud and nullity are synonymous terms, for we have seen that fraud must be expressly alledged, and is not to be gathered by implication from other parts of the pleading. Now, did the defendants really mean fraud and collusion, when they pleaded that the judgment was null? No, for they tell us, in a former part of their argument, that the record of the judgment itself was, "*in fact*," an essential part of the evidence on which they meant to rely, that they intended to shew, from the face of the judgment, that it was null, and this, if they could have succeeded, would be proper and regular enough; a species of proof in strict conformity to their allegation. But can it be gravely maintained, that it is one and the same thing, to alledge that a judgment is null, and that it was obtained by fraud and collusion? One plea presents a question of law fit solely for the court, the other alledges matter of fact, that may be proper for the investigation of a jury. But in lieu of all further argument on a part of the subject so plain, and on which, it is believed, the court entertain no doubt, we will conclude with this single observation, that there

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is one essential difference between these respective pleas, a judgment that is null is void, *ab initio* a judgment obtained by fraud and collusion; is, at most, only *voidable*. Therefore, independently, of the plain common sense difference between them, the allegation of the one cannot be the allegation of the other.

The following points then are considered as established on the part of the plaintiffs.

1. That the plaintiffs are *judgment creditors*, of Meeker, Williamson and Patton, for $40,711 92, by a judgment of the late superior court, of the territory of Orleans, of the twenty-seventh of July, 1811.

2. That the house and lot in question, was partnership stock of the firm of Meeker, Williamson and Patton, which had expired, prior to the failure of Williamson and Patton in February, 1812.

3. That there are no other priviledged debts against the estate, except costs and expenses, (which there are more than sufficient funds to satisfy,) as is manifest from the account and tableau exhibited by the syndics, and from their omission to allege, in their answer, the existence of any interfering priviledges.

4. That, the plaintiffs pursued the right course to enforce the payment of their debt in proceed-

ing by rule, setting forth their character of judgment creditors, the sum, the date, the parties, and the court, and were not bound to proceed to an action of debt on their judgment, with the form and expense of petition, and citation. That such actions would have been odious and vexatious, and uselessly expensive, and, especially, as against an insolvent estate.

5. That the defendants were not surprised, being bound to notice the existence of the plaintiffs' priviledged debt, at least, ever since the failure, and this, not only from the records of the court and of the recorder of mortgages, but from the oath of the plaintiffs' agent, at the original meeting of the creditors, and, being also actually apprised of it, as is evident from their own answer complaining of it, as an incumbrance, and from the repeated efforts of the plaintiffs, to compel the defendants to answer at all.

6 That the statute of insolvency, being of a general nature, was intended to operate upon all further proceedings in cases of insolvency, then pending as well as on those of subsequent origin.

7. That the defendants had power to raise the mortgage created by the judgment, as well by the nature of their office, as by the statute of insolvency of 1817.

8. That the syndics are competent and com-

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plete representatives of the creditors, as plaintiffs or defendants, in all suits, concerning the estate of the insolvent and the interests of the creditors. That this is apparent, as well from the statute of 1817, as the repeated decisons of this court and the rules of reason, justice and convenience.

9. That consequently, a final judgment pronounced against the estate, represented by the syndics is conclusive against the creditors, without any personal notification to them.

10. That on a demand of payment, of a privileged debt against the syndics, if it be made manifest to the court from the shewing of the syndics, that there are no interfering privileges ; the court will at once, and without circuity proceed to decree not only in favor of the debt and its priviledge, but payment also, as was done in the cases of *Brown* vs *syndics of Phillips* & *Ibanez* vs. *syndics of Bermudez*, and is done every day in cases of high priviledge.

11. That the necessity, on the part of the syndics of rendering a final account of their administration subject to any objections, from the creditors as to the classification of debts, is no sufficient reason for retaining to the injury of priviledged creditors ,all the funds of the estate until the exhibition of that final account, that the existence and extent of interfering priviledges, can-

not be unknown to them. That the judgment of the court will always protect faithful syndics. The argument founded on the possible abuse of their trust, by collusion with a particular creditor, is radically unsound, and might equally be employed to overthrow every human institution.

12. That the record of the judgment of the late superior court was evidence before the court below, and the very foundation of the plaintiffs' demand and of the decree of the court, and that the defendants were not debarred the use of evidence permitted to the plaintiffs, nor any advantage, that an attempt to exhibit the nullity of the judgment could have afforded, as is manifest from the whole face of the proceedings, and is strikingly evinced by the fact that the defendants thought fit to except to a refusal of leave "to prove that the judgment itself had been obtained by *fraud and collusion.*"

13. That, if there could be any doubt as to what was evidence in the court below, that doubt must conclude against the defendants, and in favor of the judgment of the inferior court; for it was incumbent on the defendants as parties appellant, to have prepared, or caused to be made a statement of facts.

14. That the judge of the court below, did not err in refusing leave to the defendants to go into evidence (or rather time to seek evidence) of

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fraud and collusion, because it was not in issue between the parties.

15. For, evidence of fraud and collusion cannot be admitted, when it has not been expressly alledged. That otherwise the party, against whom it is produced, is surprised. That this is not a captious objection, requiring any particular skill or pleading, but is equally supported by the principles of law and justice, and of consequence, that

16. Fraud and collusion were not sufficiently pleaded by the allegation that the judgment is null, and does not confer a priviledge; the latter allegation being but a conclusion from the first, in any other point of view, amounting merely to the untenable position "that a judgment, by its nature, does not confer a priviledge," and, certainly not amounting to an express allegation of fraud and collusion: the former part of the plea, to wit:—that the judgment is *null*, being equally far from an allegation of fraud and collusion—nullity and fraud not being convertible terms. The former, presenting a question of law for the court; the latter, matter of fact for the jury, and a judgment that is null being *void ab initio*—a judgment, obtained by fraud and collusion, being, at most, only *voidable*.

DERBIGNY, J. delivered the opinion of the

court. A rehearing has been granted in this case, with a view principally to obtain a more particular investigation of the following questions, which, on the first argument, passed almost unnoticed;

1. After the filing of the tableau of distribution, by the syndics of the creditors of Williamson and Patton, was a general notice to all the creditors, an indispensable formality, which the syndics had no right to wave?

2. Under the general refusal, to let the appellants go into evidence, to prove that the judgment relied on by the appellees was null, collusive and fraudulent, were the appellants deprived of their right of shewing nullities, apparent on the face of the record of that judgment?

To come at a correct decision of the first question, we must previously ascertain, by what law the proceedings in this case are governed. This is a case of *cessio bonorum* in 1811, consequently, after the repeal of the insolvent act of 1805, by the act of 1808, which last act, as it provided only for the relief of debtors in actual imprisonment, left other cases to be regulated by the ancient laws of the country. Under those laws, then the voluntary cession of goods in this case was made, and by those laws it ought to be governed. But in the application of those laws, to

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the question under consideration, some embarrassment must result from the changes introduced by the practice of our courts in the manner of conducting the proceedings in cases of this nature. Before a Spanish court, in a case of *cessio bonorum*, each creditor pursues his own claim individually: he is notified of all the other demands, and may debate and oppose them. Upon all those claims collected together, the judge pronounces by one single judgment, classing the creditors according to their rank, and ordering them to be paid in that order. The person appointed, under the name of administrator of the insolvent's estate, has no other power than that of administering the property and collecting the debts; he has no right to interfere in the claims of the creditors. With us, the practice has been introduced, (probably borrowed from the ordinance of Bilbao) for the creditors to appoint one or two common agents, under the name of syndics, whose powers, before the enactment of the law of 1817, had never been well defined, but whose business was understood to be that of taking care of, and administering the property surrendered, and of doing all needful acts towards preparing a final settlement and liquidation of the common estate, agreeably to the provisions of the afore-mentioned ordinance, which vests the syndics with those powers and no more,

and always reserves to the creditors, the right of debating and approving, or opposing what is done through the course of proceedings until the end.

In our courts these syndics sued, and were sued, as the representatives of all the creditors: the individual creditors themselves not appearing, except in opposition to the syndics, when they refused to admit their claim.

But, although the general mode of preparing the liquidation of the esrate was so far altered, yet, when the time was come, finally, to pronounce upon the respective claims of the creditors, and to class them according to their rank, it was the invariable practice of our courts to cause general notice to be given to them all, through the newspapers, informing them that the tableau of distribution of the proceeds of the estate was laid before the court, and calling on them to shew cause why it should not be approved. By that general advertisement, the most important part of the Spanish proceedings was preserved, to wit, the opportunity given to each creditor to support his own right, in opposition to the claims of the others, and, of course, against those of the syndics themselves, whose interest, upon that occasion, was adverse to that of their constituents.

Under that practice the present syndics were

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appointed; and by that practice their conduct must be governed. They had no power to represent the creditors where the rules, under which they were named, required the creditors themselves to be called. The consequence of this must be that, if they undertook to act for them on such occasion, their act is null, the proceedings irregular, and their consent to wave the irregularity, not binding, because they had no right to give it.

The appellees have maintained that the law of 1817, not the ancient laws, ought to be the rule by which all the proceedings, had in this case since its enactment, should be governed. Should we acquiesce in that opinion, the cause of the appellees would not be advanced thereby, for, by the 35th section of the act, it is expressly provided that, on the filing of the statement or tableau of distribution, notice shall be given to the creditors by bills or publication, that they may show cause, within ten days, why it should not be homologated.

The case of *Brown* vs. *Kenner & al.* 3 *Martin*, 270. is relied on as one which furnishes a precedent of a dispute between a creditor and the syndics, decided upon without the presence of the other creditors, But in that case, the question here examined, was not raised.

We do not feel at liberty to enquire into the

particular circumstances of this case, and to lay aside the rules by which it ought to have been governed, in order to ascertain, ourselves, whether there is or not any creditor, of this estate, who can claim preference over the appellees. The tableau may, as they assert, shew that there is none; but this is begging the question; for if this tableau was to be laid before all the creditors, to be assented to or opposed by them, it is not conclusive, *now*, as to any thing that it contains.

This view of the case, precludes any necessity of investigating the other question. The judgment of this court must be altered, and the parties replaced where they were before the rule, complained of by the appellants, was obtained.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be reversed, and that the parties be replaced in the situation in which they respectively stood, before the rule of the 6th of May last was granted; and it is further ordered that the appellees pay costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District.
April, 1819.

MAURIN
vs.
TOUSTIN.

EASTERN DISTRICT, APRIL TERM, 1819.

MAURIN vs. *TOUSTIN.*

When the whole facts come up with the record, a bill of exceptions to the charge of the inferior court is not noticed.

If the vendor be brought in by his vendee to defend his title, the judgment does not bind him, as to the amount of damages he may afterwards claim, from the then plaintiff, his own vendor

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

MARTIN, J. delivered the opinion of the court. The petitioner stated, that, in October, 1809, she purchased from the defendant a negro girl, for the sum of one hundred and sixty dollars, who was afterwards recovered from her vendee, by the defendant. 5 *Martin*, 611, *Toustin* vs. *Lucile*.*—That the said negro slave while in possession of the plaintiff, had two children, and the plaintiff was at great trouble and expense

* The name of the case is there erroneously printed, *Lucile* vs *Toustin.*

during her lying in, in bringing up said children, and medical attendance, taxes, &c. wherefore, she claims $870.

The defendant, in her answer, stated that she owed to the plaintiff the sum of $160 only, which she had tendered to the plaintiff's agent, and was ready to pay. She denied all other charges, and concluded, that the whole concerns, between the plaintiff and herself (except as to the aforesaid $160) were settled by a judgment in a suit, wherein she, the present defendant, was plaintiff, and Lucile, the present plaintiff's vendee, defendant, wherein the present plaintiff intervened as warrantor, and in which, the wages of the slave were fixed at six dollars per month only, in consideration of the sums expended in her maintainance and that of her children.

The plaintiff had a verdict and judgment for $533 14, and the defendant appealed.

There is not any statement of facts, but the parish judge has certified that the record contains all the facts, upon which the cause was tried.

W. Planté deposed that he hired the slave, for about three years at four dollars per month: she left him, about three years ago, being pregnant of her first child, and has had another since.

She was attended, in her lying in, and other

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indispositions, by Dr. Dufour; the plaintiff's agent: while she was at the deponent's, she was clothed at the plaintiff's expense. She had no severe malady, while she was at the deponent's, but was severely sick at Dr. Dufour's. As soon as the deponent discovered her pregnancy, he sent her back, as she was very delicate, of but little service in that situation, and required great care. She rendered no service at the doctor's during her pregnancy, nor while she suckled her children. He values the expenses of her clothing, at $18 per year, and those of her lying in, at from $10 to 15 each time.—That the expenses of a child's food, while the mother is very weak, are from three to four dollars per month.

Madeleine Marren deposed that she hired the slave for four years, and paid for her at the rate of four dollars per month: she was clothed by her mistress: since she left the deponent, she had two children, and was delivered and attended by Dr. Dufour. She has been several times sick, as well as her children. The charges of lying in of slaves are from $12 to 14, in ordinary cases. The witness would not have taken care of her and her children for their victuals and clothes.

Touron, deposed that he saw the slave, for these five or six years, almost every week, that she appeared very healthy, that the defendant hired

her for $15 per month; and she came home twice a day to suckle her child.

With the record comes up, a bill of exceptions to the opinion of the parish court, in directing the jury that "it was their duty, to take into consideration, the charges in the plaintiff's account, relative to the two children; as it appeared to the court, that the supreme court would not, nor could not decide in their decree, any thing upon a fact of which they were ignorant, viz: the birth of the children, during the pendency of the suit of *Toustin* vs. *Lucile*,"—to which opinion the defendant's counsel excepted.

It is useless for us to take into consideration, the propriety of a charge of an inferior court to the jury, when the whole facts are spread upon the record. For, to send back the case for a new trial, with directions to withhold the part of the charge excepted to, or to give another, would be productive of delay only: as, upon a new appeal, whatever might be the verdict, unless it was a special one, it would be our duty to weigh the evidence, as if there was no verdict.

It does not appear to us, that the plea of *res judicata* can avail the defendant; as the present plaintiff was only brought in as a warrantor to defend the title she had given, and no damages could be awarded against her.

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In examining the account, we find an allowance of $370, properly supported by evidence, for the consideration of the sale, with legal interest therein, the expenses of lying in, medical attendance in sickness, clothing and taxes: but it does not appear to us, that the other charges are sufficiently supported by any evidence on the record.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and proceeding to give such a judgment as, in the opinion of this court, ought to have been given in the parish court, it is further ordered, adjudged and decreed, that the plaintiff recover from the defendant, the sum of $370, with costs, in the parish court, and that he pay costs in this court.

Davezac for the plaintiff—*Morel* for the defendant.

MILES vs. *HIS CREDITORS.*

Some property to be ceded, is not requisite to entitle the debtor, to the benefit of the insolvent laws.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is a case in which the debtor claims the benefit of the act of the territorial legisla-

ture for the relief of insolvent debtors in actual custody, 1808, *c.* 16, 2 *Martin's Digest*, 440. To his petition is annexed a schedule of his debts, and a declaration, that he has no property. This declaration, the district court considered as a sufficient badge of fraud, to deny him any relief under the law, and gave judgment accordingly.

We are of opinion, that the district court erred in considering the bare circumstance of the want of property in the debtor, sufficient to deprive him of the benefit of our insolvent laws, when no fraudulent conduct was proven against him. This would be denying the aid of such laws to persons most clearly insolvent; those who have nothing wherewith to pay their debts.

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

Preston for the plaintiff—*Eustis* for the defendants.

Eastern District. April, 1819

HEWES vs. LAUVE

A creditor of a person, for whose debt the defendant is sued, is not an incompetent witness for the plaintiff

HEWES vs. *LAUVE.*

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff states that the defendant is an auctioneer, and certain persons, trading under the firm of J. Howe and co. for some time past sold goods at public aution, under his name and sanction; that, by various acts, the defendant made himself responsible for the sales and transactions of said J. Howe and co.—that the plaintiff delivered certain goods to J. Howe and co to be sold at auction, which were accordingly sold, and the proceeds received by them or the defendant, to the amount of $545, that the said J. Howe and co. have absconded, and the said sum is due to the plaintiff by the defendant.

There was judgment for the latter, and the former appealed.

The case comes up before us on a bill of exceptions. The plaintiff offered Roderick M'Leod, as a witness, to prove transactions of the defendant with J. Howe and co. and persons who had dealings with them, in order to establish the existence of a partnership between the defendant and J. Howe and co. He objected to M'Leod's admission as a witness, because the

latter had instituted a suit by attachment against J. Howe and co. The district court sustained the objection, and the plaintiff took his bill of exceptions

The defendant contends that the witness was properly rejected; our statute disabling all persons, directly or indirectly interested in the cause, from being heard. *Civ. Code.* 312, *art.* 248.

In the present case, the witness is not a creditor of either of the parties; but it is alledged that, if the defendant be cast and the debt paid by him, the estate of J Howe and co. will be discharged therefrom, and the witness will have a better chance of recovering what they owe him.

The absolute insolvency of J. Howe and co. does not appear from any evidence on the record. The circumstance of their absconding does not alone suffice to establish it. It might be owing to other causes. This being the case, it is useless to enquire whether the interest alledged, if it existed, would occasion the incompetency of the witness.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court, be annulled, avoided and reversed, and that the cause be reminded with directions to the district judge, not to reject Roderick M'Leod, as a wit-

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ness, if there be no other objection made to his admission, and it is ordered, adjudged and decreed, that the defendant and appellee pay the costs of this appeal.

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

FLEEKNER vs. *GRIEVE'S SYNDICS.*

In determinon the propriety of allowing a *ded pot.* the court may look into the record of another suit, between the same parties. So may the supreme court, on the appeal, if that record be there also.

If fraud be not alleged, no *ded. pot.* shall be granted to prove it.

The affidavit ought to specify the fact, intended to be proven, that the opposite party may avoid the delay by admitting it.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. This case is before us on a bill of exceptions to the opinion of the district court, in refusing to the defendants a *dedimus potestatem*

The plaintiff claims rent, for certain premises from the defendants, who pleaded the general issue only.

A short time, after the period fixed for an application for a *ded. pot.* the defendants claimed one, on an affidavit, that they had just come to the knowledge that certain persons, in England, could not only disprove the plaintiff's claim for rent, but also prove that the pretended title, under which the claims, was given and executed in fraud of the creditors represented by the de-

fendants. The district judge gave as a reason for the refusal that the matter, expected to be proven, was *res judicata*, between the same parties, in a former suit.

There is not any statement of facts, and we are not enabled by the record to discover, whether the matter be really *res judicata*.

The plaintiff's counsel has attempted to shew it by the production of the record of the case, in which the alledged decision took place. It is the record of a suit originating in the court *a quo*, and the defendants' counsel contends that we cannot take notice of it, as it makes no part of, nor is referred to in, that of the present suit. The case is on our files, as it came up to this court and was finally decided by us, and the district court was directed to carry our judgment into effect. Hence, it is in our knowledge that the matter is *res judicata*, and this appears by the record of this court. It was also in the knowledge of the district court, who was correct in noticing it, since it there appears on record also.

Farther, it appears to us that the affidavit was insufficient. The only fact, which is positively stated, is that the plaintiff's title was given and executed in fraud; but fraud was not alledged,

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and the pleadings did not allow any evidence of it.

The facts, by which the claim for rent was expected to be disproven ought to have been specifically stated, in order that the plaintiff might exercise his right of averting the delay, by an admission of them; which, from the manner in which the affidavit is worded, cannot be done, without admitting the consequences drawn by the adverse party from unknown facts.

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

Smith for the plaintiff, *Livingston* for the defendants.

JOHNSON vs. *DAVIDSON*.

If the testator dispose of property, which he was bound to leave to his brothers and sisters and leave an executor, a defensor will be appointed to them, but no curator till after a division.

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

MATTHEWS, J. delivered the opinion of the court. This is a case in which the appellant made application to the court of probates, to be appointed curator of the absent heirs of James Johnson, late of New-Orleans, deceased, who it

seems made a will, by which he instituted his natural children, now residing in Scotland, his universal heirs, leaving some inconsiderable legacies to his brothers, and appointed the appellee one of his testamentary executors, who has since taken on himself the execution of the will.

According to the provisions of our statute, "natural children, if the father leaves legitimate brothers and sisters, can receive from him, either by donation *inter vivos* or *causa mortis*, only one half of his estate." *Civ. Code*, 210, *art.* 14. Every disposition, in favor of persons incapable of receiving, is declared null and void. *Id.* 212, *art.* 17.

Amongst the curators, which may be appointed, according to our law, it is clear that a curator, when necessary, may be appointed to persons, who are absent from the state, and have property within it, such as heirs to a succession. In cases of testaments, the testamentary executor, when some of the heirs of the testator are absent, and not represented in the state, is, nevertheless, authorised to take possession of the property of the succession, and to remain in possession of the portion belonging to the absent heirs, until they shall have sent their power of attorney, or until the expiration of the year. *Id.* 246, *art.* 169.

This article, it is thought, can only apply to

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cases, where all the heirs (both those who are absent and the others) have been instituted by the testator in his will; as it is the duty of the executor to carry into full effect the intentions of the testator.

The present case is singular, in its circumstances. The testament is null and void, so far as it purports to dispose of more than one half of the deceased's estate. For, he institutes his natural children heirs, and shews, by legacies to his brothers, that he had relations, of that degree, in existence. The estate is not vacant, and cannot be administered as such; because the executors are clearly entitled to the care and management of it, and have an interest opposed to the rights of the legal heirs.

Curators of absent heirs, are persons appointed by the judge to take care of, and administer on, the portion of an estate *ab intestato*, which falls to the share of such absentees, "in cases where some of the heirs only are absent and not represented." *Ib.* 172, *art.* 121.

Considering the estste of the deceased to be *ab intestato*, for that portion of it, which is attempted to be disposed of by will, contrary to law, and to which collateral relations of the deceased, absent and not represented, are entitled, it is the duty of the judge of probates, to appoint

a curator "to take care of, and administer on their shares."

But, before that can be ascertained, it is necessary that a partition should take place, (according to the provisions of the law, in such a case made and provided) to effect which, a defensor must be appointed to protect the rights of the absentees. *Id.* 174, *art.* 130.

Until a partition of an estate, it ought not to be placed in the possession of, and administered by persons, holding under different rights; who, when their claims are equally good to have the management of an undivided half, are so also for the management of the whole: and the estate cannot be administered by parts, till a division takes place. We are of opinion that no curator ought to be appointed.

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

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

East'n District. *April*, 1819.

DUNCAN & AL. SYNDICS vs. BECHTEL.

DUNCAN & AL. SYNDICS vs. *BECHTEL.*

APPEAL from the court of the first district.

If there be a plea in abatement and of the general issue, on appeal after a judgment on the merits, if the plea in abatement do not appear to have been pronounced upon, nor urged by the counsel, the supreme court will not notice

MATTHEWS, J. delivered the opinion of the court. This is an action for money had, and received by the defendant to the use of the plaintiffs. They do not state, in their petition, any of the circumstances under which he received it. The answer, besides the general issue, contains an exception to the petition, as not setting forth the cause of action with sufficient certainty.

We are of opinion, that the petition does not pursue the true sense and spirit of the acts of the legislature, which regulate the practice of our courts. It is not sufficiently explicit of the cause of action, in stating the manner, in which the money came to the hands of the defendant—how he obtained it—from what persons, &c. Every circumstance, which may be considered proper to be known, in order to put the defendant on a just defence of the suit, ought to have been stated.

But, as no decision on this exception, appears to have been given in the district court—nor, appears to have been insisted on, by the defendant's counsel, who, after pleading the general issue, appealed from a judgment on the merits, we deem it unnecessary to notice it.

The defence on the merits, as it is understood from the argument of counsel (for, on the record, there is not sufficient perspicuity to point it out) is satisfaction and payment made to Jackson, one of the firm of Duncan and Jackson, for whose benefit this action is instituted by Duncan, from whom the money was received by the defendants and appellants.

The record of the suit, referred to in the statement of facts, shews clearly that Duncan was a fraudulent partner, and had embezzled to a great extent the funds of the firm, for which judgment was obtained against him by the syndics. It further appears, from a document on file, that Jackson acknowledged satisfaction for said judgment, on receiving less than its amount.

It is the opinion of this court, that these transactions are not sufficient to exonerate the defendant, as debtor to the late firm of Duncan and Jackson: although he may have become indebted to it, in consequence of a contract with Duncan alone, whilst it is evident, that this contrast related to the funds of the partnership.

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

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DUNCAN & AL. SYNDICS *vs.* BECHTEL.

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

SAULET vs. *LOISEAU.*

A new trial will not be granted, to afford an opportunity to shew, that a witness, sworn without any objection, forswore himself.

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

The defendant, in February 1789, sold to the plaintiff a negro slave named Jacob, for $714, with the condition, that, if the slave, sick at the time, was not perfectly cured, within one month, he should take him back and repay the price. The parties placed the slave under the care of a free negro, named George, who undertook to cure him, and to whom each of the parties promised to pay ten dollars therefore.

A few days after the expiration of the month, the plaintiff brought his action to recover the price with interest, stating that Jacob, far from being cured, died on the 6th of March.

The defendant pleaded the general issue, admitted the sale—and the condition—contending that the plaintiff had no cause of action, as Jacob was not returned within the month, without having been cured, that the sale took place on the 5th of February, and on the 4th of March, when

the month expired, according to the conditions of the sale, he was cured.

There was a verdict for the plaintiff, and the defendant moved for a new trial, which was refused; and judgment being given for the former, the latter appealed.

The record shews, that George was the only witness introduced by the plaintiff.

He deposed that, he received Jacob from the parties, (who promised him ten dollars each,) that he laboured under a complaint of the chest—that he was weekly supplied with meat and biscuit by the defendant; the plaintiff never furnishing any thing. At the request of the former, he put Jacob in irons, to prevent his going abroad and eating improper food. The plaintiff was once only at the deponent's, and was informed Jacob was not yet cured.

Gassie, a witness introduced by the defendant, deposed, that he was employed from the 9th of February to the 15th of March, 1818, by the defendant, that during that time, the plaintiff came to the defendant, and the witness heard them talk of a negro, of a sale, and heard the plaintiff tell to the defendant, "he is doing well; he is doing well." This was in the presence of Julien.

Julien deposed that, on the 4th of March, he was at the defendant's with Gassie and the plaintiff, and heard the latter say to the former, that

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Jacob was in good health, eating and drinking well.

De Armas, for the plaintiff. The new trial was properly refused. If the verdict was contrary to law or evidence, the affidavit should have specified in what particlular point. 3 *Martin*, 280.

An application for a new trial, in order to impeach the credit of a witness sworn at the trial, cannot be listened to. *Bunn* vs. *Hoyt*, 3 *Johns.* 253.

The testimony of George, the plaintiff's witness, is not contradicted. The jury might give full credit to what the defendant's witnesses deposed, and to the testimony of George himself, and arrive to the conclusion to which they came. It is not to be denied that Gassie and Julien heard the plaintiff say, that Jacob was doing well; that he was doing well, eating and drinking well. Let it be admitted, that these expressions were used, and does it not follow, from the death of the slave, which almost followed the uttering of these words, that the plaintiff laboured under an error ?

But this pretended confession of the plaintiff is not conclusive against the plaintiff. It is not proved by two witnesses, and was made in the absence of the defendant.

The extra judicial confession, proved by, at

least, two witnesses, makes full proof, when made to the party. But, if it be made in his absence, although supported by the testimony of one witness, or other presumption, it is only a semi-proof. *Cur. Phil.* 1, 17, *n.* 6, *Febrero*, 2, 3, 1, § 7, *n.* 294.

Were this confession to be considered as full proof, still the plaintiff could shew that it was made in error. If one admit or deny any thing, in court, thro' error, he will be allowed, if he can, to prove the error, at any time before judgment, although the admission was made before the judge. *Part.* 3, 15, 5. If then the error of a judicial confession may be proven, *a fortiori,* in the present case, that of an extra-judicial one. The plaintiff has proven the error of his, by the testimony of George.

Gregorio Lopez, in his commentary on this law of the partidas, cites the opinions of Baldus and Andreas. *Et nota quod erronea confessio, etiam sæpius repetita, non nocet. Et quid si, cum confessione, concurrunt aliqua indicia ? Dic quod probetur contrarium. Andreas dicit quod error probabitur dicendo se errasse, et probando rem aliter se habere* These opinions are grounded on *ff* 2, 2, 42, *Non fatetur qui errat, nisi jus ignoraverit.*

Cuvillier, for the defendant: A new trial

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ought to have been granted, because the verdict was contrary to law, being grounded on the testimony of one single witness, contradicted by that of two others. It was contrary to the weight of the evidence, two witnesses having sworn that the plaintiff had admitted the cure of the slave. New proofs were discovered since the verdict, by which the defendant will be enabled, on a new trial, to shew that the deposition of George deserves no credit.

The plaintiff's counsel contends that, the particulars, in which the verdict was contended to be contrary to the evidence, ought to have been specified in the affidavit, and cites, for this purpose, 3 *Martin*, 280, where a rule of the supreme court requires such a specification in a petition for a rehearing in that court. The rules of that court cannot be considered as applicable to the parish court.

But the affidavit, on which the new trial was prayed, shews, that since the trial, the defendant has discovered new witnesses, by which he is enabled to deprive the deposition of George from the credit, which it has received.

Now, *ex natura rei*, such witnesses could not have been deemed necessary, and could not have been procured before the trial: for, till George was sworn, the defendant could not have presumed his intended deviation from the truth. And

during the hurry of the trial, when this deviation was noticed, it was not possible instantly to discover and adduce the witnesses, by whom the defendant may establish the perjury committed.

Farther, according to the tenor of the contract, if the negro was not cured, the sale was to be rescinded, and the defendant was to take back the slave, and refund the price. He was sold on the 5th of February: the month, mentioned in the condition, expired, on the 4th of March; the negro was then alive, and, according to the testimony taken from the lips of the party, doing well, eating and drinking heartily; and, if the plaintiff wished to rescind the sale, it was his duty to deliver or return the slave immediately. As he did not do so, the presumption is that, he was pleased with the bargain, and desirous of availing himself of it. He must, therefore, support any consequent loss.

DUBIGNY, J. delivered the opinion of the court. The defendant and appellant, Francis Loiseau, sold to the appellee, Balthazar Saulet, a negro slave, named Jacob, under this condition: "It is agreed and covenanted that, whereas the said slave is now in bad health, this sale shall be rescinded, in case he shall not be perfectly recovered in one month from this date, and the said Loiseau shall take back said slave and re-

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pay the price thereof to said B. Saulet." Both parties then went to one George, a free negro man, who undertakes cures, and left the slave under his care at their joint expense. Thirty days after, the slave died; the object of the present suit is to recover the purchase money.

George was sworn as a witness, and established the facts on which the appellee relies. His testimony was not objected to; but after the verdict, the defendant made a motion for a new trial, offering to prove that George had forsworn himself, on one point, and was unworthy of belief. Without examining wheth r this was a case, where new a trial could be granted for the purpose of discrediting a witness, we are satisfied that the affidavit, on which it was prayed for, was insufficient, and that the court below was right in refusing it.

The testimony of George, who swore that Jacob was very sick for several days previous to his death, has been attempted to be shaken by that of two witnesses, one of whom heard the plaintiff tell the defendant, two days before Jacob's death, that the sick negro was going on well; and the other, who was present on the same occasion, recollects that the negro was mentioned by the name of Jacob, and that the appellee said he was in good health, drinking and eating well. The appellee's opinion of the situation of that slave is,

however, very immaterial, for it is in evidence that he never went to see him, and spoke of course from report.

The counsel for the appellant has put a construction upon the clause above quoted, which cannot bear him out. He thinks, that if the slave was not cured at the end of one month, it was the duty of the appellee to return or offer to return him to the appellant at that very time, and that in defect of making such tender, his recourse under the reservation was gone.—We see nothing in the reservation which warrants such an interpretation. The stipulation is "that if the slave shall not be properly recovered in one month from the date, the sale shall be rescinded, &c.—The plaintiff proves that he did not recover at all, but died of his complaint. That is proving more than he was bound to do to support his action.

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

GOFORTH vs. *HIS CREDITORS.*

The expenses of the liquida-

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

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tion of an insolvent's estate, are to be paid out of the uncumbered property ceded, but, if that be insufficient, out of the rest.

DERBIGNY, J. delivered the opinion of the court. In this case a tableau of distribution of the monies, proceeding from the estate of William Goforth, an insolvent debtor, was filed by the syndics of his creditors, and was opposed by one of them, Antoine Curraby, who, as vendor of a house which constituted the principal part of the said estate, pretends to be entitled to the full price of that house above all other priviledges.

Carraby is not a creditor, who exercised the right of *revendication*, that is to say, of taking back his property in kind, without suffering it to be included in the common stock of all the creditors. He had no such right, because by selling on credit and delivering the possession, he had parted with the ownership of the thing, and vested it completely in the buyer himself, retaining only a lien on the property for the price of sale. *Cur. Phil* 2, 12, 6.

At the auction of the property surrendered by Goforth, Carraby became the purchaser of the same house, and now refuses to pay any part of the price. But in order, the better to try this question, we will suppose that a third person has bought the property, and that the purchase money is now in the hands of the syndics, ready to be distributed among the creditors according to their rank.

The price of the house, together with the pro-

ceeds of sale of some tracts of land on Lafourche, and of a lot of ground, in one of the suburbs of this city, constitute, according to the tableau, the common stock now ready for distribution —The first payment in order, is that of the expenses incurred to obtain a settlement of the estate of the insolvent; for they are in fact, debts contracted by the creditors themselves, none of whom ought to receive any thing, until they are satisfied.

In this case, the tableau exhibits a list of those expenses, such as notary's fees, auctioneer's commission, &c. to the payment of which there does appear to be any objection.

But the remuneration due to the attornies of the insolvent of the syndics, and of the absent creditors, and the commission of the syndics are not mentioned therein, and are included under the head of debts claimed by privilege, against which Antoine Carraby has pleaded that his own privilege is of a superior order.

It is clear, however, that the compensation for services rendered to the syndics is a debt due by the mass of the creditors; that the commission of the syndics themselves is a claim of the same nature; and as to the remuneration to which the attorney of the insolvent may be entitled, it has been settled in the case of *Morel* vs. *the syndics of Misotiere*, 3 *Martin*, 363, that such services are also to be considered, when useful to the cre-

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ditors, as services done to themselves.—Is that to be paid out of the common stock, as well as notary's fees, auctioneer's commission, &c.? Evidently so. Either all, or none, of those who are employed in settling and liquidating the estate of the insolvent, must be paid. Those are all charges of the same kind, charges against the creditors generally. Carraby might have pleaded that these charges are not due, or that they are two high; but to refuse payment altogether without alledging any other motive than that his privilege is of a superior rank, is to assign no very intelligible reason. Does he mean to say that he ought not to bear any part of the expenses incurred by the body of the creditors? But suppose the vendors of the lands on Lafourche, and of the lot in the suburb were unpaid, and had raised the same pretension, what would have become then of the payment of expenses? Was the notary who enrolled the meeting of the creditors, the attorney who conducted the proceedings, the clerk who recorded them, to receive no compensation for their services? It can hardly be supposed that Carraby's plea intends to convey any such idea.

The expenses must be paid, and if Carraby, instead of being called upon to surrender their amount, was now requiring the syndics to deliver him the full price for which the house was

sold, they would have a right to withhold it, until it might be ascertained whether enough could be raised out of the personal estate and unincumbered property of the insolvent to pay the expenses. But the syndics demand of Carraby the purchase money of his house in order to pay those charges, ought he not to be authorised to retain it, until they can satisfactorily shew that they have not been able to raise any other funds out of the insolvent's personal estate and unincumbered real property? We are of opinion that he ought.

The only other items in the list of priviledged debts, besides that of Carraby as vendor, are claims for repairs done to the house. Those seem to have been left for further investigation, and to be unconnected with the object of the present appeal.

It is ordered, adjudged and decreed, that the judgment of the parish court be reversed; and this court, proceeding to give such judgment as, in their opinion, ought to have been given below, do order and decree, that the expenses incurred towards liquidating ths estate of William Goforth, including therein the compensation awarded to the attorney, employed by him and his syndics, and the commission of the said syndics on the goods by them administered, be paid

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out of the personal and unincumbered real property of the said Goforth; and should these prove insufficient, after due diligence shewn on the part of the syndics to collect them, then out of the remainder of the estate of said insolvent in the hands of Antoine Carraby, and that the appellants pay all costs.

Morel for the claimant, *Carleton* for the syndics.

CROIZET'S HEIRS vs. *GAUDET.*

Parol evidence may be heard, when the verity or good faith of an act is contested.

The heir may shew that a sale made by his ancestor is feigned. So might the latter.

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APPEAL from the court of the second district.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs and appellees, as children and legal heirs of Simon Croizet, claim from the appellant, in his capacity of curator to the estate of Mary Martin Dumontet, the restitution of a tract of land, which they alledge was conveyed to her, in trust, by their ancestor, under the semblance of a sale, to be reconveyed by her, after his death, to two of his children, whom he intended to favor, to the prejudice of the others. The sale is clothed with all the solemnities required by law, and the principal ground of de-

fence of the appellant is, that such an instrument has nothing to fear from the attacks of verbal evidence; and, as verbal evidence has been admitted in this case, he has excepted to its introduction.

The general rule that no parol testimony is to be heard against or beyond what is contained in a written act, is a safeguard, established by law for securing *bona fide* contracts from any attempt to alter or vary them; but whenever an act is impeached as false, fraudulent or feigned, the rule does not apply. The question there is no longer shall the contents of a written act be preserved unaltered, but is this a *bona fide* act? When an act is made with an intent to cheat third persons, there is, generally, nothing on the face of it, which can detect such intention. The parties take good care to give it as fair an aspect as if it was made in good faith and strict honesty What then is to be done? Is fraud and villainy to be sheltered under the rule that no witnesses can disprove any thing contained in a written act? No. The contents of the act are not in question. The verity, the reality of the contract, the good faith of the parties is the object of enquiry. To come at a knowledge of the facts from which this may be ascertained, oral evidence must be heard. The conduct of the parties, their revelations, and all the circum-

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stances which may tend to disclose the artifice, and remove the veil under which truth lies concealed, become a fair subject of investigation: The defendant does not deny this as a general principle; for, he readily admitted that, if Croizet's creditors, instead of his children, were plaintiffs in this case, they would have a right to do what the children have here attempted. But he says, that the heirs of Croizet are bound by his acts, and have no right to shew that, which, were he alive, would not be permitted even to alledge.

From these, two questions arise: 1. Could Simon Croizet, if alive, plead that this is a feigned sale? 2. If he could not, can the present plaintiffs plead it?

I. That the party to a feigned contract may plead the simulation is admitted, in general terms, by the Spanish jurists. Their opinion is predicated principally on that maxim of the Roman law: *plus valere quod agitur, quam quod simulate concipitur.* Febrero, who has treated the question more extensively than any of the authors within our reach, after having enumerated the different sorts of simulation, expresses himself as follows: *En estos tres casos, aunque el damnificado manifiesta su torpeza y delito en haber intervenido en la simulacion, puede no ob-*

stante alegarla, no para fundar su intencion, sino para coadyuvar la contra el participe, porque trata de evitar su dano, y este lucrarse en su detrimento. Y lo mismo puede hacer su heredero, con tal que el contrato no sea en fraude del fisco, u de otro tercero. Provided the simulation be such that no third person be defrauded by it, it may be pleaded by the party, who is willing to expose his own turpitude. Here, then, if we take the plaintiff, to be altogether in the room of Simon Croizet, there are no third persons defrauded by the alledged simulation, and it may be pleaded. Whether in support of such a plea, the party can produce oral evidence alone, unaided by any written testimony, is a question of some importance; and as there is no necessity to decide it here absolutely, we will pass to the consideration of the other point, to wit, can the present plaintiffs plead the simulation of this contract as persons distinct from their father, and produce parol proof in suport of their allegation?

II. The plaintiffs we take to be the legitimate children of Simon Croizet; for after their allegation that they are Croizet's legal heirs and representatives, the admission of the defendant that they are his children, goes fully to establish that fact.

The plaintiffs then, as such legitimate children,

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are entitled by law to a portion of their father's estate, which it was not in his power to deprive them of, except for the causes also expressed by law. Where a parent has, by any practice, endeavoured to remove from the reach of his children that which the law made it his duty to preserve for them, their interest, instead of deriving from their ancestor, is in direct opposition to his acts. To pretend that, because they are his children, they are bound by such acts, would be giving countenance to a violation of the law, and annihilating rights which the law has created. With respect then to their legitimate portion, children have rights, which not only are independent and distinct from those of their parents, but may be, as in this case, directly at war, with those which their parents wish to exercise. Children entitled to a *legitime* are quasi creditors of their parent's estate: "*legitima non dicitur lucrum, sed quasi debitum.*" *Lopez, on Part.* 6, 10, 8. Hence, children are not bound by the donations, even *inter vivos,* which their parents may have made to the prejudice of their *legitime*, and may sue the donees to have the donations reduced to the amount which the donor could dispose of. *Civ. Code*, 212, *art.* 19—26. *A fortiori,* can they attack the acts of their parents, by which they are, not merely prejudiced, but defrauded.—For the purpose then of asserting

their rights to the *legitime* secured to them by law, children must be viewed in the character of third persons, and as such be permitted to alledge and prove any thing that creditors might avail themselves of —It is, therefore our opinion, that the district judge acted correctly in admitting on their part, any evidence which could establish the simulation of the contract, by which they say they have been defrauded.

As to the nature of the evidence received and the weight which it ought to have, we do not think ourselves at liberty to take that into consideration ; there being in the record no statement of facts, nor any certificate shewing that *all* the evidence is there contained.

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

Turner for the plaintiffs, *Henry* for the defendant.

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April, 1819.

HARVEY
vs.
FITZGERALD.

HARVEY vs. *FITZGERALD.*

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

When the illegality of a contract is not pleaded, and does not appear from the evidence in support of it, if there be a verdict for the plaintiff, the judgment will not be disturbed, though some evidence of the illegality may result from a cross examination of the plaintiff's witnesses, or from the testimony adduced by the defendant.

For a statement of the facts, see the opinion of the court.

Workman, for the defendant. This is one of these extraordinary suits, to determine which, correctly, will require all the care and attention of the court. We maintain that the claim of the plaintiff is founded in impudent fraud, and supported only by nefarious perjury.

It appears by the testimony on the record, that some time in the month of February, 1817, Fitzgerald went down to the English Turn, where Harvey had been some time. Fitzgerald took a lodging for him at the milk house in this city, visited him there occasionally, discounted some western bank notes for him, and, having paid some of his expenses, took a passage for him to Liverpool. The first intelligence Fitzgerald had of him, was by a letter written from the Balize, and received about ten days after his departure from New Orleans. In this letter, he states that he expects a schooner of his will speedily arrive in this port from Campeachy, which he begs the defendant to take charge of

for him, and dispose of the cargo on his account; and he concludes with *an earnest request of the defendant to accept for him a bill for* 50 *pounds.*

Would any such request have been made, in such terms, if he had left in the hands of the defendant property to the amount of $9000, or of half or quarter that value?

The plaintiff's next letter, dated Ulverstone, June 20, 1817, presses the defendant to write to him; talks of his suits in the supreme court, and says, that he is quite unhappy about this business. The next letter, dated the same place, June 27, 1817, appeals to the defendant as his *assured and generous friend;* hopes that he (defendant) *will not be offended at the length and frequency of his letters, though he has ample reason to be so,* and again recurs to the business of the law suits, &c. The next letter is from the same place, dated August 6th, 1817. It speaks, as before, of the causes in the supreme court, adjures the defendant, by the mercy of God, to write to him, and informs him that he has *taken the liberty* of drawing on him for 100 pounds. *However,* he adds, *if you are under a certainty of my having received the expected relief from Washington ere this, then you need not accept it, as in that case it will be unnecessary.* Is not this observation incompatible with the assertion that the writer had left any considerable property at all, with Fitzgerald?

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The plaintiff's next letter is from Ulverstone, September 30th, 1817. The writer says, "again I have to inform you that *Counsellor Ingersol* never wrote to me, though I sent him all the sworn attestations of my mate and crew, and also the notary public's declaration. I cannot tell what can cause this miserable delay. The underwriters cannot want more proof than I have given. It is grievous to me, I assure you, more than I can say I entreat of you, for the mercy of God, to write them yourself, and let me know their answer per next opportunity," &c.

This letter is important, as connected with another part of our testimony;—that, to wit, by which it is admitted that Fitzgerald called on Mr. Ingersol at Philadelphia, to enquire concerning the causes spoken of by the plaintiff. Mr. Ingersol said he knew nothing of any such cause. This shews that the defendant believed the plaintiff was speaking of a real, not a sham, transaction; and will, therefore, satisfactorily account for the defendant's having received some of Harvey's letters without expressing any surprise at the correspondence. The same inference may be fairly drawn from the letter of the plaintiff's, in which he promises the defendant the consignment of a vessel and cargo from Campeachy. These remarks may be proper to rebut the insinuation so often made and

so much insisted upon by the opposite party— "If Fitzgerald had no other business with Harvey than what he alledges, concerning the discounting of the Kentucky bank notes, why did he continue to receive these letters of Harvey's and keep them in his pocket. ?"

The next letter of the plaintiff's is dated Ulverstone, January 21st, 1818. He speaks of the cruel and shameful conduct of Captain Sandford towards him; how infamously he had abused his (plaintiff's) credulity; though strong, and fortified by distance, &c. he (plaintiff) threatens to visit his thoughts with more troubles than he is aware of It is strange, the letter adds, he had not artfully invented *some plausible tale* all this while, but it is now too late for credulity to swallow. I shall not delay your time longer with a business that I am determined, after a sufficient season, to give publicity enough to."

Perhaps he (Sandford) has now serious thoughts of selling my schooner, which you recollect he has in his power: let him do so, and it will only hurry the termination of his infamy and exposition."

These letters appear to shew, that at the time of writing them, the plaintiff had formed, in his mind, that plan of fraud and forgery which he is now endeavoring to carry into execution. The letters in question have an air of constraint and

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mystery. When the writer says "*it is strange he has not invented some plausible tale*," he probably had in contemplation those letters which he had determined to forge, which are now offered in proof of his claim. The plausible tale he thought of for the supposed Captain Sandford, is the pretended sale of the imaginary coffee and logwood, to Wellman and Phillips. The bankruptcy of that firm he could easily have learnt, as he resided so near Liverpool. In fact, it does appear, from his letter to Mr. William Brown, that he was acquainted with that event.

These considerations will also serve to account for a circumstance, which, at first, seemed very extraordinary, viz: the mention in the plaintiff's letter of Fitzgerald's illness. That letter is dated in March, 1818, and that the illness happened in September, 1817. There is, therefore, nothing in the least surprising that Harvey should have heard of it in the intervening period.

The very ingenious fabrication of the Orleans post mark, is by no means a wonderful effort of forgery. He, who could so well imitate the defendant's hand writing, and write letters in such a variety of hands, would find little difficulty in imitating a post mark, so well as it has been done in this instance. The last letter of this person to the defendant, is dated New-Orleans, October

1818. It it is filled with invectives and reproaches, no longer mysterious and indirect; and is evidently intended as an instrument of extortion. By the menace of an accusation of some hidden and atrocious crime, the writer, no doubt, expected to be able to obtain his ends without producing his forged letters, and thereby exposing himself to the risk of punishment. For, let it be remarked, that he did not produce those letters for a long time subsequent to his arrival in New Orleans, nor until he found his letter of menace had entirely failed of its intended effect.

It is evident that Fitzgerald had no apprehensions from any thing which this letter hints at, or threatens;—from the following circumstances:

1. That he left no instructions with his agents, Messrs. Cummins and Ramsay, not to open any letters sent to him during his absence;

2 That he expressed no dissatisfaction, or disapprobation on finding that these letters had been opened without his consent;—and that he has actually shewed the letter in question to several persons;

3. That on receiving intelligence of what was passing, he immediately repaired to this city, where he has ever since remained, and appeared in public.

4. That so far from dreading any accusation

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that the plaintiff might make against him, or any testimony that he could give, if he were disposed to turn state's evidence and informer, Fitzgerald has exerted himself repeatedly to have the plaintiff arrested.

This completely destroys the imputation that Fitzgerald was only anxious to get his opponent put out of the way.

There is another circumstauce strongly in favor of Fitzgerald's innocence. A short time before he left New-Orleans for the north, he was offered $12000 for his house in Royal-street; one half of the money down, the other in negotiable notes. Would he—would any man in his senses have refused this offer, and left the state, menaced, as he then was, by Harvey, and knowing that the property, which he could have so easily converted into cash and taken with him, was exposed to be seized in a suit like the present? Either this suit is groundless, or Fitzgerald must be an absolute iedot.

Although this fact, taken by itself, might not be considered decisive, it corroborates powerfully all the other circumstances in the defendant's favor.

But what can account for the conduct of Harvey in this extraordinary transaction? *Habitual guilt and extreme misery*. From the variety of

his modes of writing, it is evident he must be an expert, able, and long practiced forger of writings; and his letters acknowledge his extreme poverty. He thought that the business which he had actually transacted with Fitzgerald would serve as a foundation for his subsequent operations;—as a point on which the machinery of his fraud might be conveniently established. Without some such support, all attempts of the kind would have been obviously void and idle: and this may account for his selecting the defendant, in preference to any other person here, as the object of his depredation.

Stratagems of this sort, though of very rare occurrence on this side of the Atlantic, are frequently attempted in Europe by the unprincipled and desperate.

The plaintiff's letters, to which I have requested the attention of the court, are fatal to his claim, whether they are construed *literally*, or otherwise. If taken literally, there was evidently no sale of, no transaction whatever between the parties relative to, the coffee or logwood, on which the suit is founded. If the letters are to be considered as mere cyphers, then there must be some unknown, some mysterious transaction between the parties, very different from that lawful one, which the plaintiff sets forth in his petition. In this case, he cannot recover. His peti-

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tion is sworn to. If his demand is not proved as it is there stated, the whole of course must fall to the ground.

Again; if those letters be written enigmatically, why does not the plaintiff explain them? He must have the key or clue to them; and he alone is competent, according to our rules of evidence, to produce it. It is for the plaintiff to make out and prove his own case. If there is any mystery lurking in his letters, it affords an additional proof of his villainy, which alone must be sufficient to defeat his action.

In the letters attributed to Fitzgerald, all is plain and clear. Coffee and logwood are called by their proper names. Would this have been the case, if these letters were genuine, and if any such transactions as these mysterious letters hint at, had ever taken place? If there had, then Fitzgerald's letters would have been in the same style of mystery and cypher as those of Harvey.

As to the meetings stated to have taken place between the parties, they can prove nothing more than that Fitzgerald was desirous of knowing, what his adversary meditated against him, or at worst, that he wished to purchase his peace: a thing which the law allows every man to do.

With respect to the account current, annexed to one of the letters attributed to the defendant, I think it bears internal evidence that is a forgery.

1. The price of the coffee in it is credited too high, by at least *four* cents per pound. How could this arise; when, by the supposition, it was the intention of Fitzgerald to defraud Harvey?

2. No commission whatever, is charged to Harvey. Why omit this charge, when the person supposed to make this false account is endeavouring to cheat his correspondent.

3. This account of the sales of upwards of nine thousand dollars worth of Harvey's property is dated March 2d, the very day that Harvey is proved to have sailed from New-Orleans, and but a few days previous to the time, when he earnestly supplicates Fitzgerald to accept for him a bill of *L.* 50, sterling. Is not this circumstance alone decisive of the case?

4. The fabrification of the names of Wellman and Phillips, as the purchasers of Harvey's property, was too gross a blunder for any but a downright ideot to have made. The falsehood of the pretended sale could not have escaped very speedy detection. With respect to the facts stated in the fabricated letters, the plaintiff might, and probably did, know many or most of them, inasmuch as he admits having received *other letters* from Fitzgerald, which he does *not produce.*

Why does he not produce these letters? Because they would prove that his claim is un-

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founded. We have no copies of them; and, if we had, they would not be evidence for us. The plaintiff's holding back these letters is a decisive presumption against him. There is no real, no solid foundation whatever for this suit. No delivery of merchandize has been proved. No mention of coffee or logwood is to be found in any of the letters of the plaintiff, nor in the depositions of any of the witnesses, though they have been closely interrogated as to every part of the defendant's trade and transactions. No receipt has been produced, or is pretended ever to have been given by the defendant for the merchandize in question. Is it probable, is it possible, that any man, least of all such a man as Harvey, would have placed property to the amount of $9,500 in the hands of another, and quit the country without ever asking for a receipt or acknowledgment of it?

In such an action as this, it as necessary to prove the *corpus pacti*—the existence of the matter or substance of the contract, as in a penal case it is indispensable to prove the *corpus criminis* Without this, even the confession of the accused is not sufficient to convict him.

According to Harvey's own admission and statements, the transaction on which he builds this suit, is one prohibited by law: and if any credit be given to what he says in his latest mena-

cing letter, it is some transaction of the blackest guilt. Such a plaintiff can surely not recover, in such a case, even if every thing he states were taken for granted. The Roman law on this point is most clear. "If a stipulation is made on account, or in consideration of any offence already *committed*, or *about to be committed*, such stipulation is void from the beginning. *Si, flagitii faciendi vel facti causa, concepta sit stipulatio, ab initio non valet.*

The Spanish law is equally positive. Stipulations against the laws or sound morals are proscribed and void. 1 *Sala's Illustracion*, 238, *Part.* 5, 11 28 & 38.

"It is indispensable to the validity of a contract, that it be *licita, honesta, y arreglada à la ley y buenas costumbres. Febrero*, 1. 18 § 1.

These rules appear to be universal, admitting no exception in any case where *both* of the parties are in fault.

In the English law books, we find some instances where contracts, made *contrary to the provision of statutes*, are allowed to have effect to a certain extent, by the court of chancery; on which I beg leave to observe:—

1 That our tribunals have no such power as that exercised by courts of chancery; the power of modifying and mitigating the rigor of severe laws.

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2. In the cases alluded to, where that mitigating power has been exercised, the offence has been of a very dubious nature; the offence of usurious contracts. Some of our best ethical and political writers deny that there is any turpitude, injustice, or immorality in such conventions.

3. Lastly, the offence, in most if not all of these cases, was not consummated, but only intended. The usurious interest was stipulated for, but not actually received. Thus the court rendered a judgment in the case of Catalina Lopez, which at first view seems to militate with the principles here laid down. But on nature consideration it will appear that there were several important circumstances which distinguished that case from the present.

1. That was a case of a *simulated contract*, where no consideration whatever, was given, and therefore the contract was wholly void.

2. The *immorality* of the *purpose of* that contract is by no means clear. The plaintiff's testator apprehended that his enemies would institute against him, some unjust prosecution, and he therefore, wished to put his property out of their reach. Many simulated contracts, may be supposed perfectly consistent with morality and the laws—a simulated contract of sale, for instance, to skreen our property from the enemies of our country; and the like.

3. Whatever, may have been the intentions of that testator, he did not, in fact, violate any law. he did not withdraw his property from the pursuit of justice or of injustice; for no prosecution whatever, was instituted against him. Even he must be considered rather as intentionally than as actually culpable, on the harshest construction of his conduct.

4. But above all, that case is distinguished from the present by this circumstance, that in the former, the plaintiffs were innocent, and represent those who were perfectly innocent of any fraud or deception whatever. The plaintiffs were the executors of the simulated vendor, representing his creditors. As to *them*, the reason of our maxim does not all apply. The object of of the law is to discourage illicit transactions.—But no encouragement is given to wrong doers by affording relief to their creditors, nor even, perhaps to their heirs. Such persons, in general, care little about either. At all events the principal of the law is positive that where the plaintiff is innocent, he may recover back what he hath paid, given or transferred without a just cause or good consideration. *ff. De condictione ob turpem causam.*

In the English and American jurisprudence, the authorities on the point now under consideration are; (Here the counsel referred to various

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English and American reporters.) Our own *Civil Code*, 264, *art* 31 & 23, adopts the same doctrine. And all are agreed, even in England where the strictest rules of special pleading are adopted, that if from the plaintiff's own stating, *or otherwise*, the cause of action appears to arise *ex turpi causa*, or the breach of positive law, the plaintiff cannot recover. No court will lend its aid to a man, who founds his cause of action upon an immoral or illegal act "Whenever courts of law see attempts made to conceal wicked deeds they will brush away the cobweb, varnish and shew the transactions in their true light." It is not necessary for the defendant to plead the illegality or immorality of the transaction; for it is not for his sake, but for public justice that such a defence is allowed Were it required to put such a defence upon record, it would of course seldom or never be done It would be a confession of guilt which might lead a defendant to the gibbet or the whipping post Such a doctrine in pleading would be an effectual provision for enabling malefactors to enforce their contracts with each other. Thieves, robbers and pirates might then boldly sue the receivers of their plunder, well assured that the defendants would not dare to put their own crimes and infamy upon record [Here the council cited a great number of books in support of the doctrine

for which he contended.] It is the policy of the law, not to give to such villains any assistance whatever, but to defeat their conventions and break up their confederacies. They will then have no resource left, but to come out against each other as state's evidence and informers, and thus the community will be benefitted by their detection and punishment.

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Hennen, for the plaintiff. From the testimony produced by the defendant himself, it is evident that there were some transactions, between him and the plaintiff, of long standing. He continued to receive letters from the defendant, for upwards of a twelvemonth, and then, when a note of the defendant's was presented to him, he told the notary, he knew nothing about him. The whole conduct of Fitzgerald throughout this business, was marked by falsehood, duplicity and fraud. If there was any mystery or enigma in the letters, surely Fitzgerald must know it. Why then does he not explain it ? Why does not he tell the court who is meant by that infamous *Capt. Sanford*, who so cruelly and shamefully abused the credulity of his friend, and endeavoured to cheat him of his property. The defendant would do better, to say nothing about villainy in this business. If there is any villainy in it, he has his full share.

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As to what is said of Fitzgerald's application to Mr. Ingersol, it is of little consequence; as that application was made, after he had heard of Harvey's arrival in this city to sue him. Nor will the court allow any weight to the circumstance of Fitzgerald's refusing to sell his house. It is always through some weakness, folly or oversight, that fraud and villainy are detected. *Quos deus vult perdere, &c.*

The letters and account current, on which the action is founded, have been proved to be the hand writing of the defendant by several credible witnesses—respectable gentlemen of the banks, perfectly acquainted with Fitzgerald's hand writing. The only testimony, at all in opposition to this, was given by persons who had been told by Fitzgerald, that the letters were forgeries, and whose minds were therefore prejudiced.

The proof of the post mark by the clerk of the post office, first sets the question of the genuineness of those letters at rest. The private meetings and conferences, between the defendant and Harvey, at the very time, when the latter pretended he was endeavoring to have him arrested, explain this as well as other parts of his conduct. Basset's testimony on this point is conclusive.

On the whole, nothing appears which can jus-

ify the court, in disturbing the verdict of the jury, on the grounds stated by the defendant. If the verdict is to be altered, it can only be by increasing the damages. As to the question of law, as to the defence set up of a smuggling transaction, it cannot be admitted in this cause. There is no proof that Fitzgerald knew of any such transaction, if it ever existed. The property was delivered to him to be sold by him, for the owner. How the owner acquired it, or how he introduced it into this city, was no business of the defendant. It is only when both parties are *in pari delicto*, that this defence is admissible.

But if such a defence were applicable, it could avail only when pleaded on the record. It was indispensable according to the rules of our practice, and those of the codes from which ours was taken, to plead such a defence before any evidence of it could be given, in order that the opposite party might be put upon his guard, and enabled to rebut the testimony that might be offered against him. [In support of this position, the counsel cited various authorities from the pandects, and from the Spanish law.]

MATTHEWS, J. delivered the opinion of the court. This is an action brought by Harvey, to recover the price or value of a quantity of merchandize, described in the petition, which he

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alledges were placed by him in the possession o Fitzgerald, to be sold on commission for and o account of the plaintiff. He charges the defend ant with an intention of defrauding him, by de taining the proceeds of the merchandize to hi own use.

The answer contains a general denial of all th allegations in the petition, and on this issue alone the case was tried by a jury in the court below where a general verdict was found for the plain tiff, and judgment having been given therein the defendant appealed.

In the course of the trial, in the court *â quo*, appeared by the testimony of some witnesse that the plaintiff had acknowledged that th goods, to recover the value of which this suit i brought, were smuggled, and that it was a smug gling transaction between him and the defendan

On this evidence, it is insisted by the couns of the defendant and appellant, that should th court be of opinion that such a contract, as sta ed in the petition, really existed between the pa ties, it must be considered as illegal and voi on account of having for its foundation a tran action in fraud of the revenue laws of the Unit States—that is one, in which courts of justi ought not to interfere to relieve either party, a cording to the maxim, *ex turpi causa non orit actio.*

The principal evidence, in support of the plaintiff's claim, consists of letters from the defendant, and a feigned account of sale of the goods, made by him to Wellman and Phillips. Witnesses were also introduced to shew the intimacy, which subsisted between the parties, about the time at which the property may be supposed to have been delivered to the defendant. From the whole testimony, as it comes up with the record, we see no reason to differ from the jury, in relation to the important facts of the case.

Contracts, which are founded on smuggling transactions, wherein both parties have been concerned, are clearly such as will not be enforced by courts of justice, and whenever facts are established according to sound rules of pleading and evidence, shewing their illegality and turpitude, actions to carry them into effect ought not to be sustained.

Since this cause was argued on its merits, a new discussion has taken place, at the request of the court, on the question whether the defendants can take advantage of the illegality of the contract, without having alledged it in his answer. Our laws, on the subject of the practice of courts in civil cases, contain provisions tending as much as possible to simplify it and relieve us from all unnecessary technical rules, relating

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to special pleadings. But parties, in a suit are bound on the one side, plainly and substantially to set forth the cause of action, and on the other, the means of defence—a denial of the facts stated in the petition, or a statement of other facts in avoidance of those. It is necessary to a fair administration of justice that such certainty should prevail in pleading, as to put each party on his guard. The rule of law, which requires that judgments should be rendered *super allegata et probata*, is founded on common sense and principles of justice. The illegality of a contract, arising from transactions *in fraudem legis*, may be taken advantage of by a plea in bar, a peremptory exception of the civil law, and should be regularly pleaded as that of *doli mali* or *rei judicatæ*. Such pleas, of necessity, carry with them a suggestion of facts, in avoidance of those stated by the plaintiff and often require testimonial proof of their truth, which the opposite party may rebut. In an action grounded on an engagement, entered into with a view to contravene the general policy of the laws, if the plaintiff, by the evidence in support of his claim, should also shew the turpitude and illegality of the transaction, perhaps it would be the duty of the court, before whom the suit was instituted, immediately to dismiss it. But the present case, from any thing that appears on the record, is not

thus circumstanced. It does not appear with certainty by which of the parties, the witnesses were introduced, who testified to the confession of the plaintiff that the transaction was a smuggling one. From the manner in which the testimony is arranged on the record, this confession, seems, in the first instance, to have been drawn from one of the plaintiff's witnesses, by cross-examination, on the part of the defendant, and in the second, to have been proven by a witness of the latter.

It is true, that the maxim, *Nemo allegans suam turpitudinem est audiendus*, appears to be opposed to any system of pleading, which would compel a defendant to alledge his own turpitude. Whether this rule be applicable only to plaintiffs, who call on courts of justice to enforce their base and illegal agreements, and ought not to be invoked against a defendant, is a question, which in the present case there is no necessity of determining. The civil law puts the exception of general illegality on the same footing with those of *doli mali*, or *rei judicatæ*, *&c ff.* 44, 1, 3. No principle of jurisprudence exists to prevent a defendant from alledging the turpitude of the plaintiff, and such allegation would answer all reasonable purposes of the strictest rule of pleading, by putting the adversary on his guard: although it should afterwards appear that they were both equally base or immoral.

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From this view of the case, the judgment of the parish court might be affirmed, without any reasoning, were it not that there are cross appeals. The plaintiff contends that the damages, assessed by the jury, are too small. As the contest between the parties is involved in some doubt and mystery, and as the verdict is not contrary to evidence, and the probable justice of the case,

It is ordered, adjudged and decreed, that the judgment be affirmed, and that each party pay his own costs in this court.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, MAY TERM, 1819.

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WILLIAMS vs. *GILBERT.*

WILLIAMS *vs.* GILBERT.

An obligation for a given quantity of cotton is not to be discharged by the nominal sum in money, which the parties intended to discharge by the delivery of the cotton.

APPEAL from the court of the second district.

MARTIN, J. delivered the opinion of the court. The defendant is sued, as curator of the estate of the late W. Gilbert, on an obligation of the deceased, in the following words; "I have this day sold to B Williams, jun. ninety thousand weight of cotton, of a good quality for the Orleans market; which cotton I am to deliver him or his agent, on board of some vessel in New-Orleans or in that port, on or before the 28th of March next, as he may direct and have received his obligation, in payment of the same. The cotton to be well baled and marked B. W. La-

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fourche, March 28th, 1815, W. Gilbert." On the back, are credits for several quantities of cotton delivered.

The defendant pleaded the general issue.

At the trial the parties agreed on the following facts. 1. The cotton, contracted to be delivered by the deceased, was to be received and taken by the plaintiff, in lieu of $3,000, due him at the date of the contract. 2. On that day cotton was worth from 14 to 15, and at the same time stipulated for its delivery, 30 cents. 3. The deceased's signature and the credits are admitted. 4. The plaintiff did not attempt to take advantage of the defendant in the contract for the delivery of the cotton.

The district court gave judgment for the plaintiff, for the value of the cotton at 30 cents, the admitted value of the cotton on the day on which it was to have been delivered. The defendant appealed.

His counsel contends that the judgment ought to have been for the nominal sum due, on the day of the contract, only: deducting the value of cotton delivered. He relies on 2 *Pothier on obligations*, *n.* 497.

We are of opinion, that the present case differs materially from those cited by Pothier, viz: that in which a husband hypothecated some es-

tate for the security of the wife's dowry, and it was agreed that it should be taken in payment of the dowry, at the dissolution of the marriage —the other, the case of a lease, in which a rent of five hundred livres was reserved, to be paid in wine, made on the premises. In both these cases, the mention of payment, in real estate or wine, was held to have been made for the sole purpose of securing to the debtor the faculty of paying in these objects, in lieu of money: and inserted for his sole benefit, so as to leave him at liberty to pay either money or the object mentioned, as he saw fit.

In the case of the rent, the price of the wine ıot being fixed, it is true, that if the lessor had ›rought suit, he could have recovered five hunlred livres only. Hence, it follows that the lesee might liberate himself, by paying before hand ıe sum which, if a suit was brought, the judge ·ould condemn him to pay, viz: that of five undred livres.

The case of the husband differs from the above, ıd seems to afford a rule favourable to the dendant. For there the husband, notwithstanding agreement, that the hypothecated estate should given in payment of the dowry, may keep it, if suit his interest, and pay in money the nomisum received: in other words, have the benefit of the rise, without incurring the hazard of fall, of the value of the estate.

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Cases which deviate from the general principle *qui sentit commodum, debet sentire et onus*, must not afford a rule of decision in others, not precisely similar It would be destructive of every thing like commerce, if an obligation to deliver a specific quantity of merchandize could not be enforced either specifically, or by the payment of a sum of money, which could enable the creditor to purchase the same quantity of merchandize, on the day on which it was to have been delivered. Here, no particular sum of money is to be repaid, by a quantity of cotton of the same value, but the defendant's intestate sold to the plaintiff a specific quantity of cotton, for which he acknowledged to have received compensation. Whether this compensation was the surrender of the evidence of a claim of the plaintiff, or an actual payment, makes no kind of difence. Justice equally demands a specific performance of the agreement or the payment of so much money, as will remunerate the creditor.

The judgment of the district court, which gives to the plaintiff, a sum equal to the value the cotton on the day of which it was to be delivered, with interest from the inception of the suit is correct.

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

Morse for the plaintiff, *Duncan* for the defendant

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CASTANEDO vs. *TOLL.*

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

Land cannot be affected by any parol contract, except a lease.

MARTIN, J. delivered the opinion of the court. The petition states that the plaintiff was the owner, and in July last was in possession, of a certain plantation, and the defendant turned out and expelled therefrom his overseer, wherefore he prays to be restored to and quieted in his possession and that the defendant may be enjoined from disturbing him. A provisional writ of sequestration was obtained by which the defendant was removed from the plantation.

The answer denies all the facts in the petition, and alledges that the plaintiff and defendant entered into a partnership, in which the former put his plantation, negroes, horses, &c. and the defendant his industry, and the profits were to be divided among them, in a certain proportion.

A number of witnesses deposed that the plaintiff and defendant agreed, that the latter should act as a gardner and overseer on the plantation

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of the former, and should be rewarded by a share in the profits—that the former being dissatisfied with the conduct of the latter desired him to quit the place, and did put another overseer thereon, whom the defendant turned out.

The defendant introduced several witnesses, who proved him to be industrious and steady, testified to his conduct, and that the plaintiff wrongfully discharged him.

An instrument was prepared, in the form of partnership; but was never executed.

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

The answer does not deny the plaintiff's title to the plantation, since it admits it to be his plantation, which he put into partnership, or the use of it. Now, the plaintiff's right thereto cannot be affected by any contract, except that of lease, which is not pretended to have existed, unless by a written act. *Civ. Code*, 310, *art.* 241.

The defendant, therefore, cannot claim any right to the plantation, under a *parol* agreement and no written one is produced. If he has been improperly turned out of his employment, in violation of the plaintiff's engagement, he has his remedy; but cannot be relieved in the present action: nor is this any reason why the plaintiff should be disturbed in the enjoyment of his es-

tate. The judgment in this case, appears to us perfectly correct.

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

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

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GIROD vs. *LEWIS.*

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

The marriage of a slave has its civil effects, on his emancipation.

MATTHEWS, J. delivered the opinion of the court. The only question in this case, submitted to the court, is whether the marriage of slaves produces any of the civil effects resulting from such a contract, after manumission.

It is clear, that slaves have no legal capacity assent to any contract. With the consent of eir masters they may marry, and their moral wer to agree to such a contract or connection that of marriage, cannot be doubted; but, ilst in a state of slavery it cannot produce any il effect, because slaves are deprived of all ci- rights. Emancipation gives to the slave his l rights, and a contract of marriage, legal and

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valid by the consent of the master and moral assent of the slave, from the moment of freedom, although dormant during the slavery, produces all the effects which result from such contract among free persons.

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

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

DELAZERRY vs. *BLANQUE'S SYNDICS.*

The surety on an appeal bond, when the principal has failed, is liable to pay, without an execution issued against the latter. The surety claiming a discussion, must point out property and furnish money to defray costs.

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

DERBIGNY, J. delivered the opinion of the court. In the year 1811, the plaintiff in this case obtained judgment in the then city court, against Wm. St. Marc. St. Marc appealed to the then superior court of the territory, and the late Jo Blanque became his surety. St Marc did not pursue his appeal; but the plantiff, about three years afterwards had his judgment confirmed the district court, to which the causes p

ding in the superior court had been removed. St. Marc having become insolvent, he now demands the amount of the appeal bond subscribed by Blanque.

The defendants resist this claim on two grounds: 1. that the judgment obtained upon the appeal is null, because rendered against St. Marc, after his insolvency, without making the syndics of his creditors parties to the suit; 2. that the plaintiff's demand is at least premature, inasmuch as he has not discussed the property of the debtor.

St. Marc presented twice his bilan or schedule of his affairs: the first time before, the second after, the judgment on the appeal was rendered. On his first petition for a convocation of his creditors, an order issued calling such a meeting at thirty days, and staying all proceedings against him *in the mean while*. That order was never carried into effect: the time ran out, and nothing was done. The consequence was, that after the expiration of the delay, during which the proceedings were suspended, St. Mark remained exposed to prosecution, as before the issuing of the order. The judgment on the appeal was rendered about eighteen months posterior to that order.

A few days after the date of that judgment, St

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Marc again presented his bilan, prayed for a meeting of his creditors, and obtained the usual decree. On this occasion, the decree was acted upon, and no creditor having attended, the sheriff was, according to law, appointed syndic of the creditors.

In this state of things, the defendants maintain that the plaintiff has no right to sue them, before he has discussed the property of St. Marc.—To this it has been objected generally, that judicial sureties are not entitled to the benefit of discussion; but admitting, as the defendants contend, that the reservation, contained in their bond, makes this an exception to the general rule, that defence cannot avail them. For, in the first place, according to the words of the appeal bond, the surety is bound to pay, if the execution that may issue is not satisfied out of the appellant's property; therefore, as no execution could issue against St. Marc after his failure, the condition is resolved, and the surety must pay. 2. It is by our laws made the duty of the surety, who claims the benefit of discussion, to point out, to the creditor, the property of the principal debtor: here this was not and could not be done. It is also required of the surety, to furnish a sufficient sum to have the discussion carried into effect; no such thing, of course, was or could be thought of here. Finally, the discussion of the property

of the principal debtor cannot be required, when such debtor has become a bankrupt. *Febrero de escr.* 4, 5, *n.* 124, nor even where the principal debtor is notoriously poor. 2 *Gomez's var. addit. to chap.* 13, *n.* 15.—*Lopez on Part.* 5, 12, 9.

We are upon the whole satisfied that this action is well supported, and that the plaintiff ought to recover.

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

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

SMITH vs. *KEMPER.*

If the statement of facts be so imperfect, that the court cannot from it, discover the merits of the case, the appeal will be dismissed.

APPEAL from the court of the fisrt district.

DERBIGNY, J. delivered the opinion of the court. In this case, the settlement of old and intricate accounts had been referred in the inferior court. The referees made a report which was set aside, it is not seen upon what ground. The court afterwards pronounced judgment, allowing to the plaintiff nearly the same sum which the referees had found; and we are now called upon

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to say, whether this judgment was correct. But in the paper, called a statement of facts, which comes up with the record, there is nothing that can enable this court to understand the accounts on which the parties are at variance, nor what are the points on which the appellant may wish to obtain a decision here. The accounts were originally submitted to referees, with the power to summon and hear witnesses, and to call for the production of documents and papers. No traces remain of what has been proved before them; and of such vouchers as are contained in the record, only a part is recognized in the statement of facts. The case is in such a situation that we find it impossible to adjucate upon it.

It is ordered, that the appeal be dismissed with costs.

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

CUVILLIER vs. *M'DONOGH*.

The tradition of real estate may be made by the consent of the vendor, that the vendee take possession.

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

MARTIN, J. delivered the opinion of the court. The petition states that the plaintiff, in

the month of July last, purchased from the defendant, four squares in the town of McDonogh, and the defendant refused to put him in possession, whereby he has sustained great injury, and concludes with a prayer for a rescission of the sale and damages.

The answer admits the sale, and denies that the defendant ever refused to put the plaintiff in possession.

There was judgment for the rescission of the sale, but no damage was allowed, and both parties appealed.

The evidence shews that the plaintiff, some days after the sale, applied to the defendant to be put in possession, when the defendant appointed the next day: that the plaintiff neither came nor sent on that day, but on the following sent a man, who found the defendant's surveyor laying out the streets of the town, who said that, the square bought by the plaintiff, being in the rear, their lines could not be run for some time: when the plaintiff's agent went to the defendant, who told him that, if the plaintiff came or sent on the next day, he, the defendant, would go and draw the lines of his squares. The plaintiff, on this being reported to him, replied he would not go nor send, as the defendant, being no surveyor, might draw the lines incorrectly and subject

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him to law suits. He afterwards wrote to the defendant, demanding a rescission of the sale.

There was evidence of the plaintiff speaking to some slaves, who promised to come on the following Sunday and cut wood for him, bringing others to a considerable number, and that the defendant offered him some of his negroes to hire for the same purpose.

The sale was made on a plan, on which the squares are marked and numbered. Two streets were actually run, and the defendant's surveyor was, it appears, employed in completing the survey, when the plaintiff made application. In order to perform the work with correctness, it was necessary to proceed regularly, and survey the squares in the order in which they lay. There was no neglect, therefore, on the part of the defendant, in effecting the survey in such a manner as would do justice to all his vendees. He offered to go himself and survey the plaintiff's squares, if he would be satisfied with his doing so, but this was refused. The plaintiff might have known with a little trouble, which the defendant offered to take for him, the squares sold to him, by a recourse to the plan. *Id certum est, quod certum reddi potest.*

The defendant consented that the plaintiff should take possession, since he offered to attend him for that purpose, and to hire him negroes to

cut wood on the squares, and our statute provides that the tradition of real estate may be made by the consent of the vendor, that the vendee should take possession, *Civ. Code*, 350, *art.* 19, so that the tradition has actually taken place.

It appears to us that the judgment of the parish court, rescinding the sale is erroneous. It is, therefore ordered, adjudged and decreed, that it be annulled, avoided and reversed, and that there be judgment for the defendant, with costs in both courts and on each appeal.

The plaintiff *in propriâ personâ*, *Turner* for the defendant.

DE ARMAS & WIFE vs. *HAMPTON*.

APPEAL from the court of the second district.

If by a contract of marriage, land purchased with money reserved as part of the dower, may be sold by the husband with the wife's consent, land in common between the wife and her children by a former marriage, and adjudged to her.

MARTIN, J. delivered the opinion of the court. The defendant being sued for the payment of a tract of land purchased from the plaintiffs, and which is admitted to have been part of the property of the wife's first husband, refuses it, because the vendors were not duly empowered by their contract of marriage, to sell the premises. There was judgment for them and he appealed.

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at its valuation, cannot be sold under the contract.

The record shews, that by the 6th article of that instrument, it is provided that, "when the wife shall have consented that the sums, which she and the husband may receive, as part or the whole of her dower, be laid out in real property or slaves, he shall not be capable of selling or mortgaging the same without her consent, expressed in the act." By the same instrument, she constituted all her present and future property as her dower.

After the marriage she, duly authorised by her husband, obtained a valuation of the real estate and slaves, which were of her first husband, held in common between her and their children, and with the consent of the family meeting, and her then husband's, caused such property to be adjudged to her, at the valuation.

Now at the date of the marriage, she held an undivided portion of the real estate, the whole of which was adjudged to her, and that undivided portion made part of the dower. The contract does not allow the sale of any real estate, part of the dower at its date, but only of such real estate as may be purchased with any money, of the dower, as may come to her hands or those of her husband.

The portion of the children, which was adjudged to her, was not an acquisition with any money proceeding from or received in part of her

dower. For any thing that appears on the record, the price became, according to law, payable at the majority of the children with interest.

The district court erred, in giving judgment for the plaintiffs.

It is therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the plaintiffs pay costs in both courts.

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

DODGE'S CASE.

If a defendant in execution be discharged on an *habeas corpus*, the plaintiff may appeal.

If the plaintiff fails to make the advance required by law, for the support of a defendant, in execution, the latter cannot be discharged *ex parte*.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. This man caused himself to be brought before the district court, by a writ of *habeas corpus*. By the return of the jailor, it appeared he was committed on an execution from that court, and admitted to the bounds of the prison, having given bond and security according to law. The sheriff and jailor made oath, that the plaintiffs, in the execution, had not paid in advance, or otherwise, the sum required by the act of Feb. 7,

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1817, § 5, whereupon he was discharged and the plaintiffs, in the execution, appealed.

It is contended, that no appeal lies from a discharge on a writ of *habeas corpus:* as the proceedings thereon are of the most summary kind, and cannot be suspended or delayed by an appeal. They may be, and often are had, at chambers before a judge, and an appeal is said to lie only from the judgment of a court.

Secondly, that the prisoner was rightly discharged.

I. It appears to us, that the writ of *habeas corpus* was improperly resorted to. The appellee was under no physical restraint, and there was no necessity to recur to a court or judge, to cause any *moral* restraint to cease. The sheriff did not detain him, since he had admitted him to the benefit of the bounds: the doors of the jail were not closed on him, and if he was detained, it was not by the sheriff or jailor. If his was a *moral* restraint, it could not be an illegal one.

The object of the appellee was, therefore, not to obtain the removal of an illegal restraint from a judge, but the declaration of the *court,* that the plaintiffs in the execution had, by their neglect, lost the right of detaining him. A judgment declaring such a neglect, and pronouncing on the

consequences of it, was what the appellee had in view. The correct and ordinary means of obtaining it, was by bringing the plaintiffs in the execution into court, in order to have the neglect complained of contradictorily pronounced therein. If this mode had been pursued, the decision of the district court would certainly have been liable to be examined in this court. Is it less so, because the same decision has been obtained, without giving to the plaintiffs in the execution the opportunity of being heard? We think not.

II. It is contended, that on the failure of the plaintiffs to make the advance, the appellee was *ipso facto* discharged, and the jailor had no longer the right of detaining him. As he had given security, and been admitted to the bounds, the jailor could not legally detain him, *before* the neglect. If he was *ipso facto* discharged, from the obligation of remaining within the bounds, he needed no *habeas corpus*. He was at liberty to go wherever he pleased. From his applying to the court, we are to infer, that he believed his discharge by the court necessary. Before the court could discharge him, it was bound to inquire into the correctness of the fact alledged, and to determine the legal consequences of it. The party, whose rights were to be affected by

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the decision of the court, had a right to hear the allegation and proof, and to be heard in disproving it, and in shewing that the consequences of it were not those on which the adverse party insisted. The court erred in proceeding *ex parte*.

It is therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, at the costs of the appellee.

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

WOODWARD & AL. vs. *BRAYNARD & AL.*

No judgment can be given against a party who is not in court: nor any final one, till an answer filed or judgment by default taken.

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

MARTIN, J. delivered the opinion of the court. The plaintiffs, endorsers of a note of Braynard, not yet payable at the inception of the suit, averring he had secretly departed, removing out of the state all his property, except sixty one hogsheads of rum, attached by V. Rilieux, prayed an attachment thereon, alledging they were sufficient to satisfy his and their claims. It was accordingly obtained and levied.

H. B. Morse, and J. Brandt and co. were made parties to the suit as garnishees.

Morse answered he was not accountable for the rum, as it did no longer belong to Braynard, from whom he had purchased it, for a valuable consideration.

J. Brandt and co. denied all the facts stated in the petition, and added, that they were then, and at the time of the attachment, the true and lawful owners of the rum, and in possession of it.

By consent, the rum was sold, and the proceeds were deposited in the hands of J. Brandt and co. to await the determination of the suit.

V. Rilieux, J Walton, J. R. Roans, J. Cole aud J. Musson, having also brought suits against Braynard and J. Brandt, and co. against the sheriff, their agreement was entered on record, that the question, of the right of property to the rum, should be binding as to that right, in all and each of the above causes.

The court appointed an attorney to Braynard.

Judgment was given that "the transfer of the property, since attached, having been made by Braynard, in a suspicious time, when he was not only in failing circumstances, but preparing secretly to absent himself, was null and void." The plaintiffs had judgment against Braynard for the amount of the note, but, in sustaining the attachment, the court reserved the right of the holders of the rum for the freight, storage and necessary expenses.

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From this judgment, Morse and J. Brandt, and co. appealed.

There was no statement of facts, but the parish judge certified that the whole evidence before him was spread on the record.

From this it appears M'Neil, Fisk and Rutherford, who were directed to be made parties to the suit, were never cited and the attorney appointed to Braynard did not act, so that there was not any answer put in for, nor any judgment by default taken against, him.

The other facts in the case are these: some time in the summer of 1818, Braynard had seventy one hogsheads of rum consigned to him, and endorsed the bill of lading to S. A. Woodberry and co. a firm of which H. B. Morse is a partner; being arrested for a debt of about $800, Braynard proposed to one Terry, to bail him and offered as a means of indemnification, that the bill of lading should be endorsed to him, by S. A. Woodberry and co, which was accordingly done. A few days after Terry agreed to endorse the bill to J. Brandt and co. on they relieving him from the bail. This was accordingly done, and the latter having taken an assignment of the bill of lading, entered the rum at the custom house, and took possession of it. The record does not enable us to ascertain the exact dates of these transactions.

On the 12th of August, 1818, Braynard gave a power of attorney to Morse to transact his business, and three days after sailed for Boston. At this time, he was apprehensive of an arrest, having endorsed notes to a considerable amount, for persons who had since failed, and Morse told one of the subscribing witnesses to the power of attorney, that Braynard meant to make a difference between the payment of these notes and his other debts.

On the 10th of August, Braynard signed a receipt, for the amount of the seventy-one hogsheads of rum, to S. A. Woodberry and co. On the 13th, an account current, between him and them, exhibited a balance due the latter (the rum being accounted for) of $2843, with a reserve of $2735, due by him to J. Brandt and co.

On the 15th, the day of Braynard's departure, the rum was attached, in the hands of J. Brandt and co. at the suit of V. Rilieux, by whose consent it was left there, on they giving a receipt to the sheriff, acknowledging it to be the property of M'Neil, Fisk and Rutherford, who had stored it with them, and who held their receipt. On the 29th, the rum was attached in the present suit.

It appears to us, that the parish judge erred, in giving judgment against Braynard, as there

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was no answer filed by the attorney appointed to him by the court, so as to present an issue to be tried, and as there was no judgment by default taken against him. The judgment is therefore annulled, avoided and reversed.

Proceeding to determine what judgment ought to have been given below, it appears to us, that the defendant Braynard was not before the court: no property of his was in the custody or power of the court. By the endorsement of the bill of lading to S. A. Woodberry and co. by Braynard, and by that house to J Brandt and co. the property of the rum passed out of Braynard, and it appears, that the proceeds have been fairly applied to the payment of the freight, duties and charges accruing on the rum, and the discharge of the debts due by Braynard, to J. Woodberry and co. and J. Brandt and co. But, it is contended, that at the time, when he assigned the bill of lading, he was in insolvent circumstances, in the knowledge of S. A. Woodberry and co. was pressed by his creditors, and had not sufficient property in the state to pay his debts therein. This does not, in the opinion of this court, render the assignment absolutely void: for it was necessary to the payment of the duties, freight and charges on the rum; further, it was not made without consideration, since J. Brandt and co. became bail for the assignor. On the

subsequent failure of Braynard, the mass of his creditors might perhaps compel S. A. Woodberry and co. and J. Brandt and co to bring into the common stock the balance of the proceeds of the rum, after deducting the amount of the freight, duties and other charges, in order that it might be distributed among all the creditors, including these two houses: but, no particular creditor has a better right to this balance than them. It would be equally unjust, that the present plaintiffs should receive any more than their proportion, or obtain the whole of their debt, as to allow the proceeds to remain where they are. If the present holders are to account, they must do so to the mass, and not to any individual, of the creditors of Braynard.

It is, therefore ordered, adjudged and decreed, that the plaintiffs' petition be dismissed, and that they pay costs in both courts.

Morel for the plaintiffs, *Workman* for the garnishees.

PIERNAS vs. *BLANQUE'S SYNDICS.*

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

The opinion of the court *a quo*, in admit-

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ting a witness, must be tested, according to the circumstances of the case, when it was given.

If by consent, a witness be introduced to prove a fraud, but discloses facts, of which parol proof can only be admitted to establish fraud, and there is a special verdict, that there is no fraud and faces are found, which demand the judgment of the court, in favor of the party introducing the witness, if the adverse party does not insist on a new trial, he cannot be relieved on the ground, that the testimony ought to have been listened to so far only as it tended to establish the fraud.

MARTIN, J. delivered the opinion of the court. The petition states that the plaintiff, being in need, applied to Blanque, who loaned her the sum of one thousand dollars, and she, being willing to secure him by a mortgage of three slaves, whom she possessed, he availed himself of her necessitous situation, of the influence he possessed over her, and the confidence which he enjoyed as her brother-in-law, and induced her to execute an absolute bill of sale, instead of a mortgage—that two of the said slaves were then hired to the wife, now widow of said Blanque, in whose possession they have ever since remained, and the other was then, and has ever since been in the possession of the plaintiff—that the said Blanque, ever after continued by fair promises to avoid a settlement with the plaintiff, as well for the hire that was due her for the said slaves, during a long period before the loan and ever since, as for other sums, in which he became indebted to her, and died insolvent, before any settlement could be obtained from him. The petition concluded that the defendants may come to settlement, and on receiving the balance, if any be due, be for ever enjoined, &c.

Annexed to the petition, were two notes from Blanque to the plaintiff, posterior to the date of the instrument, by which he begged the use or hire of the slave, who remained with the plain-

tiff, and a note of L. B. Macarty, a brother in-law of Blanque's, and concerned with him in a plantation, conveying an intimation that his father, Blanque's father-in law, desired to purchase the same slave, desiring to know his price, &c.

The case was submitted to a jury, who found specially, that the bill of sale was not fraudulent, but a security for the loan—that the slaves were worth double the sum loaned—that one of the slaves continued to remain with the plaintiff without any claim being made to him by Blanque—that he was at times hired out by the Chevalier Macarty, father in-law to Blanque, to work on an estate in which he and Blanque were jointly concerned, and the Chevalier's son, applied in his father's name to the plaintiff, for the purchase of the slave, offering $1200—that Blanque accounted with the plaintiff for the hire of the three slaves, including the one hired for the plantation. That four years after the date of the sale, Blanque exhibited an account against the plaintiff, in which he made no charge, for the hire of the slave sold, which remained with the plaintiff. and on the same day, she rendered an account to Blanque, which she receipted, in which she charged him with $848,50 for the hire of the said negroes, to which he made no objection.

There was judgment, that on the plaintiff pay-

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ing to the defendant the sum loaned, with interest, the act of sale be cancelled.

The defendants appealed, there was neither statement of facts, nor any certificate of the whole evidence being on the record.

But it appeared by a bill of exceptions that, at the trial, the plaintiff's counsel offered witneses to prove the meaning of the parties, when the bill of sale was made, the defendants objected to any witness being introduced except to prove fraud, and the court overruled the objection.

The record shews that, after the verdict, the defendants moved for a new trial.

1. Because the verdict was contrary to law.

2. Because, no evidence could be admitted, except as it tended to shew the fraud alledged, and as the evidence produced tended only to shew the intention of the parties, at the time of the contract, it was admitted in direct violation of the law.

The counsel, afterwards, withdrew the motion as it was his intention to appeal.

The facts being especially found by the jury, and, the judgment of the court correctly given thereon, we have only to enquire, whether the court erred, in suffering the witnesses excepted to, to be sworn, and all the facts, on this point, must be taken from the bill of exceptions.

The defendants' counsel, according to his own

shewing, did not oppose the introduction of any witness to prove the fraud alledged; the plaintiff's counsel only prayed, that witnesses might be heard to prove the intention of the parties, in executing the deed. Now, no fraud could be proven against Blanque, according to the allegations of the petition, which charge fraud only in refusing to give a defeasance or counter-letter, without shewing the intention of the parties, at the time of the execution of the deed. If the plaintiff prayed to prove that intention by witnesses, and the defendants consented that the fraud alledged might be proved by witnesses, they agreed to what the plaintiff proposed, and the judge could not reject evidence of the intention of the parties, without rejecting evidence of the fraud, which both parties were content should be produced: we are, therefore of opinion, that he did not err in this respect.

But, it is contended, that the finding of the jury, that there was no fraud intended by Blanque in taking the bill of sale, alters the question, and since it is apparent that no fraud did exist, the testimony was improperly admitted.

In testing the correctness of the judge's conduct in admitting the evidence, we are to examine the question, as it stood, when he gave his opinion. Both parties agreed to the same proposition, tho' in a different manner: the defendants agreed tha

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witnesses should be examined to prove the fraud—the plaintiff, in order to prove the fraud, sought to establish the *sine qua non*, viz : that the parties meant not to have a sale, but a mortgage executed.

Whether, after the jury found there was no fraud, there ought not to have been a new trial granted, or whether before the verdict, the jury ought to have been charged, that if no fraud was practised to obtain a bill of sale, a part of the said testimony ought to have been rejected, is not a proper subject for our enquiry. For the motion for a new trial was withdrawn, and none appears to have been made for the judge's direction to the jury. Our attention must be confined to the bill of exceptions, taken on the admission of the parol testimony ; for we are bound by the special verdict, and if we were not, we find that the jury had before them written evidence to support their finding, viz : that resulting from the low price, mentioned as the consideration—the account of the insolvent in which, no hire was charged for the slave whom the plaintiff retained, and the account of the plaintiff, in which the insolvent was charged several hundred dollars, for the hire of the negroes he held, and finally, the note of the insolvent, in which one of the slaves mentioned. in the bill of sale, is considered as still the property of the plaintiff.

We are of opinion, that the defendants, having consented to the introduction of parol testimony to prove the fraud, cannot complain that the judge allowed such testimony to go to the jury, and that the parties contemplated no transfer of property, but only the security of the defendants' insolvent in the loan he was about to make.

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

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

TERRIL & AL. vs. *FLOWER & AL.*

APPEAL from the court of the first district.

The dissolution of a partnership does not prevent the partners from suing.

If the agent evidently meant a voyage to a certain place, and the principal one to another, their error prevents any contract of mandate from taking place

Livingston, for the plaintiffs. This is a suit brought against the defendants, as the plaintiffs' agents, for neglecting to make insurance on a vessel, the property of the plaintiffs, according to order and to promise; by which the plaintiffs incurred a partial loss.

If the facts of the order, of the promise to comply with it, and of the loss be proved, the plaintiffs must recover. The law does not seem to

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be disputed; and if it were, it is too clear to need any reference to authority to its support.

The act of the principal, ratifying that of the agent is to be liberally construed.

I The order and the promise to comply with it, are proved by the same testimony: and it is clear and decisive.

1. The testimony of Dr. Little. He heard the consultation respecting the propriety of getting insurance between the plaintiffs and one of the defendants, he remembers the reason given by the defendant Finlay, for advising the measure; he perfectly recollects the order and the promise to comply with it; and that the defendant told the plaintiff, he need not provide the funds for the premium, that he would take care of it.

2 The confession of the other defendant, Flower, to captain Fisher, that orders had been given to insure, and that he either had complied or would comply.

This testimony being full and conclusive, proving the order and an express promise to effect the insurance by one partner, and an acknowledgement by the other, that such orders had been given, and that they would be complied with—nothing was left for the defendants, on this point, but to impeach the credibility of the witnesses This has been done with a patience and perseverance, that seemed to increase with the improbability of success.

To Little, it is objected that the reason, given for insuring the voyage back, was one that could not have existed; and that, therefore, he *misrecollects*. Now, if this be so, instead of recollecting ill (which, I believe, is the idea intended to be conveyed) the witness must be guilty of direct and deliberate falshood. For it is impossible that he could suppose such a circumstance to have been mentioned, if it never was.

And in truth, this circumstance is a strong internal mark of veracity, and would serve to corroborate the testimony, if it wanted support. The conversation took place, when Marsh was in town: he left it, if I recollect right, on the 17th. The vessel was then shortly to sail, and by the instructions was immediately to return. A voyage to Norfolk is frequently performed in 12 or 14 days, which would bring her there, counting from the time of her actual departure the 23d, on the 10th of March; and if she met with only ordinary delay, she might be ready to return before the 21st, the very day of the equinox. But as the gales prevail for a month or more after that period, she would, on the largest calculation, be exposed to them.

It is said, that he is contradicted by our other witness, captain Fisher, because this latter *does not know whether the orders were verbal or written, positive or discretionary*. If captain Fisher

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had said, that he was present at the conversation related by Little, there would, even then, have been no contradiction; because one witness might have heard what escaped the other. But when all the information Fisher had came from Flower's confession, it really seems rather extraordinary reasoning to say, that the first witness, who heard the conversation, must be mistaken, because the defendant did not choose to relate the whole to the second.

The other objections to the positive testimony in this cause, may be reduced to one:

That it is improbable.

1. Because, the defendants had no inducement to be guilty of the negligence imputed to them—to which I answer, that whatever be the motives, or whether any exist or not, if the fact be proved, we are entitled to relief. Men are guilty of neglect without any motive; if they had any, it would not be neglect but design —It is both the interest and duty of an advocate, to attend strictly to the cause of his client. Yet, where is the lawyer, however diligent or correct, who can say, that he has not sometimes been guilty of inattention to his duty?

2. Because the defendant declared, at the insurance office, that his orders were discretionary, and that he would not insure, because the premium was too high. Now, admit the novel princi-

ple, that the defendant is to make testimony for himself, and what is the result? Why, that he is equally liable as if his orders had been positive; for this plain reason, that if he refused to insure, because the premium was too high, it was his duty immediately to have given notice to his principal, that he might have got the insurance elsewhere. This is expressly stated in the authority read to the court—that in cases where the factor receives orders which he does not think prudent to execute, he must immediately give notice to the principal.

The court will also judge, how far this application to insure is consistent with the denial, first, strongly implied by the interrogatories and the affidavit, stating the substance of the testimony which we admitted to be true.

3. It is improbable, because the parties made no complaint at not finding the charge for insurance in the account.

This is no evidence, that Terril who received the account ever examined it, nor that he knew of the orders to insure—besides, generally people do not find great fault with the omission of a charge against them, even where they discover it—and he might have thought that the premium was paid, as I believe it actually is, by a note, and that it would be charged when the note was paid.

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4. It is highly improbable, that the orders were given, "because Marsh, who gave them, made no reproach against the plaintiffs to the person who brought him the intelligence;" and in the record the very formula of exclamation is given by the defendants' counsel; he ought to have cried out, "*good God! Is it possible?*" and because he did not cry out *good God!* it is clear that he never ordered the insurance.

5. Another probability arises, from the plaintiffs' continuing to employ the defendants as their factors, after they knew of the loss.

This may be accounted for in several ways—by supposing that the continuance of the business was more convenient to the plaintiffs, than the change of it into other hands, at the moment when the partnership was about to cease—by supposing that they did not think the omission to insure proceeded from any evil design—or by supposing that they were really ignorant of the liability of the defendants, by reason of the neglect.

6. The want of written instructions is also urged, as a reason to believe that none were given.

The clerks, I believe, swear that it was usual for the defendants to take such instructions *in writing*, but, surely a man can never set up his own usage and custom, in bar of a suit against

him: a custom he was at liberty to follow, or break alternately at his pleasure, and which (independent of the instance in question in this suit) we have abundant proof, that the defendants did not always adhere to.

They insured the cargo of this vessel, without any written instructions—"but the owner was on the spot, say the defendants; this forms an exception to the *customary common law* of our compting house." Be it so. We do not pretend to be acquainted with all the doctrines of this important code. But if it be an exception, we claim the benefit of it; for when we gave the instructions, we were also on the spot.

But you must make another exception to exclude us: for you confess you had orders to insure, and that you made an attempt to execute them; but that they were *discretionary*. Here then, is another exception in this customary law, not given to us by the text of the learned commentator Crocker. In the next edition, we hope he will add a note, stating that only *positive* instructions were required by the custom to be in writing, lest future students might be misled. And I would here, most respectfully suggest to the court, if they should sanction this custom, that they would recommend to every factor, the publication of the custom of his compting house, with notes and commentaries, in the same way.

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that the different customs of France were given to the world, before the Napoleon Code. This would somewhat load the shelves of our libraries, but we should be amply indemnified, by the increase of suits on our docket.

The defendants *must*, and I am sure the court gladly *will*, excuse us from making any further reply to the other suggestions, why the positive testimony of two respectable and unimpeached witnesses should not be believed. Their testimony is too full, too circumstantial, too positive to admit the idea of inaccurate recollection. The circumstances they detail are such, as never could have been impressed on the mind, by erroneous comprehension. The testimony is either true, or wilfully false—and, even if the defendants should have succeeded in convincing the court (which I cannot believe) that it is *improbable*, it does not follow that it is *untrue*.—*Le vrai peut quelquefois n'être pas vraisemblable*, has grown into a proverb, and its truth must be acknowledged, as applied to the actions of men, until they shall always be guided by truth, by reason, and the natural course of events: when they are, there will be no occasion for the rules of evidence, for the ingenious comments that have been offered on them, or for the ministry of your honours, or the advocates who address you. But until they are, we must look

for truth in the evidence of what is, not of what ought to be.

II. Having, as we hope, established the orders to insure, the promise to comply, and the failure to fulfil them, we have only to shew the *interest of the plaintiffs* and the *loss.*

The first is proved by the captain, by the agency of the defendants, by their accounts charging us with disbursements, by the copy of the register in the Spanish proceedings, the original being by law of the U. S. directed to be returned to the office whence it issued—and the point is the only one I believe, that is not controverted. The second, *the loss*, is also proved by captain Fisher, by the gentlemen who purchased the vessel at the Havana, and by the proceedings in the Consulado there.

The amount of that loss was nearly a total one; but the jury by deducting the charge for wages, to which we had no right, and placing to our account, the sum deposited at the Havanna, have liquidated the amount very correctly at 4300 dollars.

But the defendants say: "that as we have made no abandonment, we cannot make them liable for a total loss, that they are liable, if at all, only to the extent, and in the manner that insurers would be."—If there were any necessity

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for contradicting this position, I think it might safely be done in this case, where the factors are the insurers, because if they had made the insurance, it would have been their duty to have abandoned to the underwriters, for their principal; whenever his interest required that step. But in the case, where the factors and insurers are the same person, they cannot, as insurers, take advantage of their neglect, as factors to abandon—and this idea is strengthened, by the omission in all the authorities of any mention of the necessity of abandonment, in suits against a factor for neglect to insure.

Interest and *loss* must be proved; because without *both* of them there is no *injury*, and without it there can be no *action*.

However, whatever be the law on this point, it is immaterial in this suit, for we do not sue for such a total loss as requires abandonment, it is required in cases only, where the loss is constructive; but where the actual loss amounts to the whole value of the thing insured, no abandonment is required; because there is nothing to abandon. Or where there is only a small part left, and the owner is willing to keep that on his own account, he has no need to abandon.

When he wishes to turn a partial into a total loss, then if the loss be of sufficient magnitude he may abandon; and he *must* do it before he

can put the insurer in his place. But if he do not abandon, the only consequence is that he can only recover according to the amount of his loss.

Here, we made no abandonment: but we sue only for the loss actually sustained. We thought we could prove that to the amount of 5,000 dollars, and we accordingly claimed that sum; but we could prove to the satisfaction of the jury, only 4,300 dollars. Is there any principle of law, which prevents our recovering it? I never heard of any.

But if we had gone for a total loss, and suggested an abandonment and failed in the proof of it, we should still be entitled to recover for a partial one, to the amount we may have proved.

I could answer most completely and satisfactorily all the charges of neglect brought against the captain after his arrival at the Havana. The slightest attention to his proceedings there will shew that he acted discreetly—without funds, in a foreign port, he wrote to his owners, and repeatedly to their factors, the defendants, he waited a considerable time for their answer; but not receiving it, he acted with the property, as he would with *his own*; for that is the meaning of the advice which he received and followed; to act, *as if the property was not insured*: which, though criticised by the defendants, was the only legal course, he could pursue, having only been cur-

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sorily informed on his departure, that the vessel either *had been* or *would be* insured. Though he might *believe*, that it was done, he was not and *could not* be certain of the fact. In this situation, by acting as if she was not insured, he did his duty to his employer, if he was uncovered, and consulted the interest of the insurer, if she was insured.

This want of advice from New-Orleans is the reason why he did not apply to the Consulado, until some time after his arrival. When he lost that hope, he applied to the proper tribunal, and took no step, but under its authority. There the vessel was sold, and all the accounts and expenses audited and paid.

There was therefore no neglect after the arrival of the vessel, on the part of the captain.—But if there had been, how could it affect the present question? If the loss *is occasioned* by neglect or want of skilfulness of the master, there are cases where it exonerates the insurer.—But the loss here was by lightning; and if he had abandoned the vessel, immediately after her arrival and gone to the East-Indies, without giving any advice to those concerned, the insurers would have been liable for the actual damage, whenever we could prove the amount.

That amount is, as I have shewn, sufficiently proved in this case. The wages which were

claimed were properly rejected by the jury; and instead of 5,000 dollars to which we supposed we had a right, they have given us only 4,300, which may be made up without including any objectionable charge.

"The captain ought," say the defendants, "to have made a protest," he *did* make one, as appears by his declaration to the Consulado.

"But he ought also to have produced it." For what purpose? It could not be introduced as evidence for him, if he had; and if the defendants wanted it, they ought to have sent for it themselves, or at least have given us notice to produce it. In the case cited from 9 *Cranch*, 79, the doubt was as to the necessity of putting in, here there can be none, because the damage to the vessel is most fully and clearly proved. Unless, indeed, the defendants mean to argue with respect to the ship, as they have with respect to the instructions. that it is highly improbable, notwithstanding the positive evidence, that she was struck by lightning; because out of 100,000 vessels, not more than one meets with that accident, and that it is therefore one hundred thousand to one (fearful odds!) that the story is false. Besides the ship had a most excellent character for going safe and it was her custom to go without insurance. Therefore there are strong circumstances to induce a belief

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that she was not insured, and that she met with no accident, and "as a presumption, which necessarily arises from circumstances, is often more convincing and more satisfactory than any other kind of evidence", therefore, the lightning did not strike the brig, which was to be demonstrated.

A most extraordinary attempt is made to insinuate from the expression in the Spanish proceedings describing the vessel as "*procediente de Perth Amboy*," that there had been a deviation. Now, as this is only the language of the tribunal, it would seem hard to make captain Fisher answerable for their expressions, in a foreign tongue, even if they had meant to say that he *came* from Perth Amboy. But it plainly relates to the port to which the vessel belongs, as by the register, it will be found that she is of Perth Amboy, that is to say, belonging to, registered at, that port.

"How is this presumption, (that he came from Perth Amboy) to be got over" asks the defendants' counsel.

Only by that testimony, which it is his interest, throughout this cause, to consider as the worst, because he has none on his side—by positive testimony —That of the captain, that he took in the negroes at Norfolk—by the delivery of the negroes at the Havanna—by the payment of

the freight for them to the defendants themselves.

I shall add nothing more; to examine all the objections made by the defendants, would take up more time, than I can bestow on this cause, and to treat them all seriously would require a greater stock of gravity than I possess. Indeed, I feel as if an apology were necessary for the light manner in which some have already been treated.

III. Merely from that attention due to the defendants, I must notice their first objection that this suit cannot be sustained, because we have called ouselves *Terrill and Marsh.* But as we have also let the defendants into the secret of our respective christian names, and written very plainly that it was Abel Terrill and John F. Marsh, who chose to call themselves Terrill and Marsh. I cannot very readily, I confess, see the weight of the objection; authorities were read in support of it, to shew that one partner cannot legally sign the joint firm after a dissolution; or bind the former partner, if he do. This is certainly very true: but how does it apply to a suit brought by two partners to recover a sum of money due on account of a partnership transaction, and brought too in their names at full length?

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Even in the case cited of the signature of the firm, after the dissolution of the partnership, if the signature had been made by the authority of both, can there be a doubt that it would have bound them?

I own, I can comprehend nothing from this objection, except that the defendants found it necessary to make one—and then, if it do not defeat itself, it must stand, for I shall say nothing further to defeat it.

I conclude with the hope, that as this cause has been tried, and the amount settled, by a special jury of merchants, summoned to try a mercantile question, that their decision will have some weight; but that the facts in the cause will have more, and that the judgment of the district court will be affirmed.

Ellery, for the defendants. Were the plaintiffs' case made out, they could not succeed in this form of action; inasmuch as it is brought by an expired firm, instead of being brought by the partner, or person charged to wind up the concerns of that firm.

The petition in this suit, is entitled the petition of Abel Terrill and John T. Marsh, trading under the firm of Terrill and Marsh, of the parish of St. Martin, &c.

These words are obviously, not intended as

words of description, but to give the character of the petitioners, and shew in which capacity the suit is brought :—that it is brought by them, not as distinct individuals, but as composing the firm of Terrill and Marsh. Now, there is no such subsisting firm as that of Terrill and Marsh; and from the testimony, we find, that it was dissolved prior to the institution of this suit. This appears by the cross examination of Little, as well as by the admitted testimony of Jennings. This suit therefore, stands in the name of an expired firm, instead of that of its acting or surviving partner : in other words, it stands in the name of a non-entity. As well might the individuals, who composed a corporation, the charter of which is expired, continue notwithstanding to sue in its coporate name, as those who composed a firm now expired, in its partnership name. After dissolution of partnership, the relations of the partners in the one case are as much extinct, as those of the corporators in the other; the joint-tenancy existing between them in the partnership effects is dissolved, the partners cease to exist as such, and become distinct persons; and it is difficult to conceive, upon what legal principle, or by what resuscitating process, they are thus made to revive and re-unite as partners and plaintiffs in the present action. If after the dissolution of partnership, they are still permitted to

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sue as a firm, why not to perform any other partnership act? If they can put the partnership name to a suit; why not to a note, bill, or obligation. Yet, this has repeatedly been decided, cannot be done. 3 *Epinasse's. Rep.* 109, *Abel and another* vs. *Sutton.* 2 *Johns Rep.* 300, *Lansing* vs. *Guire & Ten Eycke.*

Go the length of admitting the use of the partnership name, after its dissolution, and where are we stop? By which of the partners is it to be used? Terrill and Marsh are now distinct persons, holding several interests, the one is no longer bound by the acts of the other, neither Terrill nor Marsh can separately use it in this suit; both must concur in bringing it, and that concurrence must be shewn; it cannot be presumed; the dissolution of the firm excludes such presumption. But would even their concurrence be sufficient, without a renewal of the partnership. Suppose a judgment in their favor, by whom is satisfaction of judgment to be signed, and how are they to concur in the partnership signature: and in case of a judgment against them, and execution for costs; upon what property is it to be levied? And where is to be found the property of an unsubsisting firm?

Again;—can they begin the suit as partners, and recover as distinct persons? Can they sue as joint-tenants and recover as tenants in common?

Suppose the plaintiff in a suit die, will the court suffer it to be continued in the name of a deceased person? As little then will it suffer a suit to be brought, and carried on in the name of a deceased firm; the one must be conducted by the executors or administrators, and the other by the acting or surviving partner.

It is said, that this objection comes too late, and that advantage ought to have been taken of it, in a plea of abatement. But the dissolution of this firm was a private and not a public one, and we were accidentally brought to the knowledge of it, by the testimony of one of their witnesses, taken under a commission, issuing a considerable time after filing our answer. The plaintiffs are not however, put upon worse ground. Had such a plea been filed, it would have been tried with the principal defence. But our proceedings do not require, perhaps not warrant, such a a plea: they are not copied from the common law, but chancery proceedings; where, instead of a plea in abatement, an exception is taken to insufficient parties. In our answer, adopting this practice, we save to ourselves all benefits of exception; and this exception, surely comprehended in this saving, was on the trial below specifically argued.

I therefore conclude, that as the plaintiffs have brought this suit in the name of an expired firm,

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instead of that of the acting or surviving partner of that firm; they are not entitled to recover in this form of action; that the suit is not well brought, and that judgment must be entered against them as in case of nonsuit.

II. Admitting the suit to be well brought, the defendants' instructions, to effect insurance upon the vessel in question, did *not* extend to her voyage back, and were *not* positive, but discretionary.

The plaintiffs hold here the affirmative of the proposition, and aver, that the orders to insure *did* extend to the return voyage, and *were* positive and not discretionary. Now the affirmative is always susceptible of direct proof, but the negative which we take, in its nature not admitting of direct proof, can only be made out by the proof of circumstances, inconsistent with the affirmative averment: and we contend, that every material circumstance in the cause is inconsistent with it. The affirmative of the proposition is sought to be supported by the testimony of Little and Fisher, master of the vessel. The testimony of the latter, as I shall presently shew, is neutralised by his letter to defendants from the Havanna;—by his acknowledgement, in his cross-examination, that *he never heard any mention made of insurance upon the voyage back*, and

that he does not know whether the instructions to insure were *positive or discretionary*. The affirmative may fairly then be considered as resting principally, if not exclusively, upon the testimony of the former witness. This testimony, as I shall presently shew, is not only weakened by intrinsic objections, but opposed by the whole array of circumstances in the cause; and however positive in its nature, is overpowered by the presumption necessarily arising from these circumstances. Neither am I inclined unqualifiedly to admit the superiority, claimed by the plaintiffs' counsel, of *direct* over *circumstancial* proof On the contrary, I think the latter species of proof is often the most satisfactory and conclusive. We all know how liable witnesses are to be deceived, and even sometimes to deceive; how liable to be warped by influence or feeling, by prejudice or passion:—and how apt, from the frailty of memory, to mistake, after a lapse of time, opinions for facts, and confound information with recollection. The testimony of circumstances on the contrary is always unsophisticated and unsuborned;—neither fallacious nor equivocal. Circumstances, it is proverbially said, do not lie; and to a train of well connected and well attested circumstances, it is difficult for the mind to withhold its assent, even at the expense of *direct* testimony. These opinions, I conceive, are

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drawn from the principles of evidence, and sanctioned by authority. In a court of justice, certainty of proof is unattainable; in lieu therefore of *certainty*, founded only on the view of the *senses*, we take up with *probability*, founded on *experience*. The testimony of a witness, therefore, is weakened in proportion as the story he tells is contrary to probability;—as the fact, to which he deposes, is found unaccompanied by those *circumstances* necessarily or usually attending it;—and so far is a controverted fact, from being settled by the declaration of a witness, that both the facts and declaration are afterwards compared with the other facts in the cause, and are wholly excluded from belief, if outweighed by superior probability. And we often find in *collateral circumstances* an index that will guide us with more certainty to the discovery of the truth of the case, than *direct* testimony. *Gilbert's l. of ev.* 147, 148. *Swift's Ev.* 151, *n.* 11. *Id:* 149, *n.* 8 & 9. Justice Buller, in his charge to the jury, on the trial of captain Donellan, also says, "a presumption, which necessarily arises from circumstances, is often more convincing and more satistisfactory, than any other kind of evidence"; and of this opinion, seems also, judge Story, in the case of the brig Short staple and cargo. 1 *Gall. Rep.* 103. This reasoning emphatically applies to the testimony of the pre-

sent witness, weakened, as it will be found, by inherent defects, and at war with all the facts in the case.

I shall not detain the court with any remarks, upon the style and structure of this deposition, upon the technical precision of its language, and minute particularity of recollection; it is before them; and as the plaintiffs' demand principally rests upon it, without doubt, it will be scrupulously examined by the court. Without questioning the veracity of the witness, it is easy to conceive, that his account of a short conversation, held more than fifteen months before, might be erroneous; a conversation of so remote a date, and of so short a duration, and which the witness had so little interest to hear, understand, or remember, could hardly fail to be misconceived or misrepresented: of this, I think, we are furnished with strong intrinsic proofs.—The parties, as detailed in this testimony, begin with an inquiry, on the part of Marsh, "whether it were best to insure the brig? Finlay said at first, he did not know, &c." This introduction serves as an aukward precursor of *positive* orders; on the contrary, it pretty strongly marks both Marsh's uncertainty in this respect, as well as his implicit reliance upon the opinion and discretion of Finlay: nor is it at all likely, as his determination to make insurance proceeded only

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from the advice given him by Finlay, that the orders to make insurance, should be given in such *positive* terms as are set forth in the subsequent part of his deposition.

A striking proof, however, of the witness's misapprehension or misrecollection is found in the reason he makes Finlay assign, why the brig should be insured on her voyage back, "because she would then be exposed to the equinoctial gales."—leaving this port on the 23d of February, the brig on her voyage *out* might be exposed to these gales, and therefore it was reason to insure her *outward* voyage; but on her voyage *back*, which probably would not, and actually did not commence, until the latter part of April following, she seemed little exposed to this risk. The vernal equinox takes place the 21st of March; a vessel therefore leaving port, on her return voyage, on the 22d of April (above a month afterwards) seems to have a little fear from the gales of the *vernal*, as from those of the *autumnal* equinox. When an inadequate and assured reason is thus assigned for this opinion of Finlay, we have a right to believe, that the witness is grossly mistaken, and that the opinion, if given, exclusively referred to the voyage out, which might bring the brig within the verge of these equinoctial gales, and never to the voyage *back*, beginning above a month after-

wards. The equinoctial gales, though not confined to the very days, when the sun crosses the line, by no calculation are extended in their range to a month before and after their periods; such a calculation would extend their empire over one third of the year.

But leaving all intrinsic grounds of distrust; let us compare the testimony with the facts in the cause, and examine it according to the rules of probability.

Did or did not these instructions to insure, extend to the voyage *back*, and were or were they not positive? Let us take the case upon either hypothesis, and see which is borne out by the facts in the cause. Hypothetical reason, both in law and science, are considered as yielding satisfactory proof, when none but the given hypothesis explains all the phenomena.

Upon the plaintiffs' hypothesis of *positive* insiructions, extending to the voyage *back*, we are beset, at every step, with difficulties beyond solution; neither the conduct of the parties, nor the testimony of the witnesses, are capable of being reconciled or explained.

The defendants, upon the scheme of argument, are made to act gratuitously against both their interest and reputation—are made guilty of a wanton b each of duty—a flagrant violation of instructions and engagements, without any osten-

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sible or assignable motive or excuse:—not from neglect nor forgetfulness, because they applied for insurance upon the brig; nor from a wish to save the advance of the premium, because the sum was too paltry and insignificant, and because on the policy in their hands, they would have, in case of loss, not only a lien for that advance and commission, but also for their general balance of account—thus enlarging both their profits and security:—instructions too, the breach of which exposed them to the penalty of becoming insurers upon this vessel, and in case of loss, responsible for her full value:—yet though thus penal, not committed, (as was invariably the case with similar instructions) to writing, or even entered upon their books;—guilty too of voluntary and gross misrepresentations and falsehoods at the insurance office, *in asking only for the insurance out* and in assuring the secretary, when they declined the terms of insurance, *that their orders to insure the brig were discretionary:*—and all this waste of truth, character and principle, for the poor chance of contingent injury to persons, with whom they never were at variance, and exposing themselves certain litigation, loss and reproach —Can we believe in such gratuitous folly and wickedness, or subscribe to an hypothesis standing on such grounds? Can this conduct be softened or ex-

plained upon the plaintiffs' suggestion of a want of communication between the two partners upon the subject of those instructions? This suggestion, in itself destitute of probability, is destroyed by the fact, that the instructions to insure were given to Finlay, and the application of insurance made by Flower. The conduct of the defendants therefore remains without excuse or palliation, and a mercantile house, long established in this city of untainted character and credit, upon this hypothesis, is made to risk and lose both, not only without interest or inducement, but under impending penalty and loss.

Neither, upon this hypothesis, can the conduct of the plaintiffs be better understood or explained, but remains equally destitute of probability, and contrary to experience. Not to dwell upon Marsh's positive declaration to the defendants, in presence of Crocker, their book-keeper. *that upon the arrival of the brig at Norfolk, it would depend upon circumstances, whether she returned to New-Orleans, or proceeded elsewhere*, which wholly excludes all idea of insurance upon the *return* voyage. How upon this principle, can we account for the conduct of the plaintiffs when they received at Attacapas, from Mr. Jennings, (her former master) the news of this accident—of a probable loss, involving as is suggested, almost their all. It would seem natural,

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upon the first hearing of such a loss, and in conversation with their former captain, to emphasize the *positive* nature of the orders they had given the defendants, to have the brig insured on her *return* voyage ;—to reproach them for their disobedience of orders—even to aggravate their conduct, and threaten them with their responsibility. These feelings and reproaches would have been as excusable as natural. But instead of thus exhaling themselves in reproach, not a syllable even of complaint is breathed. Now according to the admitted testimony of Jennings, "*they regretted the loss of the brig, but did not pretend nor suggest, that they had ever given the defendants, or either of them, any instruction to effect insurance upon her,*" nor impute any blame to them for not effecting it. In a subsequent conversation, also between Marsh and Finlay at New-Orleans, Cooper, the defendants' bookkeeper, who was present, when questioned as to the particulars of this conversation, says, "*he does not recollect hearing any blame thrown out upon the subject, and heard no censure implied by Marsh against Finlay.* Marsh asked Finlay, if the brig was *insured? Finlay answered, no; Marsh then said, it was an unfortunate circumstance, and seemed to regret it.*" In a separate conversation had soon afterwards, between Cooper and Marsh upon the same subject, not an idea

is suggested by Marsh, of any orders given to insure. About the 10th of May, 1817, above two months after the sailing of the brig from New-Orleans, Terrill is in town, and receives from Crocker (the defendants' book-keeper) an account of that date, headed, "*brig Hero and owners for disbursements*," in which no advance of premium nor commission (as would have been the case, if insurance had been effected) stand charged. Terrill receives the account, seems satisfied with it, says not a word of insurance and makes no comment upon the omission of these charges. The general account, into which is copied verbatim this particular account of the disbursements of the brig, is also suffered to pass without comment or inquiry. About the 10th of July, 1817, another general account bearing that date, into which is also carried the balance of the amount of these disbursements, is handed to Marsh, who settles the account, and receives and gives his receipt for the balance struck.

Was the advance of premium, an item too insignificant to be missed in the account? On the contrary, including commissions, would it not nearly equal the whole account, as it now stands, at $327 29? Two and a half per cent, rate of insurance upon the voyage out and back, upon $5000, value of the brig, would give, without commission, $250. Would not an exclamation

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then naturally and involuntarily burst from the lips of the plaintiffs, upon missing these charges in the account of the brig's disbursements, good God! Is it possible our brig is not insured? And to insist, as it was not then too late, to have it immediately done.—Can this conduct be rationally attributed to any inadvertence or forgetfulness? Can this be seriously pretended, when this vessel, as we are told, included their all—when she was *then* on her *return* voyage, exposed to these famous equinoctial gales;—when but a short time before, according to their witness, they had so particularly discussed the rate of insurance, fixed the amount to be insured, and provided for the advance of premium.

But to finish the review of the plaintiffs' conduct, on the 14th of August, Terrill commits to the defendants, "these faithless agents," fresh business, as well as on the 6th of November following.

During all this period, living in the neighbourhood of each other, and with a full knowledge of all these facts, no hint of blame on the part of the plaintiffs is thrown out, no sign of disapprobation appears: neither in their interviews and intercourse with the defendants, nor in their conversations with others:—with Cooper—with their former captain, Jennings—with their late captain, Fisher:—nor even in their letters to him,

in answer to one from the Havanna, informing them of the situation of the vessel, and requesting their instructions, does it appear that the slightest mention of insurance, or smallest manner of complaint, escapes their lips or pen? Can this conduct, upon the supposition of *positive* orders to insure, and so serious a loss produced by their violation, be considered natural or probable? Is it in human nature? "*Hath not an owner senses, affections, passions?*" Is this the conduct of men, not only greatly suffering, but deeply injured, towards the authors of their losses and injuries, and while smarting under them? Is it not equally destitute of all probability, and contrary to all observation and experience? And yet this amicable intercourse and friendly deportment continue, for nearly a year—up to about the period of the institution of this suit, when they are suddenly awakened to a full perception of their wrongs and injuries.

Upon this hypothesis, therefore, the conduct of the plaintiffs is as little be solved, as that of the defendants; whereas upon the contrary one, of *discretionary* instructions to effect insurance upon the voyage *out*, the conduct of both parties becomes natural and intelligible, falling in with common experience, and the usual course of human conduct and feelings; and every thing, says Domat, which happens naturally and commonly is taken as true.

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Neither upon this hypothesis, can the testimony of the witness be better conciliated or explained. When there is an apparent inconsistency or contradiction in the testimony of witnesses, it is a general rule, that such construction shall be put upon it, as will make them agree, rather than such as will make them disagree; for the law will presume that every body swears the truth. *Swift's ev.* 145, *Gilb. ev.* 154.

The testimony of the plaintiffs' principal witness in the cause, can in no other way be reconciled to the other testimony in the cause, than by taking the contrary hypothesis, and by supposing that, in a short conversation, occurring long since, and in which he could take no interest, and did not even appear to know one of the parties, he mistook or misrecollected, the value and extent of the plaintiffs' instruetions. The single fact indeed, of the supposed risk of the vessel from equinoctial gales on her voyage *back*, which she could *only* be exposed to on her voyage *out*, shews the probability of such mistake or misrecollection—otherwise this testimony stands in the cause, weakened by intrinsic defects, unsuppported by assistant proof, met by counteracting circumstances, and opposed by direct testimony.

This testimony is said, however, to derive support from that of Fisher; but the record, to

which I refer, shews between them rather a contradiction than concurrence. The master does not pretend to know whether these instructions to effect insurance were *verbal* or *written, positive* or *discretionary;* and also expressly declares that *he heard no mention of any insurance upon the voyage back.* His acknowledged uncertainty, in these respects, is further evidenced by his letter to the defendants, from the Havanna; where he says, he does not know whether the vessel were insured or not, but is advised to proceed as if she were not. These declarations militate indeed, with some parts of his principal examinations; but the strongest testimony is surely there produced upon the cross examination, when drawn from a reluctant witness. I take no pleasure in pointing out inaccuracies, or else several might be cited in this testimony. His belief of the vessel's being insured, arose, he says, from his instructions, which he acknowledges however, were never communicated to the defendants, and which when produced, seem to justify no such belief, and which from his letters from the Havanna, he soon ceased to entertain. At the Havanna he also calls himself *consignee* as well as captain, and the balance of the proceeds of sale of the brig, which he swears were left in deposit, for those whom it may concern, was, at his own request, expressed in his own petition to

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the royal Consulado, left in deposit for the owners, and this balance, instead of $270 as stated by him in his testimony, amounted, by the Spanish proceedings, to $358,37 1-2.

Without dwelling on these inaccuracies, enough has been said to shew, that the testimony of Little is not strengthened by that of Fisher; and I shall now shew, that it is directly opposed by that of other witnesses.

It is opposed first, by the declarations of Flower, at the period of his application for insurance upon this vessel:—these declarations, accompanying this application, are considered in law, as making part of the application itself, and as such may be given in testimony. *Swift's ev.* 139, 6 *East.* 188. Longer, secretary of the insurance company, in his deposition says, that Flower (14th of February, 1817) made an application for insurance upon the brig and cargo, from New-Orleans to Norfolk, Petersburg and Richmond; that Flower found 2 and a quarter per cent. the premium demanded, too high—accepted it however for the cargo, because, he said, his orders were *positive*, but rejected it for the brig, as he had a *discretion*. At the period of making this application, Flower was as devoid of interest as the witness, whose testimony he contradicts: his declarations may be considered like the examination of a witness taken at the time, he

was uninterested, but afterwards becoming a plaintiff, in the cause. 1 *P. W* 288, *Goss* vs. *Tracy*. His instructions must also then have been fresh in the mind, and he could have no interest either to violate or misrepresent them ; and yet he declared, they were *discretionary*, and, upon the ground of that discretion, declined accepting the terms of insurance proposed. Was Flower or Little most liable to mistake the *nature* of these instructions ? Are his declarations made at the time less worthy of credit, than those of Little, made more than fifteen months afterwards ?

It is a fact also not to be omitted, that this application for insurance was made only for the voyage *out*, and that nothing was said in relation to the voyage *back :* an unequivocal proof, that the defendants' instructions, whether positive or discretionary, did not extend to the *return* voyage, in which the vessel was lost.

Is not then the testimony of Little, taking it as unimpaired by any objections brought against it, fairly counterbalanced by that of Flower ? And is not the latter, thus introduced, as credible a witness as the former ?

But the testimony of Little is equally opposed by that of Marsh ; it being the peculiar fate of this witness to be contradicted by both parties. From Marsh, Crocker (defendants' book-keeper) understood, that the agency of defendants, as to

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this vessel, ceased upon her leaving port; and by Marsh he is also informed, that upon her arrival at Norfolk, it would depend upon circumstances, whether she returned to New-Orleans, or proceeded elsewhere. Of this opinion seemed also captain Fisher: when, at the Havanna, he stiled himself the *consignee* of the vessel; and it is a fact, demanding attention, that on a former, and precisely a similar voyage, under the command of captain Jennings (as we find from his admitted testimony) the agency of the defendants, in like manner ceased, and the vessel was put under the sole control of the captain, either to return to New-Orleans, or be freighted for any other port —that she then actually made an intermediate voyage;—that the insurance was then left to the *discretion* of the defendants, and that none was then effected upon her, from New Orleans. Strongly corrobatory of this is also the letter addressed by the defendants to the plaintiffs, of the fourth of May, 1816, when the brig was bound from New-Orleans to Richmond, and on which they recommend to the plaintiffs "to have her consigned to some house *there*, to *send her back here, to New-York*, or any other place, where a good freight might offer."

Thus is the testimony of this witness found in contradiction with the declarations of both parties to this suit, as well with all the facts in the

cause, and this concurrence against it of direct and circumstancial proof (exclusively of inherent improbability) demonstrates his misapprehension or misrecollection. Admitting however, the affirmative proof (resting principally, if not wholly, upon the testimony of this witness) to be only counterbalanced, and the case rendered doubtful, the plaintiffs must fail, since they are bound to adduce not merely an equality, but preponderance of proof, and it is settled law, that no man can recover on a doubtful demand. *Swift's ev.* 151, *n.* 11, *id.* 149, *n.* 8.

It has been objected, that as we have not called witnesses to impeach the credit of this witness, his deposition must, therefore, be taken as true It is not, however, the *credit* of the *witness*, that we wish to impeach, but the *credibility* of his *testimony*. It is further objected, that we reach his *credibility* only through his *credit*. On the contrary, we have sought to explain and reconcile its discordance with the other testimony: upon our hypothesis alone can this be done.

Under this head, and in this connection may be noticed some miscellaneous objections, omitted in the general view taken of the testimony; though perhaps, almost too minute and immaterial, either for notice or reply.

As a proof of the defendants' *general* neglect as agents, (though surely not issuable in this cause)

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is cited the acknowledged correspondence of the captain from the Havanna; but from the testimony of the defendants' book-keeper, it appears but one of these *numerous* letters was received. (*Letter B. 15th of May*, 1817.) This same letter is next used for the purpose of shewing their *continuance* as agents, in relation to this vessel, and fixing upon them greater responsibility, as being the only persons, to whom the captain looked for advice and relief;—but its perusal at once shews, that the defendants were merely employed as a medium of communication with the plaintiffs; and that the request, contained in it, of communicating to them its contents, was immediately complied with by the defendants, as appears from a copy of their letter of the 11th of June. With the same view, a letter from the plaintiffs to Luke and Lezir of Richmond is produced, which, upon examination, turns out a mere letter of recommendation. To this end the circumstance of the payment of a small balance of freight by Reeves is also laid hold of; which payment, as appears from the testimony was directed to be made by the captain, and received by the defendants, as the plaintiffs' *general* agents, and duly credited in their *general* account, but, independently of direct testimony on this point, let me ask, who did the business of the brig at Norfolk? Who procured the freight, but the captain, acting under the instructions of Marsh?

The want of *written* instructions to effect insurance, particularly when those instructions are said to be *positive*, I have already noticed, as at least contrary to usage and in this case rendered more remarkable, as such instructions *in writing* were always required by the defendants. To this it is answered, that no such were required in making insurance upon the cargo. But it will be recollected, that this insurance was made under the eye of the owner of the cargo, who was himself upon the spot, and sailed in the vessel. However it may be the bounden duty of a ship's husband, if so instructed by his principal, to obtain policies of insurance, it is distinctly laid down that for this he must have express authority. 5 *Burrows*, 2727. Express authority supposes an authority in writing; and this would certainly be less dispensed with upon the present occasion as coming from a mercantile house, the business of which, as appears from the admitted testimony of Jennings, was loosely conducted, and a want of harmony prevailing between the partners. This, however, was not done; nor even an entry made in the book, kept by the defendants for such purposes;—nor even the existence of such orders suspected by the defendants' book-keepers whose duties as such confined them to the compting-house, and necessarily made them witnesses to every conversation held there; and

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Crocker says, if such instructions were given, he should probably have had a knowledge of them. In commenting upon the conduct of the plaintiffs, I mentioned, that no sign of disapprobation or complaint was shewed by them either in their correspondence or or conversation with the defendants or with others; neither in those with Crocker, or Jennings, or Fisher; and alluded to their letter of the 29th July, addressed to the captain at Havanna; and was here interrupted by the counsel, and told that as the captain could not (however closely questioned) recollect any one particular of that letter, but its date, which by the way, *a few minutes afterwards he tries to forget*, I could draw no conclusions from it. But as this letter was received in answer to that of the captain's *requesting instructions how to proceed in relation to the brig*, if any mention had been made of insurance, or any blame imputed to the defendants, for not effecting it, would not have been recollected? And, is it not also a little singular, that a letter, containing his *instructions* upon this head, should so completely have vanished from a memory, sufficiently tenacious of every other circumstance in relation to this vessel? And have we not also further right to complain, inasmuch as every scrip of ours has been so carefully preserved and produced, that he should omit to preserve or

produce this letter of the plaintiffs, necessarily having such a bearing in the cause?

In this discussion, I have shewn that by the affirmative of this proposition, not only is the testimony of the witnesses wholly discordant, but the conduct of the parties plaintiff and defendant utterly irreconcileable to human experience and common life—that the testimony of their principal witness is weakened by inherent defects, unaided by adopting the negative of the proposition.

III. Even were these instructions positive, the plaintiffs have failed in taking the legal steps necessary to make the defendants liable either for a total or partial loss; in the former case, by neglecting to abandon; and in the latter, by being guilty of neglect, as well as deficient in proof.

In this suit we are put precisely upon the footing of *insurers*, and the plaintiffs can recover against us, only in point of law which they could have recovered, in case of loss, in an action against the underwriters, had the insurance been effected. *Condy's Marsh.* 301, *note* 92. *Liv: Agen.* 326, 327 And in this action we can avail ourselves of every defence, such as fraud, deviation, neglect even which the underwriters might have set up in action on the policy. *Id*

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In the case of *De Tassot & Co.* vs. *Crousillet*, in the circuit court of Pennsylvania, it was decided that a claim against an agent, who had neglected to insure, was founded on a breach of contract: that he made himself the insurer; was liable as such, and entitled to the same defence. (*Id.*) And before the same court in the case of *Morris* vs. *Livermore*, the judgment in which was afterwards affirmed in the supreme court, he was declared answerable for the loss as insurer, and entitled to the premium as such. (*Id*)

If the present suit is brought as for a *total* loss, which the prayer of the petition, claiming $5000, full value of the vessel, shews it to be, the plaintiffs must necessarily fail: inasmuch as they neglected to abandon their interest in the vessel to the defendants: upon receiving news of this accident, it was the duty of the plaintiffs, within a reasonable time to elect, to abandon or not: and if to abandon, to give seasonable notice of such abandonment. And though no particular form of abandonment is prescribed, yet in whatever form declared, it ought to be explicit; and; if unseasonably delayed, is considered as waved. *Cond Marsh.* 589, 590—600, 609.

The propriety of this principle is too obvious to need illustration; had such abandonment been seasonably made and signified, we should have

been afforded an opportunity of exercising our own discretion—of using our own credit and funds, and of selecting our own means and agents: but, by neglecting so do to, the plaintiffs have taken every thing upon themselves, and wholly deprived us of those advantages.—Neglecting therefore to abandon, it will hardly be pretend d that they are entitled to recover as for a *total* loss. Is not their neglect, as well as deficiency of proof, equally fatal to their pretensions to recover as for a *partial* loss?

It will be distinctly kept in view, that though by abandoning, the captain, (until superceded) might be considered as *our* agent, yet neglecting so to do, he still remained the agent of the plaintiffs; who, by continuing him as such have adopted all his acts. *Cond. Marsh.* 592. For his acts therefore, *they*, and not *we*, are responsible; and *his* neglect is *their* neglect. Let us see in what this neglect, as well as deficiency of proof, consists, and the legal consequences which result.

As a flagrant proof of continued and general neglect, on the part of the captain, we need but cite his state of perfect inaction, from the 13th of May, the day of his arrival at the Havanna, until the 25th of June following; when for the first time, he applied to the royal Consulado. This was the period, which ought to have excit-

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ed his greatest diligence and activity; but during this time of nearly six weeks, while the brig was lying exposed to heavy expense, and subject to daily deterioration, about what, was this diligent captain employed? He became epistolary, say the gentlemen, and wrote five or six unacknowledged letters to the defendants (but *one* of which, by the way, ever came to hand). He also, it is said, unsuccessfully addressed several merchants at the Havanna. But did these important acts require a period of a month and a half for their performance?—True, on the 10th of June, nearly a month after his arrival, he had something which he terms a survey called upon the brig; but which, I shall presently shew, is wholly irregular and inadmissible. At last, however, having contracted debts, and his money falling short and his crew impatient, he addresses the Consulado, by which tribunal the brig is appraised at $4030, and afterwards, at the prayer of the captain, in order to pay the wages, provision, &c. boarding of himself and crew, and the debts incurred upon this account, she is ordered to be sold, and about the beginning of August is actually sold for $1350; making a difference between the appraisement and sale, of $2680. Of the neat proceeds of sale, amounting to 1233, the sum of $492 is applied to pay the wages, provision and boarding of the captain and crew: and

of this $492, that of $192, exclusively to the captain; who, in addition to his wages and share of provisions, is paid for *six weeks boarding, at the rate of* $12 *per week*. The balance after paying port duties, costs and charges, stands at $357,37 1 2, instead of $270, as stated by the captain; and is *not* deposited, as stated by him with the Consulado, for those *whom it might concern*; but, at his request, *for the owners*.

What, under these circumstances, was the duty of the plaintiffs or of their agent, the captain? Not electing to abandon, and treating this loss at first as a *partial* one, and now seeking to recover against us as for a *total* one, they ought to be made responsible for the slightest neglect, and held to the strictest proof. It was the first duty of the captain, within twenty four hours of his arrival at the Havanna, to have *noted*, and within a reasonable time afterwards, to have extended his *protest*. It ought to have contained a circumstancial account of the accidents, extracted from the log-book, duly attested before the notary, and sworn to by himself, his officers and crew. It is always considered as a most important document, and indispensably necessary by all laws. *Jac. Sea Laws*, 373—*Ordin. de Bilb.* 242, *c.* 24, *no.* 62. It is necessary to fix facts when they are fresh, and to protect parties from the fraud, misrepresentation and imposition of

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the captain, insurers as well as owners. In the case of the brig Struggle, judge Livingston observes, that "perhaps a case never occurs that a vessel is forced to abandon a voyage, without stating the reasons of such deviation in the form of a protest, at the first port where she arrives. Although of itself it would be no evidence, the master might have stated in his testimony, that he had made one at Martinico. His not having done so, subjects him to the just presumption of his having neglected it altogether, and that his going thither was brought about by a necessity of his own contrivance, and not by the act of God, or adverse winds." 9 *Cranch* 75. How came this important and necessary duty to be neglected, of which no master that ever commanded a vessel, is ignorant? By the plaintiffs' counsel, it is *inferred* to be done, from an expression occurring in one of the captain's petitions to the Consulado, where he says he went, within 24 hours, *à formar su protesto, to* make his protest. But was it actually done? If done, would it not make part of the Spanish proceedings? Would it not have been produced on the trial of this cause? Would not the captain so have stated it in his testimony? By the latter omission alone "he is subjected," to use the words of judge Livingston, "to the just presumption of having neglected it altogether." But if

actually done, why let me again ask, on the trial, was it not produced ? As insurers in this action were we not entitled to its production ? As such, ought it not indeed, to have been exhibited to us even prior to the legal demand of a loss ? In this connection, I might also ask, why was the log-book, clearance, &c. or other ship's papers withheld ? These, as well as the protest (if ever made) we peculiarly important in this case. From a part of the Spanish proceedings, one might be led to suspect, that the brig, in fact, did not come immediately from Norfolk, but Perth Amboy; which, if true, would as a *deviation*, discharge us from the present claim. I refer to these proceedings. *Nota que produxó el capitan Americano, de los individuos que componen el equipage del buque de su mando, ſha ut supra, copia del Roll del brig Americano Hero, su capitan John Fisher, procedente de port (Perth) Amboy, que entrò en este puerto de arribada.* Then follows the names of the six sailors: the *very same*, whom, on the following page, we find actually composing his crew. Will it be said this "*note*" is taken from the register of the vessel, and has no relation to this voyage ? But this cannot be the case, as the register, which is transcribed entire, is not introduced until *three* pages afterwards. How is this to be got over ? There is nothing to contradict it in the

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shortness of the period which elapsed after the brig left this port; she sailed on the 23d of February, which gave her full time to discharge her cargo at Norfolk, and afterwards touch at Perth Amboy. The fact, that the captain, not only in his first application to the Consulado, when he recounts his misfortune, but in all his subsequent ones abstains from naming the port of departure, strengthens this suspicion; and it is also not a little increased by the absence of the protest, and all the ship's papers.

It was the captain's next duty to have called a *survey* upon the brig, in order authentically to ascertain the amount of damage, and the expense of repairs. This step is as important as that of making the protest; and equally required both by law and usage. Instead, however, of a regular survey, we are presented with a paper, purporting to be signed by the master of one vessel, by some person (whether officer, passenger, or sailor not expressed) of another, and by a ship carpenter; in which these personages give it as their opinion, that it would cost more to repair the brig than she was worth; but made certain by no calculation of loss, nor expense of repairs. Stamped also with every species of irregularity; neither called by *authority*, nor sanctioned by *oath*, nor attested by any *officer;* and bearing date, the 10th of June, nearly one month after her arrival

The *reasons* also assigned for selling the brig have nothing in common with the defendants, considered in the light of insurers. She is not sold. because in an irreparable or perishable condition. but principally in order to satisfy the wages and boarding of the captain and crew ; a proper reason undoubtedly for selling the brig, but rather a slender ground to make underwriters responsible for a loss. Even the application of the captain to the Consulado is in the nature of a libel for wages.

No *necessity* for the sale, arising from the damage the brig actually received, has been distinctly shewn. On the contrary, though she suffered some damage in her hull, the damage was principally confined to her spars and rigging. On the 12th of May, she is struck with lightning, yet it appears she was not so much injured, as to prevent her arriving the next day, at the Havanna, *fifty-five miles distant.* And so late as the 4th of July following, she is appraised by the Consulado at $4030, only $970 short of her full value, previously to the accident; when, as the captain informs us, she was as good a vessel as he ever sailed in, new, sound, staunch and well formed. On her arrival then at the Havanna, her frame generally sound, and having received only a local injury, was she not worthy of being repaired? But deserted afterwards by her crew,

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abandoned also by her captain who had put himself into snug quarters ashore—in a state both of deterioration and dereliction, her fate was easily to be foreseen. The *necessity* therefore of selling her was one of the captain's own creation, and produced entirely by his neglect and mismanagement. She was in effect rather *sacrificed* than *sold;* and this too by the mere authority of the captain, without any pretence of instructions to this effect from the owners.

Upon no legal or equitable ground, can we be made responsible for the acts of the captain; they must be all referred to the owners by whom he was appointed, and of whom he continued the agent. If insurers, we did not insure against his neglect or mismanagement. The owners therefore, are responsible for all losses arising from these causes. 13 *John.* 458, *Grim* vs. *Phæn. Ins.* 8 *Mass. Rep.* 308, *Cleveland* vs *Un Ins. co.*

But the plaintiffs have not only been *guilty of neglect*, but are also *deficient in proof;* and this *deficiency* principally arises from this *neglect.* In a case, however, always considered as a *hard* one, in which we are not voluntary insurers, but made so by the operation of law, it behooved them, claiming for a partial loss, to adduce satisfactory proof of its amount. As a substitute for regular accounts, and those proofs, usually required in cases of insurances, to ascertain a loss

they have relied upon the proceedings before the *Consulado*, sought to be helped out by the testimony of the captain, so strongly interested in this case, to purge himself from neglect and responsibility towards his owners, and of course given under the strongest bias. But, ought these Spanish proceedings, to which we were neither parties nor privies, to be admitted as proof against us. Were they the proceedings of a court, and even ripened into a judgment, they could only be evidence against a *party to the action*, or one claiming under him. *Peake* 38, *Swift* 15. Instead of this irregular and inadmissible testimony—these *ex parte* proceedings, why did not the plaintiffs pursue the commission *they took out* for the Havanna, in which we should have had an opportunity of cross-examining the witnesses? It would be monstrous to believe, that we can be concluded by the declarations and acts of the different persons, embodied in these motley proceedings, while we were not heard nor represented.

From the want then of regular account and customary proofs, and the absence of the protest and ship's papers, though the plaintiffs may have proved a *loss*, they have failed to actertain its *amount*; without which they can recover but nominal damages. 1 *Mass. Rep.* 236, *Urqhuart* vs. *Robinson*. Had they been guilty of no ne-

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glect, and had there existed an absolute necessity for the sale of the brig, and had we been shewn responsible for the loss, the rule to ascertain its amount, would probably be found in the difference between the neat proceeds of the sale of the brig $1233, and her prior value $5000, giving $3767, which less $250, amount of premium, would leave the balance at $3,517.

But the items which stand against us (not indeed, in the plaintiffs' account, for they exhibit none, but claim, as for a total loss, the unbroken sum of $5000, value of the brig) in the Spanish proceedings, even upon the admission of full proof, are wholly inadmissible. As one item we find charged the expenses of the brig, while at the Havanna, from the 13th of May, date of her arrival, up to the beginning of August, period of her sale: even the sum received by the captain for the wages and boarding of himself and crew, figures in the demand:—making us, in this manner, insurers upon the *voyage and wages*, as well as upon the *body of the vessel*. 1 *T. R.* 127: Even the balance of $357, 377 1 2 left in deposit in the Consulado for the benefit of the owners is not excepted in their claim.

But it is unnecessary to dwell upon particulars, I assert, that the plaintiffs have exclusively claimed as for a *total loss*: they alledge in their petition, the brig to be worth $5000, and pray

that the defendants be decreed to pay $5000, value of the said brig; and they come wholly unprovided with any proof to recover as for a *partial* one; they produce no statement;—they exhibit no account;—they are supported by no vouchers or documents;—they neglect to pursue the commission which they had taken out, by which such loss might have been verified and ascertained;—they therefore, must fail in their demand, as for a *partial loss*. Neither does this speculation, upon the two species of loss, at all contribute to recommend their demand. By first treating this loss as a *partial* one, we are precluded from making any effort to remedy or diminish it; obtaining this advantage, they then boldly demand as for a *total loss;* and on the trial, convicted of neglect and failing in proof, they come back to a *partial* one. And never, in a case of insurance, was it before known, that all what is termed the documentary proofs, was withheld from the insurers—that not a single ship's papers was produced, and not even the protest, if made, suffered to appear.

Aware that the whole case is now before the court, as well the facts as the law, we forbear to notice the different bills of exception, which we took in the court below. As the plaintiffs' counsel, however, in default of other proof and argument, wished to derive some advantage from the

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verdict of the jury, I refer to these bills of exception, to shew, that the jury not only were permitted to receive improper testimony, but were misdirected in points of law. It being a *special* jury, does not turn their finding into a *special* one, and after all the ingenuity displayed, I cannot help thinking, that there is some difference between the *special* verdict of a jury, and the verdict of a *special* jury. Had the plaintiffs wished to have benefited by the verdict of the jury, they might easily have drawn up facts to be submitted to them, and thus procured a special finding. 1805, 26 § 6. But neglecting to do this, it is too late to avail themselves of their verdict; the cause now rests exclusively upon the law and the testimony. 4 *Martin*, 320, *Abat* vs. *Doliole.*

DERBIGNY, J. delivered the opinion of the court. Abel Terril and John T. Marsh, formerly trading under the firm of Terril & Marsh, owned a brig named the Hero, which while here was consigned to the house of Flower and Finlay, the defendants, in February 1817. Sometime before the departure of the brig from this port, John T. Marsh one of the plaintiffs applied to them to cause the vessel to be insured. It is alledged that he gave positive orders for that purpose, requesting the insurance to be made both for the outward and the return voyage. The in-

surance, however was not effected; and the brig having been struck by lightning and considerably shattered on her return here, the plaintiffs pray that their agents may be decreed to pay them damages to the amount of their loss.— From the verdict and judgment which the plaintiffs obtained in the court of the first district, the defendants have appealed.

The defence, which they set up, is

1. That Abel Terrill and John T. Marsh, being no longer in partnership at the time this suit was instituted, could not sue in the name of the firm.

2 That the instructions, given by the appellees to effect insurance, were not positive but discretionary, and they did not extend to the return voyage.

3. That supposing the instructions to have been positive, the appellees have failed in taking the legal steps necessary to make the appellants liable.

I. The first ground we consider as untenable in a case where all the parties interested in the late firm have united as plaintiffs in the suit. It would at best make it questionable whether they can recover jointly or must have judgment each for his share; but it cannot defeat their rights to join in the same suit for claiming property which is so common between them.

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II. The next plea of the appellants rests principally on matter of fact. And here, although it it is evident that the jury cannot have found for the plaintiffs, without being satisfied that the instructions for insuring were positive, and that they did extend to the return voyage, yet as the verdict is a general one, and the whole of the evidence is spread before us, such as it was produced below, the law makes it our duty to enquire into that evidence, and to decide whether it supports the finding of the jury.

That instructions, were given by one of the plaintiffs, to the appellants to effect insurance on the brig Hero, when she was about to sail from this port in February, 1817, is a fact satisfactorily established. Whether these instructions extended to the return voyage of the brig is the question which requires investigation.—To this point one single witness has deposed. This deposition, if rational in itself and not inconsistent with the circumstances of the case, must prevail. Let us examine it attentively. An evening in February, 1817, the witness went into the store of the defendants with John T. Marsh, one of the plaintiffs, and *then and there* heard a conversation which took place between Marsh and the late Michael Finlay, one of the partners of the house, relative to the insurance of the brig Hero, *on a voyage then in contemplation to be*

performed—Here is from the beginning a great want of certainty, as to the voyage for which this is insurance is to be made. This only witness, on whose only deposition the defendants are to be charged, does not know what was the voyage, about which this conversation took place. The brig was dispatched sometime after to Norfolk or Richmond: but surely we are not to conclude from thence that the voyage, in contemplation at the time of the conversation alluded to, was indubitably the voyage which was afterwards performed. Yet unless the identity of the voyage be proved beyond a doubt, the plaintiffs' case has no basis to rest upon. But to proceed: Marsh, who had not made up his mind about insuring the brig, asked Finlay, "whether it would be best to insure her;" Finlay after some hesitation, said: "yes; the brig should be insured, *as she will be on her return voyage about the equinoctial gales.*" Here the witness gives the reason for which the brig was to be insured; that reason must be consistent; for if the motive, said to have been assigned for an action, is incompatible with it, the person who relates what he has heard, will be supposed to have misunderstood the conversation. If a witness would say that a vessel was ordered to be dispatched in December to Greenland, to avail herself of the long days and mild season, there would be no

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doubt of such witness having mistaken one country for another, and no hesitation in believing that the vessel was sent to the south, contrary to the positive declaration of the witness. The mistake here is not quite so striking, but the act and the reason assigned for it are equally incompatible.—The owner of the vessel, hesitating whether he will or not have her insured, is advised to have an insurance effected, *because of the danger of the equinoctial gales.* The vessel is likely to sail, and did actually sail, at the latter end of February; immediate danger awaits her the moment she leaves this port. Yet, what is the reason assigned for the insurance *?* That she will be exposed to the equinoctial gales *on her return.* What! And not on the outward voyage *?* If she was to be insured on account of the equinoctial gales, was not the outward infinitely more dangerous than the return voyage ? During the first, she was *certainly* to be exposed: during the second, it was *doubtful.* If she was detained until the middle of April (and the evidence is that she did not sail before the 22d. though she met with no delay) the dangerous season was over. Yet not a word is said of the insurance on the voyage *out,* and without any recommendation to that effect, Finlay takes a memorandum in writing of the insurance to be made *on both.* Is this credible *?* And must we

not conclude, on the contrary, that the reason assigned for insuring this vessel applied to the immediate voyage, not to the other, and that the witness misunderstood the remark made by Finlay.—An additional reason to be convinced, that such was the understanding of the parties, is that the per centage spoken of is applicable only to one voyage. For if the insurance was to be effected on both, five per cent, not two and a half, would have been mentioned as the probable amount of premium. The conduct of the appellants too, after they had given this advice, agrees perfectly with the motive which they had assigned. They go to the insurance office, and propose to have the brig insured for the immediate voyage, that during which the vessel was likely to encounter the equinoctial gales: no mention is made of the other. And here, let us understand the nature of the instructions given by Marsh to Finlay, the better to test the extent of responsibility to which the appellants may be subject. Marsh did not come to Finlay with a determined intention to have his brig insured at all events: he did not order him at once to cause the insurance to be made He consulted him upon the subject; and had Finlay told him, that the insurance was unnecessary, it is more than probable that he would have thought no more of it. Finlay, however, considering that the vessel was

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about to be exposed to the equinoctial gales, recommended him to have her insured *on that account*. It is very clear, that in giving that advice, he must have had in view the outward voyage; and, that he so understood it is evident from the application at the insurance office. Now, although error will not discharge an agent, to whom positive orders are given, in terms that cannot be mistaken, because there the mistake must be owing to carelessness or neglect, the case is certainly different, when it is the principal, who has misunderstood the advice given him by his agent. If the agent evidently meant one voyage, and the principal understood another, no contract of mandate, can be said to have taken place between them; for in that, as in all other covenants, consent is the principal ingredient, *obligatio mandati consensu contrahentium consistit*; (*ff. mand.*) and there can be no consent where the object of the contract is mistaken: *si de alia re stipulator, de alia promissor senserit, nulla contrahitur obligatio.*

But, supposing that Marsh had given to Finlay clear and explicit orders to insure the vessel, both for the outward and return voyage, yet, from a view of the other facts in the case, we do not deem this sufficient to entitle the plaintiffs to recover.

What an agent fails to do according to his in-

structions, or what he undertakes to do beyond those instructions, will not always make him answerable for the consequences. If the constituent chooses to ratify what he has done, or to assent to what he has omitted to do, he is, of course, discharged from any responsibility. We find in this case, that before the return of the brig to this port, a particular account of the expenses of the vessel, together with a general account current between the parties, is handed to one of the plaintiffs. The account consists of a few items, and amounts only to the sum of $327. The article of the premium of insurance would have nearly doubled it. The account, however, is received, and not one word is said about the omission of the premium; and that, while it was yet time to insure, while the plaintiffs, if they really had ordered the insurance to be made on the return voyage, could yet have the omission supplied, or supply it themselves. Was not that silence an acquiescence in the omission? Most undoubtedly, and why that acquiescence? For this very simple reason: the time of the equinoctial gales was over, and the object of the insurance no longer existed. It is objected that Terril, who received the account, had probably no knowledge of the orders given by Marsh. We must suppose the reverse, and believe that two partners, who reside in the same parish, perhaps in

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the same house, did not fail to communicate to each other any thing material to their common interest; and that during nearly three months, which elapsed between the order for insuring and the rendering of the account to Terril, Marsh did not leave his partner uninformed of what he had done with respect to the vessel, which constituted, it appears, no inconsiderable portion of their partnership stock, and in relation to which, it is admitted, "he was always unwilling to give any instructions without the concurrence of Terril."—It may be further observed, that Marsh himself settled an account with the defendants in July following, and gave them a receipt "for balance as for statement rendered," that in August of the same year, Terril sent them some money to be credited on his account, and that as late as November, he requested them to forward him some articles, for which he says "he shall not be in funds to pay before March." If the whole of this conduct, and particularly the receipt of the account in May, be not an acquiescence in the omission of the insurance, nothing short of an express declaration to that effect could be deemed sufficient. Yet, it is a principle generally acknowledged that the acts of the constituent, from which an adoption of those of his agent may be implied, ought to be construed liberally. In case of an act done beyond or without the au-

thorisation of the principal, there is no doubt that his knowing and seeing it, and remaining silent amounts to an approbation. *Pothier, contract de mandat, no*, 99. Why his silence at the omission of an act by him ordered to be done, should not also amount to an acquiescence, principally while it is yet time to supply the omission, we should be at a loss to conceive.

We are, upon the whole, satisfied that the verdict and judgment from which this appeal is claimed, are predicated upon mistaken evidence, and contrary to the rules of law, which govern the contract of mandate.

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.

QUERRY'S EX'R vs. *FAUSSIER'S EX'RS.*

APPEAL from the court of the first district.

If there be judgment against an executor, for the debt of his testator, and no property of the estate being found, an execution issues against the property of the executor, he can-

DERBIGNY, J. delivered the opinion of the court. In this case, judgment was rendered in this court against the present applicants, as executors testamentary of the late Jean Louis Faussier. 4 *Martin*, 609. And execution having issued against them in their capacity, the writ

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not be relieved, without shewing that all the property of the estate, which came into his hands has been legally administered.

was returned with the endorsement : " no property found " This being considered, as a refusal on the part of these applicants, to exhibit the goods of the estate which they administer, the plaintiff prayed that the execution might be levied on their own property, and the writ having issued accordingly, application is made to this court for relief against that proceeding.

The question to be decided here, is whether an executor, who does not exhibit any goods of the estate of his testator, makes himself liable at once to have the execution levied upon his own.

The common law rule, according to which an executor, who does not plead the want of assets, makes himself liable to pay out of his own property, is not known in our practice. With us, an executor, when sued for a debt of the estate, is not bound to make any other defence than that which the testator himself might have made. If judgment goes against the estate, execution is, of course, levied upon its goods. But what if the executor exhibits none ? Is the plaintiff then driven to the necessity of bringing another action against the executor himself, and of proving either, that he has goods of the estate which he conceals, or that he had such goods, and wasted them ? The practice does not seem to be settled positively : at least we have not found in the Spanish practical books within our reach, any

express rule of proceeding upon the subject. In the *Curia Philipica*, *part* 2, § 10, *no.* 12, we see that, "against the tutor or curator, no execution ought to issue for the debt of the minor, unless he does not exhibit the property of his pupil, &c." Febrero, upon the same subject expresses himself as follows: "although the tutor should have bound himself as such for the debts of his minor, no execution ought to issue against him, nor against his property, unless he should fail to exhibit the goods of his pupil, for upon his offering to render his account for the purpose of paying, (as it is customary to stipulate it in such contracts) he must be sued in the ordinary way, because by his offer, he arrests the executive proceedings, until the balance of his account be ascertained, &c" *Febrero*, *Cinco Juicios*, 3, 2, § 2, *no.* 82.—Making every allowance for the difference now existing, between the Spanish practice and ours, the amount of this doctrine is, that unless a tutor (and the same principles certainly apply to an executor) exhibits the property which he administers, he is at once liable to execution against his own; but, that he may obtain immediate relief by offering to render his account. This mode of proceeding is attended with no hardship: the executor holds his own fate in his hands: if he is a faithful administrator, he can exonerate himself by shewing the situa-

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tion of the estate; if not, it is as well that he should be made at once answerable, as that the creditor should be obliged to resort to another action. It is not for this court to say, how he is to proceed in the first case: we cannot make rules of practice for the other courts; but when no precise mode of proceeding is established, any step, which may lead to the end pointed out by law, must be deemed regular.

The rule obtained in this case must be discharged, and the applicants left to seek relief according to the principles above recognized.

It is accordingly ordered, adjudged and decreed, that the rule calling upon the judge of the first district, to shew cause, why the *fieri facias* issued in this case, against the property of the applicants should not be set aside, be discharged.

Seghers for the plaintiff. *Livingston* for the defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JUNE TERM, 1819.

East'n District
June, 1819.

RALSTON
vs.
BARCLAY & AL.

RALSTON vs. *BARCLAY & AL.*

APPEAL from the court of the first district.

A claim for damages, on account of the defendant's neglect in managing the plaintiff's affairs, must be specifically laid as the petition, and will not be admitted on a petition, which charges only, that the defendant is indebted on an account.

A joint owner is liable for ordinary neglect. If he be in the habit of having the common ship insured, and insures

MATHEWS, J. delivered the opinion of the court. Both parties being dissatisfied with the judgment of the district court, each of them appealed.

The petition states that the defendants are indebted to the plaintiff, in the sum of *L* 4759, 15, sterling money of Great Britain, equal to a certain amount in dollars and cents, money of the U. S. and for greater certainty refers to an annexed account. The evidence in the cause consists of written documents and depositions, taken in direct and cross interrogatories. In the course of the trial in the district court, it appear-

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his own half only, he will be liable to his co-owner for the loss.

ed that the items of the plaintiff's account, consisted of complaints of negligence and misconduct in the defendants, in regard to property of which they had the care and management, and an unjust charge of premium of insurance on a quantity of cotton and tobacco of the defendant.

The counsel for the defendants excepted generally to all the evidence offered by the plaintiff, in support of his action, as being irrelevant and inadmissible on the allegations of his petition. These certainly, without looking in the account, would lead to a belief, that the action was founded on an *insimul computassent.* But when examined and compared with the evidence offered in support of them, they are found to contain charges of gross negligence and fraud. The petition does not state the cause of action, with that clearness and precision, which ought to be recognized in legal proceedings. The obvious meaning, in acceptation of law, of the phrase *indebted on an account* is a debt arising from services rendered on goods sold, the amount of which is not ascertained by an express stipulation. In cases, in which the obligation of the defendant to remunerate is founded on negligence and fraud. it is incumbent on the plaintiff, to set forth the charge of negligence and fraud in his petition. Had the evidence, in the present case, been offered by the plaintiff, such as it appears to be, in support

of the allegations in his petition, and were there no circumstance exhibited by the record, which shew that the counsel for the defendants had perfect knowledge of the charges, which they were called on to contest, we should probably be of opinion that the exception ought to be sustained. But, it appears they had such knowledge before they entered on the trial of the cause, from the manner in which the cross-examination of the plaintiff's witnesses is conducted, and other incidents: it is believed, that now to overrule the opinion of the district court, in admitting the evidence, would be doing injustice, as the object of certainty and explicitness, in setting forth the course of action in a petition, is to inform the defendant of the claims and pretentions against which he has to contend.

In relation to the merits of the case, the evidence shews, that the plaintiff and defendants were joint owners of the ship Alpheus, which, by her register, stood in the name of the defendants, who acted as ship's-husbands; that they have been in the practice of insuring the ship at her full value, thereby securing the interest of the plaintiff and their own, until a voyage attempted to be made, in 1816, in which she was lost, wherein they had only insured one half of her value, which they claimed for their own benefit. It

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is further shewn in evidence, that the plaintiff, in 1815, shipped on board of said ship, and consigned to the defendants, 300 bales of cotton and 30 hogsheads of tobacco, from New-Orleans to Liverpool, and requested the defendants to have insurance made thereon; that the letter advising them of the shipment, and containing a request to have insurance effected, was received only two days before the arrival of the ship at Liverpool. These are the only important facts, established by the testimony on the part of the plaintiff, as connected with the charges in his account.

The first is opposed by the defendants, on the ground of want of instructions to insure, and the second, on that of having faithfully and honestly complied with the plaintiff's request by insuring his cotton and tobacco, paying the premium, &c. On this latter charge against the defendants, the only question which arises is one of fact, and according to the whole testimony relating to it, we see no reason to differ from the opinion of the jury expressed in their verdict.

The plaintiff's right to recover, on account of the alledged neglect of the defendants, in not causing his interest in the ship to be insured, depends more upon legal questions. The evidence in the cause shews most clearly, that the plaintiff and defendants were joint owners and partners in the ship, of which the latter had the ex-

clusive possession, care and management. According to the law *contractus quidem* of the Roman digest, they are answerable to the plaintiff for ordinary negligence. They were bound to take the same care of his interest in the common property, which they did of their own. This they have not done ; having failed to insure for him, whilst they did for themselves. They are liable also on another ground : having been in the practice, of insuring the plaintiff's interest in the ship as well as their own, it is to be presumed, that for that purpose they had proper authority, and could not legally decline performing the same service, without making the circumstance known to him. *Domat*, 1, 15 § 4, *art.* 4.

As to the plaintiff's claim for a difference in the price, we are of opinion, that it is not supported by the evidence.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, and that each party pay his own costs in this court.

Duncan for the plantiff, *Livingston* for the defendants.

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MORTMAIN *vs.* LEFAUX.

MORTMAIN vs. *LEFAUX.*

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

If one undertakes to conduct a newspaper, for a given time, and he quits it before its expiration, because the owner insists on having a piece printed in it, which he disapproves, he cannot recover payment for the time he conducted the paper.

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellee instituted this suit, to recover compensation for services rendered to the defendant, in editing a newspaper, called *Le Moniteur*. He relied on a written agreement entered into by the parties, by which it was covenanted that he should have the direction and management of the paper, during the absence of the defendant from the city, or at least for the space of one year, and that the profits should be divided among them. The petition states, that he had by great trouble and pain procured an increase of subscribers, that he had been conducting its publication for the space of three weeks, with such diligence and discretion, as to promise considerable profit, when the defendant interfered, in violation of his contract, and insisted, in opposition to the true interest of both, on having published a piece of his own composition, in favour of monarchical power. In consequence of which interference, the plaintiff withdrew from the defendant's printing office, and refused any longer to take upon himself the care of editing the paper.

On this statement of the cause of action, tak-

en together with the written agreement of the parties, we are of opinion, that the plaintiff has no right to recover.

Having by an express stipulation the care, and direction of the manner in which the Moniteur should be conducted, during all the time of the absence of the proprietor, or for the term of one year, whilst that period continued he was master of the press, and had as much right to refuse the publication of any improper piece, offered by the defendant, as of those presented by any other person. He ought to have maintained his situation and standing as editor, and persisted in the fulfilment of his duties, under the contract. There is nothing alledged or proven against the defendant, which authorised the plaintiff, to decline the performance of his engagements, during the period stipulated, and to sue for damages, as on a breach committed by the defendant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that judgment, as in a case of non-suit, be entered against the plaintiff and appellee, and that he pay costs in both courts.

De Armas for the plaintiff, *Denis* for the defendant.

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GOMEZ vs. BONNEVAL.

A slave does not become free, on his being illegally imported into the state.

GOMEZ vs. *BONNEVAL.*

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The petitioner is a negro in actual state of slavery: he claims his freedom, and is bound to prove it. In his attempt, however, to shew that he was free, before he was introduced in this country, he has failed, so that his claim now rests entirely on the laws prohibiting the introduction of slaves in the United States. That the plaintiff was imported since that prohibition does exist, is a fact sufficiently established by the evidence. What right he has acquired under the laws, forbidding such importation, is the only question which we have to examine. Formerly, while the act dividing Louisiana into two territories was in force in this country, slaves, introduced here in contravention to it, were freed by operation of law; but that act was merged in the legislative provisions, which were subsequently enacted on the subject of importation of slaves into the United States generally. Under the now existing laws, the individuals thus imported acquire no personal rights: they are mere passive beings, who are disposed of, according to the will of the different state legislatures. In this country, they are to remain slaves,

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and to be sold for the benefit of the state. The plaintiff, therefore, has nothing to claim as a freeman; and as to a mere change of master, should such be his wish, he cannot be listened to in a court of justice.

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

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

BOUTHEMY'S EX'R vs. *DUCOURNAU.*

If the vendor covenant to clear the estate of an incumbrance, interest will not be allowed on the price till he does, and the vendee has knowledge of the estate being clear

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

MATHEWS, J. delivered the opinion of the court. This suit is brought to recover the last instalment of the price of a tract of land, which belonged to the estate of the deceased, and was sold by the plaintiff to the defendant. The act of sale states the existence of a mortgage, on the premises in favour of Berger, the vendor of Bouthemy, which the executor covenanted to have raised and cancelled, before the last instalment should become payable. The note, which was given for it, was made payable on the first of

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March, 1815, but the vendee in justice and equity and according to his stipulation in the act of sale, was not bound to pay till the property should be freed from the incumbrance of the mortgage in favor of Berger. The amount secured by that mortgage, as it now appears, had been paid off and discharged long before the time, at which the last instalment of the price became due, according to the words of the note given for its payment. But this was not made known to the register of mortgages, so as to have the mortgage regularly raised and cancelled, neither was the knowledge of it communicated to the defendant and appellant. It seems to have been a late discovery of the plaintiff and appellee himself. Payment substantially extinguishes a mortgage, and as in the present case, the register had raised Berger's, in obedience to an erroneous order of the parish court, now, that it is clearly ascertained to be extinct by payment, the plaintiff ought to recover.

The parish court having allowed interest, on the amount adjudged, from the time at which it appears to have been payable, according to the expressions in the note, it is contended against this part of the judgment, that the principal was not due, till after the discharge of Berger's mortgage was explicitly made known to the defendant, and consequently, no interest ought to have been

allowed before that time. This knowledge does not appear, to have been brought home to the defendant, till the trial of the present suit. We are, therefore, of opinion that the parish court erred.

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 its opinion, ought to have been given in the parish court, it is ordered, adjudged and decreed, that the plaintiff and appellee, recover from the defendant and appellant, two thousand and twenty-five dollars, and that the former pay costs in this court.

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

JOURDAN & *AL.* vs. *WILLIAMS & AL.*

APPEAL from the court of the first district.

If the marriage contract expresses that the wife brings as her dowry $2373, in four slaves appraised at $2200, and the balance in cattle and furniture, the property of the slaves passes to the husband.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs, as children and heirs of the late Mary Louisa Chauvin, wife of Louis F. Trouard, alledge that they are creditors of their father, for the amount of the dotal and other property of their said mother, and demand to be

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paid by priviledge the proceeds of sale of a certain mulatto girl, a slave of their said father, seized at the suit of D. C. Williams, one of the defendants.

The plaintiffs had put at issue, in the court below, their whole claim on their father's estate, amounting, as they said, to seventeen thousand nine hundred and eighty-two dollars; but the court decreed, that having failed to support it, they could not recover.

They have now reduced it to so much as may embrace their present demand, so that instead of taking into consideration the different items, of which it was composed, this court is called upon to decide only, whether the *dot* or dowry of their mother is due to them in money, for should it be so awarded, it is admitted by both parties that the sum here in dispute, to wit: the price of the mulatto girl Sophia, does not exceed the balance which they would be entitled to receive on that dowry.

The only question, therefore, submitted in the present case to this court, is, whether the property brought in marriage by the mother of the plaintiff, consisting of sundry negroes and some moveable property, was delivered to their father under an appraisement amounting to a sale; for if such was the case, the ownership of those slaves and moveables was transferred to him: the

price of appraisement was substituted in lieu of the things, and his property was from that amount legally mortgaged for the payment of that price.

The expressions in the marriage contract are, on the part of the wife, that she brings for dowry, the sum of two thousand three hundred and seventy-three dollars, in four slaves judicially appraised at two thousand and two hundred dollars, and the balance in cattle and furniture; and on the part of the husband, that he acknowledges to have received the said sum of two thousand three hundred and seventy-three dollars, in the slaves, cattle and furniture above-mentioned, of which he gives his formal receipt and acquittance.—We do not conceive, how any doubt, can have arisen on expressions so clear, that the articles composing the *dot* of the wife were transferred to the husband for the price of appraisement. The Spanish law did not require, as our code now does, any express declaration, that the property appraised and delivered to the husband, is intended to be conveyed to him for the price of appraisement. That resulted from the fact of appraising, and delivering on one side and receiving on the other for a given sum. Even in case of doubt the transfer was presumed. We deem it useless to dwell on so plain a question.

It is, therefore, ordered, adjudged and decreed,

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that the judgment of the district court be annulled, avoided and reversed; and that judgment be entered for the plaintiffs for the neat proceeds of the sale of the mulatto girl Sophia, now in the hands of the sheriff; and that the costs in both courts be paid by the appellee D. C. Williams.

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

NANCARROW vs. *YOUNG & AL.*

If the share of a part owner of a steam boat be attached, and the others obtain the delivery of the boat to them, on giving bond to *abide the judgment of the court*, their liability does not exceed the interest of the defendant.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court: John Nancarrow, the plaintiff in this case, being creditor of John House, a citizen of Kentucky, sued out a writ of attachment against the property of said House, in the first district of this state, by virtue of which writ the steam boat Franklin, whereof House was part owner, was attached. The other owners, to relieve the boat from that attachment, came forward and filed their claim for the three fourths of that vessel, offering at the same time "to give security to account for such part, as should be found to belong to the defendant John House, upon a final adjustment of their respective claims and accounts, upon a due appraisement or sale of the

interest and share of the said John House."—On the filing of that claim and on motion of the counsel for the claimants, it was ordered by the court, "that the boat should be delivered to the claimants upon their executing bond in the sum of ten thousand dollars, with Maunsel White, their surety, conditioned to abide the judgment of the court in the premises."—Judgment having been rendered against House in favor of Nancarrow, for seven thousand one hundred and twelve dollars, and thirty three cents, and only a part of that sum having been satisfied, out of the proceeds of the sale of House's share in the steam boat Franklin, the present suit is brought against his co-proprietors, on the bond by them given, to recover from them the balance remaining due on the said judgment.

To support this pretention, the plaintiff relies on the expressions of the bond into which the claimants have willingly entered, "to abide and perform the final judgment to be made in the premises."—This, it is contended, is a promise to satisfy the judgment to be rendered against House.—But, the claimants did not subscribe this bond as sureties for House: House is not even a party to the bond. They subscribed the bond as principals, and gave surety besides: they subscribed as parties to the suit, and engaged to abide by the judgment to be rendered against

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them, on their offer "to account for the part of the defendant John House, in the steam boat Franklin." This bond, is not one of those which the law requires from a defendant, who wishes to relieve the property attached These claimants were not defendants: they were third parties, who complained that their property had been attached to pay the debt of another; but at the same time, as they acknowledged that an undivided part of that property belonged to the defendant, they prayed that the whole should be delivered to them, on their giving security to account for the defendant's share, *upon its appraisement or sale.* After this prayer, the property is ordered to be delivered to them, on their giving bond with surety to abide by the judgment of the court. This must necessarily be understood, in relation to their obligation to account for the share of their co-proprietor; but should it remain doubtful, from the manner in which the order of the court and the bond are worded, whether these claimants intended any thing more than making themselves responsible for the share of the defendant, justice commands to put upon that bond, the most equitable construction, and will reject an interpretation which would tend to make them pay the defendant's debt, not only out of his share, but out of their own.

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

Eustis for the plaintiff, *Turner* for the defendants.

TREGRE vs. *TREGRE.*

A husband may proceed, without his wife, to the partition of the moveable property of a succession accrued to her.

Parol evidence cannot be received of the irregularity of the proceedings of a family meeting before the parish judge.

If such proceedings be written in French, they will be set aside.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. Antoine Trègre, the defendant, after the death of Mary Barbe Haydel, his wife, caused an inventory of their joint estate to be made, and under the 2d. section of the "act to amend the ninth section of the eighth title of the first book of the digest, respecting tutors and curators of minors, &c." obtained the whole estate to be adjudicated to himself for its estimated value. The children of Antoine Tregre, and Mary Barbe Haydel were nine in number, four of whom were of age, and the others minors. Of these nine children, four appear as plaintiffs in this case, and demand that the adjudication be declared null and void, and that a new estimation, sale and partition of the property may be ordered.

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The district judge has dismissed their petition on the ground, that the decree of adjudication being a judicial proceeding, their complaint against it ought to have come before him in the form of an appeal. This reasoning, we think, was correct with respect to one of the plaintiffs, but not to all, for some of them were not parties to the adjudication, and therefore, could not have appealed, or if they could, were not bound to resort to that mode of proceeding as their only remedy.

The principal grounds, on which the plaintiffs rely, are, that the family meeting, whose consent is required by law to an adjudication of this nature, was irregular and incomplete, and that the proceedings on the adjudication were not written in English, as all judicial proceedings ought to be. They have further alledged various other causes of nullity, which will hereafter be examined, if found necessary.

Previous to entering into an investigation of the merits of this case, the relative situation of the plaintiffs must be understood and fixed, and a discrimination, between their respective rights, established. Two of the plaintiffs, Mary and Cité Tregre are the wives of Elie Giron and Sylvain Roussel, who appear to have been present at the inventory, appraisement and adjudication, and to have received their respective shares of

the whole estate: another, Eulalie Tregre, now married to G. Haydel, was, at the time of the inventory, a minor above the age of puberty, whose curator *ad lites* Elie Giron, signed the proceedings; the fourth, Joseph Tregre, was also a minor above the age of puberty, whose curator *ad lites* was then, and still is the same Elie Giron.

The two first, have clearly no right to petition against the adjudication of so much of the property inventoried, as consisted of moveable property. A husband being by law authorised to proceed, without his wife, to the partition of the moveable part of a succession accrued to her. The claim of Eulalie Tregre is also inadmissible, so far as it respects the moveable property, the person, who has married her since, being proved to have received, as well as the others, her share of the price of adjudication of the whole estate. As to Joseph Tregre, who is still in the same situation as on the day of the adjudication, that is to say a minor assisted by the same curator, his petition is, on his part, premature, and on the part of his curator, a most extraordinary step, to say the least of it.

The demand of the three married women, authorised by their respective husbands, to petition against their acts must be considered, so far as it respects the immoveable property and slaves, as strictly legal, whatever may be its aspect other,

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wise; and the enquiry now is, whether the adjudication of that property to their father, was made according to law.

The attempt to shew, by parol evidence, that the proceedings conducted by the parish judge were irregular, and that the record of them does not contain the truth, was resisted by the defendant, on the ground that no oral testimony can be introduced against matter of record, except only where such record is attacked as false, and then under the rigid rules prescribed by law to the party, who undertakes to prove the falsity. We think, with the counsel for the defendant, that the plaintiffs have not pursued such steps here, as could entitle them to produce witnesses to impeach these proceedings.

But the counsel for the plaintiffs says that, supposing the proceedings to be otherwise regular, they are radically defective in one point, to wit: because they are not written in English as the constitution requires.—The language of our constitution is that, "all laws which may be passed by the legislature and the public records of this state, and the judicial and legislative written proceedings of the same, shall be promulgated, preserved and conducted in the language in which the constitution of the United States is written"

It has been debated between the parties, whe-

ther these proceedings are such as the law calls judicial. But having no doubt, that the acts of a judge presiding as such to the partition of an estate, and decreeing the adjudication of it according to law, are stamped with the character of judicial proceedings, it is our duty to declare, that unless such proceedings are written in English, as the constitution directs, we are bound to pronounce them void.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be reversed; and this court proceeding to give such judgment, as they think ought to have been given below, do further adjudge and decree, that the adjudication made to the defendant, of the slaves and real estate, inventoried as the common property of him and his children, be set aside and avoided; and that a new partition of the said objects be proceeded to according to law, reserving to the defendant his right against the husbands of the plaintiffs, to compel them to account for, or refund the sums which they have received, as the shares of their wives in the appraised value of the said slaves and real estate.

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

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PLANTERS' BANK vs. *GEORGE.*

APPEAL from the court of the first district.

A witness, is not protected from answering a question, on the ground, that he may thereby make himself liable to a civil suit.

DERBIGNY, J. delivered the opinion of the court. In this action, the Planters' bank demanded of the defendant, master of the brig Hannah and Rebecca, the reimbursement of a quantity of dollars, contained in a keg, which was sent to be shipped on board of his vessel, and was, as they alledge, lost through his carelessness — The facts, however, being settled by a special verdict, in which the jury have declared, that this loss did not happen through the defendant's fault, there is no occasion to enquire into the merits of the case as they now stand.

But the plaintiffs contend that, had the facts been presented to the jury, in the manner in which he had stated them, and which the court would not admit, a different result would have been obtained from their verdict. It is, therefore, necessary to ascertain, whether the district judge acted correctly in refusing to submit those facts to the jury.

By the 10th section of the act, entitled, "an act to amend the several acts, to organize the courts of the state," it is provided: "that in every case to be tried by a jury, if one of the parties demands that the facts set forth in the peti-

tion and answer, should be submitted to the said jury, to have a special verdict thereon, both parties shall proceed, before the swearing of the said jury, to make a written statement of the facts so alledged and denied, the *pertinency* of which statement, shall be adjudged of by the court and signed by the judge, and the jury shall be sworn to decide the question of fact or facts so alledged and denied, &c "—This provision, which is, we think, the last that was enacted on this subject, requires the facts to be submitted to the jury, as they are alledged and denied.—This seems to have been understood as meaning, that the issue must be submitted to the jury nearly *verbatim*, as set forth in the pleadings. But should such have been the intention of the legislature, there was no necessity to provide that the *pertinency* of the statement of facts should be judged of by the court, for if the statement was to contain the allegations and denial in the words of the pleadings, there was no doubt about their *pertinency*.—No such restriction, we conceive, was ever intended; and no such restriction could have been prescribed without defeating the object of the law, which evidently is to enable the parties to obtain from the jury, their decision upon the naked facts, unconnected with any matter of law. Taking this very case as an example, the petition states that the dollars here claimed were deli

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vered to the defendant, and that they were lost through his carelessness. To shew such a delivery, the plaintiff could certainly state as a fact that the delivery was made to an agent of the defendant; but finding that they were delivered to the defendant himself, on evidence of delivery to an agent, is a finding on matter of law, for what constitutes an agent, and how far be may bind his principal, are matters of law. Again, it is said in general terms, that these dollars were not lost by the fault of the defendant: —this is, to all intents and purposes, a general verdict, the result of a consideration of both law and facts Yet, for aught we know, the facts, on which this opinion is predicated, might not warrant such a conclusion. The object of a special verdict is to establish facts, not inferences from facts One of the questions proposed by the plaintiff was, whether the loss happened after the ropes had been tied round the keg of dollars, and while the crew of the brig, was by the direction of the mate, hawling it on board. This was a proper fact to be submitted to the jury. Then the inference from it would have been, either that it happened through the defendant's fault, or that it was not chargeable to him. But this inference was matter of law, because what constitutes neglect in a carrier is matter of law.

It is hardly necessary to travel out of this case,

for example, to shew that a verdict to be special, must state the naked facts and no more, and that a verdict on a question couched in general terms, will, nine times out of ten, be found to include matter of law as well as of fact.—It appears to us, therefore, proper to admit the parties to lay before the jury the facts of their case, as naked as they can present them, and that no other restriction can be imposed upon them, than to require such facts to be pertinent to the issue. In this case, we think, that such part of the facts stated by the plaintiffs, as had no other object than to establish the agency of Taylor and Purdon, on this occasion, as agents of the brig, were irrelevant to the issue, in a suit against the captain alone, but that the rest was pertinent.

The plaintiffs further complain, that a witness, by them summoned, was excused from answering, because the questions put to him, tended to extort from him a disclosure of facts which might affect his interest, so as to make him liable to a civil suit.

Upon a question of this kind, the ancient laws of the country can afford no assistance. Laws which required torture to be inflicted on witnesses, suspected of participation in a crime, to compel them to reveal their own guilt and infamy, would not be very tender in protecting a witness, when his interest alone was at stake. Such laws,

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being at open war with the principles of a free government, must be considered as abrogated in common with all dispositions, repugnant to the liberality of our institutions —Hence, as much from a tacit conviction, that the former laws of evidence are sometimes adverse to the privileges of freemen, as from the introduction of the trial by jury with all its concomitants and consequences, it has grown into practice to resort, upon questions of evidence, to the principles recognized in a country where liberty directs the administration of justice.

Referring, therefore, to those doctrines, we find that in England, it was long doubted, whether the respect due to individual security and comfort, would permit to compel a witness to disclose facts, which might subject him to a civil action, or charge him with a debt. Much was argued on both sides of the question; decisions were given, disclaiming any right to extort such disclosures; till at last, on a question referred by the house of lords to the twelve judges, eight of them, with the chancellor, were of opinion, that, provided the facts sought to be proved did not expose the witness to any penalty or forfeiture, he was bound to disclose them, though they should eventually subject him to a civil suit.

After that solemn adjudication, in a country where personal rights are so well understood,

there can be no inconvenience in adhering to those principles here, where the laws which we derive from our former government are far from being so liberal. 1 *Am. Law Journ.* 223.

In truth, it is difficult to conceive why, in the same court, where the parties themselves may be compelled to disclose the secret which may ruin their case, nay, where their silence, on such a question, is taken as an implied confession of the fact, where the prejudice to be suffered by that compulsion is certain and immediate, witnesses, called upon to avow a just debt or confess themselves liable to a just claim, should be authorised to conceal the truth to the injury of others, merely because they may eventually be exposed to pay what they justly owe.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be reversed, and that this case be remanded, to be tried anew, with instructions to the judge to admit and suffer to go to the jury, the facts stated by the plaintiffs, except such part thereof, as relates to the agency of Taylor and Purdon as agent of the vessel only, and also to admit the testimony of Thomas L. Taylor, and require his answers on all facts pertinent to the issue, although the disclosure of such facts may expose him to a civil suit.

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PLANTERS' BANK vs. GEORGE.

Livermore for the plaintiffs, *Maybin* for the defendants.

HUNT vs. *MORRIS & AL.*

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Where a suit is not on trial before the jury, it cannot be discontinued, without the leave of the court.

The owners of a steam boat, which is destroyed by fire, are not liable to the freighters, if it appear, that proper diligence was used, although the accident happened in the night whilst the boat was on a return from a trip up the river to procure wood, during which she ran aground, while her hands were getting in wood.

APPEAL from the court of the first district.

MATHEWS, J delivered the opinion of the court. The pleadings, as they appear on the record, present a contest for decision arising in *locatione operis mercium vehendarum* or contract of hiring of the carriage of goods: and the principal question relates to the liability of carriers, according to our laws on the subject of this species of bailment.

The petition is in the usual form, and the plaintiff claims damages to the amount of the value of certain goods and merchandize, contained in boxes and packages, which were placed by him on board of the steam boat Vesuvius, then lying in the port of New-Orleans, to be carried to Natchez. He states that the goods were not delivered according to contract, but were lost and destroyed by fire, on board of said boat, in consequence of the negligence and misconduct of the master and those employed under him.

Before a discussion of the merits of the case,

it is necessary to dispose of a bill of exceptions taken by the plaintiff's counsel to the opinion of the district court, in denying him the priviledge of discontinuing his suit; after the trial had began and the evidence was closed, but before the case was finally submitted to the court for decision

If the introduction of the trial by jury, in our system of jurisprudence, necessarily brings with it all the rules of the common law of England, on that subject, it is clear, that a plaintiff may, at any time, before the verdict of the jury is recorded, suffer a non suit. This practice which at first originated in the liability of plaintiffs to be amerced, when they failed in their suits, at the discretion of the king *pro falso clamore*, since the disuse of amercements, has been continued for their benefit, in cases in which they suppose, that sufficient evidence has not been given to maintain their claims. Admitting that this must be an inevitable consequence of the trial by jury, it does not appear to us, that an absurd inconsistency in practice, should be exhibited should a different rule prevail in cases, submitted entirely to a court, competent to judge them both as to law and fact, wherein the discontinuance should be left to the discretion of the court. Issues of fact are not, in our system of practice, necessarily to be tried by a jury: their

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trial in that way, depends on the option of either party: and, as by the choice of a defendant, a plaintiff may have his case submitted to judges whom he would not choose, there is no palpable absurdity in allowing the opportunity, by suffering a non-suit, to renew his action, in order to have it submitted to a court or a different jury. But, even should an apparent contradiction exist in practice, as it relates to the different modes of trial, by the court or a jury, arising from the various codes from which our jurisprudence is formed, it is not for us to correct it. In a former case, decided in this court, we have said that, after the commencement of the trial of a cause, it was discretionary with the court before whom it is pending to permit or not a discontinuance, and we see no reason, now, to alter this opinion. 5 *Martin*, 20. The Spanish law provides that, after a *contestatio litis*, the plaintiff cannot discontinue or change his action *ad libitum*. *Febrero, Cinco Juicios*, 2, 3, 1, *n.* 219.

The power exercised by courts of justice of allowing or refusing to plaintiffs leave to discontinue their actions, ought (like all their other powers) be used and directed by a sound and legal discretion, according to the particular circumstances of each case. Why should a plaintiff, after having harrassed a defendant by bringing him into court and compelled him, with great expense

to enter into his defence, be permitted to dismiss his action at any time before judgment? Our laws and the practice of the courts under them, give great latitude, for the amendment of pleadings: continuances are obtained with facility, so as to allow the parties in an action to come fully prepared to trial, and prevent as much as possible, surprise and injustice, and when neither is likely to take place, no error or want of proper discretion can be attributed to a decision, which denies leave to discontinue. Whether injustice will probably be the result of such a denial, may be most clearly discovered after hearing all the evidence, as in the present case, under the circumstances of which, as they appear to us, we are of opinion, that the district court did not err in refusing leave to discontinue.

The attempt of the plaintiff's counsel, to discontinue his action, seems to have arisen from an apprehension, that they had failed in proving sufficiently the delivery and value of the goods, although in argument, they insist strongly on the fullness and legality of the proof. Whether the evidence would or would not in this respect, authorise and support a judgment in favor of the plaintiff, this court will not inquire, being of opinion that, under all the circumstances of the case, even admitting full proof of the delivery and va-

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lue of the goods to have been made, the defendants are not liable for the loss of the property which was destroyed by the burning of the boat.

In examining the responsibility of a carrier for hire, he must be considered as a bailee of goods for the purposes expressed in the contract and liable under it, according to the common import and meaning of such a contract, where nothing is expressed, which creates an increase of obligation: and, here we may lay aside all the doctrine on the subject, as inapplicable, which proceeds from the principle of holding common carriers responsible like insurers. Considered simply, as bailees on a contract of hiring of carriage, they are answerable for ordinary neglect, which is the omission of that care, which every man of common prudence, and capable of governing a family takes of his own concerns. This is a definition and rule laid down, by Sir William Jones, as founded on the plain elements of natural law, and the principles contained in the codes of different nations, on this branch of jurisprudence, which we believe, to be in conformity with the provision of our own laws on this subject.

Our statute provides that, "carriers and watermen may be liable for the loss or damage of things, entrusted to their care, unless they can prove such loss or damage has been occasioned

by accidental or uncontrolable events. *Civ Code*, 384, *art.* 63. The French text has the words *cas fortuit ou force majeure.* By another article they are subjected to the same obligations and duties, which are imposed on tavern keepers, *art.* 61. These are made responsible for thefts and damage done to the goods deposited with them, whether they occur by the acts of their servants or persons who frequent the tavern: they are not answerable for robbery, nor where the theft is committed after breaking open the outer door, or by any other extraordinary violence. This clause seems to relate solely to thefts of property, deposited with an inkeeper, and we cannot perceive its applicability to the present case, although relied on by the counsel of the plaintiff.

The rule, by which the responsibility of carriers for loss or damage is to be ascertained, is found in the part of the code just cited. They are excused by accident, or overpowering force, *cas fortuit ou force majeure*, wherever the first does not occur by their negligence, and they do not unnecessarily go in the way of the latter.—In other words, if they have used that due diligence in the performance of the contract, which the nature of their situation requires. It appears, by the expressions of the code, that the accident or overpowering force must be proven by the car-

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rier, in order to excuse his failure to perform his undertaking, according to agreement. In cases, where the loss or damage arises from occurrences entirely beyond the control of the carrier, such as an attack by the public enemy, a storm or tempest, it is enough for him to prove the fact, and he who claims compensation for the loss is to prove the fault or misconduct of the carrier, in order to recover against him. But, in those cases, which are not readily supposed to happen, without negligence, such as a loss by robbery, fire, &c. the carrier is bound to shew, that they happened without any fault or negligence on his part, which, being a negative proposition, can only be established by evidence of the ordinary care and attention, usually given by diligent men on like occasions. *Curia Philipica*, 509, *art.* 31.

This rule gives to the plaintiff the advantage of implied or presumptive evidence of negligence, on the part of the masters and owners, which they are bound to disprove by shewing due diligence. How far they have succeeded in this, is to be ascertained by the evidence and circumstances of the case.

The plaintiff thought fit to place his goods on board of a steam boat, which, being propelled through the agency of fire, must from the nature of things, be more expressed to destruction by that element, than boats which are so by the ap-

plication of ordinary powers. At the time when the boat was burnt, the agent of the owners (who has become one of them since the boat was repaired) was on board as well as the master. The usual number of men skilled in this sort of navigation were employed, in conducting the boat on the short trip made for the purpose of procuring wood, during which the accident happened, which destroyed the boat and cargo. We are clearly of opinion, that this trip of itself does not establish such a neglect, on the part of the master and agent, as will authorise a recovery against them or the owners. The circumstance under which it was undertaken, and the occurrence, whilst it was in execution, are much relied on by the counsel for the plaintiff, as shewing what they term actual negligence, in leaving the port late, so that the boat would probably be in the night on her return, and suffering her to get aground, whilst the hands were getting in the wood.

As to the time of day, in which the trip was begun, it may be observed, that all masters of steam boats, are in the constant habit of running them by night, whenever extraordinary darkness does not forbid it, and this appears to us a sufficient excuse for the conduct of the parties in the present case. The risk by fire, if there be any difference, is less by night than by day, because

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its commencement in any part of the boat would be more readily discovered in the dark. The circumstance of the boat being run aground, in the slight degree, in which it appears from the evidence that she was, is one of these accidents which often happen, in this kind of navigation, in which the boats have so frequently to approach the shores of the river, for the purpose of getting wood; and it ought not to be considered as proof of culpable negligence.

It appears, from the whole tenor of the evidence on the part of the defendants, that the master, and all his men on board, were in the actual performance of their respective duties, when the unfortunate event occurred, which involved the property of both the plaintiff and defendants in one common destruction, and that no negligence can be attributed to those who were concerned in the navigation of the boat, which was consumed together with her cargo. It is to the plaintiff *damnum absque injuria.*

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

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

HARROD & AL. vs. *GLENNIE & AL.*

East'n District
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HARROD & AL
vs.
GLENNIE & AL.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiffs obtained a writ of attachment, against the property of the defendants, which was levied on one hundred and thirty-seven tons of iron, the cargo of the brig St. Paul. Bartlett and Cox, claiming the iron as their property, intervened in the suit, and thier claim was sustained. The plaintiffs appealed.

If A's agent, real or pretended, draws bills on him, which are endorsed and sold by B., who with the proceeds purchases and ships a cargo for A.'s account and risk, and A. declines receiving the cargo, denying the authority of the drawer, and suffers the bill to be protested, and afterwards a third person sells the cargo and ships a return one for the account and risk of the owners of the outward cargo, and B. after paying the protested bill, receives the return cargo, it cannot be attached by a creditor of A.

The facts, as they appear by the record, are as follows: James Carleton presented himself to the claimants, as the agent of the defendants, on whom he drew bills to a considerable amount, which were endorsed and sold by the claimants, who with a part of the proceeds purchased a quantity of tobacco, indigo and sugar, which they shipped on board of the brig St. Paul, for the account and risk of the defendants, and which were consigned to A. Gleg and Son, of Bergen. On the brig's arrival at that port, the consignees directed the master to proceed to Gottenburg and address himself to R. Dixon. This gentleman, having suspended his payments, when the brig reached Gottenburg, J Dixon his brother, at the request of the master, wrote to the defendants, to inform them of the brig's arrival and to ask their

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orders. In the mean time, the cargo was stored. The defendants, in their answer to Dixon, informed him, that as the cargo of the brig had been shipped by Carleton, without their authority, in any shape whatsoever, they did not acknowledge it to be on their account or risk, and requested him to secure for them, out of the proceeds of it, *L.* 247, 4, stg. the amount of the premium of the insurance made by them, at Carleton's request. On this, J. Dixon, at the master's solicitation, sold the cargo, and out of the proceeds purchased the iron, which the plaintiffs have attached, and which was consigned to the owners of the outward cargo of the brig.

The bills drawn by Carleton on the defendants, endorsed and sold by the claimants, were returned duly protested and were paid by the latter. On the arrival of the brig, and previous to the attachment of the plaintiffs, her cargo, the affairs of the claimants being suspended, was turned over to Montgomery and son to sell it, and account to them for the proceeds.

Besides the outward cargo of the St. Paul, the claimants, having raised money by the sale of Carleton's bills on the defendants, loaded another brig, the Moscow, which on her return they attached without effect.

The plaintiffs must fail, in this case, unless they

shew that the defendants, might have compelled the claimants to deliver to them the return cargo of the St. Paul, and this it is contended they could, because, by the payment of the premium of insurance on the outward cargo, they ratified and adopted the purchase and shipment of it; and the property of it having once been vested in them, no act of theirs can divest the plaintiffs, their creditors, from the right of attaching it.

Neither the premises nor the conclusion appear to us correct. Notwithstanding, their disapprobation of Carleton's conduct, they might to avoid a loss, which it might be their interest to avert, insure the cargo: and, if they had approved of his conduct and accepted the shipment they might, at any time, before any creditor of their's attached the cargo, with the consent of the shippers, the present claimants, decline considering it any longer as their own. This they have done, and the claimants afterwards and before any attachment, by taking the iron as their own, have sanctioned the act of the defendants. Now the latter could not successfully, at the time of the attachment, demand the iron from the claimants; Carleton had no right thereto: the district court consequently, correctly considered it as the property of the claimants.

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

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HARROD & AL. vs. GLENNIE & AL.

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

MADAUD vs. *MITCHELL.*

The wife has a tacit mortgage for her dower, on any real property sold by her husband,

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court The plaintiff claims a right of tacit mortgage, on a certain slave sold by her husband to the defendant The special verdi t, found by the jury on the only fact submitted to them, shews that the plaintiff brought into marriage, as dower, a sum of two thousand and forty-three dollars; the defendant did not deny, that the property found, in the possession of the plaintiff's husband, fell far short of that amount; but she alledged certain facts in evidence of the plaintiff's claim, none of which she attempted to prove. There is no complaint, that she was prevented from proving and submitting to the jury any of those facts. The case is before us on the special verdict, and nothing else. However hard, therefore, this case may be, there is no ground on which relief can be given to the defendant.

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

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

ANDRY & AL. vs. *FOY.*

East'n District.
June, 1819.

ANDRY & AL. vs. FOY

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

Although several slaves be bought together and for a single price, the sale will not be rescinded for all, if any number less than the whole have any redhibitory defect.

No interest, even from the inception of the suit, is allowed, when the sum due is liquidated by the judgment only.

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The plaintiffs bought from the defendant, nine slaves, for $10 500, payable in their note at one year. Six of them having successively ranaway, they brought the present suit for the rescission of the sale, alledging that the slaves were addicted to running away, in the knowledge of the defendant, prior to the sale. There was judgment for the rescission of the sale as to the six slaves, who ran away, and the defendant was condemned to the payment of $6500. Both parties appealed.

Mazureau, for the defendant. The parish court erred, in rescinding the sale, as the defendant, by the act of sale, bound himself to warranty against the *maladies*, which give rise to the redhibitory action, and against all troubles of eviction: which was excluding all warranty in regard to *moral* defects.

The defendant, having in his act of sale declared the names of his vendors, the dates of their acts of sale, with the offices, in which they are to be found, the plaintiffs ought to impute, to their own negligence, their ignorance of the bad habits of the slaves, as they would have been informed

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of them, if they had taken the trouble to examine these acts.

The correspondence of the parties, before the sale, shews that the plaintiffs confined the responsibility of the defendant, with the regard to the running away of the slaves, to a period of fifteen days, during which he had them on trial.

There is not any evidence on the record from which it may be fairly concluded, that the habit of running away existed in the slaves, before the sale to the present vendees.

Admitting, that all these points may be determined against us, the judgment of the parish court is erroneous, on account of the extravagant sum at which the slaves, whose sale is decreed to be rescinded, are valued—it is also erroneous in refusing to the defendant a reasonable hire for these slaves, while they were with the plaintiffs, and lastly, in allowing to them interest on the sum awarded. This sum, being unliquidated till the judgment of the parish court, could not legally bear interest. This court held so in *Pierce* vs. *Flower & al.* 5 *Martin*, 388.

Moreau, for the plaintiffs. In the sale of slaves, the vendor's warranty for corporal or moral defects, which give rise to the redhibitory action is always implied, and the silence of the parties in the present case, with regard to moral defects,

cannot be considered as a waiver on the part of the plaintiffs, of the action which the law gives to vendees, if the slave be addicted to the habit of running away. *Servus fugitivus vitiosus.* The warranty, in such a case, is of the *nature* of the contract and will exist, notwithstanding the parties have been silent thereon. *Code Civ.* 356, *art.* 65. *Pothier, contrat de vente, n* 181.

It is true the warranty, not being of the *essence*, but only of the *nature* of the contract, may be excluded. But the exclusion must either result from the formal expression of the intent of the parties, or necessarily result from the clauses of the contract. *Part.* 5, 5, 66. *Curia Philip.* 321, *n.* 28, and the vendor will be liable even, if the warranty be excluded, if he concealed the defect *scienter*, or otherwise acted *malâ fide. Macarty* vs. *Bagneres*, 2 *Martin*, 149, *Code Civ.* 357, *art.* 68, *Pothier, contrat de vente, n.* 229, *Rodriguez's note, on ff.* 21, 1, 14.

The defendant, therefore, is liable for the habit of running away of these six slaves, because the legal warranty was not excluded, and if it had been, because he did not act with good faith, having concealed this moral defect from the plaintiffs, to whom he was bound to declare it. That he was acquainted therewith, appears from the act of sale of W. Brant to him, by whom Lindor is sold, without any warranty for moral

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defects, and the acts of sale of M'Claskey and Hopkins, by whom Horace, Anthony and Sandy are sold to him as runaway slaves. The registry of the jail shews, that these four slaves were confined for running away, as well as John and Isaac, while they were in the possession of the defendant. Farther, A. Abat, the broker, by whose intervention the purchase was effected has deposed that, according to the defendant's instructions, he offered them, to the plaintiffs, as good and well disposed slaves.

If the defendant was bound to declare, as we have shewn, the habit of running away of those slaves, he cannot clear himself under the pretence that he gave the names of his vendors, the dates of, and the places in which his titles could be seen by the plaintiffs, especially as we have shewn that he instructed his broker to assure them, that the slaves were good and well disposed.

The correspondence between the parties, to which the defendant's counsel refers, shews only that some of the slaves having manifested some reluctance to go with the plaintiffs, they stipulated, that they should keep these for a fortnight on trial, and that should any of them runaway, during that time, the defendant should support the loss. The plaintiffs' intention was to guard against the consequences of the purchase of slaves disposed to run away, but of whose habit to escape

legal evidence might not be attainable. This precaution, cannot be considered as a renunciation of the redhibitory action which the law gives to vendors.

On our part we contend, that the parish court erred in decreeing a partial rescission of the sale only. The slaves were sold as one entire gang for one price. It is in evidence, that the defendant, delaying the delivery of four of these nine slaves, and being pressed by the plaintiffs to deliver them, offered to keep them, under a deduction of $4500, and was answered that the plaintiffs would have all or none.

Although it be true, as a general principle, that when several things are sold together, the sale is only to be rescinded as to the one which has a rehibitory defect, it is otherwise when it appears, that the vendee would not have bought the others without it.

In the present case, the circumstance, of all the slaves having been purchased for one price, is evidence of an intention of the plaintiffs not to purchase them separately. "What has been said, as to slaves sold as comedians, or the like, takes place when they have not been sold separately, but as constituting a gang, and a circumstance which causes this to be presumed is, that one price has been given for the whole. Therefore, Africanus says, that when several things of

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the same kind, as several players or a troop of comedians, are sold, inquiry is to be made, whether a price was agreed upon for each, or whether one only for all, and this will shew whether there was one only or several sales; this will enable us to determine, whether the vendor is to be compelled to take a sick slave only or all. *C.* 33, *Afric. lib.* 7, *quæst.* This agrees with what is said by Labeo: if you have sold several slaves, warranting the health of all, although all be not sick, but one or more, you will be liable as to all on your warranty. *L.* 64, § 1, *Pompon. lib.* 17, *epist.*" 1 *Pothier*, *Pandectæ*, 21, 1, 2, *sect.* 5, § 1, *n.* 65.

Admitting, however, that the parish court was correct in rescinding the contract, as to the six slaves only, it has erred, in ascertaining the sum, which the plaintiffs are entitled to recover. There is on the record a list of the slaves sold, in the handwriting of the defendant, in which their respective qualifications and talents are specified, as well as sheir ages. From it, this court will perceive that the three slaves, whom the plaintiffs are compelled to keep, are the oldest and those who are represented in that list as the less valuable. Yet, the defendant is decreed to pay $6500, for the six youngest and most valuable that is to say, at the rate of $1083 per head, while he will receive for the three others, $4000, that is to say, $1333,33, a head.

Mazureau, in reply. The sole circumstance, of a number of things of the same kind having been sold for one price, does not suffice to induce a court to conclude, that the intention of the vendee was not to acquire them individually. Pothier in his pandects, after the part of them which has been cited by the plaintiffs' counsel, adds: this circumstance is not always sufficient to establish the presumption, that the parties intended to treat separately of the things sold, and not individually, for although these things were sold altogether and for one single price, they may have been considered and valued separately, and *vice versa*. It is possible that there should be but one sale, although the several things be bought each for its distinct price, and the sale will be rescinded as to all, for a defect in one of them: which is ordinarily the case as to a troop of slaves educated as comedians, a span of horses or of mules. In which cases one is of little use without the rest. *Pothier, Pandectæ, loco citato, l.* 1, § 1.

In the present case, the slaves sold were field hands, their value consisted in their strength, and the services of any one of them were quite independent from those of the rest or any of them. As a comedian cannot act alone, and a span of horses, well paired, are of much greater value, if possessed together, than if owned individually, the presumption that he who purchases comedians or

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a span of horses, would not have given the same price for each slave or horse, if he had not contemplated the additional value, which results from the connection or match.

Even in regard to the slaves, who have been taught any of the handicraf trades, which are considered as useful on a plantation, as the trade of a carpenter, blacksmith, mason, or wheelright, the value of such is not at all increased, from the circumstance of their being acquired together. He who possesses a carpenter, may procure a blacksmith or mason with facility, if he be in possession of the means. But he who is possessed of a horse, will not with the same facility, find the opportunity of procuring one that may match him in height, bulk, color, shape and speed: so at Rome where slaves were trained to scenic performances, a number of them trained together, and used to act the several parts of certain plays, suffered a great diminution in their value, when they were sold separately.

MARTIN, J. delivered the opinion of the court, after stating the pleadings and the evidence. It is true, the slaves were not sold separately and for distinct prices, and after the sale, the vendees refused to retain any of them, and rescind the sale for the others, but insisted on an entire compliance with, or an absolute rescission of the

contract. These circumstances do not, however, appear to us sufficient to authorise the vendees in demanding the rescission of the sale of all the slaves, on account of a redhibitory defect, in one or more of them. For, they did not constitute a whole, as a company of comedians or a span of horses, in which the value of each of the component parts, is increased by its union to the rest. It is true, after the sale, the vendees declared their willingness to annul it *in toto*, and refused to do so partially—a circumstance, which is presented to us as giving rise to the presumption, that they would not have agreed to the purchase of any number of these slaves, less than the whole. The presumption, however, appears to us too slight to be received as evidence: we therefore conclude, that the parish court did not err, in refusing to rescind the sale *in toto*.

The habit of running away is a redhibitory vice. *Civ. Code*, 358, *art.* 79. A warranty against it is, therefore, of the nature of the contract of sale of slaves, *i. e.* it needs not to be expressed in the deed. Hence the silence of the vendor in this case, as to this warranty, does not prevent him from being bound thereto. Neither does it appear to us, that the circumstance of his having disclosed to his vendees the names of his own vendors, and referred, in his act of sale, to

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those of the latter, in any degree lessens his liability.

This warranty, however, not being of the *essence* of the contract, may be excluded by the agreement of the parties. But this agreement must be proven, and the exclusion must be a fair one, that is to say, the vendor must be ignorant of or disclose the existence of the vice. In the present case, it is clear, that the disposition of six of these slaves to run away was known to the vendor, and that he did not communicate it to the vendees. The understanding of the parties, that the slaves should remain on trial, during a fortnight, with the vendees, at the risk of the vendor, in case they ran away, does not enable us to conclude, that the intention of the parties was that, if after that period, they or any of them ran away, and the vendees could prove a previous habit of running away, they should not avail themselves of the legal warranty.

The existence of this habit in the six slaves, of whom the sale is rescinded by the judgment of the parish court, clearly appears from the evidence on the record, particularly the deposition of the jailor and the orders of the mayor.

The defendant was bound, at the inception of the suit, to reimburse the price of these slaves, but this price was not fixed by the parties and required to be liquidated: the parish court, there-

fore erred, in allowing interest from the date of the judicial demand: but no hire can be allowed.

Both parties complain of the valuation made in the parish court, the vendor thinking it extravagant and the vendees insufficient Perhaps this is the best evidence of its correctness. It does not appear to us so materially incorrect as to authorise our interference.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and this court proceeding to render such a judgment, as in its opinion, ought to have been rendered in the parish court, it is ordered, adjudged and decreed, that the sale of the negroes Lindor, Tony, Sunday, Isaac, Horace and Boucaud, be rescinded and made null and void, and that the plaintiffs do recover from the defendant the sum of six thousand five hundred dollars with costs in the parish court, and that the plaintiffs pay costs in this court on both appeals.

See the same case, 7 *Martin*, 33.

DESSE'S vs. *PLANTIN'S SYNDICS.*

APPEAL from the court of the first district.

The creditor of a partner has no right to be placed on the bilan of the partnership.

MARTIN, J. delivered the opinion of the court. The plaintiffs alledge, that there existed a com-

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nor of his debtor's co-partner.

mercial partnership, between the respective insolvents of the parties, and pray that they may be admitted by the defendants to participate in the dividends and distribution of the monies proceeding, from the estate of the defendants' insolvent, as well as her other creditors, offering the reciprocity. There was judgment for the defendants on a plea of the general issue, and the plaintiffs appealed.

The partnership contract bears date of the 11th of October, 1813, and sets forth, that the parties are to be interested in a dry goods store. Their stock is to be composed of a sum of $7000, already furnished by Plantin, and an equal sum to be furnished by Desse. It is declared that the partnership began on the preceeding first of July.

Desse failed in 1816. His inventory or schedule, does not mention his interest in the dry good store, and the property he surrendered consists of wet goods only. Plantin failed in March, 1817.

There is not any evidence of Desse having ever paid one cent of the sum of $7000, specified in the partnership articles, as his part of the stock. He is not mentioned as a debtor, creditor, or partner in Plantin's bilan.

As both partners have falled, it is clear, that

the estate of neither as a claim, on that of the other for any share in the profits. If that of Desse has any claim for the whole, or any portion of his part of the stock, proof must be made of its having been paid. That Desse's estate is a creditor of Plantin's, for any part of the stock furnished by the former, is negatived by both their bilans.

The creditors of a partner have no claim on the partnership, much less on the co-partner, unless they shew, that their debtor contracted with them for the affairs of the partnership. Now, if any of Desse's creditors has so contracted with him, he has a right to be placed on the bilan of either or both the partners as a creditor. But, as he cannot be thus placed, till he has proven both the nature and amount of his debt, it follows that the whole of the creditors of a partner, *en masse*, cannot be placed on the bilan of the other: for the respective claim of each creditor must be individually tested.

The district court was, therefore, correct in rejecting the plaintiffs' application, and it is ordered, adjudged and decreed, that the judgment be affirmed with costs.

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

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ROUVILLE & AL. vs. *ROUVILLE.*

ROUVILLE & AL. vs. ROUVILLE.

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

The proof of a deed cannot be rejected, on the ground that it appears, to have been improperly obtained, and that the donation, of which the evidence, was contradicted by the sale of the thing given, by the party who offers the deed.

MARTIN, J. delivered the opinion of the court. The plaintiffs claim from the defendants, their uncle, their shares of the estate of their grand-mother. He denies having any part of it in his hands. There was judgment for them, and he appealed.

At the trial, he produced an instrument, under private signature, executed before two witnesses, purporting to be a donation *inter vivos*, made by his mother, the plaintiffs' grand-mother, to Paulinville, a natural son of Eulalie Bonvalet, of the negro girl Francoise, stated in the petition to be part of the estate of the deceased. The plaintiffs' counsel opposed the proof and introduction of the instrument, and the court sustaining the opposition: the adverse counsel took a bill of exceptions.

The bill does not enable us, to ascertain on what ground the opposition was made. In the opinion of the court, we are informed that the donation appeared irregularly made, and at least wrongfully obtained from a very old, weak and infirm, if not insane woman. Further, the opinion states, that the donation was contradicted

by a sale made by the defendant of this very slave.

The evidence in the case is not before us, and we are bound to believe, that it justified, in the view of the parish judge, the disregard of the instrument offered. But, nothing appears to us to have justified its rejection. The defendant had a right to have this document examined, and the effect of it considered. This could not be done, till it was proven to be the genuine act and deed of the deceased. Nothing on the face of it has the appearance of fraud and irregularity, and we are bound to say, that the defendant ought to have been permitted to prove it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the cause be remanded, with directions to permit the defendant to adduce proof of the execution of the instrument by the donor, and it is ordered that the plaintiffs and appellees pay the costs of the appeal.

Carleton for the plaintiffs, *Seghers* for the defendant.

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WHITE vs. *HEPP & AL.*

APPEAL from the court of the first district.

A legatee cannot be compelled to suffer a deduction from his legacy, in order to pay a debt, not established, contradictorily, with the heirs or executors.

MARTIN, J. delivered the opinion of the court. The petition states, that James Fletcher died, indebted to the plaintiff in a sum of seven hundred dollars, that Catherine Hepp, his heir and executrix, left the state for Vera Cruz, carrying with her the principal part of the deceased's estate, leaving in the hands of the executors of Daniel Clarke, a sum more than sufficient to satisfy the plaintiffs' claim. An attachment was accordingly levied, and the executors of Clarke summoned as garnishees, when they denied, on oath, having any property of Fletcher; admitting, however, that a sum of about $2000, the balance of an account, arising from the proceeds of the sale of a tract of land sold by C. Hepp, to D. Clarke, was in the possession of the garnishees, at the time of the service of the attachment in this case, but had been previously attached by the defendant Navarre, in a suit instituted against said C. Hepp, as executrix of Fletcher, to recover the amount of a legacy bequeathed to said Navarre, by Fletcher, in which judgment was obtained for $2000, which they were compelled to pay to the sheriff.

The court appointed an attorney to the absent debtor, who pleaded the general issue, but after-

wards consented to judgment being entered for the plaintiff for $710, with interest and costs.

The plaintiff next filed a supplemental petition, stating that James Fletcher owed him $710, and having made his will in which he appointed C. Hepp, Adelaide Hepp and —— Hepp his heir, and C. Hepp his executrix died, that these persons left the state, leaving only the sum of $2000 of the estate, in the hands of the executors of Daniel Clarke—which was attached by J. Navarre, in a suit against the executrix, for a legacy left her by Fletcher, wherein she has recovered judgment, and execution has issued, and the money has been paid by the executors of D. Clarke to the sheriff, whereupon the plaintiff prayed the judgment of the court, that he might have his claim satisfied by preference, out of the money in the hands of the sheriff.

J. Navarre pleaded the general issue, and there was judgment for her, whereupon the plaintiff appealed.

There is not any statement of facts, but the judge has certified that the record contains all the matters and facts upon which the cause was tried.

It is true, the debts of a testator must be paid by preference to his legacies. But, where creditors do not sue, legatees may prosecute for, and obtain the payment of, their legacies. In this

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case. the defendant Navarre fairly obtained judgment for her legacy. It is not stated, that the estate is insolvent; on the contrary, the plaintiff avers, that the whole, except the sum received by the legatee, has been carried to Vera Cruz, whither the heirs have removed.

It is clear, that the heirs are not in court, none of their property was attached and they were not served with process. A creditor has not a right to attach, in the hands of a legatee who has judgment for his legacy, without first resorting to the heirs, or the executor, at all events without establishing the insolvency of the estate. The parish judge, in our opinion, acted correctly in refusing to compel the legatee to suffer a deduction, in order to pay a debt which was not established, contradictorily, with the heirs or the executors, neither of whom appear to have been made properly parties.

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

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

MUSSON vs. *BANK U. S.*

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Musson vs. Bank U. S.

APPEAL from the court of the first district.

Germain Musson, testamentary executor of James Johnson, an inhabitant of Pittsburgh, instituted the present suit against the bank of the United States, to obtain the surrender of certain monies there deposited by James Smith, deceased, which funds, he alledged, to be the property of his testator. Maunsel White, curator to the estate of James Smith, intervened and claimed those monies as belonging to the estate which he administers; and pending the contest between these parties, Samuel Smith, calling himself the testamentary executor of both James Smith and James Johnson, came into court and demanded that the money in dispute be delivered to him.

The district court gave judgment, in favour of the plaintiff, Musson, for the money deposited and a sealed packet—White, one of the intervening parties, alone appealed.

A power to fill up a blank check is personal.

The proceeds of goods sold on commission, placed in bank by the vendor to his own account, cannot be viewed as a deposit belonging to the owner of the goods.

But if the vendor, on his death bed, declares that the money belong to the owner, and orders a blank check to be given him for it, this will be such evidence of the property in the owner of the goods that he may maintain an action for it.

The facts, as they relate to the appellant and Musson the appellee, were these:

Johnson, who had come to New Orleans with a quantity of flour, being obliged to go to Natchez on some business, left seven hundred barrels of it in the care of James Smith, his uncle, with instructions to sell them. Smith sold them,

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Johnson returned to New-Orleans not long after. Both Smith and Johnson died here within a few days of one another, without settling accounts.—Smith, who died first, being on his death bed, declared to Michael de Armas, notary public, that although he had already made a last will, he wished to make another, "on account of some money which he had, belonging to his nephew Johnson, and which he had deposited in the United States bank, under his own name." On being advised that a check on the bank would be sufficient, he desired the notary to write and sign one for him, leaving the sum in blank, "as he could not recollect the amount he had in bank, belonging to his nephew." The check was drawn and delivered to Johnson, who was then sick himself and died shortly after, without ever filling the blank. Germain Musson, having filled it, called at the bank for the money and was refused.

Porter, for the plaintiff. The plaintiff contends that, as executor of Johnson he is entitled to the money and the packet, by virtue of the check drawn by Smith, because the money deposited, and that in the packet were the proceeds of Johnson's property sold by Smith as his agent.

White has no claim thereto, for at the time of the trial of this action in the district court, he was not the legal curator of Smith, nor has he

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ever been since. His functions had long before ceased, more than a year and a day having elapsed since his appointment

It is admitted, that the check was good in Johnson's hands, and that if he had filled up the blank, the plaintiff, his executor, would have been entitled to recover; but it is contended, that he did not transmit to his executor the power of filling it up, that the power expired with him.

The power and right to receive the money did not expire with Johnson, for it was a *vested* right and, therefore, passed to his executor.

In general, powers are revocable either by the act of the party, or the operation of the law; but there are exceptions to this principle. A mere naked power of attorney is revocable, but a power coupled with an interest is irrevocable. 2 *Esp. Rep.* 564, 1 *Caine's cases*, 15, *Judge Kent's opinion;* 1 *Caine's Rep.* 379 To the examples put in these cases, may, with propriety, be added those bills of exchange, checks and orders; these are evidences of powers coupled with an interest, which the death of either drawer or drawee does not revoke.

The money claimed abundantly appears from the record to be the proceeds of a quantity of flour sold by Smith for Johnson's account: the plaintiff is, therefore, entitled to recover it. *Livermore on agency*, 275—285 See particularly lord Ellenborough's opinion, 284.

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Lastly, White is not now the legal representative of Smith's estate, his functions of curator having ceased, at the expiration of one year and one day after his appointment. *Civ. Code*, 180, *art.* 142—144.

Moreau, for the intervening party appellant. The check did not transfer any property. It is not intended to be denied, that a paper signed in blank, after it has been filled up, binds the subscriber, provided it was filled by the person to whom it was given, or by his directions, while he lives. The party is bound, because the delivery of the paper implies a power given to the person who receives it, to fill it up in the manner agreed upon.

A *blanc seing* (a blank paper signed) is a paper subscribed at bottom, by him who intends to bind himself, or give a discharge or release, according to the discretion of him to whom he delivers it, *giving him power to fill it up as he sees fit, according to their agreement.* 1 *Ferriere*, 215.

According to this definition, a *power*, given by he who signs, to him to whom the paper is delivered, is always implied: and all *powers* from their nature, are personal and end with the life of either of the parties; at least, with that of him to whom the power is given. Johnson did not then trans-

mit to his executor the power which he received from Smith.

A distinction is attempted to be made in the present case, on the ground that the power was *coupled with an interest* We must not confound what *creates*, with what *extinguishes* a debt. If I acknowledge to owe a sum of money, I certainly give to my creditor the right of claiming it; a right which he will transmit to his representative, at his death. But if I send him a power of attorney, in order that he may convey or cause to be conveyed to himself, a tract of land, which I designate or which he may select among those I own, in payment of what I owe him, will it be contended that, on his dying, without the conveyance having been made, the power will pass to his representative? Certainly not.—For the power was personal and expired with him.

Further there is not, in the present case, any acknowledgement of a debt. Smith did not acknowledge that he owed any particular sum, nor did Johnson declare that any such was due him. Neither did he say, that all the money deposited in bank belonged to Johnson. The check did not give any priviledge to Johnson's estate over any of the creditors of Smith.

A right of revendication is claimed on the pretence, that the money deposited never ceased to

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belong to Johnson. The money is assimilated to a *deposit* made by Johnson in Smith's hands.

No evidence of a deposit can be discovered on the record, Johnson gave Smith a quantity of flour to sell for him. The latter sells it, and places the money in bank or elsewhere: nothing appears of a request from Johnson, that the proceeds of the flour should be deposited in bank for him. This transaction does not. in any manner, differ from ordinary consignments.

The Spanish law recognizes two kinds of deposit, the regular and irregular. The *regular* is that of one or more of those things which are not counted, measured or weighed, except money, when it is put in a purse, bag or box, sealed or locked, and delivered to the depositary, not to be used by him, but to keep it, under an obligation to return the thing itself, not another like it, and if it be money, the very same pieces, and not others of the same weight, fineness or value. *Febrero*, *Juicios*, 2, 3, 3, § 2, *n.* 200. This author adds in the same paragraph, that in case of an union of creditors, *concurso*, and of a regular deposit, the depositor preserves the right of claiming the thing; because in such a case, neither the property nor the use of the thing are transferred to the depositary; both remain in the person of the depositor, who may claim it either by the action *de deposito* or that *de revendicatione* which are anterior to all.

The *irregular* deposit is that which is done of pieces or things, which are commonly counted, measured or weighed, as wheat, wine, oil, which are not delivered to the depositary, wrapped up or sealed, or with other marks, establishing their identity, because the depositary is not forbidden to use them, provided he restore them or others equal in goodness, quantity and species, in weight, measure or number; for the depositor, in such a case does not retain the property or dominion, which passes to the depositary. *Id. n.* 201.

It is true, Febrero grants a priviledge to him, who has made an irregular deposit over the chirographary creditors of the depositary; but in order that this may take place, the agreement to deposit must appear by an authentic act *Id. n.* 198.

The ordinance of Bilbao allows only the right of revindication to the owner of goods delivered to be sold on commission to a merchant who fails, in certain cases, where the whole or part of the goods yet remain in bales, and in that state of entirety, which enables the creditor to identify them, and when they are sold on a credit and unpaid. *Art.* 27 & 28, *chap.* 17. It is no were held that he may claim a preference on the proceeds of the sale, even when found in the insolvent's possession.

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If the depositary uses the things deposited, the contract of deposit ceases to exist, being merged in one of loan When money, or other things which are consumed in the use, is given you in pledge, with a convention that you may use it, if you want it, this convention does not prevent the existence of a contract of deposit, as long as you make no use of the thing: but when the thing deposited will be consumed, by the use which you are permitted to make of it, the contract of *mutuum* will dissolve that of deposit, which cannot exist when the thing which is the object of it is consumed. *Pothier*, *Depot*, *n.* 11.

Lastly, although more than one year elapsed, since White's appointment of curator to Smith's estate, he retains the right of claiming the funds left by the deceased, in the bank.

It is true, that the administration of a curator to a vacant estate, or absent heirs, ceases at the expiration of the year which follows their appointment. *Civ. Code*, 181, *art.* 144, like that of a testamentary executor. *Id* 247, *art.* 173. But are we to conclude that the time runs against these persons, when by an obstacle beyond their control, as a law suit, or the unlawful withholding of the estate, they are prevented from possessing, and consequently administering it? Cer-

tainly not. This results from the provisions of the law. Curators to vacant estates are, within the year and a day, give an account of their administration to the parish judge. *Id.* 181, *art.* 144 The curator must have administered, before he can render any account. The object of the curator's appointment is the liquidation of the estate, and would be defeated, if by law suits or otherwise, he could be prevented during the year from obtaining the possession of the estate, and he could not administer it, after having overcome these obstacles, if they lasted during a year.

This objection has been started in regard to testamentary executors, and it is held that the year runs only from the time of their obtaining possession of the estate. Customs, says Pothier, have confined the powers of the executor to a year and a day, in order that the heir may not, during too long a time, be kept from the enjoyment of the estate, under a pretence that the execution of the will is not yet completed. Although they speak of the year after the decease, yet, the time only runs from that when the executor did or could obtain possession of the estate. If contestations arise, the time only runs from their termination. *Donations*, 5, 1, 4.

There is such a parity of reasoning, between the case of an executor and that of a curator, that the same principles must be applicable to both.

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In the present, the property in bank constitutes the whole estate to be administered in New-Orleans. The year after his appointment had hardly begun, when the present contestation arose.

Will it be said, that the whole curatorship ceased by the appearance of Smith's heir? The curator has a right to demand the delivery of the estate to him, notwithstanding the appearance of the latter, who must receive from him the proceeds of the estate: and the functions of the curator end only by the rendition of his accounts, which the heir has a right to demand. *Civ. Code*, 181, *art.* 142. He has claims on the estate which cannot be destroyed by the heir: he has a right to *retain* his commission and legal charges, and it is only to the *balance*, which the heir may have any right.

The packet deposited in the bank, appears to contain $400 in bank notes. It might have contained $10,000. Should the court determine, as we believe they will, that the blank check, filled up by Johnson's executor, does not make the sum there written, a part of the estate of the latter, no claim can be made by the plaintiff to this distinct packet, which was the object of a regular deposit, and was to be returned unbroken. It is clear, that Smith did not contemplate, when he ordered a check to be given to Johnson, that the

cashier, in order to pay it, should violate the seal of the packet.

Derbigny, J. delivered the opinion of the court. Both parties admit that if Johnson himself had filled the blank of the check, the transfer of the property would have been complete, and his testamentary executor would have a right to receive the money. Any question therefore as to the regularity of the check is put at rest by that admission.—But it is contended that the right to fill the blank of the check was personal to Johnson, and did not pass to his representative.

This is probably a case, the like of which we would in vain search for; it must be decided according to general principles, by analogy —Men will sometimes place such confidence in others as to trust them with a blank paper bearing their signature, to be filled by the trustee according to agreement, or with an obligation, part of which is written, and part remains to be written by the person so trusted. In all such cases it is evident that a power to fill the blank is given to the trustee by the subscriber, and that such a power is exclusive and personal, and cannot be transmitted to any body else, without the consent of him who gave it; for nothing would be more absurd than to permit any person to exercise a right, which was granted to a particular individual

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from an implicit confidence in his probity and virtue.

It is not to be expected that much may be found in law books upon this very unusual mode of transacting business, which now and then, when men, in the simplicity of their manners, could rely on each other's honesty, was indulged in. Ferriere, however, in his *doctrine de droit*, vo. *blanc seing*, speaks of it as follows: "*Blanc seign* is a paper signed at the bottom by him who intends to bind himself, give acquittance, or compromise at the, discretion of the person whom he entrusts with such *blanc seing*, giving him power to fill it with what he may think proper, according to agreement."— This power, we say, is personal, and, as all other powers, dies with the attorney.

But if the plaintiff cannot recover on the blank check, he contends that the estate which he represents is entitled to the money, as being by Smith's confession, and according to the proofs exhibited, the money of Johnson himself.

That this money cannot be claimed as a deposit, as the curator of Smith's estate contends, must be acknowledged at once, the transaction between Smith and Johnson has none of the features of a deposit. No such thing as money was ever deposited by Johnson in the hands of Smith: he gave him flour to sell, and Smith converted it into money.

But we have to enquire whether the money now in bank is the proceeds of that sale, and if so, whether the executor of Johnson has a right to take it?

The evidence goes very far to shew that the money here in contest is the proceeds of the sale of Johnson's flour: but what proves positively this money to be Johnson's property, is the acknowledgment of Smith himself, who, on his death bed, declares that the money, which he had deposited in the bank, belonged to his nephew Johnson. It is true that the expressions, which he uses, are that he wishes to make his will, "on account of some money which he had belonging to his nephew," this unaided by any other testimony would not signify absolutely that all the money deposited in bank by Smith was his nephew's, but when we see that he ordered the sum to be left blank in the check, "because he did not now recollect the amount he had in bank," and that the check was so drawn on the advice of the president of the bank, it being communicated to him, that as the bank book was not settled, the check might be drawn in blank and afterwards filled up, when the amount in bank should be ascertained, there can remain no doubt that the intention of Smith was to give a check for whatever sum he had in bank, and that his acknowledgement, that he had

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money in bank, belonging to his nephew, amounts to a declaration that the money, which he had deposited there, was his nephew's.

In a contest between the representative of Johnson and the representative of Smith, touching their respective rights to receive this money, such a declaration must be conclusive; for the question here is not, whether Johnson is entitled to take in preference to the other creditors of Smith, such creditors if any, being not parties to this suit; but simply whether Johnson has a right to recover the money, which Smith himself acknowledges to be his.

The intervention of Samuel Smith as executor of Johnson, having not changed the situation of G. Musson as special executor for this particular business, there is no need of taking any notice of it.

As to the sealed packet deposited in bank by Smith, there is no evidence that he acknowledged it to belong to Johnson; for Michael de Armas, the only witness who makes any mention of it, after having stated, in the first part of his deposition, that the check had been drawn for the sum of $3240, and a small bundle, declares upon recollection, that the sum was not filled up but left blank, making it thus improbable that any thing should have been written after the blank. At any rate, there is not upon this particular sub-

ject sufficient evidence to enable this court to decide that a sealed packet, deposited in bank by Smith in his own name, was the property of another person. This bundle (or rather its contents for it has been since opened) must be surrendered to the curator of Smith's estate, Maunsel White, whose quality as such is not contested by any proper party; Germain Musson, as executor of Johnson, having no interest to dispute it, and Samuel Smith having not justified himself to be, either the heir, or the executor of James, as he had alledged.

The judgment of the district court, therefore, though approved in all other respects, must be reversed on account of this.

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 they think ought to have been rendered below, do order adjudge and decree, that the sum of three thousand two hundred and forty dollars, deposited in the office of discount and deposit of the bank of the United States, by James Smith, be delivered to Germain Musson, the special executor of James Johnston, and that the contents of the sealed packet, which had been deposited in the same office by said Smith, be delivered over to Maunsel

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White, curator of said Smith's estate; and it is further ordered, that each party in his respective capacity shall pay his costs, and one half of the costs incurred by the bank.

BARNWELL vs. *HARMAN.* *SAME* vs. *KUMBEL.*

When testimony is taken down, under the act of 1817, the presumption is, if there be no suggestion of the contrary, that the record contains all the evidence.

If the jury find the issues submitted by the defendant, and on his motion, judgment is entered accordingly, he cannot appeal.

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APPEAL from the court of the first district.

MATHEWS, J delivered the opinion of the court. These suits, having been consolidated in the district court, by the consent of the parties, were submitted to a jury, who found for the defendants, upon which judgment was afterwards rendered on the motion of their attorney. Upon this one of them, Harman, took the present appeal.

The verbal evidence purporting to have been taken down in writing, according to the 12th section of the act of the 28th of January, 1817, comes up with the record, and is to serve as a statement of facts. This is objected to, by the appellee's counsel, because there is no certificate of the district judge, that all the testimony in the cause accompanies the record. The law under which the verbal evidence, in this case, was reduced to writing and sent up with the record, requires no such certificate, and there is no rule of court (admitting that such could be legally made) that requires it.

We are of opinion, that in all cases, wherein the depositions appear, as having been taken in conformity with the law cited, it ought to be presumed, that the record contains the *whole* evidence until a suggestion be made to the contrary. The written evidence produced by both parties is required to be filed with the proceedings, unless the parties or their counsel agree to read them in evidence on the appeal. When thus filed, it seems, from the expressions in the 13th section of the same act, that they make part of the record, and the certificate of the district judge is only required in cases, in which facts proven appear by written documents.

The judgments, in the present cases, were given at the instance of the defendants, and agreeably to their request. According to the maxim *volenti non fit injuria*, they have no right to appeal. Indeed, many of the proceedings are so anomalous, that it is difficult to know how to dispose of this case, but as we are of opinion, that under the circumstances of it, damages ought not to be given, at in cases of appeals taken for delay only.

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

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

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STATE BANK vs. *SEGHERS.*

APPEAL from the court of the first district.

Banks cannot obtain payment, on motion, under the act of 1818, without giving notice to the party.

DERBIGNY. J. delivered the opinion of the court. The defendant is the endorser of a note of eight hundred dollars subscribed by the late Desbois to his order. The note being protested for non payment, the Louisiana State bank, in whose possession it is, moved for a judgment and order of seizure against the endorser, conformably to the sixth section of the act of March 13, 1818, but omitted giving or causing to be given the adverse party any notice of this proceeding. The endorser moved to have the judgment and order of seizure set aside, on the ground that this mode of proceeding was a violation of the 2nd section of the 4th article of our constitution, his motion being overruled, he appealed.

The summary manner of proceeding, by motion in cases like the present, has its origin in the Spanish law. The *via executiva*, or executive mode of proceeding, extended to all cases where the debtor was considered as having confessed judgment. One of them, indeed was the case of a private obligation in writing; but before such written obligation could give to the creditor the right of proceeding to execution, he was bound

first to call his debtor before the judge to recognize his signature. No other proof than the confession of the party himself gave the creditor a right to this extraordinary remedy; even the oath of the subscribing witness was deemed insufficient. If the party denied the signature to be his, the suit was then conducted in the ordinary way: if he acknowledged it, the execution went on In this manner of proceeding, it is obvious that calling the party to admit or deny his signature was sufficient warning of the creditor's claim, independently of which he was entitled to other notice before his property was exposed for sale; so that, in the *via executiva* he had as full notice of what was going on, as in the ordinary mode of proceeding.

Under our present practice, some of the rules observed in the Spanish tribunals have necessarily been abandoned as incompatible with our judiciary system, and others have been preserved and sometimes revived, from which state of things, some difficulty must inevitably now and then have arisen In this instance the act, under which the present action has been instituted, seems to have been intended as a re-establishment, in favor of the banks, of the Spanish summary mode of proceeding in cases of promissory notes, and other like obligations, but as it does not require the subscriber to be called up-

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on to recognize his signature, it becomes indispensable that he should have notice of the demand in some other way It is contended by the appellant that this ex-parte proceeding is contrary to the 2nd section of the 4th article of the constitution which secures a right of appeal in all civil cases where the matter in dispute exceeds three hundred dollars, because having had no opportunity to defend himself, he would have nothing to lay before the court of appeals. That is certainly true, but without resorting to this consequence of a departure from the first principles of natural law he might have invoked those principles themselves, which, under a free government need not the sanction of legislative acts to be respected as eternal truths.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be reversed, and that this case be remanded with instructions to the judge not to proceed in it, until he shall have made the appellant a party defendant in this suit; and it is further ordered that the costs of this appeal be paid by the appellees.

Duncan for the plaintiff, the defendant *in propria persona*.

DELACROIX vs. *PREVOST'S EX'RS. Ante* 276.

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DELACROIX vs. PREVOST'S EX'RS.

Former judgment confirmed

In this case, the defendants obtained a rehearing on the question, whether the confession of an executor, drawn by an interrogatory, be sufficient to charge the estate in his hands.

Morel, for the defendants. The defendants are not sued on a contract entered into by themselves or their ancestor, but upon a contract of their testator It follows from thence, that if the stipulation to pay interest, at the rate of ten per cent, had been sought to be enforced during his life, it could, not have been established by testimonial proof. 2 *Martin's Digest*, 159, *n*, 7. 3 *Febrero*, *cinco juicios*, 43, *n.* 112, 121, *n.* 284, *Code Civil*, 315, *art.* 256, 2 *Pothier*, *Obligations*, *n.* 754.

The nature of the case is not altered by the death of the defendants' testator. They are neither his heirs nor his legatees. If the testimony must have been rejected before his death, it cannot become admissible by it.

The defendants, though they be in name parties to the suit, have no interest in it. They are mere witnesses, introduced by the plaintiff against an estate in their possession, and of which they have the management. The real parties to the suit are the plaintiff and the heirs.

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The proof upon which the judgment is grounded is the extra-judicial confession of Prevost to Soulie, who has since become his executor. A confession not made to the plaintiff, and not attended, with any of the circumstances that the law requires to make it evidence. It was not made on oath, nor in the presence of the plaintiff: it was uncertain as it did not express the time during which this interest was to be paid. *Cur Phil.* 109 *n.* 1 & 2. Nothing proves that interest was to be paid at the rate mentioned, until the payment of the debt. 2 *Pothier, Obligations*, *n.* 801 Such a confession cannot be received in lieu of the litteral proof, which the law requires of an agreement for conventional interest.

The second agreement, said to have been entered into by the plaintiff and defendants, the only one in which according to Pothier, the decisory oath could be resorted to, in order to supply the literal proof required by the code, is expressly denied on oath, there is no proof of it. The consequence is, therefore, that as the plaintiff alledges two agreements to pay interest, one at 10, the other at 6 per cent, and he admits that the first was at an end, and merged in a second, which he cannot prove, he cannot recover on either.

The interrogatory was answered, because the

executor thought himself bound by law, so to do. Surely, this cannot affect the heirs who were not parties to the suit, and who, if they had been, would have excepted to the testimony. An executor is bound to declare what he knows, when legally called on, and in the present case, the executors were not competent to object to the demand of an answer on oath, because they were without interest in the suit, and considered themselves as witnesses called upon to the first agreement, and that the real parties, viz: the heirs, should thereafter be made parties to the suit or a defensor appointed to them on the plaintiff's application, who might have excepted to the testimony. The now defendants, the executors, could neither refuse to answer nor except to their own testimony. At all events, the answer to the interrogatory cannot affect the rights of the heirs: the executors representing only the person or estate of the deceased, and not the heirs, to whom they are accountable.

The counsel for the plaintiff declined making any reply.

MARTIN, J. delivered the opinion of the court. The defendant's counsel contends that the confession of the executors, drawn by an interrogatory, is not sufficient to charge the estate, because

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if it be, the rights of the heir, may be affected by parol evidence, in cases in which that kind of proof is inadmissible.

The law authorises every party to probe the conscience of his adversary, and to draw from him any evidence in his possession: it makes no distinction in cases of executors, and it is not easy to discover on what grounds it should. The executor is the chosen friend, who possessed the confidence of the testator in his last moments: the person whom he selected to protect and defend his estate, after his death. He may bind the estate by confessing judgment, by not availing himself of certain exceptions, which it is his conscientious duty to decline to use, when he knows the demand to be fair. It is true, he may possibly do an injury to the heir: but he is accountable for his conduct to him. But the testator, if he had no forced heirs, might have disposed of his whole estate, in favor of the executor, or any other person. The forced heir may prevent the interference of the executor, by paying or securing the payment of the legacies. This, it is true, the heir may, sometimes, be unable, to do: but the case of a father, on his death bed, colluding, in order to destroy the rights of his children, with the person whom he is about to appoint his executor, in the hope that he may, by paying, and collusion with, feigned creditors, charge his estate is

too remote to authorise us to conclude, that the legislature did not intend that the general law, authorising an appeal to the conscience of the party, should reach the case of an executor.

It is, therefore, ordered, adjudged and decreed, that the judgment, formerly rendered, in this case, remain in force as if no rehearing had been granted.

MARIE vs. *AVART.*

A slave may sue for her freedom, another person than her master.

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

The petition stated, that the plaintiff is a slave of Nicholas Lauve, that Erasmus Robert Avart, made his last will, by which he directed that, immediately after his decease, his testamentary executor (the present defendant) should purchase the plaintiff and her child, and afterwards emancipate them according to law—that Nicholas Lauve is willing to sell the plaintiff and her child, for a reasonable price, wherefore the plaintiff, in order to obtain her freedom, and that of her child in due time, prays that the defendant be cited to declare, whether he accepts the said executorship, and in case he does, that he may

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be compelled to fulfil the will of the testator, in the premises, and in case he declines it, some proper and fit person be appointed in his stead.

The defendant pleaded the incapacity of the plaintiff to stand in court, as she was the slave, not of the testator, but of another person,

The parish court gave judgment, that "the plaintiff be maintained in her right to institute this suit, that she be declared entitled to obtain her freedom, and, to this end, that the defendant, in this cause, be compelled to purchase the plaintiff, and her child, as agreed upon by her master, and emancipate them, agreeably to the last will and testament of Erasmus R. Avart, of whom he is executor, and further, that he pay the costs of the suit.

From this judgment, the defendant appealed.

MARTIN, J. delivered the opinion of the court. This action is grounded on the regulations, in our civil code, which relate to slaves, and particularly that part of them, which authorises them to be parties in civil actions, either as plaintiffs or defendants, when they have to claim or prove their freedom.

The defendant denies the plaintiff's right to sue, because, by her own shewing in the petition, she is indisputably the slave of another person, and does not claim freedom directly against the defendant.

As she is not opposed by her acknowledged master, we are of opinion, that she has a right to maintain her action. But, as the parish court has erred in deciding definitively, in favor of her right to freedom:

It is therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the case be sent back with instructions to the judge, to hear the parties and decide the case, after an investigation of its merits.

De Armas for the plaintiff, *Mazureau* for the defendant.

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1 In determining on the propriety of allowing a *ded. pot.* the court may look into the record of another suit, between the same parties. So may the supreme court, on the appeal, if the record be there also. *Fleckner* vs. *Grieve's syndics.* 504

2 If fraud be not alledged, no *ded. pot.* shall be granted to prove it. *Same case.* id.

3 The affidavit made to obtain a *ded. pot.* ought to state the fact intended to be proven, that the opposite party may have the opportunity of avoiding a delay by admitting it. *Same case.* id.

DEED.

The proof of a deed cannot be rejected on the ground, that it appears to have been improperly obtained, and that the donation which it contains was contradicted by the sale of the thing given, by the party who offers the deed. *Rouville & al.* vs. *Rouville.* 702

DOWER.

1 If, by a contract of marriage, land purchased

with money, received as part of the dower may be sold by the husband, with the wife's consent, land in common between the wife and her children by a former marriage, and adjudged to her at its valuation, cannot be sold under the contract. *De Armas and wife* vs. *Hampton*, 567

2 Under the Spanish government, if the contract of marriage stated, that the wife had brought a certain sum as her dower, in a given number of slaves, the property of the slaves passed to the husband. *Jourdan & al.* vs. *Williams & al.* 659

3 The wife has a mortgage for her dower or any real property sold by the husband. *Nadaud* vs. *Mitchell.* 688

EVIDENCE.

1 When an act is attacked as fraudulent, parol evidence is admissible to prove or rebut the obligation of fraud. *Fouque's syndics* vs. *Vignaud.* 423

2 Same point. *Croizet's heirs* vs. *Gaudet.* 524

3 So when the verity of an act is contested. *Same case.* id.

4 Parol evidence cannot be received of the irregularity of the proceedings of a family meeting, before the parish judge. *Tregre* vs. *Tregre.* 665

5 The heir may shew, that a sale made by his ancestor is feigned. *Same case.* id.

See DEED, WITNESS.

EXECUTOR.

If there be judgment against an executor, for the debt of his testator, and no property of

the estate being found, an execution issues against that of the executor, he cannot be relieved, without shewing that the property of the estate, which came to his hands, has been legally administered. *Querry's ex'r.* vs. *Faussier ex'rs.* 645

HABEAS CORPUS.

See CA' SA', 2.

INTEREST.

1 Writing is not of the essence of a contract for conventional interest. *Delacroix* vs. *Prevost's ex'rs.* 276

2 No interest, even from the inception of the suit is allowed, where the demand is liquidated by the judgment only. *Andry* & *al.* vs. *Foy.* 689

See MORTGAGE 2.

INTERROGATORY.

1 A party who is required to answer an interrogatory which he is not bound to answer, ought to move to have it stricken out; if he do answer, he will be concluded thereby. *Delacroix* vs. *Prevost's ex'rs.* 276, 727

2 An interrogatory may be put to an executor. *Same case.* 730

JOINT OWNER.

1 A joint owner is liable for ordinary neglect, *Ralston* vs. *Barclay & al.* 649

2 If he be in the habit of having the common ship insured, and insures his own half only, he will be liable to his co-owner for the loss. *Same case.* id.

See ATTACHMENT 2.

LEGATEE.

He cannot be compelled to suffer a deduction from his legacy, in order to pay a debt, not established contradictorily with the heir or representative. *White* vs. *Hepp & al.* 704

MORTGAGE.

1 If the vendor covenant to clear the estate from a mortgage, he will not be permitted to recover the price, till he satisfy the vendee that the mortgage is raised. *Bouthemy's ex'r.* vs. *Ducournau.* 657

2 And interest will not be allowed him, except from that time. *Same case.* id.

See DOWER 3,. PARAPHERNAL ESTATE.

NEW TRIAL.

Whether one will be granted to afford an opportunity to shew, that a witness, sworn without objection, perjured himself? *Saulet* vs. *Loiseau.* 512

PARAPHERNAL ESTATE.

All the wife's property, not constituted in *dot*, is paraphernal, and she has a mortgage on the husband's property, if he disposes of it. *Hannie* vs. *Browder.* 14

PARTNERSHIP.

1 The dissolution of a partnership does not prevent the partners from bringing suit. *Terril & al.* vs. *Flower & al.* 583

2 The creditor of a partner has no right to be placed on the bilan of the partnership, nor on that of his debtor's co-partner. *Desse's* vs. *Plantin's syndics.* 699

3 A debtor of a firm on its failure, cannot plead

to the action of the syndics, payment aud satisfaction by the individual partner, with whom he contracted, to the other. *Duncan & al. syndics* vs. *Bechtel.* 510

PARTITION.

1 An heir may bring an action of partition, against a purchaser of the estate from his co-heir. *Gravier & al.* vs. *Livingston & al.* 281

2 The action of, is prescribed by the lapse of thirty years only. *Same case.* id.

3 A husband may proceed, without his wife, to the partition of the moveable part of a succession accrued to her. *Tregre* vs. *Tregre.* 665

See EVIDENCE.

PETITION.

See PRACTICE. 1, 6.

PRACTICE.

1 Every circumstance, which is proper to be known, in order to put the defendant on his defence of the suit, ought to be stated in the petition. *Duncan & al. syndics* vs. *Bechtel.* 510

2 When a suit is not on trial, before a jury, it cannot be discontinued, without the leave of the court. *Hunt* vs. *Morris & al.* 676

3 When causes are consolidated the court cannot till they be severed, give judgment on either of them alone. *Lafon* vs. *Riviere.* 1

4 No judgment can be given against a party, who is not in court, by his person or property; nor any final one, until after answer filed or judgmeut taken by default. *Woodward & al.* vs. *Braynard & al.* 572

5 When the illegality of a contract is not pleading, and does not appear from the evidence

in support of it, if there be a verdict for the plaintiff, the judgment will not be disturbed, though some evidence of illegality may result from the cross-examination of the plaintiff's witnesses, or from the testimony adduced by the defendant. *Harvey* vs. *Fitzgerald.* 530

6 A claim for damages, on account of the defendant's neglect in managing the plaintiff's affairs, must be specifically laid and will not be admitted, on a petition, which charges only that the defendant is indebted on an account. *Ralston* vs. *Barclay & al.* 649

7 Parties are to be admitted to lay the facts of their case to the jury, as naked as they can present them; and no other restriction can be imposed on them, than to require that the facts be pertinent. *Planters' Bank* vs. *George.* 673

8 If the proceedings of a family meeting, held before the parish judge, for the partition of an estate be recorded in French, they will be set aside. *Tregre* vs. *Tregre.* 665

See ABATEMENT, ATTACHMENT, APPEAL, *CA' SA'*, CITY COURT, CESSION OF GOODS, *DED. POT.* EVIDENCE, EXECUTOR, INTEREST, INTERROGATORY, NEW TRIAL, WITNESS.

PRESCRIPTION.

See PARTITION 2, SLAVE 1.

RENT.

When the tenant holds over after notice to quit, and a declaration that a specified higher rent will be required, no greater rent can be recovered, without evidence of the value

of the rent or of damages sustained by the landlord. *Rodriguez* vs. *Combes* & *al.* 275

RIPARIOUS ESTATE.

1 The words *face au fleuve, primâ facil* designate, in Louisiana, a riparious estate. *Morgan* vs. *Livingston* & *al.* 19

2 The vendee of a riparious estate acquires a qualified property in the bank of the river, and consequently in the batture, which may be added to it. *Same case.* id.

3 An intervening highway does not prevent this, if the owner of the estate be bound to repair the way and the soil of it to be at his risk. *Same case.* id.

SALE.

1 A sale of land, under private signature, is binding, although it recites the intention of the parties, to have a notorial act of it executed. *Poeyfarre* vs. *Delor.* 10

2 If the vendor be brought in by his vendee to defend his title, the judgment on such a suit does not bind him as to the amount of damages, which he may afterwards demand from the then plaintiff, his own vendor. *Maurin* vs. *Toustin.* 496

3 Although several slaves be sold together for a single price, the sale will not be rescinded for all, if any one, or a number less than the whole, have any redhibitory defect. *Andry* & *al.* vs. *Foy.* 689

4 The tradition of a real estate may be made by the consent of the vendor, that the vendee take possession. *Cuvillier* vs. *M'Donogh.* 564

5 If he who has sold goods for another, renders

an account of them which is accepted, he cannot afterwards be called upon for the price of any part of them uncollected. *Rion* vs. *Gilly & al.* 417

See MORTGAGE, SLAVE 3.

SLAVE.

1 One who enjoyed her freedom in Hispaniola, during the revolution there, may reckon that time in establishing her title by prescription. *Metayer* vs. *Metayer.* 16

2 The marriage of a slave acquires civil effects by his emancipation. *Girod* vs. *Lewis.* 550

3 If a slave sold remain with the vendee, he is liable to be seized for his debts. *Pierce* vs. *Curtis.* 418

4 A slave does not become free on his being illegally imported into the state. *Gomez* vs. *Bonneval.* 656

5 A slave may sue another person than her master, in order to obtain her freedom. *Marie* vs. *Avart.* 731

See SALE 3.

WITNESS.

1 One who testifies against his own interest is not liable to objection. *Peytavin* vs. *Hopkins.* 256

2 The creditor of a person, for whose debt the suit is brought, is not an incompetent witness for the plaintiff. *Hewes* vs. *Lauve.* 502

3 A witness is not protected from answering a question, in the ground that he may thereby render himself liable to a civil suit. *Planters' Bank* vs. *George.* 670