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.

Quod magis ad nos
Pertinet, et nescire malum est, agitamus.
Hor. sat. 2, lib. 2.

VOL. V.

BEING VOL. VII. OF THIS REPORTER.

NEW-ORLEANS:

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1820.

CHRONOLOGICAL

TABLE OF CASES.

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There was not any change, in the officers of this court, during the period the cases of which are reported in this volume.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JULY TERM, 1819.

East'n. District. *July*, 1819.

POEYFARRE *vs.* DELOR.

POEYFARRE vs. *DELOR.*

After the defendant has appealed, and the judgment has thereon been affirmed, the plaintiff may still appeal and have any error to his disadvantage in the judgment corrected.

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

DERBIGNY, J. delivered the opinion of the court. This case was already before this court upon an appeal claimed on the part of the defendant, and the judgment of the inferior court was affirmed. It is now brought up by the plaintiff, and the question arises whether a case already adjudicated upon, on the appeal of one of the parties, can again be enquired into, on an appeal by the other. 6 *Martin*, 10.

To decide this question, the ancient laws of the country afford little assistance; for, as the

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delay for appealing was by them limited to five days, if both parties appealed, both complaints were before the appellate court at the same time, and the whole could be disposed of with a full consideration of the respective productions of the suitors. The act of 1813, organizing this court, has altered that mode of proceeding by granting two years to claim an appeal, and under it arises the present difficulty.

The general principle, which regulates the jurisdiction of courts of appeals, is that they have cognizance only of the subject matter of the appeal. The party, dissatisfied with the judgment of the inferior court, prays for redress either against the whole judgment, or against such part of it as he conceives to be injurious to his rights. If he complains of the judgment only in part, the jurisdiction of the appellate court extends no further.—It is laid down in the *Curia Phil. part* 5. §. 1, *n.* 22, that the appeal claimed by one party avails the other *en lo appelado*, that is to say, that the subject matter of the appeal, may be revised and corrected, not only in favor of the appellant, but even in favor of the appellee. If, therefore, after an adjudication of the court of appeals upon that subject, the appellee should, in his turn, attempt to bring the same matter before them, it would be

just to consider the judgment as conclusive against him. But if the appellee chooses to appeal from some part of the judgment, which was not submitted to the apellate court by his adversary, it appears to us that he has a right to be heard: for it is in fact a new subject, and, with respect to to the jurisdiction of the court of appeals, a new case.

In this particular instance, it is true that an appeal has been claimed by the defendant generally. The question under that appeal was whether a contract of sale of the house of the defendant was valid and binding, and the court decided that it was. But a part of the plaintiff's demand, to wit, the damages which he claimed, was not taken notice of in the judgment of the inferior court, and consequently, made no part of the subject submitted to the court of appeals. The plaintiff has therefore a right yet to pray for a decision of this court upon that separate point.

The damages here claimed are the rent of the house, since the day on which delivery ought to have been made, until possession was given. The monthly rent which the house yielded, when let, was one hundred dollars. We think it just that the seller should account to the purchaser for that rent, since the day on which a tender

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of the price of purchase was made, until the date of the judgment of this court on the first appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court, confirmed by the former decision of this court, be so far corrected as to embrace the rent of the house sold by the defendant to the plaintiff, from the 29th day of July, 1818, to the 18th of January following, at the rate of one hundred dollars per month; and that accordingly the plaintiff do further recover from the defendant the sum of five hundred and sixty six dollars, with costs.

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

CLAIBORNE vs. *POLICE JURY*.

A court cannot compel the police jury to comply with the directions of an act of the legislature, in laying a tax.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. On motion, made in the court of the first district on behalf of the representatives of the late William C. C. Claiborne, that court issued an order for the police jury of New-Orleans to shew cause, within three days, why they should not be compelled to lay a tax on the parish.

conformably to the provisions of an act entitled, "An act for the relief of the widow and heirs of the late Governor Claiborne" and that rule having been made absolute, an appeal was claimed therefrom, and brought up by consent of parties.

The order of the district court is resisted on two grounds: 1. Because the courts of justice have no jurisdiction over a legislative body to compel them to fulfil their legislative functions; and 2. Because the law, ordering the police jury to lay this tax, is unconstitutional.

The first fundamental principle of our constitution is, that the powers of the government are divided into three departments, ever to be kept distinct, to wit. the legislative, the executive and the judiciary.

To the legislative branch of the government belongs the right of laying taxes for purposes of general utility. Supposing the present tax to be one, which the legislature had a right to create, the law, by which they have ordered the police jury to impose it, is a delegation of their powers. To obey that law the jury must legislate—they must themselves enact a law providing what sort of tax it shall be, on what property it

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shall be laid, in what manner it shall be levied, how it shall be enforced. Is it the province of the judiciary to direct how they shall do all this? And, if they can give such directions, how are they to compel a compliance? Suppose the jury enact a law, without providing for its execution, will courts again interfere? As well might they legislate themselves. But the better to test the impropriety of such interference, how and against whom is this supposed authority to be exercised? The police jury, though authorized by law to represent the parish in courts of justice, is not a corporation possessed of property; therefore, no *distringas* can issue to compel a performance. One of their adverse counsel found no difficulty in the matter—he thought it very simple to send them all to jail. This mode is, no doubt, expeditious; but the question is, whether it is legal and proper.

In a deliberative body, the majority rules the minority. Suppose in this assemblage of twelve citizens, five were willing to lay the tax, and seven were dissenting; are they all to be imprisoned as refractory, or is the court to discriminate between them? The last seems to be the only step consonant with justice; but how is the court to know who is disobedient, and who is not? In this particular case, there was

something said about unanimity; but the knowledge of this fact is accidental. The question is, whether the court can compel a disclosure of the yeas and nays, and then pick out the refractory members to send them to jail; or whether, without taking any such trouble, it can at once through them all into prison, until a majority can be compelled to legislate. We think that it can do neither.

A majority of the court (MARTIN, J. dissenting) being of opinion that the imposition of the tax, required to be made by the police jury in the present case, would be an act purely legislative; it is deemed unnecessary to examine into the constitutionality of the law, by which the legislature have undertaken to delegate to them power to legislate in this particular instance.

It does not belong to the courts of judicature to interfere in legislative concerns, in such a manner as to order laws to be passed, or perfected, either by the legislature itself or any body politic to which it may have delegated legislative power, admitting its competency, to authorize others to legislate in any case.

It is, therefore, ordered, adjuged and decreed, that the judgment of the district court be annul-

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led, avoided and reversed, and that judgment be ordered for the defendants, with costs.

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

POLICE JURY vs. *M'DONOGH.*

A police jury may sue for money expended in paying for work done on a delinquent planter's levee. The members of it may be witnesses. The proceedings of the jury may be recorded in French. When works are especially ordered, the visit of the parish judge is not essential. A law is not unconstitutional which provides a means of recovery for debts due before its passage.

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

The plaintiffs claimed from the defendant four thousand and odd dollars, paid out of the parish treasury to planters ordered to work on his levee, in the year 1815. There was judgment against him, and he appealed.

Turner, for the defendant. The plaintiffs were not authorized to sue, as a corporation, till the act of the 22d of February, 1817, upwards of two years after the cause of action in the present case occurred. The law cannot have a retrospective effec : it may authorize them to sue, whenever the cause of action is posterior thereto. A claim which could not be enforced by a suit, is not a legal claim, and the situation of the debtor cannot become harder, without any act of his. The parish court therefore erred in sanctioning the suit.

The records of the proceedings of the police jury, being kept in the French language, cannot have any effect in a court or out of it. If the general assembly had, in that language, enacted those regulations, binding on the defendant, he could not have been compelled to have yielded obedience to them. *Const. art.* 6. *sect.* 15. *Nemo plus jus dare potest quam ipse habet.*

The police jury cannot have any power but that which they derive from the legislature who created it, and how could the legislature grant to them the power of doing what they could not themselves do. Members of the police jury were also improperly admitted as witnesses.

The regulations relied on were not enacted by a competent authority. The jury was not then duly organized; for one third of the justices of the peace commissioned in the parish were not present, as required by the act of the 25 of March, 1813. Out of twelve justices commissioned in the parish, only three were present.

It is provided by the act of April 6, 1807, that, if the parish judge, going in company with two inhabitants to examine whether the works ordered have been performed, find any part of them not done, he shall order the delinquent to complete it within a given time, and if this be not done, the judge shall pro-

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cure it to be completed, at the delinquent's expence, paying therefore at the rate of one dollar for each day's work for the slaves employed. 2 *Martin's Digest*, 588, *n.* 2. In the present case there was no examination, no inspection by the judge—no time fixed by him, at the expiration of which only, the slaves of neighbouring planters might have been placed on the levee to complete the work, at one dollar per day. Here the price fixed by law was disregarded, and the jury arbitrarily paid and expect to recover from the defendant at the rate of three dollars per cubic toise, while it is in evidence that a negro may complete this toise in a day. The defendant, if he be liable to pay any thing is answerable only at the rate fixed by law, and the plaintiffs have no right to resort to a *quantum meruerunt.*

Lastly, it is in evidence that the work for which payment is claimed was unnecessary.

Moreau, for the plaintiffs. That law could not be said to be intended to have a retrospective effect by which a corporation, a minor or any other individual incapable of acting for himself, would be provided with a person to stand in court for the protection of rights which could not otherwise be defended. This would

make no change in the nature of the right or of the obligation. Before the territorial act for the incorporation of the city of New Orleans the actions instituted for the protection of the municipal rights of its inhabitants were not brought in the name of a mayor, aldermen, &c. A mucipality and before that a cabildo represented the inhabitants. Now can it be pretended that the new administrators cannot prosecute in cases in which the cause of action accrued before their creation. And what difference can there be between providing a corporation with new officers or giving them such officers, when it is not provided with any? Was it ever pretended that a tutor could not prosecute the debtors of his minor, because before his appointment they could not be effectually sued, as, in the language of the counsel for the defendant, a claim, which cannot be enforced by a suit, is not a legal claim?

It is true the constitution of the state requires that all laws that may be passed by the *legislature*, the public records *of the state* and the judicial and legislative written proceedings *of the same* be promulgated, preserved and conducted in the language in which the constitution of the U. S. is written. But, are the minutes of the police jury of a parish, those of the corporation of

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a town, the regulations of an hospital or a bank, even when by-laws are enacted, *legislative proceedings* of the state? Are the members, who enact such by-laws, THE LEGISLATURE? Certainly not.

The interest of an inhabitant of a parish or a city in the affairs of the corporation is so very minute, and it so generally happens that evidence necessary to the support of corporate rights is in the possession only of the members of such a corporation, that the law has provided that such an interest should not exclude their testimony. 3 *Martin's Digest*, 482, *n.* 5.

It is true the act of 1813, *c.* 4, § 14, requires the presence of one third of the justices of the peace commissioned in the parish, and a majority of the jury, in order to constitute a *quorum*, and the defendant's counsel urges that there were only three justices present, who consequently did not form a third of the whole number. It is admitted, that if we reckon the justices of the city of New Orleans, as part of those of the parish, there were present only one fourth of the latter, there being one justice in each of the four districts of the parish and eight for the city, in all twelve; so that the three justices present constituted only one fourth of the whole, when the regulation or order on which the present

action is grounded was adopted. But, in the city of New Orleans, the justices appointed in each of the eight sections in which the city is divided has, *by the tenor of his commission, the title of a justice of the peace of the 1st. 2d or 3d section of the city of New Orleans, as the case may be.* 2 *Martin's Digest*, 540, *n.* 20. And the authority of the police jury of the parish of Orleans does not extend to the city of New Orleans, in which the corporation exercises the functions of the police jury. *Ib.* 294, *art.* 9. Accordingly the justices of the county alone attend the meeting of the police jury and those of the city are never present to it.

The defendant's counsel further contends that the police jury could not by their regulations alter the forms prescribed by the legislature, or the rate which it has fixed.

It is true that the act of 1807 provides that at the expiration of the time fixed by law for the termination of the works, it shall be the duty of the judge to go, in company of two inhabitants, to examine the said works, in order to satisfy himself that they are executed in the manner prescribed by the regulations, and any inhabitant, who shall have failed to execute the same, shall forfeit and pay the fine fixed by the regulations, and the judge shall order him to

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execute his said work within a certain time: after which, if the said inhabitant has again neglected to make it, the judge shall order the work to be made at his, the delinquent's expenses, either by the job, or by the inhabitants of the parish, each of whom shall send to the spot a number of able bodied negroes, proportioned to the strength of his gang, for the hire of which negroes they shall receive one dollar per day. 2 *id.* 588, *n.* 2. The 10th article of the regulations of the police jury of July 6, 1815, directs that the syndics, assisted at least by two planters of the neighbourhood, will order the works to be done to the existing levees.

There is no contradiction between these two dispositions. The inspection, which the judge is directed to make by the act of 1807, is only to take place after the period within which the works on the levees are to be completed, which ought not to prevent the jury from taking proper measures as to the manner in which these works are to be ordered or executed.

Farther, the legislature speaks of ordinary reparations or works to be done on levees. The 11th article of the regulations of July 8, 1815, requires the works to begin in July and be completed in November following. The exami-

nation of the judge after that time ought not to prevent the jury to direct in what manner, even this ordinary work is to be performed, or ordered by the syndics. As to extraordinary works the legislature has vested the jury with an unlimited power.—1807. *c.*

The jury were likewise well authorized to allow for this extraordinary work, at the rate of three dollars per cubic toise. The act of the legislature cited relates only to ordinary repairs to the levee. In extraordinary, where a *crevasse* threatens the inundation of a whole neighborhood, the impending danger cannot be averted by ordinary means, and the risk of being carried away or of receiving material injury may prevent negroes from being obtained at the ordinary price.

Lastly, the defendant contends he is not liable, because the works performed on his levee were ordered by the jury without any necessity. He supports this part of his defence by the testimony of his own overseer and two of his neighbours. Our only answer to this is that, the law has constituted the police jury legal judges of the necessity of a work of this kind.

MATHEWS, J. delivered the opinion of the court. The police jury brought this action, in

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their corporate capacity, to recover from the defendant, the sum of 4899 dollars, paid by them to several inhabitants of the parish, for work and labour done in making a levee on the land of the defendant, who resists their claim on every ground that could be imagined, in a laborious and ingenious defence.

The answer contains a peremptory exception to the sufficiency of the petition, in law, to authorize a recovery and a general denial.

During the trial of the cause, in the parish court, eight bills of exceptions were taken by the defendant's counsel and must be disposed of before a discussion on the merits.

The first is to the introduction of any testimony, on the cause of action set forth in the petition. This is nothing more than a repetition of the exception in the answer, which was attempted to be supported on two grounds: that the police jury have no right to sue *eo nomine*, as a corporation and that, by their own shewing, they have not pursued the course prescribed by the law by which they were created and under which they now act.

The acts of the legislature of 1807 and 1813 have created political bodies to direct and manage the police of their respective parishes, un-

der the name of police juries: and, it is a principle of law that, when a corporation is formed and named by a competent authority, it acquires certain rights and powers, capacities and incapacities, among which is that of suing and being sued by its corporate name. *Civ. Code*, 88, *art.* 6. 1 *Black.* 474. If the creation and name given to a corporation are circumstances in themselves sufficient to confer on it the capacity of suing and being sued, there can be no necessity for any express enactment to this effect. But, there is an act of assembly of 1817, by which police juries are authorized to sue in cases like the present, and, although passed long since the performance of the work, for which a remuneration is claimed, in the present action, it is not, in our opinion, unconstitutional, as being *ex post facto*, or impairing the obligation of a contract. It creates no new penalty for an act or offence previously committed. So far from having a tendency to impair any obligation, arising from a contract or quasi contract of the parties, it is declaratory of the means by which it may be enforced. The capacity of the plaintiffs to sue, in their corporate name, is thus far clear and evident. Their right to recover on the cause of action, as set forth in the peti-

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tion, depends on the powers which they possess to act for the individuals of their parishes, found in circumstances like those in which the defendant is stated to have been, as the time the work and labour was performed for him by their order.

It is agreed that police juries derive all their powers and authority from the acts of the legislature above cited, and that these are to be taken and considered as one act, so far as the provisions of the first are not inconsistent with those of the latter. Both acts grant to police juries power, in the most general terms, to make regulations relative to roads and levees according as circumstances may require, and, in some instances, the judge of the parish has the right of ordering a levee to be made, at the expense of an inhabitant, who fails to comply with the regulations of the police jury.

The petition states that the defendant was required to complete his levee, within a limited time, which he had been ordered to make under a regulation of the police jury—that he was unable or unwilling to perform the work required of him, and the parish judge ordered it to be done, at his expense, which was accordingly carried into complete execution and paid out of the parish treasury—&c. It is believed that

the petition sets forth a good cause of action, and evidence ought to have been received in support of the allegations therein, and consequently that the parish court was correct in overruling the defendant's objection to any evidence in support of the action.

The seven remaining bills of exceptions are to the admissibility of certain witnesses, on the score of incompetency and of written evidence offered by the plaintiffs. The objection to the witnesses, on the score of their being members of the corporation, must be repelled, according to the act of the territorial legislature of the 26th of March 1806, 3 *Martin's Digest*, 482, *n.* 5.

The objection made to the admission in evidence of the minutes of the deliberations of the police jury, on account of their being in the French language ought not to be sustained. They are not of that class of proceedings required by the constitution to be in English.

Taking the whole of these exceptions together we do not discover in the opinion of the parish court, any error requiring that the cause be remanded, and we will proceed to investigate it on its merits.

In doing this, it is necessary to recur to what has been already noticed, in part, in treating of

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the first bill of exceptions, in regard to the powers granted by law to police juries. They have a general power to direct the making of levees, in their respective parishes, and as to their structure and the time within which the planters may be required to perform the works ordered thereon. It is a power which ought to be discreetly used: but to give a full effect to it, whenever an inhabitant is unable or unwilling to complete a levee, required to be made by him, according to the dimensions and within the time prescribed, and the whole neighborhood is exposed to injury by his inability or perverseness, it has been thought proper by the legislature to grant power to the parish judge to order it to be made at the expense of the delinquent.

In the present case, the appellee was required to make his levee, the necessity and extent of which was determined by the police jury. He failed to do it, and the work was completed by the slaves of the neighboring planters, in obedience to the order of the parish judge, and they were paid out of the parish treasury. But it is said that, these things were done without proper authority, because it does not appear that the jury, who made the regulations relative to the levee of the parish in general, and particularly in relation to that of the defendant, were con-

stituted as the law requires, and therefore all these acts are void, and because the judge did not visit the levee of the defendant as he was required to do by the act of 1817, 2 *Martin's Digest*, 588, *n.* 2, before he ordered the work to be done at his expenses. The police jury must be presumed to be legally organized when they acted, unless the contrary be shewn, which in the present case, it is believed has not been done. The list of the justices of the peace, produced by the appellee, from the registry of the executive, does not contradict the presumption that a sufficient number, of those who were distinctly of the parish, were present at the enactment of the regulations relied on by the plaintiffs in the present case. The visits of the parish judge, before ordering the making and completion of levees, at the charge of individuals, can only be inferred as means of obtaining correct information when the works have been ordered by the general regulations of the police jury. In the present case, the jury have by *special* regulations required the work to be completed by the appellee, and on his failure, the neighboring inhabitants were compelled to perform it, and have been paid by the parish to whom the amount ought to be refunded, according to the just value of the work performed.

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What this value may be is the only question which remains to be examined.

The work was paid for at the rate of three dollars per cubic toise. The act last cited allows to the inhabitants one dollar per day for the labour of their slaves, when compelled to work as in the present case: we are of opinion that this provision of the law ought substantially to be carried into effect. The evidence is various and contradictory, as to the time which would be requisite for a good labourer to complete a cubic toise of levee. Some of the witnesses say that it would require three days and others only one. The truth most probably would give a medium portion of time—two days for each toise, which we think proper to adopt, in fixing the amount of the judgment.

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 our opinion ought to have been given, it is further ordered, adjudged and decreed, that the plaintiffs and appellants recover from the defendant and appellee the sum of two thousand, seven hundred and fifty-two dollars, with costs in both courts.

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PORTER & AL. vs. *LIDDLE.*

APPEAL from the court of the first district.

A bidder may refuse taking land struck to him, on discovery of an incumbrance and the auctioneer's proclamation, before the bids began, is no evidence of the bidder's knowledge of the incumbrance.

MATHEWS, J. delivered the opinion of the court. The plaintiffs and appellants instituted this suit to compel the defendant and appellee to comply with his obligation as purchaser of a lot of ground, sold by order of the court of probates.

Their right to recover, as their counsel admits, depends entirely on a question of fact, viz. whether the defendant knew, at the time he was bidding on the lot, that it was encumbered with a lease.

There is nothing to be found in the evidence that may shew with certainty that he had knowledge of the lease, nor does it appear that all the necessary steps were taken by the plaintiffs to communicate that fact to the public, in such a manner as to raise a legal presumption that the defendant could not well be ignorant of it—no mention was made of this in advertising the sale. The only evidence of any attempt to give publicity to the circumstance is the declaration or proclamation of the auctioneer, at the time of sale, which, in our opinion, is not sufficient to charge the buyer, unless it should be made further to appear that this proclamation was utter-

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ed, under such circumstances, that the bidder could not fail to hear it.

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

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

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On the failure of a debtor, his note though not yet payable may be put in suit.

Till there be a stay of proceedings any creditor may sue or attach.

If goods be assigned, proof of tradition is necessary.

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APPEAL from the court of the first district.

Porter, for the plaintiff. On the 14th of October, 1818, the plaintiff instituted a suit by attachment against the defendant for 3596 dollars, 31 cents, and seized his property in the hands of T. Howe, under a writ issued out of the parish court, and on the next day he instituted another suit, in the district court, on which an attachment was issued and levied in the hands of the same person. The first suit was afterwards transferred to the district court, by consent of the parties; both suits having been consolidated there was judgment for the plantiff, and the cause is now before this court on a bill of exceptions and a statement of facts.

The bill is taken to the opinion of the dis-

trict court in overruling the motion of the defendant's counsel to set aside the suit originating in the district court, on the ground that, from the plaintiff's own shewing, the debt was not payable at the time the attachment issued.

As the petition alledged the bankruptcy of the defendant, this circumstance suffices to give the right to sue immediately. *M'Bride* vs. *Cocherons*, 5 *Martin*, 276.

If the petition sets forth a case which authorizes an attachment, this court cannot enquire into the proof exhibited to the judge or clerk of the court from which the attachment issues. 1 *Martin's Digest*, 512 *n.* 6 & 516 *n.* 2.

If the court should think that they have a right to enquire into the evidence on which the attachment issued, the depositions and documents annexed to the petition abundantly prove the failure of the defendant, previous to the issuing the attachment in both cases. The bill of exceptions can only be considered as applying to the case originating in the district court, as it was taken before the transfer of the other case.

On the merits, the case is so fully with us, that we need only to refer the court to the statement of facts.

Hennen, for the defendant. Our attachment

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law provides for two cases, where the debt is due at the time of issuing the writ, *acts of* 1817, *page* 26, § 2, and the other where the debt is not yet due. *Ib.* 9.

The plaintiff wishes to bring himself within the provisions of the second section, although the notes had not arrived at maturity, by endeavouring to prove the failure of the defendant.

The proof offered, we contend, does not establish the fact of insolvency, bankruptcy or failure of the defendant. No evidence has been given of the protest of his notes, nor of any legal proceeding in the state of Massachusetts which justifies the plaintiff's allegation. The plaintiff must prove that the defendant has done some act which, by the laws of Massachusetts, his place of residence and domicil, amounts to a bankruptcy. That has not been done. He does not pretend to bring himself within the provisions of the third section of the act of 1817, which was the only one that could authorise an attachment, in this case. If, however, the court should be of opinion that the defendant has become insolvent, has failed and become bankrupt, would an attaching creditor in such a case have a privilege over the others? Does not the plaintiff by his own shewing declare that he wishes to take advantage of the other creditors? *Coop-*

er's Bankrupt Laws, Appendix, xxvii. The plaintiff moreover shews by the assignment, which he has given in evidence, and which forms a part of the statement of facts, that the defendant has no right in the property attached. The court must presume every thing against the plaintiff and in favor of the defendant, and will therefore presume, as the contrary does not appear, that a delivery has been made under the assignment previous to the attachment.

Under all the considerations of the case we trust the court will dismiss the attachment or render judgment in favour of the defendant.

Porter, in reply. We not only rely on the third section of the act of 1817, referred to by the defendant's counsel, but we contend that the petition sets forth a case which authorizes an attachment—under the second, because the debt sued for, although not yet payable, according to the terms of the contract, had become so by the insolvency of the debtor: the rule being that on his insolvency all debts become payable presently, although by the terms of the contract they be only so *in futuro*. The insolvency of the defendant is alledged in the petition and the affidavit which the law requires is annexed thereto. The rule of which we claim the ben-

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lit is found in our statute book. *Civ. Code*, 276, *art.* 88, and this court acted on it in the case of *M'Bride* vs. *Crocherons*, which has already been cited.

It is contended that sufficient proof of the insolvency of the defendant was not offered to authorize the issuing of the attachment. The proof required by the act of 1817, already cited, is the affidavit of the plaintiff, his agent or attorney. This was furnished and if it be not deemed sufficient, it is believed that the depositions and documents annexed to the record will place the question out of doubt.

It is said that the property attached had been assigned by the defendant, before the attachment. Admitting this allegation to be proved and that the property is identified, still the defendant must fail; for the assignee, as the property was not delivered here, had only an inchoate right. So, this court decided in the case of *Norris* vs. *Mumford*. 4 *Martin*, 20.

If the defendant's insolvency did not exist, he might have disproved our allegation of it. This he did not attempt.

MARTIN, J. delivered the opinion of the court. Suits were brought by attachment on two notes of the defendant, before the arrival of the day on which they were made payable. The suits

being brought on different days, were consolidated. Before the trial, the defendant prayed that the attachment on one of the suits might be dismissed, the affidavit and petition not shewing a sufficient cause. The court overruled the motion and he took his bill of exceptions. There was afterwards a judgment for the plaintiff and the defendant appealed.

The affidavit establishes the debt and the residence of the defendant out of the state, and the petition avers his failure.

His counsel contends that the attachment ought to have been dismissed, as no evidence was given of the protest of any of the defendant's notes or any legal proceedings or any act of bankruptcy.

We are of opinion that the district court did not err. The petition averred the failure of the defendant, and this under our statute authorized the suit. *Civ. Code.* 276, *art.* 88. The affidavit established the only two facts which the law requires—the existence of the debt and the residence out of the state of the defendant.

On the merits, the execution of the note is admitted by the statement of facts, and the depositions which come up with the record establish the failure of the defendant.

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But the defendant's counsel contends that one of the creditors of an insolvent has no privilege and cannot attach his property, which must remain liable to the claims of all generally. As long as proceedings at law against a debtor's person and property have not been stayed, any of his creditors may resort to either for the payment or security of his debt. Whether he does attach or receive goods or money for the joint benefit of all, or to his own private use, is a question useless to be discussed in the present case.

The defendant's counsel further contends that the property attached, though once the debtor's, has ceased to be his by assignment, which the court must presume to have been followed by delivery, although none be proved. If no delivery be proven the consequence is the same as in all other cases. *De non apparentibus et non existentibus eadem est lex.*

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

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WILLIAMSON & AL. SYNDICS vs. *SMOOT & AL.*

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APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. The plaintiffs having caused an attachment to be levied on the steam boat Alabama, the St. Stephens steam boat company intervened in their corporate capacity, and claimed her as their property. The intervening party are a body politic, created by an act of the legisl ture of the territory of Alabama, the capital stock of which is divided into shares of a certain amount, and Smoot the defendant owns ten of them, subscribed for by him.

Corporations of other states may sue in this state

The creditors of a stockholder cannot seize his share in any specific part of the property of the corporation.

The questions to be decided are 1. Is it proper for our courts of justice to recognise, in their judicial proceedings, the company as a corporate body? 2. Can the shares or stock of any individual stockholder be legally attached?

I. The propriety or legality of one sovereign state acknowledging, and favouring the rights and privileges of political bodies of another state, are opposed on the ground of their being in violation of the sovereignty of that which recognizes the acts of incorporation of the other, and to the prejudice of the rights of its citizens.

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It does not appear to this court that these things will of necessity result, in every case, from such acknowledgment and recognition. When attempts directly opposed to the sovereign power of a state and the rights of its citizens are made by the political bodies of another, they certainly ought to be repelled, and so ought such, if made by corporations deriving their existence from the government, under which they act. But as the present claim of the St. Stephens steam boat company is not of this nature, we are of opinion that they ought to be allowed to prosecute it in their corporate capacity.

II. The existence of the claimants being recognised as a body corporate, and it being admitted that the boat attached belongs to them as a part of their common stock, it is clear that Smoot does not possess such certain and distinct individual property in it, as to make his interest attachable. The estate and rights of a corporation belong so completely to the body, that none of the individuals who compose it has any right of ownership in them, nor can dispose of any part of them. *Civ. Code*, 88, *art.* 11.

The court is of opinion that the district court erred in disallowing the claim of the company.

It is therefore, ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and that the attachment of the plaintiff and appellant be quashed, so far as it relates to the said steam boat the Alabama, and that she be released therefrom.

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Livingston for the plaintiffs, *Duncan* for the claimants.

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In this case, the court pronounced judgment, at June term. *See the preceding volume.*

Former judgment confirmed.

Mazureau, on an application for a re hearing. The first question to be decided between the parties was: Is the defendant by the manner in which the sale was made, under the circumstances disclosed by the testimony and after the plaintiffs' own allegations, bound to warrant the redhibitory vices?

The court in examining this question lay it down as a principle of law, susceptible of no exception, that the vendor must be ignorant of the existence of the vice or disclose it to the vendee, to exclude the warranty, and hold that "in the present case, it is clear that the dispo-

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sition of the slaves sold, to run away, was known to the vendor and he did not disclose it."

On this decision we beg leave to represent, that whenever the vendee, at the time of the sale, knew or had it in his power to know, with facility, the vice or defect complained of, the law excludes the warranty.

This exception is founded upon the rule: "*Damnum quod quis suâ culpâ sentit, non videtur sentire.*" The only object of the law being to prevent the vendee from being deceived by the vendor. "*Ne emptor decipiatur,*" says the Roman law. *ff.* 21, 1, 1, § 6.

No se puede pedir la redhibitoria sabiendo el comprador el vicio de la cosa que compro al tiempo de la venta, o siendo apparente en ella, aunque el vendedor no se le diga. Curia Phil. 1, 13, §. 29. Pothier teaches the same doctrine, and says that vices, which may be easily *(facilement)* known, cannot be the foundation of redhibitory action. In such a case, says he, *l'acheteur est presumé en avoir eu connaissance et avoir bien voulu acheter la chose avec ce vice, & par consequent n'avoir souffert aucun tort; nam volenti non fit injuria. Et quand même il ne l'aurait pas connue, il ne serait pas recevable à se plaindre du tort qu'il souffre de ce contrat &c. Contrat de Vente, n.* 207, 208.

This doctrine is perfectly applicable to the present case: a careful examination of the proceedings and of the evidence will demonstrate that it depended entirely on the vendees to know the vice complained of. 2. The plaintiffs cannot have been ignorant of the vice. The vendor in his bill of sale recited the different deeds by virtue of which he was possessed of the slaves; the names of the persons who had sold them to him; the dates of the deeds; the names of the different notaries public, in whose offices they had been passed, &c. and in some of those deeds, the vice complained of is mentioned as to three of the slaves.

The vendees, in their petition, have alledged and stated that "prior to the sale made to them, that is, when the vendor purchased the slaves, they were *notoriously* bad characters, addicted to every sort of vice or defect and in the habit of *running away*."

Such facts being known, if the exception contained in the *Curia* and Pothier be correct and well understood, we contend, that the action of the vendees cannot be maintained; for, if the *bad character* of the slaves and their *habit of running away* were matter of *notoriety*, there was no necessity to disclose them; they were, they must have been, *known* to the vendees.

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We say a thing is *notoriously* known to have such a vice or quality, when it is so known to all the people of the place, in which the thing is. Now the plaintiffs are *part of the people* among whom the slaves were. The consequence is that the vices of the slaves were notorious to *them* as *well* as all the rest of the community.

The definition of the word *notorieté*, as found in the *Repertoire de Jurisprudence*, shews the correctness of this argument. *Notorieté: ce mot se dit, en général, de ce qui est connu publiquement. Les jurisconsultes appellent notorieté de fait celle qui est fondée sur une certaine croyance publique.* 12 *Guyot*, 324.

According to this definition we see that the plaintiffs' allegation amounts to this: "Prior to our purchase, it was *publicly known*, it was of *public belief*, in New Orleans, that the slaves, we have bought, were addicted to every sort of vice or defect and *in the habit of running away*," and we would believe that *men* in such situations, cannot be said to have been deceived or be heard.

The second question to be examined was "does the evidence support the action as to all the slaves, for which the court below ordered the sale to be rescinded?"

To decide it a previous knowledge of the law was necessary.

The law says, it is true, that the vice of running away, in slaves, is a redhibitory *vice*, but it also says that the vice consists of *the habit of so running, prior to the sale*. *Civil Code*, 359, *art.* 76, & 79. *Partida* 5. 5, 64.

Now, I would beg leave to observe that out of the six slaves, which are ordered to be taken back by the vendor in this case, there are *two* who are not proven, by the evidence, to have been in the habit of running away prior to the sale, to wit: *Horace*, about 14 years old, at the time of the sale, who prior to it had, it is said, runaway *once* and *no more* who, since the sale, has never left the vendees' house or plantation. And *Boucaud*, who is proven to have runaway *only twice*, before the sale and that too, in *four years*.

If a gentleman should happen to get *in liquor once* or *twice* in four years, would any person pretend to say that he is in the habit of getting drunk? If not, why should it be said that Horace and Boucaud were, prior to the sale, in the habit of running away?

L'habitude est un penchant acquis par l'exercise des memes actions. ***Encyclopedie,*** verbo ***Habitude.***

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The judgment says, "The existence of the habit of *running away*, prior to the sale to the plaintiffs, is *sufficiently proven* by the bills of *sale to the vendor*, the deposition of Lamothe and the orders of the mayor," &c.

Upon this point, I pray to remind the court, 1. That the bills of sale to the vendor shew the existence of the vice as to three of the slaves sold, and not as to the six ordered to be retaken by the vendor; and that neither Horace nor Boucaud is in the said deeds of sale, represented as being in the habit of *running away*. 2d. That, from the deposition of Lamothe and the orders of the mayor, nothing appears, as to Horace or Boucaud, except that the latter did *run away twice* in *four* years *prior to the sale*.

The third question was relative to the sum which the vendor was to reimburse to the vendees in case he was bound to warrant the vice of running away.

The court in examining it say, "Both parties complain of the valuation made in the parish court, the vendor thinking it extravagant, the vendees insufficient; perhaps this is the best evidence of its correctness; it does not appear to us so materially incorrect, &c."

This argument might be easily retorted by saying. "The judgment must be very bad since none of the parties is satisfied with it." The circumstance of both parties complaining of the judgment can never, in my humble opinion, be an evidence of its correctness; all that can be presumed from it is that the judge acted with *impartiality.*

At any rate, the question was not whether the *valuation* appeared correct, but whether the judge who made it had the right to make it in the manner it was made: and on this point I beg leave to recall to the mind of the court that I have shewn, that the judge had no right to make any valuation, but was obliged to decree the sum to be reimbursed according to the testimony; and I should think that the will or caprice of men ought not to be substituted to the *sacred will* of the law. *Partida*, 3, 16, 40.

The last question was whether any hire was to be allowed for the slaves for which the sale is rescinded during the time they have been in the possession of the vendees.

The court have decided that no hire can be allowed to the vendor.

On this part of the judgment I beg leave to represent that he is entitled by law to the hire

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of the negroes, in that situation. *Redhibiendose la cosa ha de ser volviendola al vendor, con mas lo que se hubiere deteriorado or diminuido, y sus aumento, accessiones, partes, frutos y redit s, y alquileres, &c. Curia Philipica*, 1, 13, *n.* 37.

One of the slaves, Horace, ordered to be retaken has constantly been and still is on the vendees' plantation, the five others have been kept by them for nearly three months after the sale and prior to their action.

The vendor must certainly be paid for the services the slaves have rendered to or performed on the vendees' plantation.

Finally it appears, from the sentence of this court, that the judgment of the court below was reversed, as to the interest, on the only ground that, the price to be reimbursed was not fixed between the parties; and that no interest being allowed, no hire can be allowed. But I would observe that had the price been fixed, no interest could have been allowed. Interest is given by law to indemnify the vendee for the use which the vendor has had of the purchase money. Therefore as, in this case, the vendees had not paid the purchase money down, at the time of the sale, but on the contrary had given their note for it, payable one year after, all they

were entitled to was a restoration of their note, and security from the vendor, that at the same period fixed for its payment he would pay them the amount fixed for the price of the particular negroes he was obliged to retake; but no interest was due.

A re-hearing was granted on the second point only. The plaintiffs' counsel offered no new argument and the defendant's relied on those urged above.

MARTIN, J. delivered the opinion of the court. At the request of the defendant, a rehearing has been had, in this case, on the question whether Horace and Boucaud, two of the slaves sold by the defendant to the plaintiffs, were really in the habit of running away, at the time of the sale, so as to entitle the plaintiffs to their redhibitory action.

The fact was found, against the defendant, by the jury, in the parish court, and although this circumstance is not conclusive on the appeal, it cannot fail to have some weight.

Horace was purchased by the defendant in March 1818, and his vendor then expressly excluded the legal warranty against such vices, which the law considers as redhibitory ones,

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viz. capital crimes, robbery and the habit of running away. This appears by the bill of sale on record: and the very vendor did declare that Horace ran away from him, and was absent seven consecutive months, during which he went to New York, Liverpool and Charleston, where he was arrested and brought to New Orleans, where five weeks after he sold him to the present defendant, informing him he was a runaway and was sold as such.

It is in evidence that Boucaud was brought to jail as a runaway, before the sale to the plaintiff, and that he has since run away twice. In the sale of Boucaud to the defendant, the vendor warrants only against the *maladies* for which the law grants a redhibitory action.

The counsel for the defendant thinks the jury and this court erred in inferring from this testimony that the slaves were in the *habit* of running away—that one single instance of running away is proven anterior to the sale, which cannot constitute a habit.

As to Horace, trips to New York, to Liverpool and Charleston, and an absence of seven months, which ended by his capture only; the circumstance of his being sold as a runaway; the information given by the defendant's vendor, that he was a runaway, justify in our opinion

the conclusion which the jury and this court have taken.

As to Boucaud, the circumstance of his having been purchased by the defendant, with a simple warranty of the redhibitory *maladies*, of his having been committed to jail as a runaway once, would not authorize the same conclusion. But he ran away twice, within a very few days after the plaintiffs purchased him, which raises a presumption, when coupled with the preceding facts, that the habit of running away existed before the sale. Indeed the cases of these slaves are not easily to be distinguished from that of *Macarty* vs. *Bagneries*, 1 *Martin*, 149. There, there was no evidence of any repeated act of running away before the sale, but the slave had been kept several months in jail, and not liberated therefrom, till the sale, and ran away soon after. Thus, Horace's voyages to New York, Liverpool and Charleston, and the declaration of his then master, excite as much apprehension and alarm as evidence of three ordinary acts of running away.

It is therefore ordered, adjudged and decreed, that the judgment of this court in this case be certified to the parish court, as if no rehearing had been granted.

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Taxed costs of every kind are priviledged.

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

A. Bordeaux, Marie Louise, and other creditors of the insolvent, instituted suits against him, in June 1818, and on the 10th of July obtained judgment by default. On the 16th he filed his petition for the meeting of his creditors, and obtained an order for the stay of all proceedings against him, before the judgment by default became final. The creditors met, accepted the cession and appointed a syndic.

The creditors, who had obtained judgments by default, obtained against him a rule, to shew cause why the taxed costs in these suits should not be paid as priviledged debts, which after argument was made absolute. There being no personal property surrendered, no apportionment was made in pursuance of the rule, and these creditors opposed the homologation of the tableau of distribution, and obtained their collocation thereon, for these costs, before the mortgage creditors, who appealed from the decision of the court in this respect.

De Armas, for the appellants. The 21st arti-

cle of the Napoleon code is couched in the same words as the part of our statute on which the appellees rely. *Civ. Code*, 468, *art.* 73. In ascertaining therefore the legal meaning of the terms law charges, *fraix de justice*, in our statute, we will be much aided by the opinion of commentators and the decisions of courts of justice in France on the correct meaning of the same words in the corresponding article of the Napoleon code.

One could not imagine that by virtue of this article (the 2101st) a creditor, who had caused the personal estate of his debtor to be seized and sold, could pretend to a preference, on this account alone, on the proceeds of the sale. Pretentions of this kind were, however, admitted by an inferior tribunal, but set aside by a decree of the sovereign council of Brussels of the 11th of December, 1806. *Discussions sur le Code Napoleon*, 485. *Notes on art.* 2101.

Law charges, which enjoy a general priviledge are *those that have a relation to the total mass of the failure*, such as those of seals, inventory and the like. 3 *Pardessus, Cours de droit commercial*, 320.

If the assignees or syndic had sustained law suits for the common benefit and judgment had

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been obtained against them, the right of the plaintiffs as to the costs, or that of the defendants as to their disbursements, would not be *a priviledge*. *Id.*

The collection of active debts may have occasioned charges and costs not taxed, *faux fraix*. The sale of personal property must occasion charges of appraisers, auctioneers, brokers, costs of stamp, registry. These it is just should be deducted, so as to present for distribution the clear proceeds of the things on which they accrue. *Id.* 397.

Law charges, which are those of seals, inventory and sale. *have for their object the preservation of the thing.* 3 *Guichard, Legislation hypothecaire*, 105.

The priviledge, for the charges of seals, &c. takes place in case of failures, as well as in cases of deceases. It can be applied to mortgage as as well as to chirographary creditors. *Nap. Code*, 2106, 2108.

Allais having failed, his real estate was sold and the personal being insufficient, the officers of justice claimed, by priviledge and preference on the proceeds, payment of the costs occasioned by the failure, and resulting from the affixing recognising and removing the seals. Bourcier and the insolvent's wife, creditors by mortgage,

opposed their collocation. They contended that such charges, being no ways useful to mortgage creditors, whose rights are preserved by the sole registry of their claims, could not be levied, by a resort to their prejudice, on the mortgaged property, but only on the other property, inasmuch as they are incurred for the sole advantage of chirographary creditors, and that the articles 2101 and 2104 of the Napoleon code, which allow a priviledge on real and personal estate for law charges, are not to have any effect in cases of failures, but only in cases of decease. The officers of justice answered that, as the law had not made any distinction, the courts could not make any. They obtained a judgment in the court of the department of La Loire, which was affirmed by the imperial court on the 28th of January, 1812.

The expenses of seals and inventories, those of sales, of the settling of the ranks of creditors, of the seizure, appraisement and auction and other law charges are to be levied before any other debts: *because they concern all the creditors; having been laid out for their common benefit. Domat*, 3, 1, § 5.

When a creditor causes the personal estate of his debtor to be sold, if there be no opposing creditor, it is evident that there is no priviledge

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or concurrence with any other person; and he is entitled to the amount of his debt out of the proceeds. But, if there be opposing creditors and a suit be instituted for distribution, the officer is to deposit the proceeds, after deducting his fees, and the several privileges are to be discussed. Among these, law charges occupy the first place. These charges are those of seizure, guardianship and sale, which are incurred *for the common interest of all.* It is evident that those which the creditor has made in order to obtain judgment do not enjoy this priviledge, because he has made them *for his own private advantage* only. *Nouveau Ferriere,* verbo ***Privilege.***

The name of law charges is given to all the expenses occasioned by an act passed under the seal of a court of justice, whatever that act may be. The charges of acts are generally to be borne by those for whose interest they are made. 8 *Denisart, 757,* verbo ***Fraix de justice.***

The expenses incurred in prosecuting a law suit are denominated law charges or costs: but the latter denomination is more particularly applicable to those which are privileged by law. The defendant has no privilege for his. The plaintiff has not a privilege for all the expenses

he has been at in obtaining judgment, but only those made to render his title executory.

If there be several creditors and the money is to be apportioned among them, the costs of the apportionment are to be taken out by preference. As to the costs, incurred by the opposing creditors, in the contestation, they are not to be paid by preference, unless the creditors were authorised to enter into such a contestation: otherwise they are to be classed for these costs as for their principal debts.

As the sale of the personal estate is necessary to procure the payment of the creditors, when it takes place under an order of court, the costs are to be taken out of the proceeds, because they are for the benefit of all.

The costs of seals and inventory, which preserve the goods seized and prevent their waste, have the same priviledge as the cost of the sales. *Tessandier, Regime Hypothecaire*, 7.

The only priviledged costs are those incurred for the common interest of all the creditors. 7 *Le Clerq*, 201.

Law charges, in the sense of the article 2101, are all those made to procure the sale of the thing and the distribution of its proceeds. A distinction is to be made between these charges and

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the costs incurred before courts of justice, in order to obtain judgment.

It must, therefore, be said with Ferriere, as to the law of the eleventh of Brumaire, in the seventh year, and with the orator of the tribunate, that the law charges, of which it is a question here, are those incurred for the preservation of the thing for the benefit of all those who have a right therein: those of seals and inventory, of sale or adjudication, those for making out the tableau and the determination of contests arising thereon, and, in a word, those which, according to the expressions of the tribunate, have for their object the preservation of the thing. 10 *Merlin, Rep. de Jur.* 20. verbo *Privilege.*

Law charges, are those which have been made, according to Domat, for the common cause of the creditors, for preserving their pledges, for discussing and making out the apportionment. In consequence, we are to consider as such the costs of seals, either after the failure or decease of the debtor, those of the inventory, sale and liquidation: those of conservatory acts, or instances in order to interrupt prescription, for a revendication, stoppage *in transitu.* Those which a creditor may have made for his personal advantage as to obtain judgment or render his title executory, cannot enjoy any priviledge,

but that which belongs to his claim, of which they are but an accessary. 1 *Perfil, Regime Hypothecaire*, 36.

Law charges which have a priviledge are those for affixing the seals after the decease or failure of a debtor, the sale of property seized and the like. *Vauvilliers, des privileges & hypotheques*, 4.

Law charges, in the 2101st art. of the code Napoleon, are those concerning the common interest of the creditors, such as those of seals and inventory. Those for the particular interest of a creditor follow the nature of the principal demand. 12 *Delvincourt, Cours du Code Nap.* 620.

Cuvillier, for the appellees. The judgment of the parish court is in conformity to the uniform decisions of this, in the cases of *Morse* vs. *Williamson & Patton's syndics*, 3 *Martin*, 282, *Morel* vs. *Misottiere's syndics*, as well as those of the superior court of the late territory, in those of *Ellery* vs. *Amelung's syndics*, 2 *Martin*, 242 & *Elmes* vs. *Esteva's syndics*, *id.* 264.

It is not in contradiction with the decision of the tribunal of the department of La Loire, affirmed by the imperial court of France, cited by the opposite counsel, nor the decree of the superior council of Brussels.

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Funeral expenses, law charges, certain medical charges, salaries of certain persons, the price of a debtor's subsistence are by our statute priviledged on his personal and real property. *Civ. Code*, 468, *art.* 73, 470, *art.* 76. The priviledge cannot be confined by construction to expenses incurred in the preservation of the thing; for they extend to every part of the debtor's property, whether incurred for the preservation of this or any part of it, whether they relate to his property or are merely personal. If a baker supplies me with bread, his priviledge immediately attaches: Will any subsequent failure destroy it? Certainly not; it will follow my property *after its cession*, in the hands of my creditors. If I employ an attorney, his taxed costs, those of the sheriff and clerk, if he bring a suit, are priviledged costs. My failure will not divest them of their rank, among other claims against me. If I succeed in the suit, these taxed costs are payable by the defendant against whom judgment was obtained: and there cannot be any good reason to say that they are not due as taxed costs, in the language of the statute as law charges, and recoverable as such. If so, the creditors of them have a priviledge on the property of the plaintiff and defendant and the failure of either cannot mar their rights.

MATHEWS, J. delivered the opinion of the court. This is a case in which a *tableau* of distribution of the insolvent's estate is offered for homologation, by the syndics, and opposed by two of the creditors. They claim, as a debt priviledged on all the moveable property of the insolvent, the taxed costs of certain suits, which they had prosecuted against him previous to his failure, and rely on that part of the statute which grants a priviledge to *law charges*, in general terms, without confining or limiting the expression to any specific costs and charges. *Civ. Code*, 468, *art.* 73. It is contended by the syndics that this part of our code is expressed in terms similar to those of the 2101st article of the Napoleon code, and the construction and interpretation given by French jurists to the latter ought to be adopted by the courts of this state. According to this, the terms *fraix de justice* (which correspond to the English words *law charges*) are confined to those expenses, which arise out of proceedings instituted for the benefit and preservation of the estate of the insolvent; and a number of authorities are cited, for this confined application of these terms. But, with whatever deference and respect, we may view the opinions of the authors cited, we are certainly not bound to adopt them. As the

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article of our code is indefinite and does not distinguish and limit the species of law charges intended to be embraced by it, courts of justice cannot make any distinction.

We are of opinion, that the statute accords to the appellees, the priviledge they contend for, as to every kind of judicial cost which may have been properly *taxed* against the insolvent.

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

WEEKS vs. *M'MICKEN.*

If A. gives an order to B. to receive a sum of money in New-Orleans, and B writes to A. then his clerk in New-Orleans and will be a good opportunity to bring money, and A. desires that he may bring it and the clerk brings it and places it with B's money in a drawer, B. is liable therefor

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellee is an inhabitant of Bayou Sarah, whose business was usually done by the defendant and appellant, a merchant in St. Francisville. Having some money to collect at New-Orleans, from the house of Flower & Finley, he gave to the appellant an order on them for the amount; and subsequently, on being informed by the appellant that J. Tolman. his clerk, was in New-Orleans on a journey and might bring the ap-

pellee's money safely, he appears to have requested the appellant to commission him to fetch it, together with some other money which the appellee had in the hands of L. Millaudon. Tolman brought the money to St. Francisville, and deposited it with other monies in the drawer of a desk of the appellant's, in the appellant's store. The money, however, disappeared; and on the refusal of the appellant to refund it, the present suit is brought to compel him thereto.

The defendant resists this claim on the ground that this money never was delivered to him, but to Tolman, out of whose possession it was stolen. He proves that when Tolman arrived at St. Francisville, he (the defendant) was absent, and that the money had disappeared before his return.

That employers are responsible for the acts which the persons employed by them execute within the limits of their agency, and that, of course, merchants are answerable for the acts done by their clerks as such, is one of those plain rules which admit of no dispute. The only question here, therefore, is one of fact: Was Tolman acting in the line of his functions as clerk of the defendant, when he received, brought up and kept the plaintiff's money?

The defendant endeavours to stand out of the

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way by attempting to shew that Tolman acted at the request of the plaintiff. He exhibits a letter in which the plaintiff requests him to employ his young man to collect the money; but that letter is in answer to one in which the defendant informs the plaintiff that Tolman is at New-Orleans, and will be a safe hand to bring the money; and that letter refers to an order which the plaintiff had given long before to the defendant for that part of his money which was in the hands of Flower & Finley. The defendant was the person who did the plaintiff's business. Before Tolman went to New-Orleans, he had already received the order on Flower & Finley payable to himself, and needed no authorization from the plaintiff to send it by his clerk. Tolman brought the money, put it along with some of the defendant's in a drawer of the defendant's desk, and he and another clerk paid and changed money out of that drawer indiscriminately. It is strongly probable, though the witnesses did not disclose it, that the plaintiff was credited with the amount received for him at New-Orleans, for among the payments made by the clerks out of the drawer, is that of an order of the plaintiff for fifty dollars, which was *charged to his account.*

We are of opinion, upon the whole, that Tolman acted, with respect to the plaintiff's money, as the clerk of the defendant, and that the defendant is liable for the loss of that money in his store.

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

Livingston, for the plaintiff—the defendant did not appear.

BRIGGS & AL. vs. *RIPLEY & AL.*

If the consignor desires that the sale of the goods be not delayed, if on their arrival a certain price can be obtained and he afterwards draws for the net proceeds, and the consignee sells below the price mentioned, he is not liable for damages.

APPEAL from the court of the first district.

The petition stated that the defendants were indebted to the plaintiffs in the sum of 1637 dollars, which they refused to pay. At the foot of it was the affidavit of Sterling Allen, who styled himself the plaintiffs' agent, and swore that the defendants permanently reside out of the state. On this an attachment issued, which was levied on the ship Governor Griswold, which was claimed by Seth Grosvenor. The defendants pleaded the general issue, there was judgment

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for the plaintiffs, and the claimant and defendants appealed.

It appeared in evidence, that in May, 1818, Stockton, Allen & co. of New-Orleans, shipped to the defendants a quantity of manufactured tobacco, with the following instructions: "It is our wish that on arrival, it (the tobacco) should be sold, if not more than twelve cents and an half can be had per pound; the net proceeds are to be placed to the credit of Gardner & Center."

Gardner & Center drew on the defendants, in favour of the plaintiffs for 3500 dollars, at 60 days, on account of the proceeds of the tobacco, which the defendants accepted on the 25th of June, and on the 5th of October, they sold the tobacco at 10 cents per pound.

The ship, Governor Griswold, was sold by the defendants to Seth Grosvenor the claimant, in New-York, where both vendor and vendee have their domicil, while she was at sea, so that there was no actual delivery.

Morse, for the plaintiffs. The ship was well attached as the property of the defendants notwithstanding the sale to the claimant. As no delivery took place, the sale had not the effect of transferring the property to the vendee.

and she was liable to the attachment of the creditors of the vendor. This point has been frequently determined in this court. *Durnford* vs. *Brooks' syndics.* 3 *Martin*, 222. *Norris* vs. *Mumford*, 4 *id.* 20. This is the rule of the civil law, it is true, but that of the common law is perfectly the same. A grant or assignment of chattels is valid at common law between the parties, without actual delivery of the chattels, and the property passes immediately on the execution of the deed. But, as to creditors, the title is not perfect unless possession accompanies and follows the deed. *Meeker & al.* vs. *Wilson.* 1 *Gallison*, 419.

On the merits, we have shewn that our agent consigned our tobacco to the defendants, with directions not to sell it for less than twelve and an half cents, that they sold it for ten, so that we lost two cents and one half per pound, which we are entitled to receive.

Livermore, for the claimant and defendants. I contend, that the alienation, either by deed or will, of personal or moveable property is to be governed by the law of the alienor's domicil. *Huberus, Praelectiones juris civilis, tom.* 2. 1, 3. In this case the domicil of both parties to the bill of sale was in New-York, where the com-

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mon law of England prevails. By the common law it is clearly settled, that the property of a ship at sea, or in a foreign port, will pass by a bill of sale without delivery, in opposition to the rights of creditors. 1 *Gallison*, 423. 4 *Massachusetts Rep.* 663. 4 *Burr.* 2051.

I contend, that here was an actual delivery of the vessel and that the assignee got possession before the attachment was laid. The bill of sale was lodged by Gardner in the custom house on the 6th of January, and the attachment was laid on the 8th. In leaving this bill of sale at the custom house, Gardner can be considered as acting in no other manner than as the agent of the claimant, for whose benefit it was done. And he declares that from the time he received the bill of sale he considered himself as the agent for the claimant in all things which concerned the ship. He is also confident that he did at that time receive instructions from the claimant, though the letter is lost. But admitting him to be a mere *negotiorum gestor*, possession taken by him will benefit the claimant, for whose benefit he took possession, and who has at all events ratified his act. This is fully stated by *Cujas*, whom *Pothier* styles *juris interpretum praestantissimus*. In commenting upon the title *de adquirenda vel amit-*

tenda possessione, ff. 41. 2, 1, § 20, he says, *Sequitur in hoc § quod jam supra diximus saepe, per procuratorem nobis adquiri possessionem ita demum, si velit nobis possidere, si operam nobis solis suam accommodet, si possessionem apprehendat nostro, non suo nomine, et mandatu similiter nostro, vel etiam ratihabitione secuta, id est, volentibus nobis, non nolentibus. Scientibus autem vel ignorantibus nobis, voluntas nostra sufficit, nec requiritur etiam ut sciamus, procuratorem apprehendisse possessionem nostro nomine.* The following law in the Digest is also very strong to this point. *Generaliter quisquis omnino nostro nomine sit in possessionem, veluti procurator, hospes, amicus, nos possidere videmur. ff.* 41, 2, 9. This law, and also the commentary of *Cujas* upon it, are sufficient to support our claim. For there can be no doubt from the evidence, that Gardner intended to act as an agent and friend of Grosvenor, and that he believed he was acting as his agent. Upon the law last quoted Cujas observes, *Haec l. docet, nos possidere non tantum per servos & filiosfam.. sed etiam per hominem liberum, id est, sui juris, si nostro nomine sint in possessionem, veluti per procuratorem, vel colonum et inquilinum, per hospitem. vel amicum voluntarium, ut Cicero loquitur, id est, per*

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negotiorum gestorem, secuta ratihabitione nostra. The evidence of Gardner that he had received instructions from the claimant, at the time he received the bill of sale, is strongly confirmed by the letter of Mr. Grosvenor which is in evidence. In this letter the claimant evidently writes to a man with whom he had previously corresponded.

In the next place, I submit to the court, that the plaintiffs cannot recover, because this action is not supported. The plaintiffs are not entitled to recover, 1st. Because the petition is insufficient. It is expressly required by law, that the petition set forth the cause of action. It merely alledges that the defendants are indebted to the plaintiffs, but whether upon bond, bill of exchange, for goods sold, or for slander, does not appear. This objection is conceived to be fatal, either on demurrer, or upon an appeal. This case is different from that of *Ralston* vs. *Barclay & al.* 6 *Martin*, 649, lately decided in this court. In that case the objection was not to the petition, but to the evidence as applied to the petition; and the objection was there made too late, being after all the evidence had been read to the jury, and

after the defendants had joined in the commission and put interrogatories to the witnesses.

The second objection is, that the plaintiffs have shewn no interest in the tobacco consigned by Stockton, Allen & co. to the defendants. The affidavit of Allen was sufficient for taking out the attachment; but is no evidence in the cause. The objection to this defect in the evidence could not appear upon the record, because no bill of exceptions lies to the decree of the judge. The defendants have appealed, and have assigned as the ground for reversing the judgment of the district judge, that the judgment was for the plaintiffs when it ought to have been for the defendants. If there is not evidence in the record sufficient to support the judgment, it is, of course, erroneous, and must be reversed. The affidavit is merely *ex parte*, and no evidence.

3. The defendants have violated no instructions. According to the true construction of the letter from Stockton, Allen & co. to the defendants, there is no positive price limited, within which the tobacco was not to be sold. The direction contained in the letter is positive only upon one point; to sell the tobacco upon arrival, if not more than a certain sum can be got for it. But the letter does not direct the defendants to hold

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the tobacco until that price can be obtained. In the absence of positive instructions, the law requires of a factor good faith and reasonable diligence. There is no pretence that these have not been shewn by the defendants. No proof has been offered that any damage has been sustained by the plaintiffs, in consequence of the sale of this tobacco. It has not been proved, nor can it be proved, that, from the time of the consignment to the present time a greater price could have been obtained for this tobacco than that for which it was sold. This action is then, in all its features, a hard action; and for this reason alone, if the letter is at all equivocal, the construction should be against the plaintiffs. Upon general principles of law, a principal, who complains of a disobedience of orders by his agent, is bound to shew that his orders have been precise and unequivocal; and the agent is only liable in case of a direct violation of precise and clear instructions. Here there are no positive direction to sell for less than twelve and an half cents. The most that can be made of it is, that the letter contains a strong expression of the writer's belief as to the probable price which could be had. and perhaps of his wishes that it should be held for that. This, however, is not clear; and, if it were, it would not be a rule up-

on which the court could decide in favor of the plaintiffs, consistently with the case of *Ralston* vs. *Barclay & al.*

The plaintiffs have sustained no damage. There is a difference between the disappointment of rather sanguine expectations and such damages as give a right to an action at law. We contend that some evidence should have been offered to shew that some loss had been occasioned by the sale here complained of; that it should have been proved, that the price of this species of tobacco has been much higher in New York, or at least there was a probability that it would be higher at some future time.

The plaintiffs had no right to limit the price absolutely. This consignment was made under an agreement entered into in New-Orleans between Stockton, Allen & co. and Gardner & Center, the agents of the defendants. By this agreement, Stockton, Allen & co. were to have an advance upon the consignment, but there was no agreement or consent on the part of Gardner & Center, that Ripley, Center & co. should be limited in the sale of this tobacco. This agreement was entered into by Gardner & Center as general agents of the defendants in good faith, and there is no pretence that they exceeded their

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authority. Of course, the defendants were bound by their acts, and were bound to accept the bills drawn by them and given to Stockton, Allen & co. for this advance. If these bills had not been accepted, the holders, Stockton, Allen & co. could have recovered damages against the drawers. The agreement was on one part, to consign the tobacco, on the other to make the advance by drawing bills on New York. Nothing was said about limiting the price. Consequently any limit which would interfere with the consignee's reimbursement, would have been in fraud of the agreement and not obligatory upon the consignee. Something has been said in the argument about the respectability of the house here; but when advances are made upon consignments, they are made upon the security of the goods, and not of the consignee.

MARTIN, J. delivered the opinion of the court. The plaintiffs' counsel contends that he has shewn that the tobacco was their property, that Allen, Stockton & co. were their agents and consigned it to the defendants, restricting them to sell it at twelve cents and a half per pound, and that as they sold it for ten cents, the plaintiffs have lost two cents and a half per pound, which it is the object of the present suit to recover.

As no specific cause of action was *alledged* in the petition, other than the non payment of an undescript claim, the evidence ought, at least, to have *established* the plaintiffs' right to a recovery, the general issue having been pleaded. That the plaintiffs were, in any manner interested in this shipment of tobacco, we are left to presume from the circumstance of Sterling Allen having, as their agents, made the necessary affidavit, in order to procure the writ of attachment. The conclusion is far from being strictly logical. He might have become their agent since the cause of action arose: even for the sole purpose of instituting the suit. Admitting him, however, to have been the plaintiffs' agent *ab initio*, does it follow as a necessary consequence that every transaction and consignment of his is for the account of these, his principals? Are also all the transactions and consignments of Stockton, Allen & co. for the account of the plaintiffs? If they be not, how is this consignment of tobacco to be distinguished from the rest?

But admitting all these queries to be properly answered in the affirmative, it is far from being clear that the defendants have been guilty of any deviation from the orders of the consignees. These gentlemen gave no positive instructions, except that the sale of the tobacco should not be

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delayed, if twelve cents and a half could be obtained *on its arrival.* They do not desire it, that if that price cannot be obtained then, and, after waiting a reasonable time, there be no hope of obtaining that price, the consignees may not sell under it.

With these instructions the defendants complied. The tobacco was shipped in May, and no sale took place until October. At first, they had been directed to credit Gardner & Center with the net proceeds of the tobacco. Afterwards, the consignors procured these gentlemen's draft, at sixty days, for the probable amount of these proceeds, on the defendants, who accepted it. It is true, the consignors' letter, accompanying the tobacco, communicated their hope that the article being of a good quality would sell well: and the restriction from delaying the sale, if on its arrival twelve cents and a half could be procured, is evidence of the consignors expectation that this price would be obtained. The draft, which was afterwards procured on the defendants, is presented by their counsel, as an evidence of the waiver of any previous restriction as to price. This court is not prepared to say that the draft could be considered as the waiver of any positive direction (if any had existed) not to sell below a certain price, but we

are ready to say that when no *positive* restriction exists, a draft for the proceeds of the consignment, justifies a sale, in order to meet it, altho' without it, prudence and the state of the market might demand a further delay.

No allegation of fraud or misconduct in the defendant is made. It is not shewn that the interests of the consignors would have been promoted by a delay, nor, that at any time, till the inception of the present suit or since a greater price could have been obtained.

It appears to us that the district court erred in giving judgment against the defendants. This being the case, that against the party intervening, as a claimant, cannot be supported.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendants and claimant, and that the plaintiffs and appellees pay all costs in both courts.

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APPEAL from the court of the first district.

If the subscribing witness to a deed reside out of the state, his handwriting

The petition set forth that, on the 5th of November, 1818, at Natchez in the state of Mis-

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being proved, the deed will be read.

When the party does not *formally* deny his signature, it may be proven by witnesses.

A report subscribed by a witness may be read, in order to weaken his testimony by shewing a discrepancy between what he signed & what he swears

A stockholder cannot be a witness for the corporation.

Hearsay is no testimony.

A member of an unincorporated company is bound *in solido* for its debts.

The nature, validity and construction of a contract is determined according to the *lex loci* the remedy, according to *lex fori*.

sissippi, the defendant, by the name and style of chairman of the board of directors of the Natchez Steam Boat Company, for himself and others composing said company, did covenant and agree to give to the plaintiff the sum of 65,000 dollars for the steam boat Vesuvius, then on a voyage from New-Orleans to Louisville, said steam boat to be delivered at New-Orleans on her return, at which time 15,000 dollars were to be paid, and the residue in equal instalments, at three, six, nine and twelve months, with interest at six per centum, and that, at the time of delivery, the defendant should make his promissory notes for said four instalments, which should be signed by him as chairman of said company. The petition then avers an offer to deliver and refusal to receive, and, that the defendant had refused to pay according to the contract. It prays judgment for the said sum of 65,000 dollars or that the defendant be ordered to pay the sum of 15,000 dollars and to execute promissory notes as above stated, and concludes with a prayer for further relief.

The defendant pleaded, 1st. A general denial; 2d. In abatement, that there were seventy two other persons (naming them) who were parties with the defendant to the contract, and who ought to have been made parties to the suit.

3d, That the covenants were made by the defendant with seventy-two other persons associated in a special and limited partnership, having a capital stock of 100,000 dollars, of which defendant owns but 1000 dollars. 4th. The fourth plea states that the said company are now a corporation. 5th. The fifth plea sets forth the organization of the Natchez Steam Boat Company, that public proposals were issued on the 4th of January, 1818, for forming a company for the exclusive purpose of purchasing, or building and equipping one or more steam boats, and for raising for that purpose the sum of 100,000 dollars, to be subscribed by the persons forming said company, in shares of 100 dollars each share; that afterwards on the 21th of July, 1818, the subscribers met, formed rules and regulations, and elected nine directors; that the defendant was elected chairman of said board of directors; that in that capacity he addressed a letter to the plaintiff, offering to purchase the Vesuvius for the use of the company; that a correspondence took place, and that on the 10th day of October, 1818, the plaintiff proposed, in a letter to defendant, that the company should purchase from him the steam boats Orleans and Vesuvius, desiring an examination of the Orleans as she was reported to be rotten. and

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stating that "the character of the Vesuvius was too well known to need comment." The answer proceeded to set forth at great length the negociations between the parties, and contended, that the contract was conditional, and that the company were not bound to receive the boat unless satisfied with her condition after an examination: that the plaintiff, in his letters and conversations, misrepresented the qualities and condition of the boat; that he represented her to be entitled to certain patent rights which she was not. It further stated, that previous to the execution of the contract the plaintiff had the subscription list, proceedings, rules and regulations of the company, and that a conversation took place between him and the defendant, in which the plaintiff desired the defendant to sign the notes with one or two members of the company in their individual names, and not in the name of the company, and that defendant refused and said he would not be responsible further than his own share. It further charged, that the plaintiff had in conversation represented that the boat would return from Louisville early in December, and that he had in a letter offered to contract for the delivery of both boats on the 1st day of January, 1819, thereby inducing the defendant to believe the Vesuvius would re-

turn sooner; but that she did not return until the last of February. It concluded with setting forth a correspondence which took place between the parties in New-Orleans in February, an examination, and that the boat was so defective the company would not receive her.

The contract produced, upon the trial, was executed at Natchez on the 5th of November, 1818. by the plaintiff and defendant, who described himself as "chairman of the board of directors of the Natchez Steam Boat Company," and was sealed with the private seals of the parties. By it, the plaintiff did "covenant and agree to sell to the Natchez Steam Boat Company the steam boat Vesuvius (now on a voyage from New Orleans to Louisville) with her engine, tackle, furniture, apparel and appurtenances of every name and description whatever, and that he, the said Jasper Lynch shall and will deliver the said steam boat Vesuvius to the said Natchez Steam Boat Company or its agent at New-Orleans, in good order, immediately on her return from her present voyage, allowing her a reasonable time thereafter for the discharge of the cargo she shall then have on board. And that he the said J. L. shall and will also at the time of the

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delivery, &c. make, execute and deliver a formal conveyance for vesting the title to the said steam boat in said company, and thereby guarantee and secure the title free of all suits, &c." On the part of defendant were the following covenants. "And the said chairman, board of directors and company, &c. on their part and behalf do covenant and agree, in consideration of the premises, to pay the said Jasper Lynch for the steam boat Vesuvius, the sum of 65,000 dollars, in manner following, that is to say, 15,000 dollars at the time of the delivery, &c. and the further sum of 12,500 dollars in three months thereafter, and the further sum of 12,500 dollars in six months thereafter, and the further sum of 12,500 dollars in nine months thereafter, and the further sum of 12,500 dollars residue of the said sum of 65,000 dollars, in twelve months thereafter, together with interest on the four last mentioned sums at and after the rate of six per cent. per annum from the said time of delivery of the steam boat Vesuvius, &c. And also that the said company at the said time of delivery of the steam boat Vesuvius, &c. will execute to the said Lynch their promissory notes for the payment of the said sum of 50,000 dollars, the residue of the purchase money at the times and in the manner above stipulated, with the interest

thereon as above expressed. And also, that they will, at the same time, make, execute and deliver to the said Lynch, a mortgage of said steam boat as a collateral security, &c." For the performance the parties bound themselves in the penalty of 20,000 dollars.

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From the mass of written and verbal evidence in this cause it appeared, that the steam boat Vesuvius was built at Pittsburgh, in the winter of 1813 and 1814, that she came down to New-Orleans in March, 1814, and from that time until July, 1816, was employed in the trade between New-Orleans and Natchez. In July, 1816, she took fire and burnt to light water mark, in New-Orleans, having then a cargo on board and bound up. She was hauled up, rebuilt in the most substantial manner, and launched in January, 1817. When launched she was considered, in all respects, as good as a new steam boat. From this time she was employed in the trade to Louisville, and, as appears from the testimony, was considered, until after the contract was made, the best boat on the river. On the 27th of July, 1818, the plaintiff being at New-York, the defendant addressed a letter to him on behalf of the Natchez Steam Boat Company, stating their desire to purchase the boat as she then stood, and requesting to know the price. The

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plaintiff answered that he should be at Natchez in September. On the 10th of October, being in New-Orleans, the plaintiff addressed a letter to the defendant, in which he proposed to sell to the company the Orleans and Vesuvius, and stated his desire that the Orleans should be examined, as she was reported to be rotten, and that the character of the Vesuvius was too well known to need comment. Afterwards, on the 21st of October, he proposed to sell the Orleans for 50,000 dollars, and the Vesuvius for 75,000 dollars. In this letter the plaintiff says, "These two boats are running under the patent of Robert Fulton, and will, when merged in one stock, both enjoy the right of the exclusive trade between New-Orleans and Natchez, with the additional privilege attached to the Vesuvius to trade under the same right to the falls Ohio. I will sell the boats with all rights they may be entitled to. All questions, in respect to violation of patent rights, are reserved; though it may not be unnecessary to observe, that until the boats are in the full and undisputed enjoyment and benefits of the rights insured to them to the exclusion of all others, no claim can be interposed." This proposition was rejected: but on the 22d of October, the defendant, with William Rutherford and Augustus Griswold, two other mem-

bers of the company, wrote to the plaintiff, stating that they were authorized to offer him the following proposals: They say, "It is proper to premise that the delivery of the boats without any material injury sustained after leaving this port at the time prescribed is deemed indispensable by the company." They proceed to offer "for the steam boat Orleans, with her machinery, tackle and furniture of every description on board, to be delivered on her first return from the city of New-Orleans to Natchez, &c. 45,000 dollars." And "for the steam boat Vesuvius, now on her voyage to Louisville, to be delivered on her return to the city of New-Orleans with her machinery, &c. as in the case of the Orleans the sum of 65,000 dollars." This proposition the plaintiff refused to accept; but in about ten days after he acceded to the terms.

While the cause was in the district court the defendant made an affidavit, stating the absence of a material witness, by whom he expected to prove, that the original subscription list, proceedings, rules and regulations of the company had been shewn to the plaintiff some days previous to the execution of the contract, and that a conversation then took place, as to the mode in which the notes to be given in payment for said boat were to be executed, that the

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plaintiff objected to the mode proposed, and stated, that he had no acquaintance with the members of the company, and did not wish to to have to look to them for his money, and proposed to the defendant that he, with two others, should sign the notes without any allusion to the company; that the defendant refused to do this, saying that he would not become responsible beyond the amount of shares by him subscribed, and, that if the plaintiff was not satisfied with the security which the subscription list presented, the negociation must close, and, that the contract was concluded and signed some days afterwards. The affidavit further stated, that previous to the making of the contract, the plaintiff had represented the Vesuvius to be "a fine, strong, substantial boat, the best boat on the river, the *ne plus ultra* of steam boats;" that he represented that she would return to New-Orleans in December. The affidavit further stated, that the company had examined the Orleans fully, before concluding the bargain for her. The plaintiff's counsel admitted these facts as if sworn to, subject to all objections as to the legality of the evidence.

The Vesuvius returned to New-Orleans in February, 1819, having been delayed in her passage up the river by the unusually low state

of the water. Having been unloaded and put in good order, according to the testimony of the master, Capt. Penniston, the plaintiff on the 19th of February offered to deliver her to the defendant. The defendant refused to receive her without a previous examination by competent persons to report upon the situation of the boat. After some correspondence between the parties, persons were selected to report upon the situation of the boat and of her engine, but with an agreement that the rights of the parties were not to be thereby affected. After the examination, the defendant refused to receive the boat.

The report upon the engine was as follows, "We, the undersigned, having been called on by Messrs. Samuel Postlethwaite and Jasper Lynch to examine the engine of the steam boat Vesuvius, do report as follows: "The engine and machinery we find perfectly good, but the boiler is inferior to the engine on account of the age, as we understand is six years old, but appears to be wafer tight. We find that the cross beam on the piston rod is broken, but in consequence of that they have ordered a new beam to make the engine complete."

(Signed) W. C Withers.
James Wilkinson."

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This report was offered in evidence on the part of the defendant, who also called Wilkinson as a witness. He testified that the boiler leaked, but not in an extraordinary manner, and that he considered it a good boiler for its age; that it had been newly painted with lamp black and oil, which might conceal some of its defects. That the head beam had been broken and fished.

On the part of the plaintiff it was proved, that the defendant was on board the Vesuvius a few days previous to the execution of the contract, that he had then seen the machinery, and had been informed by the plaintiff that the boiler was an old one, that it was the same boiler which had belonged to her before she was burnt, and that, if he did not sell the boat, he should get a new boiler. It was also proved, that, at the time of the examination at New-Orleans, the plaintiff shewed the head beam to the defendant, and said it was the only defective thing about the engine, and, that he had ordered a new one from New-York, which was daily expected. The defendant replied, "he did not know that would make any difference, if the engine was otherwise in good order." The report, upon the vessel, was as follows—1st. "We find by the examination that, on the starboard

side aft, a majority of her old timbers are defective, on the larboard side aft, some of her old timbers defective, a midship, some few of her old middle futtocks defective, her floor timbers are perfectly sound. 2d. It is our opinion, that the Vesuvius has sufficient new timbers to render her a safe cargo boat for two years. This is the unanimous opinion of the committee of examination." Signed,

Andrew Seguin, William C. Withers,
Allen Gorham, Charles K. Lawrence.

One of the persons who signed this report (A. Seguin) had been before introduced as a witness on the part of the defendant. He stated, that one third of the middle futtocks were entirely rotten, but that, in the state he found the boat, she might run two years longer and then be hauled up and repaired for five or six thousand dollars. He said that only one half of the boat was examined, but he supposed the other parts were similar. That, if he were to class the Vesuvius, he should put her in the 4th or 5th class. That the old timbers alone were defective, and, that he considered the boat in good order to receive a cargo, and seaworthy, in her present trade, for two years longer. A. Gor-

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ham was examined on the part of the plaintiff. He did not consider more than one tenth of the middle futtocks to have been defective. He did not believe she would require any material repairs within two years, and, if the boat was his he would not repair her now. When the boat was rebuilt she was cut down to the head floor timbers. The new wood constitutes 2-3ds to 3-4ths of the whole boat. Captain Gale, of the Ætna, testified that vessels built at Pittsburgh would generally require a thorough repair in four years, though some might last five years. W. Withers, considered the Vesuvius sound for her age, and sounder than the Orleans. Several ship masters and masters of steam boats, having heard the reports upon the vessel and engine with a statement of the evidence, deposed that, in their opinion, a vessel, such as the Vesuvius was described to be, was a vessel in good order; that, to be in good order, it was not necessary that she should be perfectly sound, and, that a vessel might be in good order and have one third of her frame defective.

On the part of the defendant, several witnesses deposed, that 65,000 dollars would have been a large price for the Vesuvius in November last, if she were entirely sound. The value of steam boats had since fallen 25 to 33 per cent.

There was judgment for the plaintiff in the court below: the district court being of opinion that the action lay against the defendant; but, the sum of 20,000 dollars was deducted from the consideration of the contract, and judgment rendered for 45,000 dollars only: the court being of opinion that, from the price agreed upon, the defendant must have bargained for a sound boat, that this price was the best key to the understanding of the term "good order," and, that 20,000 dollars was the medium between the sum of 15,000 and the sum of 25,000 named by different witnesses as the difference in value between a new and perfectly sound boat and a boat as represented to them.

From this judgment both parties appealed. The record contained all the facts shewn to the district court: with it came up several bills of exceptions.

1. The plaintiff having produced the contract between himself and the Natchez Steam Boat Company, subscribed and sealed by the defendant, and to which there was a subscribing witness, whose signature and residence out of the state were proven, as well as the signature of the defendant, the defendant's counsel objected to this paper being read, because it had not been proven by the subscribing witness.

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The district court overruled this objection, and the counsel took his bill of exceptions thereon.

2. The report of certain individuals, appointed by the parties was introduced on the part of the plaintiff, and objected to on that of the defendant, and ordered to be read, by the court, for the sole purpose for which it was offered, viz. to lessen the credit due to the deposition of one of these individuals, who had been examined for the defendant. Upon which the counsel took a second bill of exceptions.

3. The defendant's counsel put the following question to commodore Patterson, a witness introduced by the plaintiff for the purpose of establishing the soundness of the boat by him sold to the company: "If you had contracted for the purchase of a steam boat, in all respects *sound and in good order*, and a boat had been tendered to you under this contract, with one third of her important timbers, including her lower futtocks, rotten, would you deem such a boat answering the description in the contract, as being *in all respects sound and in good order?*" The question was objected to by the plaintiff's counsel and the objection sustained by the court, whereupon the defendant's counsel took a third bill of exceptions.

4. Charles K. Lawrence, being offered as a

witness by the defendant, the plaintiff objected to his being sworn in chief, on account of his being interested in the cause. On his *voire dire*, this gentleman declared that about the 20th of November, 1818, he purchased ten shares in the Natchez steam boat company, and in case the steam boat was declared to be the property of the company, he expected to pay his proportion of the price, as a stockholder. The objection was sustained, and the defendant's counsel took his fourth bill of exceptions.

5. Samuel A. Bower, a witness of the defendant's, proceeding to relate what he had heard a Mr. James, clerk of the steam boat say, the plaintiff's counsel objected thereto, and the objection being sustained, the defendant's counsel took his fifth bill of exceptions.

Livermore, for the plaintiff. A preliminary question to be settled in this cause respects the different systems of law prevailing in the state of Mississippi and this state. How far is the common law of England, which is proved to be the law of Mississippi where this contract was made, to govern the decision, and how far are the laws of Louisiana to have effect? We contend, that the nature, validity and construction of a contract must be deter-

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mined according to the laws of the state where the contract is made; that the form of entering into the contract must be regulated by those laws; that the consequences of any peculiar solemnity in the form, by which the parties obligate themselves to performance, must follow the contract according to those laws; and that the extent, to which the parties bind themselves, whether as principals or sureties, as principals or agents, *in solido* or not, must be determined by those laws. "*Quoad quae concernunt solemnitatem actus, seu ejus perfectionem, inspiciatur consuetudo loci celebrati contractus; et ideo si ex statuto loci requiratur certa solemnitas in ipso contractu, vel si ad subsistentiam contractus requiratur solutio gabellæ, vel quid simile; tunc tale statutum debet observari, licet in loco destinatae solutionis non sit simile statutum.*" *Peckius Ziricæus, de jure sist. & man. inj. c.* 8? *De Mercatura*, 744. 1 *Gallison*, 375. The parties are supposed to contract with reference to the law of the place in which they are at the time, and to which they owe a local and temporary, although they may not owe a permanent allegiance. This is the doctrine of *Huberus, part* 2, *l.* 1, *tit.* 3, § 1, 2, 5; of *Emerigon*, *tom.* 1. *ch.* 4, § 8, and of the common law of England. It is the doctrine of all civilians, and

may be considered as a settled principle of international law. *Ipsa questio magis ad jus gentium quam ad jus civile pertineat.*

The counsel for the defendant contended, that this was an executory contract, that it was to be executed in New-Orleans, and that the civil law must govern the construction of it. We answer, that the law of the place of execution applies only as to what shall be a discharge of the contract. *Gallison*, 375. But, in this case, the contract was executed at Natchez. The plaintiff "covenants to sell and convey the steam boat Vesuvius," &c. and that he will deliver her upon her return to New-Orleans, and then execute a formal conveyance, &c. In consideration whereof, the defendant covenants to pay certain sums at different times; the first payment upon the delivery. Here was the consent of both parties to the sale and purchase; and the boat being a thing *in esse* at the time, and belonging to the vendor, the contract between the parties was an executed contract of sale, and the property in the boat was transferred to the vendee. The delivery was postponed, and the payment also. But this does not change the nature of the contract. The purchasers acquired a property in the boat, although the vendor was to have the use of her for a voyage; and if, upon her re

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turn to New-Orleans, the price of steam boats had risen, instead of falling, they could have recovered her as their own property, upon tender of the price. The plaintiff covenanted to deliver the boat in New-Orleans; and if the laws of Louisiana prescribed any particular formalities with regard to the delivery of a vessel, they ought to be observed; but for the construction of the contract we should have recourse to the laws of Mississippi. The Natchez Steam Boat Company also have their existence in the state of Mississippi; and the nature of that co-partnership, the powers of the acting members, and the extent of their obligations arising from the contracts by them made on behalf of the company, must also be determined by the laws of that state. Of those laws it is a fair presumption that the defendant has some knowledge, and that he knows something of the nature of the co-partnership of which he is a member, as the powers, rights, obligations and responsibilities of its members are defined by those laws. But the presumption does not extend to any knowledge of the laws of France or Spain, or of the nature of those associations which are styled "*les sociétés anonymes*," or "*les sociétés en commandite.*"

As to the form of the action, and the proceed-

ings upon it, however, the cause must be governed by the laws of Louisiana. The recovery is to be sought, and the remedy pursued, according to the *lex fori*. This doctrine is incontestible. *Communissima enim est distinctio, quod, aut disseritur de modo procedendi in judicio, aut de juribus contractus, cui robur, et specialis forma tributa est à statuto, vel à contrahentibus, et in primo casu attendendum sit statutum loci, in quo judicium agitatur. In secundo verò casu attendatur statutum loci in quo fuit celebratus contractus. Casaregis. disc.* 179, *n.* 59. Upon this ground the defendant's counsel have said, that the rules of evidence must be according to the laws of the state where the action is brought. To this we willingly accede. These gentlemen profess to have a leaning to the civil law; and yet they generally cite common law books, and not always books of the best authority. They have given us pleas in abatement, and raised objections founded only upon the common law, and have resorted very freely to the common law upon points of practice, the rules of proceeding, and the nature of the remedy pursued.

1. The first objection taken by the defendant's counsel is, that we have not proved the contract in a sufficient manner. The only exception

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taken to the evidence in the court below was, that the subscribing witness ought to have been examined. This is a common law objection, and we answer it by proving that the subscribing witness resided without the jurisdiction of the court, and by proving his handwriting. We had no means of compelling the subscribing witness to testify, and he was the same to us as if dead This is a sufficient answer at common law. I refer the court to *Prince* vs. *Blackburne*, 2 *East*. 250. *Adam* vs. *Kerr*, 1 *Bos. & Pul.* 360. 7 *T. R.* 265. 2 *John.* 451. 3 *John.* 477. But it is now intimated, that this contract should be proved by experts, comparing the handwriting of the defendant with other writings proved to be his. For this, the *Civil Code*, 306, *art.* 226, is referred to. We answer, that this mode of proof is only required, when the party formally disavows his signature. In the present case, the defendant has not disavowed his signature, but, in his answer, has explicitly admitted and set forth the execution of the contract by him.

2. The second objection is contained in a plea in abatement, which states that the contract was made by the defendant jointly with seventy-two other persons residing at Natchez.

3. The third objection is, that there is a variance

between the contract declared on and that proved; that we have declared against Postlethwaite, and have given in evidence a contract with the Natchez Steam Boat Company.

4. The fourth objection is, that the defendant is only liable to the amount of 1000 dollars, the sum by him subscribed.

These three objections resolve themselves into this question: Is the defendant personally bound to the amount of this contract, and can the plaintiff recover the whole from him? If the defendant be answerable for the whole, there is no variance, and the objection of want of parties is merely formal. It is not founded upon the merits of the cause, but upon the form of proceeding. *Rice* vs. *Shute*, 5 *Bur.* 2613. All contracts with partners are joint and several; every partner is liable to pay the whole. In what proportion the others should contribute, is a matter merely among themselves. But, in actions against a partner, upon a partnership debt, the law of England allows the defendant, in a suit at common law, to plead in abatement, that the other partners are not joined. If he does not plead in abatement, it is a waiver of the objection. If the action is brought against all the partners and a recovery against all, the plaintiff may levy his execution upon the separate pro-

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perty of one. All of which shews that this is merely a matter of form. And these pleas in abatement cannot be pleaded with a plea to the merits, and they must be supported by an affidavit. In chancery, one partner may be sued alone, provided it be shewn that the others are out of the jurisdiction of the court, as is the case here. *Derwent* vs. *Walton*, 2 *Atk.* 510. *Mitford*, 25. As this objection, of want of parties, only goes to the form of proceeding, it is a sufficient answer, that, by the laws of this state, where several debtors are bound *in solido*, the creditor may proceed against either. *Civil Code*, 278, *art.* 102[illegible] *Pothier*, *des obl. n.* 270.

Is the [illegible] liable for the whole? He executed the co[illegible]act under his private seal; and he admits h[illegible]self to be one of the company. In either point of view, he is personally liable for the whole. He would be answerable from the manner of executing this contract, even if he had no interest in it; and if he had executed it in any other mode, he would still have been bound *in solido* as partner.

If the defendant had been merely an agent of the company, and not a partner, he would have been bound by this contract. He has personally obligated himself by the terms of the deed, and he has affixed his own seal to it. *Appleton*

vs. *Binks.* 5 *East*, 148. In that case the defendant entered into the agreement, "for, and on the part and behalf of lord viscount Rokeby," and affixed his own name and seal to the deed. He was holden personally liable. So where a committee for a turnpike corporation contracted under their own hands and seals, describing themselves as a committee, they were held personally responsible. *Tibbetts* vs. *Walker.* 4 *Mass. Rep.* 595. So where administrators of an estate, by proper authority from a court, sold the lands of their intestate, and covenanted in the deed "in their capacity of administrators," that they were seized of the premises, and had good title to convey the same; it was held that they were personally responsible. *Sumner* vs. *Williams*, 8 *Mass. Rep.* 162. The case of *Ernst* vs. *Bartle and others*, 1 *John. Cas.* 319. was an action of covenant by a clergyman against the trustees, elders and deacons of a church. In the deed the defendants described themselves as such, and made the contract "in the name and with the consent of the members of the church;" and they promise and bind themselves and their "successors in their respective church offices." The defendants signed the deed and affixed their seals to it. Upon demurrer it was objected, that the defen-

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dants were a corporation, and that the agreement was made with them in their corporate capacity, and that the suit was brought against them in their individual capacities. The court say, "It does not appear from the declaration, nor is it shown by the pleadings, that the defendants are a corporation, or capable of being sued as such. The names and additions by which they are described are a mere *descriptio personarum*, and they remain liable only in their private capacities. Without such a construction, the covenant would be nugatory and void; and there is no reason to adopt a different one. They have affixed their private seals to the instrument, not a corporation seal." In the case of *Taft* vs. *Brewster and others*, 9 *John*, 334, the defendants covenanted as trustees of a Baptist society. They were held personally liable. The court said, "The bond must be considered as given by the defendants in their individual capacities. It is not the bond of the Baptist church; and if the defendants are not bound, the church certainly is not, for the church has not contracted either by its corporate name, or by its seal." These cases are conclusive upon this question. For the defendant, the case of *Hodgson* vs. *Dexter*, 1 *Cranch*, 353, has been cited. The case of public agents is an exception to the rule;

and, where an agent of the government contracts for the benefit of government, and on its behalf, and describes himself as such, he is held not to be personally responsible, although, in cases of a private nature, it would be otherwise. The reasons of this distinction are stated by several judges. One reason is, that public policy requires that they should not be responsible, and that men would not accept offices under government upon the condition of being personally liable. 1 *T. R.* 172, 674. Another reason is given by Chief Justice Parsons, in the case of *Tibbetts* vs. *Walker*, 4 *Mass. Rep.* 597. "A case of this kind," he says, "is not like a contract made by an agent for the public, and in the character of an agent, although it may contain an engagement to pay in behalf of the government. For the faith and ability of the state, in discharging all contracts made by its agents in its behalf, cannot, in a court of law, be drawn into question."

In this contract, the covenants are by the chairman, directors and company, who profess to bind themselves, their successors and assigns. The chairman alone affixes his seal to the contract. The others, therefore, are not bound. But this is no reason that he should not be bound, when he has obliged himself by the terms

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of the contract. On the contrary, according to the cases before cited, and upon the principle of the case of *Dusenbury* vs. *Ellis*, 3 *John. ca.* 70. it is alone a sufficient reason for holding him responsible. Although the defendant may have had full authority from the company for making the purchase, and, although his co-partners may be bound by the bargain; yet they are not legally obliged to the plaintiff so as to give him an action against them. Neither the defendant's authority as chairman, nor as partner, enabled him to execute a deed in their names, so as to oblige them to third persons, and to give an action of covenant upon the deed against them. *Harrison* vs. *Jackson*, 7 *T. R.* 207. *Clement* vs. *Brush*, 3 *John. ca.* 180. *Green & Mosher* vs. *Beals*, 2 *Caines*, 254. It is, therefore, evident, that the plaintiff is without remedy, unless he can maintain this action. The defendant, however, can sustain no detriment from having his covenants enforced against him. He will ultimately be held to pay only his proportion, for he has his remedy for a contribution against his co-partners.

The defendant is also answerable for the whole amount, as a partner. Upon this point some very singular notions have been thrown out. Much has been said about special and li-

mited partnerships, and the right to form such partnerships, also about the species of partnership known in the French law by the name of *la société anonyme*. A partnership of this description is not authorized by the laws of Mississippi. According to the law of that state, the members of an unincorporated company are liable for the debts of the company without limitation. *Watson, Partn.* 3 & 4. The doctrine of special partnerships has no application to the case; for this contract was within the sphere of the association, and as to all contracts within the range of a special partnership the law is the same as in general partnerships. There is not a shadow of pretence for saying, that by the law of England the obligation *in solido* is confined to merchants or to general partnerships. The number of partners and the unequal distribution of their interests can make no difference.

Upon this branch of the case the defendant offers in evidence a conversation, which took place between him and the plaintiff some days previous to the execution of the contract. This conversation had reference to the notes and not to the contract. It was the plaintiff's object to have notes which he could have discounted without difficulty; and he also appears to have

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been in an error at the time with respect to the effect of a note signed in the mode proposed by the defendant. He did not execute the contract at the time, and the delivery of the Orleans was delayed, until the plaintiff had satisfied himself that each of the company would be liable upon those notes. This is alledged as a fraud! How so? Was the plaintiff the legal adviser of the company? But this evidence merely proves, that the defendant was ignorant of the law, and that he entered into a contract, by which he became responsible to a greater extent than he supposed. He should have consulted counsel. It is a common rule, that ignorance of law is not to affect agreements, even in equity. 1 *Fonbl.* 108. *Bilbie* vs. *Lumley*, 2 *East*, 469. *Brisbane* vs. *Dacres*, 5 *Taunt.* 143. *Est hoc discrimen inter ignorantiam juris et facti, quod omnis ignorantia juris supina est. Cujas, ad l.* 3. *D.* 22. *tit. de jur. et fact. ign. D.* 22, 6, 2. *D.* 22, 6, 4. *Si quis jus ignorans, lege Falcidia usus non sit, nocere ei dicit epistola Divi Pii. D.* 22, 6, 9, 5. *Non male tractabitur, si, cum ignoraret fidejussor, inutiliter se obligatum, solverit, an mandati actionem habeat? Et si quidem factum ignorarit, recipi ignorantia ejus potest: si vero jus, aliud dici debet. D.* 17, 1, 29, 1. *D.* 22, 6, 7 & 8. *Cu-*

jas, ad. l. 7 & 8. D. 22, 6. Here, ignorance of law is alledged, to furnish an unjust defence, *prodesse*, to excuse from legal liability. There seems to have been ignorance of law in both parties, in respect to this question. The plaintiff considered that the other members of the company were bound by this contract as well as the defendant. He did not advert to the effect of a seal at common law. He seems to have forgotten, that an agent, or partner, could not bind his principal, or co-partner, by deed. If, therefore, either party suffers from the mode of executing this agreement, it is him; and if ignorance of law can avail the defendant, he is without remedy. For this ignorance will not enable him to maintain an action upon the deed against the company in Mississippi. *Domat, l.* 1, *tit.* 18, § 1, *n.* 16.

But the evidence of this conversation was entirely inadmissible. The rule of law is, that all conversations are merged in a written agreement; and that no parol testimony can be received to alter, enlarge, abridge, or explain such contract. To this effect the civil law, which the defendant's counsel say should govern upon points of evidence, is explicit and positive. 2 *Pothier, des obl. n.* 758, 759, 762. *Civil Code*, 310, *art.* 241, 243. So by the com-

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mon law, *Mumford* vs. *M'Pherson*, 1 *John.* 418. *Pierson* vs. *Hooker*, 3 *John.* 68. *Hogg* vs. *Smith*, 1 *Taunt.* 346. *Rich* vs. *Jackson*, 4 *Bro. C. C.* 514. *Meres* vs. *Ansel*, 3 *Wils.* 276. *Thompson* vs. *Ketcham*, 8 *John.* 18. Receipts, and other written instruments standing upon the same footing as mere verbal contracts, may be sometimes explained. But not specialties. The same principle will be found in the case of *Clark's exr.* vs. *Farrar*, 3 *Martin.* 252. The defendant's counsel have cited several cases from *Phillips on evidence.* These are cases in chancery, in which parol evidence has been allowed in opposition to a bill for a specific performance. It has been allowed in cases of *fraud, surprise*, or *mistake.* But when the courts speak of mistake, as a reason for letting in parol evidence, they refer to mistakes of fact, and not of law. The gentlemen can produce no case in chancery, where a party's ignorance of law has been allowed as a reason for admitting this evidence. Such a reason would be contrary to a maxim adopted in the common law, without limitation or exception, *ignorantia juris non excusat.*

In this case it is not pretended, that the contract was drawn up in different terms from the understanding of the parties, or that any thing

has been inserted in it, which was not known, nor that any thing has been left out which was supposed to be there. The law must determine how far the defendant is liable upon this contract; and as the law determines that he is liable for the whole amount, the object of the parol evidence, if it can have any object, is to establish another contract; a contract for part, instead of the whole. The case of *Krumbhaer* vs. *L. deling*, 3 *Martin*, 640, establishes that this cannot be permitted. The court say in that case, that "no testimony can be admitted to prove any contract different from that made by the bill itself. But this rule does not preclude enquiry into the consideration, as in the present case, between the drawer and payee." The parol evidence, in that case, was admitted to prove that no consideration passed between the parties to the bill. But it is a well known principle of the common law, that a deed imports a consideration, and that no averment can be admitted that it was made without consideration. *Vrooman* vs. *Phelps*, 2 *John.* 177. Independent of this doctrine, however, there was no want of consideration in this case.

5. The next objection is, that the Natchez company are now incorporated, and, that they intended to apply for an act of incorporation,

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and that this was known to the plaintiff. This objection seems scarcely to merit a serious answer. If the company had been incorporated previous to the 5th of November, this would not have been the deed of the corporation. And it is difficult to suppose that any subsequent act of the legislature of Mississippi can have deprived the plaintiff of his right to enforce this contract.

6. The next point made by defendant is, that the plaintiff must be in a condition to perform his covenants, and that unless this be shewn he cannot recover. The counsel alledge that the defendant has not tendered a deed, nor shewn his power to convey a good title to the Vesuvius. In support of their objection they refer to the case of *Morgan's heirs* vs. *Morgan*, 2 *Wheaton*, 290. In that case it appeared to the court, that the appellees were incapable of making a good title; and it is evident that if this had not positively appeared on the face of the proceedings the bill would not have been dismissed. *Page* 300 *of the case.* In the present case, the plaintiff did not make a tender of a deed, because the defendant refused to receive the boat, which made such a tender unnecessary; but he has always been able and willing to perform all his covenants. And if the court should have any doubt upon this point, this condition can be made

part of their decree. The plaintiff can make a good title now. But he submits to the court, that this title should be made as of the 19th of February, and that all expenses, incurred by the boat since that period, are properly chargeable to the defendant.

7. The next objection is, that this was a conditional contract. The defendant says, that he was not absolutely bound to take the Vesuvius; but that he had a right to examine her upon her return, and if not satisfied with her condition, that there was no contract. It is a sufficient answer to this objection, that no such condition is contained in the contract. But, if we look to the preceding correspondence, we shall find that an examination of this boat, farther than the examination at Natchez on the 21st of October, was never contemplated by either party, until the defendant found that some plan must be devised to free the company from a contract, which was like to be unprofitable. He then attempted to give this construction to the contract, and to obtain the plaintiff's acquiescence in it. The plaintiff refused to join in the examination, because he saw through this intention; but he did not obstruct the defendant in his examination. The letter of October 22d, will bear no such construction as the defendant has put on it:

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and of this he seems to have been sensible from the incorrect manner in which a part of this letter has been quoted in the answer.

8. The next objection is, that the defendant misrepresented the situation of this boat. It is said, that he represented her to be a "fine, substantial boat, the best boat on the river, the *ne plus ultra* of steam boats." This is mere general commendation, such as is made by vendors in all cases to enhance the price of their commodities, and upon which the purchaser is to exercise his own judgment. Unless there be an express warranty, or fraud, these representations, though false, cannot avoid the contract. *Decuir* vs. *Packwood*, 5 *Martin*, 300. *Quod venditor, ut commendet, dicit; sic habendum, quasi neque dictum, neque promissum est. Si vero decipiendi emptoris causa dictum est: æque sic habendum est, ut non nascatur adversus dictum promissumve actio, sed de dolo actio.* *D.* 4, 3, 37. *In pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire.* *D.* 4, 4, 16, 4. *Ea, quae commendandi causa in venditionibus dicuntur, si palam appareant, venditorem non obligant; veluti, si dicat servum speciosum, domum bene ædificatam.* *D.* 18, 1, 43. *D.* 21, 1, 19. *Pothier, de vente, n.* 263. *Domat, l.* 1. *tit.* 2. §. 11. *n.* 12. The

common law goes much farther. Although the representations are material and false, yet if there has been neither warranty nor fraud, the vendor is not answerable. If there has been no warranty, it must be proved that he knew at the time that his representations were false. *Snell* vs. *Moses*, 1 *John*. 96. *Perry* vs. *Aaron*, 1 *John*. 129. *Mumford* vs. *M'Pherson*, 1 *John*. 414. *Bayard* vs. *Malcolm*, 1 *John*. 421. *Holden* vs. *Dakin*, 1 *John*. 421. *Chandelor* vs. *Lopus*, *Cro. Jac*. 4. Is there any pretence here to charge the plaintiff with fraud? It is not even alledged in the answer. The captain, pilot and engineer of the boat have been examined, and the defendant's counsel have not even ventured to ask a question relative to any particular knowledge of the plaintiff of defects in the boat. Fraud is to be proved, and not inferred from argument. *Dolum ex indiciis perspicuis probari convenit*. *Code*, 2, 21. 6. Where the fact is of such a nature that the vendor could not be ignorant of it, as of the yearly rent of an estate, he will be bound by his affirmation. But in this case the vendor had no more knowledge than the vendee. But these representations have been fully proved. That the Vesuvius was a fine, substantial boat, and the best boat on the

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river on the 5th of November last, has been proved by the testimony of Ogden, Gorham, Story, Withers and Patterson. Has the defendant attempted to prove that there was a better boat? And is not this a confession on his part that the Vesuvius was the best? That she was a strong and substantial boat is proved by A. Gorham. We have not, indeed, attempted to shew that she was the *ne plus ultra* of steam boats. This was not, in fact, said by the plaintiff, although it is admitted. He represented to the defendant that the engine was upon the best plan, and that it was the *ne plus ultra*. But if he had represented the Vesuvius to be a 74 gun ship, when she was before the eyes of the purchaser, would this representation bind the vendor? It is objected, that the boiler was not as good as that of the Orleans, that one was of copper and the other of iron. We answer that the boiler was exposed to view, and that the defendant might have examined it. Also that the plaintiff gave full and fair information as to the boiler.

9. The plaintiff is next charged with having represented that the boat would return in December. In the answer, the defendant states, that the plaintiff offered to contract for the delivery of both boats on the first of January.

Why was not this offer accepted? The defendant made his own calculations and preferred taking the chance. The cause of the Vesuvius not returning sooner is fully explained by Captain Penniston, and by Ryan. There was no fault on the part of the plaintiff, or his agents. The cause is to be found in accidents beyond the control of the plaintiff.

10. The next allegation is, that the plaintiff's letters contain misrepresentations respecting certain patent rights. The answer is, that every thing said upon this subject is strictly true, and has not been controverted by any testimony whatever.

Upon the three last objections it is sufficient to observe, that representations, even if false, cannot affect this contract,; 2 *John.* 177, and that they are taken to be true, unless proved to be false.

11. We shall next consider the only question of importance in this case. Was the Vesuvius when tendered to the defendant, in the condition in which the plaintiff covenanted to deliver her; or was her situation so materially different, that the district judge was right in making a deduction of 20,000 dollars from the price agreed upon? The objections, made to the good order of the boat, relate to the head beam of the engine, the

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boiler, and certain parts of the frame of the boat. In all other respects it is admitted she is in good order. As to the head beam, we refer to the testimony of Captain Penniston, Griffiths and Briggs. It is true that Captain Gale says, he would not make another voyage with a beam broken and fished. But he had made one voyage to Louisville, a voyage of eight times the duration of a voyage to Natchez. The Vesuvius, also, had made her voyage up and down with this beam broken and fished. But the defendant was himself satisfied, that this objection, was too trifling and captious to be insisted on. He said that, "if that was the only defect in the engine it would be of no consequence, as another beam was soon expected." There was no other defect in the engine; and a new beam was received from New-York in a few days after, and was on board the boat when the trial commenced in the court below. Upon this point, parol evidence is admissible: either to shew an agreement to enlarge the time of performance; or to shew an admission of the defendant that the plaintiff had performed. *Keating* vs. *Price*, 1 *John. Cas.* 22. *Fleming* vs. *Gilbert*, 3 *John.* 528. If it had not been for this acquiescence, the plaintiff might have had this beam welded. But the arrival of a new beam

is a conclusive answer. The old beam was broken, without any fault on the part of the plaintiff, in the course of the voyage up the river. The captain informed the plaintiff, and sent on a model of the beam. The plaintiff immediately sent to New-York for a new one. Nothing more could have been done; for a beam of that description could not be procured in the western country nor here.

The boiler is not new; but it is in good order. Whatever defects it may have had, they were known to the defendant. Upon this, he had full information from the plaintiff, that the boiler was sufficient for the present, but, that it was old, and, if he kept the boat, it was his intention to have a new one.

The state of the hull is the next subject to considered. I refer to the report, and to the evidence of Gorham, Withers, Seguin, Burrows, captains Hart and Toby, and commodore Patterson. All of these witnesses swear to the *good order* of the boat; some from actual survey; others from having the report read to them, and from a fair description according to the evidence. The witness, upon whom the defendant chiefly relied in the district court, was A. Seguin. Whether his testimony agrees with the report which he signed, the court will judge.

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The report says, that "a few of the old middle futtocks amidships are defective, that a majority of her old timbers aft are defective, and it finds no defect forward." The new timbers are all sound.

The district judge has decreed a deduction to be made from the plaintiff's claim of 20,000 dollars; because he says the boat was not in that good condition that she ought to have been in. "So sound a price must require a sound hull," This price he considers as the "key" to the meaning of the words "good order." This is a new rule for the construction of agreements. A notion once prevailed in England, that upon the sale of a horse, for a fair price, and without an express warranty, the law implied a warranty that the horse was sound. Even this notion was not sanctioned by judicial decisions, and when it came to be sifted, it was found to be so unsatisfactory a rule of decision that Lord Mansfield rejected it. 2 *East*, 322. But, even this notion was confined to the sale of horses, an animal peculiarly liable to latent defects, which render him wholly useless. This doctrine of a sound price has at all events been limited to sales by parol, and has not before been called in aid to assist in the construction of a deed. The case of *Decuir* vs. *Packwood*, 5

Martin, 300, is a decision of this court in direct opposition to the doctrine of a sound price. So is the case of *Parkinson* vs. *Lee*, 2 *East*, 314, in the court of king's bench in England. The case of *Seixas* vs. *Wood*, 2 *Caines*, 48, is a direct decision of the supreme court of New-York to the same effect. The rule of the common law is laid down by *Forblanque*, 109, and the justice of it is ably vindicated by that author in page 371 of his notes to the Treatise of Equity. The books are full of cases to the same effect; and we find nothing but some vague notions of Professor Woodeson and Doctor Cooper to the contrary. Neither of these authors have even been considered as of great authority. If their notions are to be admitted, then the whole doctrine of express warranties, upon sales, becomes nugatory.

The defendant's counsel, however, profess a partiality for the civil law upon this point; and we have no objection to gratify them, by considering it according to that system of law. Taking then the civil law for our guide, we shall endeavour to shew that the decree of the court below is neither warranted by law nor by the evidence in the case. Although we are of opinion that the *lex loci contractus* ought to govern this contract, we have no objection to resort to

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that great mine of equity and natural justice, to which the lawyers of all modern nations have had recourse, the body of the Roman law. The actions *de redhibitione & quanti minoris* are given by the edict of the ædiles ; and all the principles of law, which have been adopted in France and Spain in relation to those actions, have been drawn from the commentators upon that edict. We do not deny that a purchaser may avail himself of the equity of the *actio quanti minoris* as a defence to the *actio venditi* ; because we are not disposed to deny the authority of *Cujas*, and because we believe that his reasoning is good.

The first principle of the Roman law to which we shall call the attention of the court is, that a contract of sale is not to be defeated, on account of any inconsiderable defect in the thing sold. *Res bona fide vendita propter minimam causam inempta fieri non debet. D.* 18. 1. 54. to the same effect, *Dig.* 21. 1. 1. 8. Were there such defects in this boat as to render her unserviceable ? *Quod usum ministerium que hominis impediat.* The principle of the Roman law, adopted by the nations of modern Europe, is that the defect, which will entitle the purchaser to the *actior de redhibitione vel quanti minoris*, must be of such a nature

as to render the article wholly useless for the purpose for which it was bought, or so material that the vendee would not have purchased it at so high a price, if he had known of the defect. *Qui fortasse, si hoc cognovisset, vel empturus non esset, vel minoris empturus esset. Dig.* 19, 1. 3.) The defendant has stated that the Orleans was examined before the purchase; and it is in evidence that the Orleans was much more defective than the Vesuvius. The company took the Orleans after the examination, being of opinion that she was sufficiently strong to run for one or two years without repairs: and because they knew what she had done, what the Vesuvius had done, and what the Washington had done; that they had cleared their cost in little more than a year. They calculated upon doing the same; and considered that their bargain would be a good one although repairs would afterwards be required.

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Were there defects in this boat so considerable as to entitle the defendant to a rescission of the sale or reduction of the price? And were those defects so considerable as to entitle him to a reduction of $20,000? It is fully proved and is not denied, that all the new wood is sound. The new wood forms from two thirds to three fourths of the hull of the boat. Take

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the lowest estimate, and there remains but one third of the old boat. Of this old part of the boat the floor timbers form at least two thirds and indeed nearer three fourths. These are perfectly sound, leaving one ninth of the boat for the part complained of. So far the calculation is undisputed. Then, if we take the evidence of A. Seguin, there is but one third of this one ninth defective. So that by this calculation, the most unfavorable to the plaintiff, there is but one twenty-seventh part of the hull of the boat defective. But if we take the evidence of W. C. Withers and A. Gorham, that the boat is sound forward, that one third or two fifths of the lower futtocks amidships were new, and that of the buttocks or timbers aft, where the greatest defect was found among the old timbers, the old timbers were but one third of these timbers, and that here the old timbers were not all defective, but "a majority" of them, as is stated in the report, the defective part of the boat will be found to be much less considerable, and indeed not more than one ninetieth of the hull of the boat. Is not this an attempt to invalidate a contract of sale *propter minimam causam?*

The decree of the district judge has given an importance to these defects which the evidence

does not warrant. His calculation is founded upon the evidence of Capt. Gale, Capt. Rogers, and B. Story. These gentlemen know nothing of the state of the boat, except from the description of the defendant's counsel. How far this is a correct description, the court will judge from the question put to Story and the answers of the other witnesses to a similar question. This question supposes two thirds of the important timbers of the boat, including the middle futtocks, to be defective. The most important timbers of a boat are the stern post, the stem, and the floor timbers, all of which are sound. One would naturally suppose from this question, also, that all the middle futtocks were rotten, whereas but a small portion of them are so. At all events the witness would suppose from this question that one third of the boat was rotten, instead of one twenty-seventh or one ninetieth. In answer to this question, Story says, that he thinks 15,000 dollars would be the cost of making the boat perfectly new and sound, including the loss by detention. Another witness says 20,000 dollars, and another 25,000 dollars. Upon testimony of this description we have a decree deducting 20,000 dollars! This was taken as the medium. *In medio tutissimus ibis.* And this is in the face of all the evidence of

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those who had seen and examined the boat. Even in face of the evidence of A. Seguin, the favorite witness of the defendant. In the earnestness of *his* zeal, he did not think that more than 5 or 6000 dollars would be required to repair this boat, after she had run two years longer. It is true, that when he is specially sent for by the judge, his views enlarge, and his estimate is raised to 8,000, including detention. Two years hence it is to be supposed, that this boat will be more rotten than now; otherwise it will not be necessary to repair her then. And if she is then more rotten, the expense of repairs will be increased. So that, for the sake of A. Seguin's consistency, we must suppose the 8,000 dollars to have reference to that time, and not to the present. At this time she does not require repairs. A. Gorham says, he would not repair her now if she belonged to him. And so long as a vessel is a safe cargo vessel, it would certainly be very bad policy to haul her up and repair her, whenever a defective timber is discovered. If we are to credit the testimony of Captains Hart and Toby, as to the common condition of vessels, such a course of proceeding would certainly render this a very burthensome species of property. That the defective timbers in this boat do not detract from her strength

is proved by the report, which represents her to be safe for two years; and also by the testimony of Withers that wherever a defective timber was found, there was a sound one by the sideof it.

Another principle of law is, that the defect complained of must be one, of which the purchaser was ignorant when he made the contract. *Nemo videtur fraudare eos, qui sciunt et consentiunt.* *D.* 50, 17, 145. To this point the authorities are abundant. We shall cite a few of them. *D.* 18, 1, 43, 1. *D.* 18, 1, 45. *D.* 21, 1, 1, 6, *D.* 21, 1, 14, *sec. ult.* *D.* 21, 1, 37. *D.* 21, 1, 48. *Pothier, de vente, n.* 207, 209. The same rule prevails at common law. If the defect is apparent, or if the purchaser is informed of it, even an express warranty will not bind the vendor. *Schuyler* vs. *Russ*, 2 *Caines*, 202. An extention of this principle, or an application of it, is that parties are not admitted to alledge ignorance of notorious facts, or of facts which they might have learnt upon inquiry, or by the mere exercise of their own reason. *Ignorantia supina scientiae comparatur.* This principle is clearly and precisely stated in the *22d book of the Pandects, tit. de juris et facti ignorantia, l.* 3, §. 1, *l.* 6, & *l.* 9, §. 2, also by *Cujas, ad l.* 3, *h. t.* Cujas says, *Emptori prodest ignorantia, quae non in supinum hominem cadit: ut si ignorans*

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emat servum morbosum, hoc casu habet actionem redhibitoriam. Item, si ignorans emat liberum hominem, habet actionem in duplum. Item, si emptor ignorans emat rem litigiosam, evitat poenam litigiosi contractus. Igitur justa et probabilis ignorantia facti non nocet, supina nocet. Supina est, si omnes in civitate sciant rem litigiosam esse, ipse solus ignoret; ignorentia prope dolus est, id est, affectata videtur. To the same effect are the cases put by *Domat, liv. 1, tit. 2, § 11, n. 11. Si les defauts de la chose vendue sont tels, que l'acheteur ait pu les connoitre & s'en rendre certain, comme si un héritage est sujet à des debordemens, si une maison est vieille: si les planchers en sont pourris: si elle est mal bâtie, l'acheteur ne pourra se plaindre de ces sortes de defauts, ni des autres semblables.*

We will apply the evidence to these principles of law. It is a notorious fact, that it is only about seven years since the first attempt was made to navigate the western rivers with steam boats; and that the Vesuvius was the second boat built at Pittsburg under the patent of Fulton and Livingston. It is proved by Ogden, that she came down the river in 1814, and, that from March, 1815 to July, 1816, she was employed in the trade to Natchez. During this

time she belonged to a company. In 1816 the plaintiff entered into an agreement with this company, by which she was to become the property of certain persons in New-York, for whom he was agent. Immediately after this, she took fire at New-Orleans and was burnt. The plaintiff immediately made a contract with A. Gorham to re-build her, and when rebuilt he was obliged to take her as his own property, his constituents having disavowed his contract. She was then put into the Louisville trade and employed to great profit until the time of making this contract. She made many remarkable passages, and acquired a reputation beyond that of any other boat on the river. The defendant and his co-partners, being well acquainted with the history and character of the Vesuvius, were desirous of purchasing her. The plaintiff being in New-York, the defendant addressed a letter to him, dated July 17, 1818. It is evident, from the terms of this letter, that the defendant well knew this boat and that he was satisfied with her. He proposes to purchase her as she then stood, without representation and without warranty. He asked for no information relative to the age, situation or qualities of the boat; because he knew, or thought he knew, sufficient upon these points. But he did not know that

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the plaintiff was disposed to sell, nor what price he would demand. To these points, therefore, his enquiries were alone directed. From the whole of this statement, is not the inference irresistible, that the defendant and his partners, constituting the greatest part of the merchants of Natchez, were well acquainted with the age of the Vesuvius? That they knew when and where she was built? When and where she was rebuilt? And what proportion of the old boat was left? When the committee were on board at Natchez, we find that this burning was spoken of as a thing well known; that the plaintiff told them that the boiler was the same as had been in the boat before she was burnt; and that one of the committee even informed the plaintiff of the precise month when she was launched at New-Orleans. Is there not also sufficient here, from which a jury would find that the defendant was acquainted with the extent of the repairs, and of the proportion of the old boat which remained? She was burnt on the river, and. of course, when the fire extended to the water's edge she would sink. As she was then but little more than two years old, the proportion of her defective timbers could not be very great, and there could be no reason for not using the sound ones. The distinction between rebuilding

from the keel, and repairing from light watermark, hardly deserves a serious answer. A. Gorham considers her to have been rebuilt and made as good as a new boat. But if the committee at Natchez had not been thoroughly informed upon this subject, would they not have made some inquiries of the plaintiff? And is not the circumstance, of their not inquiring as to the extent of the repairs, conclusive evidence against them?

Having then established the fact, that the part of this boat complained of was more than four years old at the time of sale, and nearly five at the time of the examination, and that all this was known to the defendant, it merely is necessary that we shew her to have been a sound boat for her age, and we have completely demonstrated this part of the case. Withers expressly swears, that he considers the Vesuvius to be sound for her age. Captain Gale says that boats built at Pittsburgh will generally require a thorough repair in four years. though there may be boats that will last five years. Captain Toby says there are very few sound vessels, and they are not always perfectly sound when launched. Was not this boat then sound, in comparison with vessels of her age? Part of her hull was more than four years old; and the residue

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more than two years old when she was examined; and yet experienced carpenters report that she will not require repairs for two years to come. Possibly, in strict construction, a vessel cannot be called sound. which has any rotten timber. however immaterial; and such seems to have been the understanding of the witnesses; though Judge Washington makes a distinction between a vessel being unsound, and having some of her timbers unsound. *Watson & Hudson v. Ins. Co. N. A.*, 1 *Condy's Marshall*, 139 *n. b.* This question might be material, if there was an express warranty of soundness. But certainly the extent, to which the gentlemen attempt to push the doctrines of the civil law, is entirely beyond all bounds of reason. They would render the principles of that law, so just and equitable when properly understood and limited, utterly wild, extravagant and dangerous. They would establish a principle, which would operate to the subversion of all contracts of sale. For nothing is perfect in this world. Good and bad are relative and comparative terms. An old boat, or an old house, may be a good boat or house; but they are not so good, or capable of enduring so long, as the same boat, or house, when new. And yet they may equally be the subject of a

contract of sale, according to the civil as well as common law; for the Roman law is too perfect a system of equity to invalidate a contract of sale, on account of defects which are usual, and to be expected from the known age, situation, or employment of the thing.

The plaintiff covenanted to deliver this boat "in good order," within a reasonable time after the discharge of her cargo at New-Orleans. Did he not offer to deliver her in good order? Have not all the witnesses sworn that she was in good order? What do these terms imply? Is there no difference between the terms *good order*, and *perfect order*, or the *best possible order?* Certainly the term *good* is not a *superlative*, and the term *order* is not an *absolute*, but a *relative* term. An old vessel may be in good order, although she may have defective timbers; for a vessel must be in good order, to be seaworthy; and a vessel may be seaworthy and yet unsound in many of her timbers. Such is the natural meaning of the words, and such is the common acceptation and understanding of them. Com. Patterson is of opinion that a vessel is in good order if not more than one third of her frame is defective. Her frame includes the floor timbers, top timbers, upper, middle and lower futtocks. Here the de-

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fect is not more than one twenty-seventh, according to the defendant's witness, and one ninetieth according to the plaintiff's. The understanding of Com. Patterson, and of all the other witnesses, is that a vessel is in good order, when she is in a condition to receive a cargo and perform her voyage. It seems to be admitted, that the word is commonly understood in this manner, and that it is the true meaning in all cases, except when made use of in a contract of sale. Upon what principle of law is a different rule of construction to be adopted in a contract of sale from the ordinary rule? Words are to be understood in their natural and ordinary meaning; terms of art are to be understood as used by persons using the art. These are rules for the construction of all agreements. Can "good order," as used in this agreement be considered a warranty of soundness? Or can it have reference to any defects existing at the time? The words do not apply to the sale, but to the delivery. The boat is sold as she is, without warranty, and the property transferred to the purchaser; but she had left the port where the contract was made, and was not to be delivered until her return to New-Orleans. What was to be delivered? Was it a different thing from what the defendant had purchased? Was

it a boat absolutely perfect and sound? Was it a covenant, that the plaintiff would cause her to be hauled up on the stocks, thoroughly repaired and made as good as new? Was it intended, for the purpose of invalidating the contract of sale, on account of defects then existing in the boat, and which both parties must have known, if they had exercised their reason at all, did then exist? Does not such a construction lead to an absurdity? And is it not therefore to be rejected? These words were inserted with a very different view. The intention and effect of them are to bind the plaintiff to a degree of responsibility, to which he was not bound by the general rule of law. After the execution of this contract the relation between these parties was that of a lender and borrower; and independent of the words "good order," which were interlined in the deed in the plaintiff's own hand writing, he would have been answerable for no higher diligence in taking care of the defendant's property than is prescribed by the law upon the contract *commodatum*. This merely obliges him to strict diligence, but does not make him liable for casualties. Or perhaps more correctly speaking, he would have been only liable as vendor remaining in possession after the sale by consent of

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the vendee. In this character he is liable only for ordinary care. *Pothier, de vente, n.* 54. If the boat had been wholly lost, the plaintiff could not have recovered the price; because the delivery is made, by the deed, a condition precedent to the payment; and where a condition precedent becomes impossible by the act of God, the covenant depending upon it is void; in which respect such a condition differs from a condition subsequent. But provided the boat returned to New-Orleans, although greatly damaged and deteriorated, provided this damage were caused by accidents beyond the plaintiff's control, and not by his fault, or the fault of his agents, he might have tendered her in the situation in which she was and have demanded payment. If these words, "good order," had not been inserted in the contract, the plaintiff would not have been obliged to repair any such damages. The object of the defendant, therefore, was merely in pursuance of what had been declared by him in his letter of the 22d of October, and also to have the boat in such a condition when delivered, that she might be immediately employed. The boat sustained no injury, between the execution of the contract and the offer to deliver, through

the plaintiff's fault; and the only injury sustained by accident has been repaired.

12. The last point made on the part of the defendant was, that our prayer for relief is not sufficiently definite. I have strong doubts whether any further prayer is necessary than the general prayer for such relief as the equity of the petitioner's case may require. But in this case we have prayed for the price of the boat, sixty-five thousand dollars, and our general prayer will certainly cover the interest. We do not pray for the whole sum at this time, because it is not due; but we ask that it may be paid at the times and in the manner stipulated for in the contract. It is said, that we must either sue for the penalty of twenty thousand dollars, or for a performance, and that we cannot sue for both. We do not sue for both. We sue upon the contract. Twenty-seven thousand five hundred dollars are now due with interest. The balance the defendant is bound to pay by instalments at six, nine, and twelve months from the time the plaintiff offered to deliver the boat, with interest at six per cent. And for these payments he is also bound to give his notes in the form expressed in the contract, and also a mortgage as collateral security. In the case of *Decuir* vs. *Packwood*, 5 *Martin* 309,

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the sugar was payable by instalments; and the action was brought before either instalment became due.

Several bills of exceptions were taken by the defendant's counsel in the court below, which I hardly deem it necessary to notice. If the loose conversations and letters of a witness are good evidence to discredit him, when they are inconsistent with his testimony, *à fortiori* a solemn report, signed by him immediately after an examination of the thing, may be admitted to prove that he has certified to a statement different from what he has represented upon oath. The question put to commodore Patterson was obviously improper. It did not apply to the contract; for the contract was not for a sound boat. Nor did it apply to the evidence, according to which the boat is not in the situation which the question supposes. A further objection to this question is, that it required the opinion of commodore Patterson upon a question of law. Captain Lawrence was interested and incompetent; since he expected to pay his proportion of the price in the event of a recovery. I should consider it disrespectfull to the court to notice the fifth bill of exceptions.

Such are the objections made to our right of recovery. If the conduct of the plaintiff has

not been distinguished for good faith in the whole of this transaction, we do not ask a judgment. But if the exceptions taken by the defendant are merely frivolous and captious; if they are merely devices intended to worry the plaintiff into an abandonment of his rights, and to relieve the Natchez company from a contract, which is not found to be so advantageous as was supposed in November last; we trust the judgment of the court will give a useful lesson to purchasers not to sport with their faith. When this bargain was made, the advantage was supposed to be on the side of the purchasers. In the proposition which the plaintiff submitted to the company he demanded for the Vesuvius seventy-five thousand dollars, which sum he did not consider to exceed her value, and judging from his own experience of what had been done, he believed that the Natchez company would only be obliged to advance the first payment, and that the profits of the boat's employment would meet the other payments. In answer to this proposition, the company offered sixty-five thousand dollars, which the plaintiff refused to receive. Upon further reflection, he consented to accept this sum; but it was not until a fortnight after it had been proposed, and when the company

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were at full liberty to recede. Does this look like the conduct of a man who was selling an article, which he knew, or believed, to be worth much less than the sum offered? If he considered the bargain an advantageous one at the time, would he have risked such a delay? No. The advantage was believed at the time to be on the side of the company, though subsequent events have given a different aspect to this contract. In consequence of the river being unusually low, and continuing so for an unusual length of time, the return of the boat was retarded until February. In the mean time the value of steam boats had depreciated. Instead of full freights and constant employment, the harbour was filled with boats unemployed. A reduction of the rates of freights was the consequence—and a greater reduction in the value of steam boats. It was then that the Natchez company found their bargain not to be an advantageous one, and it was then that they determined if possible to free themselves from it. It was then, that the idea suggested itself to them of ripping up the sheathing, and examining the timbers of this boat. I say, it was not until then, because if such a proceeding had been originally contemplated it would have been provided for in the contract. The Natchez company being well

acquainted with the history and age of the Vesuvius, knowing that she was built at Pittsburgh in 1813 and that some part of her original frame remained, knew that in the ordinary course of things she must have defective timbers. This knowledge had no effect to prevent them from concluding the contract; because they also had sufficient information, that if the course of trade remained as it had been and then was, they could clear the price of the boat with interest, before she would require repairs. These gentlemen are sufficiently well informed to know, that a boat may be a safe cargo boat, seaworthy and fit for her customary imployment, and at the same time have many defective timbers. Having then made the examination, and having found the defects which they expected to find they refuse to receive the boat, and compel the plaintiff to resort to a court of justice for the recovery of his just debt. And in what manner does the defendant meet the merits of our cause? By an attempt to embarrass it with innumerable formal objections, having no substance either in law or in equity, and being many of them inapplicable and inconsistent with the facts. By loading the record with bills of exceptions upon points unimportant, and upon which the decision would not have been other-

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wise than it is. For what purpose all this, unless to obscure the merits of the case? I shall conclude with one remark; that the defendant, or either of the directors of the Natchez company, could hardly have reconciled it to themselves to violate such a contract, or to make such a defence in their private capacities, which, as the agents and directors of a company, they have considered themselves justified in doing.

Hawkins, for the defendant. Two questions present themselves for consideration, before the case be examined on its merits.

1. Are the laws of the State of Mississippi, or of Louisiana, to govern this contract, it being made at *Natchez*, but to be executed at *New-Orleans*; or, are the *laws* of *both* countries to be resorted to, to *regulate* the *rights* and *duties* of the *parties*?

The authorities quoted from the common law books on this subject are, 3 *Dallas*, 370, 4 *id.* 327, 2 *Johns.* 235, 1 *Gallison*, 374, 5 *Johns.* 239. In neither of the cases referred to, does the question appear to be fully settled. On this subject the common law reporters seem to have borrowed their light from commentators on the civil law.

In the note found in 3 *Dallas* translated from

Huberus, after propounding a number of cases, this author furnishes the principle; "That the place, however, where the contract is entered into is not to be exclusively considered."

If the parties had in contemplation another place at the time of making the contract, the laws of the latter will be preferred in the construction of the contract. Every one is considered as having contracted in that place in which he bound himself to pay or perform any thing. And the notes to the case in 1 *Gallison* sanction this doctrine, by giving as exceptions to the principles there laid down cases growing out of contracts made in one place, to be executed in another.

The most clear and satisfactory view of this subject is to be found in the decisions of the present supreme court of our own state. *Le Breton* vs. *Mouchet*, 3 *Martin*, 111, 50. *Hampton* vs. *Brig Thaddeus*, 4. *id.* 585.

In these cases the court have relieved the question from the doubts and difficulties found in the common law authorities; and in the latter case, 585, the principle is recognised; that the law of the place where the thing is stipulated to be done or given is the *lex loci* of the fact which gives rise to the obligation, and

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must therefore regulate the rights and duties of the parties.

It has been strongly relied on by the plaintiff's counsel, that by the contract sued on, the rights of the plaintiff vested rights, not to be affected, or controlled, by the laws of Mississippi, as upon a contract fully executed there; and hence is presented the question

2. Is the contract sued on by the plaintiff an executed or merely an executory contract?

If on this point no authority could be adduced, the plain but sound principles of interpretation, would conclusively establish the contract sued on as merely executory.

All contracts must be considered as executory which contain subsequent conditions and duties, the performance of which are essential to the rights of the parties.

In the contract before the court, every act essential to its consummation, every act necessary to the objects of the contract and rights of the parties, was to be done and performed subsequently to making this covenant at Natchez.

It is not a contract of sale vesting any right or title to the boat, but a mere agreement to sell. The seller imposing on himself various conditions to be performed before the sale was consummated.

What were the conditions? "That on her return voyage the Vesuvius should be delivered, at New-Orleans in good order, to the company or its agent, that at the time of delivery the seller should make, execute and deliver a formal conveyance vesting title in the company, and by said conveyance guaranty and secure the title to be free from all suits, liabilities and incumbrances whatsoever." Until the boat was so delivered at New-Orleans, in good order, and with the title stipulated to be made and delivered, no right occurred to the plaintiff, to demand of the company any performance on their part; for the company stipulated to pay nothing until each and every of these conditions were previously done and performed by the plaintiff, and until they were so performed, the plaintiff had no one vested right which could be sued for or enforced. Yet, according to the doctrine contended for by the counsel for the plaintiff, all his rights were vested and perfect by merely signing the covenant sued on.

Had the Vesuvius been lost on her voyage to Louisville, would the loss have fallen on the Natchez Steam Boat Company? Clearly not. If the company had no vested right to the boat surely the plaintiff could have no vested right

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to recover the price proposed to be given for her by the contract.

When the Vesuvius was tendered to the company in New-Orleans, had they not a right to require that, she should be in the good order, and accompanied by delivery to the title, stipulated by the contract? Having this right; the right to examine the boat and ascertain her condition cannot be questioned, and having by such examination found the boat not in the good order required, or, contemplated by the contract, the right to refuse the boat followed as matter of course.

With all these conditions to be performed on the part of the plaintiff, and the performance of which were indispensable before any right accrued to the plaintiff, or responsibility attached to the company, it is difficult to find, even plausible pretexts for giving the instrument sued on, any other than its true executory character.

The only authority relied on by the plaintiff's counsel to give to the articles made at Natchez the dignity and effect of an executed contract is found in our statute. *Civ. Code*, 346, *art.* 4. If this article can be construed to be at all applicable to this question, its application is fully made and explained in the same statute, 346,

art. 5, which declares that a sale may be made purely and simply, or, under a condition either *suspensive* or *resolutive*.

That there are conditions in this contract, and that they are properly suspensive conditions cannot be doubted. The effect and nature of these conditions, as illustrated by both common and civil law authorities, fully support the principles contended for by defendant's counsel.

And the nature of this contract is also strongly exhibited and well settled by the case of *Hampton* vs. *the Brig Thaddeus*, where we might with propriety pursue the very language of the court, and say that this contract "began to be executed at Natchez." Its covenants enjoining the performance of essential conditions elsewhere, the contract cannot be considered as executed, or consummated until these conditions are performed; the place of delivery is the place of performance—and the laws of the place of performance govern the rights of the parties. 2 *Black.* 443. *Civ. Code*, 272. 274. 1 *Pothier obl.* 176, 198, 201, 202, 203, 218. 4 *Martin*, 582.

Well aware that this action cannot be maintained against the defendant, if tested alone by the laws of Louisiana, the counsel for the plain-

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tiff have found it necessary to resort to the principles of the commonlaw, on the subject of partnerships, to find ground for recovery.

The extraordinary nature of this action compelled the defendant to file several pleas in order to embrace the whole merits of his defence. The first properly in order, is the plea in abatement. a plea necessary to repel the assumed right to recover of the defendant individually as a member of a common commercial partnership. Admitting the covenant sued on, established, such partnership which, however, is positively denied, as well by the contract itself as the pleadings, the plea in abatement would be fatal to the plaintiff's action according to the principles of the common law. And by our own legislative acts, all the parties should be made defendants in the petition. These principles are so well established as to need no comment. 5 *Burrows, Rice* vs. *Shute. Watson on partnership* 119, 131. 2 *Johns. cas.* 382. 1 *Comyns on contracts* 326.

The only answer given by the plaintiff's counsel to the plea in abatement was, that the co-partners of the defendant reside out of the jurisdiction of this state.

By examining the authorities they relied on to maintain this position, it is believed that they

will be found not at all applicable. The cases to which they refer were cases, where the party, plaintiff by bill in equity, sought redress, alledging as ground of relief that some of the parties were non-residents.

And in all cases to avoid the force of the plea in abatement, it is indispensable that the allegations of non-resident parties, or partners should be made and relied on specially in the bill seeking relief. But no case has been quoted at bar, or found by the defendant's counsel, where the plea in abatement has not been deemed good, when offered at a proper time and furnishing all the partners who should have been united in the action.

If the plaintiff be permitted to go to the rules of the common law to find our liability as a common commercial partner, he must submit to the rules of the common law in repelling the liability he thus seeks. The more especially as he has to go beyond the stipulations of the writing sued on, to find any cause of action at common law.

We will now consider the grounds of defence found in the special plea in bar to the plaintiff's action, in which the defendant relies, that the contract was executed by him as chairman of the company, purely in the character of agent,

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That the company was not formed for general commercial purposes, but special and limited objects, with a view to incorporation, and now is actually incorporated.

That the whole character, objects, names, amount of stock, and special liabilities of the company were made known to the plaintiff, and that the contract was entered into, not with the defendant individually, but with the company, with the view only to such special purposes and liabilities.

Under this plea, two questions are presented.

1. Could the company at Natchez appoint an agent designated as chairman, who could by contract bind the company for the objects of association: and could the acts of the agent (for and on account of the company and within the pale of his authority) be so construed as to produce individual liability on the agent?

That the company could lawfully appoint their agent, giving him the description of chairman, or any other, and vest such agent with power to bind the company, cannot be questioned. By the counsel for the plaintiff it has not been denied. Have the Natchez Steam Boat Company appointed such agent, vested him with such power, and has the defendant, as such agent, so transcended the pale of his power

as to become individually bound to the plaintiff in this action?

In the plaintiff's bill of exceptions to evidence he objects to the evidence offered by the defendant, except such parts thereof as tend to prove the "minutes, rules, regulations and subscription paper of the Natchez Steam Boat Company, and that the same were read by the plaintiff before the execution of said agreement of the 5th November, 1818." These papers and facts, therefore, are considered as duly proved and properly before the court, and clearly establish all that is necessary to maintain the defence relied on in the special plea of the defendant. The documents prove that, in the organization of the company, and, conformably to its rules and regulations, the defendant, Postlethwaite, was duly appointed chairman.

The company resolve conformably to the objects of association to purchace one or more steam boats. On the 22d of October 1818, the company pass a resolution authorising the defendant and two others to submit propositions, or respond to propositions submitted by the plaintiff, conformably to this resolution, said three persons informed the plaintiff that his proposition had been considered, and the writers were authorized to offer those of the company.

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These were the propositions which the plaintiff finally acceded to, and on which the contract was based.

Thus, then, we have the appointment of the defendant as chairman, the resolution of the company authorising him to make the purchase and the propositions made conformably to this resolution giving the terms and conditions and going to the extent of the authority conferred by the company. And conformably to these terms and conditions (substantially) was the contract finally made, signed by the defendant in his character of agent or chairman.

Are there any covenants in this contract personal to the plaintiff? None.

Are there any which go beyond the authority given by the company to contract for and bind them? None.

In fact, throughout the whole negociation, in all the letters and communications from the defendant to the plaintiff, he uniformly speaks of himself as the agent, acting for and on behalf of the company.

This is a candid and correct view of the relative situation of the parties, as to the agency of the defendant and his having acted and covenanted alone in the character of agent.

To convert the limited and acknowledged re-

sponsibility of an agent, (acting with good faith as such, within the authority conferred, and for the benefit of those conferring it) into the enlarged and ruinous responsibility, contended for by the plaintiff's counsel, would be breaking down long and well established principles of law, principles which have found encreased sanction from encreased scrutiny.

It would be a mere parade of books to present a long list of authorities for principles which have received the repeated and solemn sanction of our own supreme court. The following authorities have met with no satisfactory answer from the plaintiff's counsel.

"A contract has no effect, except with regard to the things which are the objects of the agreement and to the contracting parties."

"The agreement being formed by the intention of the contracting parties, can have no effect except with regard to what these parties intended and had in view."

"If the agreement be made in the name of another, and as having been entered into by a commission from him, the agreement would be made with him by my agency and not with me."

"A person acting avowedly as agent, is not liable personally." 1 *Pothier, obl. n.* 55, 85, 86. 3 *Martin*, 641. *Civ. Code accordant.*

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2. Were the company at Natchez competent to associate themselves in special and limited partnership; and, by contract, bind themselves alone in the limited and special character contemplated by the association?

Instead of such associations being prohibited in our country, it would be difficult to suppose a case, which could exclude their formation: and when so formed, it would be equally difficult to find any sound principle of law or morality, which should make the members thereof liable, beyond the express responsibility held out and guaranteed to those with whom they should contract.

The counsel for the plaintiff have presented no such case; nor have they furnished any answer to the grounds relied on and authorities quoted by defendant, to shew, that the partnership at Natchez, if any, was a limited and special one, sanctioned by law; that the plaintiff contracted with them as such; and that the company alone, and not the defendant is bound by this contract. The right to form such special partnerships is found in our own code, as well as the common law books; and when so formed the members are alone responsible according to the special terms of association, and responsibility held out to the contracting party. *Civ.*

Code 391, *art.* 12, 13, 18. *Watson on part* 3 & 4. *Johns. cas.* 171.

Being unable satisfactorily to repel this ground of defence, the plaintiff's counsel found it necessary to evade it by calling on the court, to seek the responsibility of the defendant as member of a general, or commercial partnership.

The doctrine in relation to such partnerships is well settled—and has not been controverted by the defendant's counsel. That in this description of partnerships, each and every member should be responsible for the whole debts of the company, is founded in reason and policy; and, required by the nature of trade, and the good faith necessary in commercial operations.

The same principle is recognized in our own code, but the very manner in which it is done, shews clearly that the principle is alone applicable to common commercial partnerships. After treating of the character and nature of special partnerships, the code proceeds to establish the rules applicable to ordinary commercial partnerships; and their special enumeration and application to this description of association, forbid the extension to any other. *Civ. Code*, 391, *art.* 11.

If, in the cause before the court, such ordinary commercial concerns between the defendant

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and the Natchez Steam Boat Company had been established. (which, however, having non-existence, has not been proved) then it has been already shewn, that the plea in abatement would be fatal to the plaintiff's action.

But let us examine the ground on which the plaintiff's counsel relies to maintain this action against the defendant as a member of an ordinary commercial partnership.

There is nothing in the covenant sued on, in the pleadings, or the evidence adduced, which goes to shew the existence of any such partnership, nor is there any thing in writing relied on to support the position, that the defendant was even a member of the company.

In the articles of covenant, the company is described as the Natchez Steam Boat Company, the defendant signs as chairman thereof; the character of the company, and the authority, by which the contract relied on was signed by the defendant as chairman, is alone to be found in the articles of association, the rules and regulations adopted for the government of the company, and the recorded resolves vesting the authority in the defendant to make the present contract.

Is there any thing to be found in these documents and proceedings, which shews that the company at Natchez were a common commer-

cial partnership? The idea of such association is wholly excluded from the very objects of the company, as well as the regulations defining these objects. The objects were the purchase of one or more steam boats, with a view to their navigation, relying upon the freight derivable from the transportation of merchandize of others, as indemnity for the funds thus invested.

And, in one case only, could even a purchase be made of any article, other than the boats, and, this case is expressly declared to be when scarcity of goods to be freighted for others rendered it necessary, heavy articles of goods in bulk were to be purchased, upon which, fair freight might be realised.

The members of the company were to become contributors, not of community of monies, effects or labour (as is essential to all commercial partnerships) but by subscribing for stock, and each member bound only for the amount of stock so subscribed in shares.

The company was associated in the mode by which all such companies are formed, previous to incorporation. In their formation and whole proceedings, they had a corporation in view. One of their first resolves was to petition their legislature for incorporation, and this was accordingly conferred.

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The appointment of a chairman, previous to incorporation, and, this was accordingly conferred.

The appointment of a chairman, previous to incorporation, to act as the agent of the company, was mere matter of form: they might just as well have called him president, or given him any other description as that of chairman.

Can any thing be more extravagant than the idea, that by virtue of his office of chairman, the defendant was to become liable for the whole debts which the company would create by their contracts; was such a liability contemplated by any one? Was such liability ever for a single moment held out to the plaintiff?

The company, too numerous to act together, created an agent, whom, they call chairman, not that he was to be ruined by the payment of the company's debts; but that he might, for them and on their account, contract and covenant to buy boats for them and for which they would pay.

It was contended, by the counsel for the defendant in argument, that the only case where one shall be deemed bound for the debt of another, without having expressly so bound himself, is to be found in the known and established relations of husband and wife, guardian

and ward, father and child, master and servant; and where the law itself points out the duties and prescribes the limits of the responsibilities, which attach to these various relations. This position is deemed undeniable; notwithstanding the depth of research displayed by the counsel for the plaintiff, no satisfactory answer was made to it. And in this case, unless it is shewn that the defendant comes within the principle, and by virtue of his office as chairman stands in that relation which the law has pointed out and made him expressly responsible, this action cannot be maintained against the defendant for a debt of the company, unless he has expressly so bound himself for their debt by the writing sued on, and in this case we shall search in vain for any covenant by which he is so bound.

And yet with these strong and admitted facts, these plain and uncontroverted principles of law before us, the counsel for the plaintiff, to maintain this action, require of the court, first, by inference and implication to establish (what never existed) a common commercial partnership in the Natchez Steam Boat Company; and, by the same equitable and just course of inference, secondly, to presume the defendant not only a member and partner, but, liable for the whole debt thus contracted by the company:

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and, this too, in violation of the covenant sued on, as well as the avowed intention and declarations of the contracting party.

In the argument of the cause, the counsel for the plaintiff seemed to differ, as to the character of the partnership formed by the Natchez Steam Boat Company.

It was contended by the counsel for the defendant, that, formed as the association was with the express view to incorporation, it should properly be considered, what is called in the commercial code, an anonymous partnership. In regard to which it is alledged that the anonymous partnership does not exist under a social name or firm, but is distinguished by the object of association. It is managed by agents or directors who are either stockholders, or not; that the directors are only responsible for the execution of the trust committed to them, nor do they contract in virtue of their administration any personal obligations, nor become jointly and severally responsible for the engagements of of the association. The association are liable only to the extent of the interest, that is, to the amount of their shares in the association, and they cannot exist without the authorization of government. *Commercial code, l.* 1, *t.* 5, *art.* 29—37.

It is relied on by the counsel for the plaintiff, that according to the commercial code of France, *art.* 31, referred to. this anonymous association can have no existence without the authorization of government. This cannot avail the plaintiff, and the more especially in the case before the court.

That the company at Natchez have a right to limit their association, and that they could lawfully appoint an agent with authority to make special contracts obligatory on the company:

And that the contracts so made with the full knowledge of the character of the association, furnished the contracting party, could only be enforced according to such limited liability, has been abundantly shewn.

Aware, however, of the inconvenience of making these special contracts, and of the benefits derivable from receiving the sanction of government, this company was formed with the declared view to such sanction, and at the earliest moment practicable, this sanction was obtained.

The only reason why the commercial code requires the sanction of government is, that the nature of the association should be made public, that there should not exist associations with special limited responsibilities hidden from society,

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and whereby impositions might be practised upon private individuals.

The principle found in the 37th article of the code, would not affect a contract made under the circumstances presented to the court in this case. Such a contract made with a company so associated, with the view to the sanction of government, and which sanction was actually conferred as contemplated, would be enforced in good faith according to the real intention of the contracting parties.

Can the plaintiff in this cause complain that he has been deceived by a secret association at Natchez, holding out false inducements, or, feigned responsibilities :

That the defendant assumed the character of chairman and made himself individually liable by exceeding the bounds of his authority :

That the company, he contracted with, is not the solvent, good company represented to him?

On the contrary, the plaintiff acknowledges, that all the papers necessary to apprise him fully of the objects and character of the association, as well as their views to incorporation, were submitted to him previous to making the contract.

He had before him, in writing, the agency of the defendant, and his authority to purchase the

boats, as well as the price and terms the company had agreed to give. He had, furthermore, the names of the subscribers, with the amount of stock respectively subscribed by each, and the knowledge that no subscriber was bound to contribute more than the amount of stock so subscribed.

The statement of facts, made in the affidavit of Fisk is admitted, as having been duly proven, and therefore to be viewed as good testimony, subject to the legal exceptions taken by the plaintiff as to its admissibility; and, these facts, so far from being at all controverted, are admitted by the plaintiff to be true. What are these facts? "That the defendant, as chairman of the said company, proposed that the notes should be executed in the same manner, in which it was subsequently agreed they should be made, and as they were, thereafter, made in the case of the Orleans. That to this the plaintiff objected, and stated that he did not wish to look to the company for his money, and proposed to the defendant that he, together with two other members of the said company (Rutherford and Griswold) should sign the notes without any allusion, or reference to the company, as in this mode, he, the plaintiff would not be under

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the necessity of resorting to the company for payment, as he would have the personal security of the persons so executing the notes for the whole amount.

The defendant positively refused to do this, saying that he was not and would not become responsible in the concerns of the said company, beyond the amount of shares by him actually subscribed in the stock of said company; and that if the plaintiff was not satisfied with the security wich the subscription list of said company presented, and the recourse which he would have against the company, as then constituted, or against the several members composing it, all further negociation must cease.

We will here only premise that this testimony cannot be refused by the court as inadmissable, because, it neither inlarges, varies, contradicts or alters the contract sued on. It only goes to prove, that, according to the face of the contract, the defendant was contracting with the plaintiff in the character of chairman, as agent for the company; the contract to be made for their benefit and on their liability. And that the plaintiff not wishing to look to the company for his money, proposed to the defendant to inlarge his contract, to abandon his character as agent, and execute the notes with two others in

their individual characters, and thereby become personally bound, which the defendant positively refused. That the plaintiff ultimately accepted the contract, and agreed to accept the notes signed by the defendant in his character of chairman, as agent for the company, and as had been originally proposed and understood by the parties.

Why did the plaintiff state that he did not wish to look to the company for his money, and propose to the defendant to become individually bound, if he did not know, and it was not distinctly understood, that the contract, as proposed, was to be made purely as agent, and with the view solely to the liability of the company and not the defendant?

Thus we have the plaintiff's own positive declarations that he was treating with the defendant purely in the character of agent; that he was selling his boat to the company, and was to look alone to the company for payment, and that he proposed to make the contract individually binding, but which the defendant positively refused.

With these admissions of the plaintiff himself, can this court enforce this contract against the defendant, without violating as well the sound rules of interpretation as the evident and de-

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clared objects and meaning of the contracting parties.

If under circumstances like these, a decree can be had against the defendant in his individual character, it must be founded on principles of morality and law, totally different from those, which heretofore have received the sanction of this and other enlightened tribunals of justice.

In the case of *Krumbhaer* vs. *Ludeling*, after settling the principle that "a person acting avowedly as agent, is not liable personally for any act, legally done in his capacity as such," this court, after stating as a general rule, that "no parol evidence can be admitted to prove any contract different, from that made by the bill itself," say "but this rule does not preclude inquiring into the consideration, as in that case between the drawer and payee of a bill of exchange."

That was a case on a bill of exchange, signed by the drawer in his individual character, and to prove that the bill was drawn as an agent, and with the knowledge of the payee.

This parol testimony went to establish an agency, when the writing was signed as principal.

The parol testimony here offered to the court

only goes to shew that the defendant was applied to by the plaintiff, to go beyond his agency, to make a contract different from that which was made, and become individually bound, which the defendant refused.

In the case of *Krumbhaer* vs. *Ludeling*, the court say further, that the defendant is at liberty to shew a want of consideration, and any circumstances of fraud, or violation of good faith on the part of the plaintiff, which may be sufficient to exonerate him from his apparent liability; the suit against him being brought by a person "with whom he was immediately concerned in the negociation of the instrument."

The court then proceed. If, then, Ludeling shews that he was a mere agent throughout the whole of this transaction, and that within the knowledge of the plaintiff, the bill is not binding on him because he is not a party to the contract, and as it relates to him, it is without consideration; and the attempt on the part of the appellee to enforce it is a violation of that evident justice and good faith, which ought to direct and govern in all contracts.

The principles here settled by this court have not been complained of, nor will they be disturbed, until we are incapable of appreciating the

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evident justice and good faith which ought to direct and govern all contracts.

We only ask of the court to test the rights of the parties now before them by these principles, and the grounds for recovery by the plaintiff must be found elsewhere than in the good faith which marks his attempt in this action to seek individual liability in the defendant. 3 *Martin*, 644.

Thirdly. We will now consider the defence presented by the defendant's plea in bar to the plaintiff's action.

Under this plea, the ground relied on is, that the defendant executed no such covenant as is produced to support this action.

We have sought in vain for the defendant's liability as agent, or as member of a partnership either general or special. Let us see how far he has incurred individual liability, by any of the covenants contained in the writing sued on.

The plaintiff covenants to sell and convey to the Natchez Steam Boat Company, not to the defendant, that he will deliver the said boat to the Natchez Steam Boat Company, or its agent, not to the defendant; that at the time of the delivery to the said company, he will make a conveyance vesting title in the said company.

The chairman, board of directors and compa-

ny covenant to pay therefor 65.000 dollars in the manner following, viz. 15,000 dollars n cash &c.

The company, not the defendant, covenant that at the time of payment of the 15.000 dollars they will execute their promissory notes to the plaintiff for the residue 50.000, and that they (the company) will execute to the plaintiff a deed of trust; and that the notes and deed of trust shall be executed and delivered by the chairman of the board of directors, in the name, and for, and on the behalf of said directors and company.

Not one single expression, in this whole writing can, by just rules of interpretation, be tortured into individual covenants on the part of the defendant. If any individual responsibility attached to the defendant, by signing this writing as chairman, it was not in the power of the company to discharge him therefrom. The same power which created the office of chairman, and conferred it on the defendant, could unquestionably have conferred it on another. Suppose, after signing this writing, the defendant had resigned as chairman, or been removed, and another elected, would not the defendant have been forthwith discharged even from the duties imposed on him as chairman? Clearly. After this instrument of writing had been prepared with

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all the covenants therein as they now stand, could not any other chairman of the company have signed them with equal propriety as well as the defendant? Most unquestionably.

This at once settles the question that there are no individual covenants of the defendant in the body of the writing, and that its execution as chairman, no matter by whom, was merely complying with the forms the company had adopted, by which they should become bound through their agent.

But, again, suppose Postlethwaite had brought an action, in his individual name, for this steam boat under this contract; could he have recovered her? Such an idea would be preposterous. If he could not recover the boat, shall he be made liable to pay for her, with no covenant on his part to do so, and in direct violation of the character in which he contracted—as well as the clear meaning and intent of the contracting parties.

The subtleties of learning never tire, when pressed to point out in this contract any one covenant, by which this action could be maintained against the defendant: the counsel for the plaintiff tell us, there is the defendant's private seal at the end of chairman. This magic, of a scrawl with a pen, has been on the wane

for some years; a number of the sister states, our own with others, have ventured to believe that a contract could be as well understood, and the objects and rights of the parties, enforced with as much justice, in the absence, as in the presence of this mysterious wax, or scrawl.

The authority (if any was wanting) quoted by the defendant, is on this point conclusive. This case is found in Johnson's Reports, where on an instrument for payment of money executed in Virginia with an L.S. which in Virginia is held a sealed instrument but made payable in New-York was held to be governed by the laws of New-York, and to be a simple contract. *Warren* vs. *Lynch*, 5 *Johns.* 239. Lest, however, this ground should be untenable, the plaintiff's counsel say, the defendant is liable, because in actions *in solido*, the creditor may apply to any one of the debtors he pleases, and refer us to the *Civ. Code*, 278, *art.* 103, & 1 *Poth. Obl. n.* 270.

This is admitted as very sound law by the defendant, but in the same books it is also declared, that an obligation *in solido*, is not presumed, it must be expressly stipulated. There is no obligation *in solido* expressed in the writing sued on—nor is there even ground to presume it,

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if presumptions could be indulged. 1 *Pothier Obl. n.* 265, 267, 241, 243, *Civ. Code*, 278 *art.* 102.

There being nothing in this contract, which could bind the defendant *in solido*; then, say the counsel for the plaintiff, he is bound by having signed it merely in his character of agent. And to support this novel position we are referred to 4 *Mass. Rep.* 148, 5 *East*, 148, 8 *Mass*, 595. 1 *John. Cas.* 319, 9 *John.* 334.

By examining these cases they will be found inapplicable, and to fall far short of establishing the defendant's liability in the action.

Parsons says, "the decision of this cause must depend on the construction of the deed. If the defendants have by their deed, personally undertaken to pay, they must be holden." 4. *Mass. R.* 597.

In that case too, the contract was made by agents, appointed by the directors who were agents, and it did not appear that the company had given the directors, its immediate agents, power to substitute other agents, by whose contracts the company should be bound; and, the judge said, that not appearing, he would not presume it, without some evidence.

The case from 5 *East*, 145, is of the same character, and was a case, where one bound himself, his heirs, &c. not as agent but for the

performance of another. And the other cases bear the same aspect, and will be found to have covenants in their nature individual, or cases failing to shew the real character of the agency, or those who might have been sued as principals.

It would require a very different class of cases from these to induce this court to unsettle all the principles they have so often and so long sanctioned as to the liability of an agent, as well as disregard the provisions of our own code which declare that the covenants by which the defendant is to become bound in this case must be expressly stipulated, not inferred.

In no view, which we can take of this contract, does there appear sufficient legal ground to enforce it against the defendant. Should, however, the court differ from us, and be disposed to attach any legal responsibility to the defendant, then is properly presented for consideration

The fourth ground of defence, to wit: That by false and fraudulent artifices and misrepresentations, the plaintiff induced the company to purchase the boat, for a full and fair price, under assurances that she was in all respects, a sound, substantial, fine boat; when, in fact, the said boat was rotten and defective, and that the

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plaintiff had wholly failed to deliver said boat, at New-Orleans, in good order, according to the tenour and true spirit of said contract.

The counsel for the defendant offered parol evidence, to prove the impositions practised by the plaintiff as to his representations, &c. concerning the boat, but which was objected to by the plaintiff's counsel upon several grounds, and amongst others, that there was no allegation of fraud in the pleadings.

This is rather a singular ground to take in this court, open as are all its avenues to justice, unshackled by the subtleties of special pleading.

We had supposed, that our allegation, of fraud, in the case, would have satisfied a court, influenced alone by the rules of common law pleading.

After going on and reciting in our plea the various representations, and inducements held out to the company to purchase; and alledging the readiness of the company to receive, if the plaintiff was ready to deliver, a sound substantial boat, such as he represented the Vesuvius to be, but, that the said Jasper Lynch, not regarding his obligations to deliver the said steam boat Vesuvius to the said company, refused so to do; he, said plaintiff, falsely and untruly alledging that the said company were bound to

receive said boat, whether in good order and sound or substantial, or not.

If to alledge the plaintiff made certain covenants and representations which he wholly disregarded, falsely and untruly alledging pretexts therefor, is not an allegation of fraud suited to the views of the plaintiff's counsel, it is sufficiently so to reach the mind of this enlightened tribunal seeking the purposes of justice rather than the restrictions which deny it.

This allegation would permit parol proof to support it, by the strictest rules of pleading found in common law courts. Here no allegation would be necessary, but the court would receive the proof under the general issue.

A great variety of cases have been quoted from common law books to shew under what circumstances parol evidence can be properly admitted to vary, or explain a written instrument. It will be received in all cases to prove circumstances tending to shew fraud or imposition, in all cases where words are used ambiguous in their import, and the explanation of which is necessary to the just exposition of the contract; in all cases where the parol evidence will not vary, enlarge, alter or contradict the writing; but where it goes to explain doubts which arise, as to the real object and intention of the contracting parties.

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In a great variety of cases, at common law, has parol evidence been admitted to alter and contradict the writing, and this too, where there has been no allegation of fraud or imposition. The parol testimony offered by the defendant's counsel, must be received under either or all the rules laid down. In regard however to the rules of evidence, they are in themselves entirely arbitrary; growing out of no fixed principles, but finding their origin in a great variety of cases in the books as each respective case presented some new feature. And Fonblanque is well justified in the idea, that there is perhaps no rule of evidence, except that the best testimony in the power of the party shall be admitted.

The case before the court, may be most properly viewed as a bill in equity, seeking specific performance; and the counsel for the plaintiff found themselves wholly at a loss to avoid the conclusive authority from *Phillips*, in page 449, where the author after taking a clear and comprehensive view of the subject, lays it down as settled: when a court of equity is called on to decree specific performance, there the party to be charged is admitted to shew that under the circumstances the plaintiff is not entitled to have the agreement specifically performed. The ad-

mission of such evidence as matter of defence is very frequent; it is used to rebut an equity. The agreement you seek, says the defendant, is not the agreement I meant to perform; and then he is admitted to prove fraud or mistake. The same author, page 450 says; the general principle appears to be, that in answer to a bill for specific performance, the defendant may suggest and give parol evidence upon the ground of, fraud, surprise or mistake.

The counsel for the defendant might, however, with the most perfect confidence yield all the benefits derivable from the common law authorities, and safely rely on having the admission of the parol testimony offered by them tested by the rules laid down in 3 *Martin*, where after recognizing the general principle, that parol evidence cannot be admitted to prove any contract different from that made by the bill; the court further say, that this rule does not prevent inquiring into the consideration, and the party is at liberty to shew a want of consideration, or any circumstances of fraud or violation of good faith on the part of the plaintiff.

The parol testimony offered by the defendant is not to prove a contract different from the one relied on, but to prove a want or failure of consideration; to prove that the boat, which was

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the only consideration with the company, was represented and purchased as a sound good boat, when in fact she was decayed and rotten, so as greatly to reduce her value. To prove that her defects are so great, that had they been known to the company, so far from giving the full and fair price of 65,000 dollars they would not have purchased the boat at all.

To reject this testimony is to unsettle the principles sanctioned by our own, as well as the common law, authorities, and close the door on facts essential to a just and equitable interpretation of the contract, really intended by the contracting parties. *Powel on cont.* 426, 484. 3 *Term Rep.* 474, *Call. Rep.* 5, 1 *Dall.* 193, 426. 3 *Dall.* 506, 1 *Binney* 587, *N. York T. R.* 232. 9 *Cranch* 36, 37. *Peake's evid.* 97, 12 *East.* 399, 5 *John.* 234,. 9 *Johnsons Rep.* 285. *Phill. Ev.* 416, 443, 448, 455, 3 *Martin*, 640.

If we are asked for the evidences of fraud, or want of good faith in this transaction on the part of the plaintiff, we need only call the attention of the court to various inducements held out in his letters, as to priviledges and benefits the company would secure by purchasing from him, priviledges and benefits, which he had not and could not guarrantee. In his letter

he does not only speak of these very privi- ledges, but gives the company a solemn warning by which to deter them from purchasing other boats. In the same letter, the plaintiff also speaks of his desire to "evince a spirit of candour, and openness of dealing with the company." In other parts of the record, the plaintiff is found urging the defendant to become individually bound for the debt of the company, which he positively refused; and the plaintiff ultimately with concealed and feigned views, as he himself acknowledges, received the contract for and on account of the company, in the manner proposed by the defendant. The plaintiff attempts to justify this conduct by the facts, stated in his affidavit and found in several parts of the record.

The ground, relied on for justification, is that before he received the contract of the defendant as chairman, he consulted counsel and examined authorities, and satisfied himself that the defendant would be individually bound for the debt, notwithstanding he was contracting as agent or chairman for and on account of the company.

The plaintiff, however, took especial good care to conceal fro... the defendant the new views of individual responsibility, obtained by his le-

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gal researches, and actually received the contract, not only with the full belief of the defendant that the plaintiff was satisfied to look to the company, but with the express declaration by the defendant that he was not and would not become responsible for the company; and that before he would incur the obligations, now attempted to be enforced against him, all further negociation with the plaintiff must cease.

Fraud is defined by the books to be "the artifices by which one man deceives another." To say the defendant was not deceived by the plaintiff, in the manner in which this contract was obtained, would be to contradict the plaintiff's own affidavit, on which he relies for his justification.

If fraud be too harsh an appellation for thus deceptiously obtaining from another a contract incurring (as the plaintiff now pretends) not only greater responsibility than the party believed, but, which he declared he had not and would not incur, and that he would not even negociate with the plaintiff with such views, it will answer the purposes of justice to inquire whether this conduct was in the "spirit of that candour and openness of dealing" previously professed by the defendant. Was it sanctioned by that good faith which must direct and govern all con-

tracts, and which is essential to give that equitable character to the plaintiff in which he must appear, before he can ask equity of another? Was it good faith to sell a boat, representing her to be a fine sound substantial boat, by which he obtained a full and fair price, and tender a boat essentially defective and rotten? Is this the good faith which is to find favor with a tribunal, whose peculiar pride is the universal principle of right and justice it enforces?

Much of the time of this court has been occupied, not in proving that this is the sound, good boat purchased by the company, but, in proving how much she is rotten and defective. All the witnesses agree in proving her most essentially defective: and, trace the counsel for the plaintiff to the last alternative of the many, resorted to for pretexts of recovery, and you find them making laborious calculations, not to prove the boat such as was represented, and covenanted, but to prove that she is only rotten to the value of some 10 or 15,000 dollars, when the court below has determined, that the testimony sanctions a dimunition from her price of 25,000 dollars.

When the plaintiff's counsel respond to the deceptions used, by which this contract was obtained, we are told that the plaintiff only over-

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reached the defendant in his legal researches; and much learning both from the living and dead languages is pressed on us to prove, that our ignorance of law will not excuse us. We should be wanting in a proper regard to the understanding of this court, to occupy them in shewing the difference between ignorance of law, and the deceptive manner in which the plaintiff induced this contract from the defendant. Without wading through the long list of authorities quoted by the plaintiff's counsel on this subject, we deem it only necessary to call the attention of the court to the principles which are applicable to the cause before them.

Fonblanque, certainly amongst the best authorities from the common law books, and peculiarly entitled to be relied on for his able equity treatise, declares an impediment to the execution of a contract to be ignorance and error; either in fact, or in law: and if the mistake be discovered before any step is taken towards performance, it is but just he should have the liberty to retract.

The same author refers to the rules of the civil law "that there is no consent, where there is error;" and says in the application of this rule, it is material to distinguish error in circumstances which do not influence the contract,

and error in circumstances which induce the contract.

Apply these rules, whether as to ignorance of law, or fact, and they secure the defendant against a recovery.

Even if the defendant became legally bound by signing this contract (which, however, we trust has been clearly shewn he did not) still his error that he was so binding himself, coupled with the positive declarations, that he was not and would not become so bound; and the admitted concealed views of the plaintiff, when he obtained this contract, notwithstanding his previous professions of candour and openness of dealing, would clearly bring the defendant in the rule as to ignorance of law.

Is not consent an ingredient indispensable to to all contracts; did the defendant ever consent to become legally bound? Can the court for a moment believe that the plaintiff would have obtained this contract from the defendant, if he had entertained the most remote idea that the law would attach, or, the plaintiff would ever have sought to make him individually responsible?

Was not the defendant induced to sign this contract, purely from the belief the plaintiff

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would look to and seek the company and not the defendant under the contract?

If then he has legally erred, and this error would have influenced him not to make the contract, had he been undeceived at the time, according to Fonblanque and the authorities to which he refers, this error of law shall excuse him and the contract be vacated.

Again, as to error in fact, can any rational mind, for a moment, doubt that the defendant was in an error as to the real situation of this boat?

It has been abundantly proved (and the testimony cannot be rejected, by the rules already established in 3 *Martin*, for it only goes to the consideration and not to alter the contract) that 65,000 dollars was at the time of the purchase a full and fair price for the Vesuvius, even if she had been in all respects a perfectly sound and good boat.

And, yet, the witnesses vary from $15.000 to 25,000 as to the loss which the company would sustain by making her, what they believed they were purchasing, a sound, good boat.

Even the plaintiff's own examiners and reporters declare that on the larboard side a majority of her old timbers are defective. Other witnesses state that one fourth or one third of

all the lower or middle and important timbers are not defective only, but rotten.

What! Give the fullest price for the best boat on the river, and tender a boat thus rotten and defective, $25,000 of less value than you believed her to be at the time of purchase, and yet not be in an error?

Instead of this being the best boat on the river, an able and experienced builder and master of vessels, and whose character for integrity was proven to be wholly unimpeachable, (A. Seguin) swears that there are five classes of vessels, and that, was he called on to class the Vesuvius, in her present condition for the river trade, he would place her in the last, or fifth class. And, yet in the great variety of expedients which talent and ingenuity bring to the aid of a hopeless cause, we are told that it is no error which would have influenced the parties in making the contract, or, which should influence the court in enforcing the rights growing out of it.

Had the defective and rotten condition of this boat been known to the company, can the most incredulous mind believe, that it would not only have influenced them in the price they gave, but would have deterred them from purchasing altogether? On this subject Fonblanque refers to

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Pothier on obligations with this remark, "to which I am happy to refer, it appearing to me to afford the best illustration of the principles and conditions of contracts."

Previous to examining the principles to which he refers in Pothier and which are sanctioned by Domat and other able civilians, we would remark that Fonblanque is supported by authority from American reporters. 1 *Fonblanque*, 115 & *note*. 1 *Hennen & Mumford*, 429.

In regard to error and the objects to which it relates, it is wholly unimportant whether it be produced by fraud, or from any other cause. It is sufficient that error exists, and that it is error, whether of law or of fact, which might fairly be considered as influencing, or inducing the parties to contract, or abstain from contracting had they been undeceived in their error, or which would have influenced them in the price they contemplated to give for the subject of purchase.

As to the case before the court, therefore, it is only necessary to shew that the defendant was in an error as to the extent of the liability he supposed he was giving, (if in fact he gave any) or, that he was in error as regarded the soundness and good condition of the boat. And

it is expressly declared by the civil law authorities, that it is immaterial whether the defects in the article sold were known to the seller or not; it is sufficient that they do exist, and that the article sold proves different from what the purchaser believed, and that the difference is such as might have influenced him in the price at the time of purchase.

Let us now resort to the sources from whence Fonblanque found himself happy in deriving information, and we shall have cause to regret our inability to the just application of the sound principles of justice, if this court cannot find abundant matter to annul and vacate this contract; a contract, to say the least, in bad faith obtained, and attempted to be enforced.

"Error is the greatest defect that can occur in a contract, for, agreements can only be formed by the consent of the parties, and there is no consent where the parties are in an error, respecting the object of the agreement." *Pothier, Obl. n.* 17.

"Error annuls the agreement, not only where it affects the identity of the subject, but also where it affects that quality of it, which the parties have principally in contemplation, and which makes the substance of it." *Id. n.* 18.

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"A contract has no effect except with regard to things which are the object of the agreement, and as to the contracting parties." *Id. n.* 85.

"The agreement being formed by the intention of the contracting parties, can have no effect except with regard to what those parties intended and had in view." *Id. n.* 86.

"Since people buy things only to employ them to the uses for which they are destined, this is a fourth engagement, which the seller is under to the buyer, to take back the thing sold, if it has such faults and defects as render it unfit for its use, or too troublesome; or to diminish the price of the thing, whether the defects were known to the seller or not, and if he knows them he is obliged to declare them." *Domat.* 1, 2, *s.* 2, *art.* 4.

"Since it is not possible to restrain all the perfidious dealings of sellers, and that the inconveniences would be too great to dissolve or call in question sales for all manner of defects in the thing sold, we consider only, therefore, those defects which render the things altogether unfit for the use for which they are bought and sold, or which diminish that use in such a manner, or render it so inconvenient, that if they had been known to the buyer, he would have

either not bought them at all, or at least not given so great a price for them."

"Although the defects of the thing sold were unknown to the seller, yet the buyer may procure a dissolution of the sale, or an abatement of the price, if the defects are such as give occasion for it; for, since people buy a thing only for its use, if it chance to have any defect, which hinders this use or lessens it, the seller ought not to reap the advantage of an apparent value, which the thing sold seemed to have, yet had not." *Id. art.* 5.

"In the same case, where the defects of the thing sold were unknown to the seller, he shall be bound not only to take back the thing or abate the price, but likewise to indemnify the buyer, as to the charges, which the sale has put him to." *Id. art.* 6.

"If the seller has declared the thing sold to have some other quality, besides those which he is bound to warrant naturally, and that quality happens to be wanting, or that even the thing sold happens to have the contrary defects, we ought to judge of the effect of this declaration of the seller, by the circumstances of the consequence of the qualities which he has expressed; of the knowledge which he might, or ought to, have of the truth, contrary to what he has said;

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of the manner in which he engaged the buyer; and above all, to enquire whether these qualities have made a condition, without which the sale would not have been concluded; and according to these circumstances, either the sale shall be dissolved or the price diminished." *Id. art.* 12.

"The seller is obliged to explain clearly and distinctly, which is the thing that is sold, in what it consists, its qualities, its defects, and every thing that may give occasion to any error, or misunderstanding; and if there is in his words any ambiguity, obscurity or other defect, they are to be interpreted against him." *Id. art.* 14.

Notwithstanding the great efforts made by the plaintiff's counsel to prevent the defendant deriving any benefit, by resorting to the rules of the common law for the admission of parol evidence, to explain doubts which might arise as to the real objects and intention of the parties; yet, when called on to account for the rotten condition of the boat, they say the plaintiff has only covenanted to deliver this boat in "good order"; and good order being mere technical terms, they contended for the right to introduce parol testimony to prove what good order means; and a number of their witnesses were examined as to the import of these words.

The counsel for the plaintiff contended, that good order, as to a vessel, means her fitness to perform a voyage; and relied with great apparent confidence, that if the Vesuvius was in a situation to perform a voyage the plaintiff had complied with his contract, and the company were bound to receive her.

This is, perhaps, the first instance in which this court has been seriously called on to confine its views to mere terms of technicality, by which to enforce these broad and universal principles of equity, which heretofore have received their sanction.

Is there any thing in the term good order, which should induce a belief that the company at Natchez intended thereby only to purchase a boat capable of performing merely a voyage, or being only a safe boat for two years?

If the words good order had not been inserted in the writing, according to the rules laid down in 3 *Martin*, parol testimony would be received to go into the consideration.

The sole consideration with the company was the boat, and any proof to shew that she was rotten or defective, in whole or in part, would therefore be good. Shall the defendant be placed in a worse situation by the insertion of these words?

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But the absurdity of this attempt to shackle us with technicalities is abundantly evinced by the singular character of the testimony relied on to support them. Some of the witnesses depose that a boat may be essentially rotten (one witness goes so far as to say, two thirds of her important timbers) and yet be in good order.

Another witness, captain Rinker, whose experience and character guarrantee the fullest confidence, deposes that a vessel having material timbers defective or rotten, cannot be considered in good order.

Watson, a merchant of high standing, deposes to the same effect.

We have abundantly proven the Vesuvius to be most essentially rotten and defective, and, therefore, according to this testimony, not in good order, and, not being in good order, the company was not bound to receive her, nor can they be compelled to do so.

If this testimony as to the force and meaning of these words is to be used by the plaintiff, surely with equal force must it avail the defendant, if the court find any necessity to travel out of this writing to get at the real meaning of the parties, for that is, at last, the end and object of all contracts, and the golden rule by which they are to be interpreted and enforced.

There is a much more solid basis on which to rely, than the various, contradictory opinions of the witnesses as to the meaning of technical words.

We have proven that the defendant represented and covenanted to sell, and the company believed that they were buying, in all respects, a sound, substantial boat, the best on the river, and for which they agreed upon a full and sound price: and instead of the boat answering the description, she is proven greatly defective and rotten, and far from being the first, A. Seguin proves her only worthy of being ranked with the last class of vessels.

When commodore Patterson, a witness on whom the plaintiff's counsel places great reliance, for the technical meaning of good order, is asked, if he would deem a vessel in good order which he had been promised for convoy and represented as a fine substantial vessel, the best from whence she sailed, and the vessel, upon examination, turned out to be essentially defective, having important timbers rotten, and only to be ranked in the fifth or last class of vessels. He answers, that he should consider himself deceived and imposed upon, by those who made him the representation.

It does appear to us that this testimony goes

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rather more to the merits of the cause, than different opinions of different witnesses as to the force of technical terms.

That the company have been deceived and imposed upon by the representations as to the real character and condition of this boat (and whether the plaintiff intended to deceive him or not is wholly immaterial) cannot be denied without disregarding entirely the testimony. If to be deceived and imposed on entitle suitors to relief from this court, a decree cannot be had against the defendant in this cause. If the court should find any difficulty in resorting to parol testimony to establish the representations of the plaintiff as to this being a sound boat; the defendant finds himself amply protected in the implied warranty which the law attaches, and that a sound price requires a sound article.

The plaintiff's counsel in the course of the argument were pleased to treat this principle of law with great apparent indifference, speaking of it as only to be founded in the extravagant notions of Professor Woodeson and Doctor Cooper. It is not a very difficult task to avoid the force of a principle not by proving it morally wrong in itself, but by attacking those who maintain it.

In the ability displayed in the argument of

the cause by the counsel for the plaintiff, we had a right to expect elucidation of principle rather than denunciation of authority.

It was not, at all events, to be expected, that the books, containing the favorite principles relied on by them to support the action, would have been denounced as containing extravagant notions.

Justice Blackstone, for whom some veneration is entertained by the devotees for the commercial law, in treating the subject of warranty says, "but the vendor is not bound to answer unless he expressly warrants the effects sold to be sound and good, or unless he knew them to be otherwise and hath used any art to disguise them, or unless they turn out to be different from what he represents them to the buyer."

It will hardly be contended that the Vesuvius has not turned out differently from what she was represented to the company. So that our case comes within this "extravagant notion" of Justice Blackstone. 2 *Black.* 450, 451.

Professor Woodeson, if not with the same splendor of reputation which Blackstone enjoyed, followed in his wake, and might fairly be considered as deriving all the benefits of the light shed upon the course of his predecessor.

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In treating of warranty he says, "in the English law relating to this subject, a very unconscientious maxim seems long to have prevailed, which was expressed or alluded by the words, '*Caveat Emptor*,' signifying that it was the business of the buyer to be upon his guard, and that he must abide the loss of any imprudent purchase, unless the goodness and soundness of the things sold are warranted by the seller. However, it is now exploded, and a more reasonable principle has succeeded, that a fair price implies a warranty, and that a man is not supposed in the contract of sale to part with his money, without expecting an adequate compensation." 2 *Woodeson*, 415.

"But to come nearer home, in South Carolina it has been determined as a good general rule "that a sound price warrants a sound commodity." 2 *Bay*, 380.

Some of the writers of common law seem disposed to confine this doctrine to horses. In the name of reason, why should not the maxim be universal? Is there any thing in the character of horses, which consecrates the principle? If just in regard to them, would it be unjust in regard to the hidden defects of a steam boat? This position is well examined in Brown's Civil Law, where he justly observes, that on this sub-

ject the civil law demands a manifest preference (over the common law) in obliging the seller not only to warrant the title, but to warrant the goodness of the commodity. 1 *Brown's Civil Law*, 368 & *note* 46.

In Su[illegible]aw of vendors is also t[illegible] the rule, that vendors are bound to warrant both the title and estate against all defects, whether they were or were not cognizant of them.

Domat and Pothier sanction the same principle. Judge Cooper, alike distinguished for the variety and extent of his scientific and literary acquirements, (but whose "extravagant notions of equity" do not suit the views of the plaintiff's counsel in this cause) in his commentaries on the civil law, gives his warm sanction to the principle that "a sound price warrants a sound commodity."

In treating of this subject, the same author brings into view authorities from the common law in opposition to this principle, and then proceeds: "this seems to me a most demoralizing principle of deci ion. I know of no argument that can be adduced to prove that if I give $100 for a commodity that ought to be worth $100, I am not defrauded if it be worth only ten. You say the seller knows nothing of it. My answer is, that before he took $100

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from me, he ought to have known that the thing he pretended to sell was reasonably worth [illegible] Generally the buyer relies on the [illegible] on the buyer cheat the seller; [illegible] for the common law rule; [illegible] may [illegible] buyer [illegible] impunity. [illegible] rule of *caveat emptor* ought to be changed into *caveat venditor* [illegible] a disgrace to the law that such a maxim (as that contended for as the common law rule) should be adopted, and I rejoice to see the good sense of the South-Carolina bench has revolted at it." Judge Cooper proceeds to say that the chancery cases in support of this rule (and which contain the doctrine contended for by the plaintiff's counsel,) ought to be classed as cases of fraud and falsehood. *Cooper's Justinian*, 609, 10, 11, *and authorities there quoted.* 2 *Bay*, 380. *Sugden's law of vendors*, 1 & 2. It is not to be wondered at that the counsel for the plaintiff should manifest some aversion to the principles contended for by Judge Cooper and other civilians. Apply them to the case before the court, and their only hope of recovery is gone.

It has been attempted by argument, (for it is not to be found in the testimony) to impress the court with the belief, that the doctrine of

warranty should not avail the defendant or the company, because they were fully apprised of the defects of the boat at Natchez.

So far from this being the fact, the boat was loaded at Natchez and could not be examined, and the gentlemen on board with the defendant, did not pretend, for they could not, to take any other than a mere cursory survey.

All that passed while they were on board was calculated to make them believe that the boat was sound, substantial, and the best boat on the river. The plaintiff spoke of the great strength of the boat, pointed to the new beams he had put in to strengthen her, that she was the best boat on the river, that she had been rebuilt, (not repaired) under the plaintiff's immediate direction and superintendance.

Relying on the representation of the plaintiff as to the soundness and good condition of the boat, one of the gentlemen on board, in company with the defendant, observed to the plaintiff, that they supposed the timbers which they could not see, were all as sound as those they could, but the witness did not hear the reply from the plaintiff. See the deposition of Griffith.

Is it upon this testimony, that the court can find grounds on which not only to disregard the legal principles, which would compel the plain-

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tiff to give a sound article for a sound price, but to enforce a contract, clearly not entitled to the peculiar sympathies of the court, by which it is to be taken out of the uniform rules of interpretation and equitable enforcement of rights heretofore secured to the suitors?

In regard to the actual condition of the boat, the number of witnesses and the delusive nature of the testimony, render a more particular examination necessary than is found in the preceeding pages.

The nature of this examination is such as to produce occasional repetition in adverting to particular statements of facts; a necessity which will find an ample apology in the importance of the cause under consideration.

We will consider next the objections to the condition, soundness, and good order of the boat under the three aspects exhibited by the counsel of the plaintiff, viz. 1. As to the head beam of the engine; 2. As to the boiler; and 3. As to the hull.

First—As to the head beam. With respect to the character and situation of this part of the machinery, there is neither doubt nor difficulty: if the head beam be wanting, or if it be unfit for service, the rest of the machinery is useless. That the beam of the Vesuvius was broken, in-

ferior, and comparatively worthless is admitted on all hands; and we have the authority of captain Gale, an experienced and skilful master of steam boats on the Mississippi, that there is great risk in attempting a voyage with a beam so broken, so much so as to risk not only the loss of the voyage, but the loss of the boat and cargo. Yet we are told that the steam boat Vesuvius, tendered to the Natchez Steam Boat Company in this situation, was tendered in good order, and that under the contract we were bound to receive her! What! The pride of the Mississippi, the *ne plus ultra* of steam boats, not in a condition to make a voyage, without danger of losing herself and her cargo, and yet in a condition to meet those lofty assurances and pretensions, and to answer to a warranty of good order! The force of this objection is perceived by the counsel of the plaintiff, and it is attempted to be combatted on the grounds—1. that a new beam had been ordered from New York, and 2. that there was a formal waiver by the defendant of all objections to the old one.

To the first apology it is sufficient to answer, that the new beam was not presented to us. We might confide in the declaration of the plaintiff that it had been ordered from New York. We might believe it was on the ocean, that it

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was on the river, or at the levee; but we knew that its local being, or being at all, was not known We saw that it did not constitute a part of that machinery, to the sufficiency of which the plaintiff knew and acknowledged to be essential. But the new beam did arrive, and that, says the plaintiff's counsel, is a conclusive answer to all objections. And when did it arrive? To this point we have the testimony of the plaintiff's witness, Penniston, that the new beam arrived and replaced the old one in the Vesuvius about the 24th of March; that is thirty-three days after the date at which the plaintiff declared the Vesuvius ready for delivery under the agreement, and from which time he claims our obligation to receive her, and twenty-two days after the institution of this suit to enforce that claim. The plaintiff's counsel, with his usual accuracy, says the beam was on board the boat "when the trial commenced in the court below." This is entirely unwarranted of the fact. Is it not clear, then, that there is no connexion between our right to require, on the 19th February, a steam boat with her machinery in good order, and the promised arrival from New-York of a head beam absolutely necessary to constitute such order—the arrival of which was remote and uncertain, and which

did not ; fact take place until more than a month after, and of which we had no notice or information until it appeared in evidence on the trial of this cause: and it is not equally clear that the defendant (on the strength of this objection alone, if no other existed) was justified in saying to the plaintiff, in his letter of the 27th of February, that "we (himself and colleagues acting for the Natchez Steam Boat Company) do not feel authorized to receive, and must decline receiving, the said boat under the agreement of the 5th of November, 1818, as we do not find her in the state of soundness, and fitness for service which that agreement requires." But we are informed by the plaintiff's counsel, secondly, that we have admitted performance as to the head beam, and cannot now object to its condition. Two cases are referred to of decisions in New-York, where the time of performing a contract was enlarged and proven by parol. Being, as the court says, "a simple contract, 1 *John. Ca.* 22. it was competent, by parol, to enlarge, &c." and proof of a positive agreement to enlarge was given. We will not retort upon the counsel of the plaintiff his notions as to specialties, nor take shelter behind the crowd of common law decisions sustaining the principle,

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"that there cannot be a defeasance or waiver of any condition of an instrument under seal other than by an instrument of equal dignity." We will be satisfied with referring to the record for this "admission of performance," and see how far it goes to support the plaintiff's pretensions with respect to it. The witness of the plaintiff, Griffith, says, "that the plaintiff shewed the defendant the head beam, and mentioned tha it was the only thing defective about the engine, and that the plaintiff had ordered a new beam from New-York." The defendant replied, that "he did not know that would make any difference, if the engine was otherwise in good order."

Straightened indeed must the counsel have been for ground to stand upon, when he resorted to this casual and qualified language to find a formal and operative waiver of an important condition in an agreement! 2. As to the boiler. Of the very great inferiority of this important part of the boat, we have the concurring testimony of every witness examined. It is old, has given way in several places, may last for twelve months, but is at present too weak to supply steam for the engine. In fact, as to this part of the boat, it may be said, without exaggeration, that the Vesuvius is as if she had no boiler. But it is alledged that the defendant was

fully informed upon this subject; an allegation unsupported by any evidence. The testimony of Griffith, relied on to this point, entirely fails to establish it. But whether or not, the statement of Griffith can be brought home to the defendant, this is certain, that the plaintiff stipulated to deliver a boiler in good order, and it is equally certain that he failed to do so, except in the particulars of oil and lampblack to conceal the defects, and of paint to exhibit an imposing exterior. On these two points, then, we have the most conclusive testimony—testimony which no subterfuge can elude, nor any ingenuity pervert. First. That the machinery of the steam boat Vesuvius, on the 19th of February, 1819, and thence to the 24th of March, was unfit for the purposes of navigation; and secondly, that if the machinery had been in order, the boiler was, on the said 19th of February, and ever since has been, incapable of supplying it with steam.

We are now to proceed to the consideration, thirdly, of the hull of the boat. On this point, the plaintiff's counsel refers to the report, *ante*, 50. It may be proper to remark that we have excepted to the admissibility of this report as testimony: it is not sworn to, it was not made under any judicial direction, and the par-

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ties to it were nearly all present in court. As it is upon the record, however, it may be proper to remark upon it. The signers of the report are, Allen Gorham, William C. Withers, Charles K. Lawrence, H. Harding and Andre Seguin—the three first named were selected by the plaintiff, under an agreement between him and the defendant, to select carpenters, and, of course, indifferent persons, to examine and report on the condition of the Vesuvius. That is, Gorham, who built the boat, Withers who afterwards put in her machinery, and Lawrence, who was in the employment of the plaintiff, as master of the Orleans for some years previously to her sale. Harding and Seguin, the only examiners of the five really disinterested, were chosen by the defendant. Of these five, only Gorham, Withers and Seguin, were examined on the trial below. Harding was absent, and when we offered to introduce Lawrence, the plaintiff objected on the score of his being a stockholder of the Natchez Steam Boat Company, and the objection prevailed; now it is manifest, that the feelings and propensities of Gorham, as well as his interest and character, went necessarily to shew the condition of the boat to be good: it is stated moreover by Seguin, that he never before, in his long experience, knew an instance of the

builder of a vessel being one of the persons making a survey or examination of her. The character of Gorham's testimony marks strongly his predilections; it is partial, involved and inconsistent. William C. Withers, another of the examiners of the plaintiff, confesses that he knew nothing of the state of the boat, but was guided more by the opinion of the other examiners than by his own judgment. The only important fact disclosed by this witness is, that, in his opinion, the Vesuvius was in better order than the Orleans, because he knew the Orleans was rotten twelve months before she was sold, Seguin was then in truth the only skilful and disinterested party to the report who examined at the time. This is stated from a conviction of its truth, and not from any belief that in the absence of his testimony the efforts of the plaintiff to establish the good order of his boat could succeed.

The steam boat Vesuvius was described to the Natchez Steam Boat Company by the plaintiff as a fine, strong, substantial boat, the best boat on the river; a boat, in fine, of which "the character was too well known to need comment." This boat was described, moreover, as having been rebuilt, and launched on the 1st of January, 1817, that is one year and ten months pre-

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cisely. At the time this description was made, the boat had a full cargo on board, bound from New-Orleans for Louisville, Kentucky; she stopped at the port of Natchez for part of a day, under circumstances which gave the purchasers no chance of examining or discovering any latent defects. We find that a committee of the company went on board of her, that the plaintiff pointed out to them in the engine room, as indicative of her strength and the substantial manner in which she was built, the magnitude of her timbers there in view; but on one of this committee stating to the plaintiff that he supposed the other parts of the boat were as sound and substantial as those which they had an opportunity of examining, the plaintiff walked to another part of the boat, and the witness did not hear his reply. What that reply was, and what it was not, we can satisfactorily determine from the ordinary characteristicks of this transaction.

In addition to this brief notice of the evidence, as it relates to the representations of the plaintiff, to the impossibility of the purchasers discovering the latent defects of the property, and to their diligence to that end; it may be necessary only to remark, that the Vesuvius was to be delivered in "good order" and in the same manner as in the case of the Orleans. We will

consider, first, how far the boat, at the time of proffered delivery, answered to the description of a fine, sound substantial boat, the best boat on the river, the *ne plus ultra*, &c. Upon this head the evidence is clear and distinct: the Vesuvius was not only not the Paragon thus described, but was inferior even to boats of ordinary pretensions. The defectiveness and rottenness of her hull were such, that if a sea vessel, decayed to the same extent, she would have been condemned: and although she might engage in the river trade, and run, in the absence of accidents with comparative security, for two years, yet if another boat could be found, the witness would prefer tha other for the transportation of his merchandize or himself. We find, moreover, that if tested by the rules governing insurance that this *ne plus ultra* would be classed in the 5th or most inferior class for the river trade, but if destined for any other trade, where subject to the winds or the waves, that she was too rotten and worthless to be classed at all. The testimony of Seguin stands entirely uncontroverted as to every important, indeed every minute circumstance of inferiority, decay and unsoundness. It is attempted to be shewn by Gorham that one third of the important timbers being declared rotten is too large a portion, but the rottenness

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itself is not attempted to be denied, and the character of A. Gorham's proportional calculations do not, in point of fact, affect the question if admitted as true, but their propriety and probability will best appear by his testimony already referred to. The exhibition of Gorham's testimony by the plaintiff's counsel is followed with great felicity by a kind of algebraical calculation, as to the relation of the parties damaged to the whole, by which it would seem that the rotten parts only bore a proportion of about one seventieth or one ninetieth to the entirety of the materials composing the boat. With the same propriety, as regards the merits of this cause, might the gentlemen have occupied the time of this court in endeavoring to prove the relative magnitude of the soul to the grosser materials of the body. The plaintiff went into testimony in the court below to shew that the Vesuvius traded to Natchez in 1814 and 1815—and, that since the Natchez Steam Boat Company must have known her age, character, &c. But, was the Vesuvius represented to us as a boat of 1814 or 1815? No: she was a boat rebuilt, according to the representations of the plaintiff, and launched on the 1st January, 1817—this is shewn by all the testimony: and the plaintiff when exhibiting the engine room to the committee of the compa-

ny, and pointing out the strength of the timbers, dwelt upon the rebuilding, and illustrated the manner of its execution by what was in sight; and declaring the whole to have been done under his immediate eye and inspection.

Yet, strange to say, this was an old vessel repaired: her upper works new and of the fine and durable timber of Louisiana, while her keel and timbers most subject to exposure and decay, and most essential to the value and security of the boat, and wholly excluded from examination, were old and of the inferior timbers of Pittsburg.

It is certain, that the general belief was, that the Vesuvius was the finest boat on the river. The opinion proceeded from the idea that she had not been repaired simply, but rebuilt, and so rebuilt as to make her as good as new. Her appearance in the water did not conflict with this prevailing idea, but the plaintiff knew the contrary; and we now know it.

In marine architecture a distinction is taken between rebuilding and repairing: the giving a vessel a new keel, is that which seems necessary to constitute a rebuilding; for if the work be on the old keel, it is usually denominated a repairing. *Reev. law shipping*, 331—*Mallory b. 2, ch. 1, § 7—Lex Mer. Am.* 98.

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This distinction is warranted by reason as well as authority, and the testimony shews that not only the keel but the futtocks and the most essential timbers of the hull were all old and rotten.

The fifth ground relied on by the defendant is, that there being precedent conditions to be performed on the part of the plaintiff, he must not only aver but prove that he was ready and willing, and competent to perform all required of him by the contract.

This principle is well settled by the common law books, and has received the sanction of the supreme court of the United States.

At the time of delivering this boat the plaintiff was to make a conveyance vesting clear and perfect title to the company. So far from tendering this conveyance he has not shewn it was in his power to convey.

The counsel for the plaintiff meet this ground of defence by saying that the court can make the conveyance a condition of their decree. It is rather a novel doctrine that the court have the power to make out a case for the plaintiff, which he has not made out for himself.

The title papers of the plaintiff should have been exhibited, with a tender and conveyance such as he covenanted to make.

There is nothing before the court which would

enable them to say that it is in the power of the plaintiff to convey.

Can they with propriety decree that the plaintiff shall execute a conveyance vesting a clear and indisputable title, free of all liabilities and incumbrances, until he has clearly shewn himself not only willing, but competent, to make such conveyance?

The court would enforce this duty on the plaintiff before he could recover, from another well established rule of law, that multiplicity of action should not be encouraged. If the court was to decree in this case in favor of the plaintiff, and it should afterwards appear that he had no sufficient title, it would drive the company to another action.

But, again, the plaintiff has actually spread upon the record evidence shewing that he has long since abandoned the boat; nor is there any proof that, since the abandonment, he has reclaimed and put himself in a situation to deliver the boat, much less make a title to her.

In *Ramsay* vs. *Johnson*, Lord Kenyon says, the plaintiff must prove that he was prepared to tender and pay, if the defendant was ready to receive, and even this is a relaxation from a former but more rigid rule: and Wheaton fur-

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nishes a still stronger case. 4 *East*, 208—2 *Wheaton*, 290.

The sixth ground relied on by the defendant is, that this contract was not proved according to the laws of Louisiana, which were indispensable to recovery.

It was intimated by the court, that the question had been adjudicated in a former case. We have not been able to turn to the case to which the court alluded; and, as we do not know the extent of its application, any manifestation of confidence on our part, on this question, will not be imputed to any want of regard and deference to the intimation to which we allude.

The principles of the law of evidence, however unsettled in many respects or subjected to the fluctuations of opinion under various judicial systems, are under ours, on this subject, at least, regulated by positive law.

As the proof of this contract may be considered as applicable to the rules of evidence, as well as to the form of action or remedy enforcing it, and the operation of the *lex fori*, in this respect, has been strongly contended for by the plaintiff's counsel, to be consistent, they cannot object to our requiring proof of the execution of the contract, by our own laws.

As to acts under private signature, two modes

of proof are established. 1st. The acknowledgement of the party against whom it is advanced. *Civ. Code*, 306, *art.* 224. 2dly. By the signature of the party being proven by one witness who saw the obligation signed, or by two persons, skilled in hand writing, appointed by the judge for that purpose. *Civ. Code*, 306, *art.* 226.

The party charged is obliged formally to avow or disavow his signature. *Civ. Code*, 306, *art.* 225. If he avows his signature it amounts to full proof against him. *Civ. Code*, 314, *art.* 257.

If the party charged does not avow his signature, must it not be proven by him who claims the execution of the obligation? If he does deny, that is disavow it, there can be no question.

Is not a general denial, by a defendant, of all the facts set forth in the petition such a formal disavowal of his signature, to an act under private signature, as will put the plaintiff on the proof of it?

If it does not, then such general denial must be deemed an avowal of such signature, for it is certain the act must be established in some way, and if not established by the defendant's counsel, it must be proved.

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It cannot be contended that, in the absence of a formal disavowal, the act is to be considered as proven; *a fortiori* it cannot, if there be a denial however general.

The party could not even obtain a judgment by default, without proving the execution of this writing. Shall our rights be weakened by a denial of its execution?

The counsel for the plaintiff were well aware that this execution of the contract must be proved, or no recovery could be had; and great pains and labour were evinced to obtain the proof that was produced; and what does this proof amount to? Not to the proof required by our code, but only to the handwriting of the defendant and the witness.

And how is it that the counsel for the plaintiff obviate the difficulty? By telling us they have given the proof required by the principles of the common law. Our situation is truly a lamentable one, if this happy facility of calling in the common law is to render nugatory the express provisions of our own code, and this too after an admission by the plaintiff's counsel that the laws of Louisiana were to govern in enforcing the remedy under the contract, and an ineffectual attempt to prove it according to these laws.

Previous to closing the defence it would be well to advert to the rules of interpretation, which will find the ready sanction of the court in the construction of the contract.

"In agreements, we must endeavour to ascertain what was the common intention of the parties, rather than adhere to the literal sense of the terms." *Civ. Code*, 270, *art.* 56.

"In a doubtful case, the agreement is to be interpreted against him who has stipulated, and in favour of him who has contracted" *Civ. Code*, 270, *art.* 62.

Here the plaintiff has stipulated to deliver the boat in good order: if doubts arise as to what was meant by the use of this term, the writing must be construed against him who has stipulated.

The seller is obliged to explain clearly and distinctly which is the thing that is sold, and in what it consists, its qualities, defects, and every thing that may give occasion to any error, or misunderstanding, and if there is in his words any ambiguity, obscurity or other defect, they are to be interpreted against him. *Dom. b.* 1. *t.* 2. § 2. *a.* 14.

"We ought to examine what was the common intention of the contracting parties, rather than the grammatical sense of the terms. *Pothier, Obl. n.* 91."

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The translator of Pothier, in treating on the subject of interpretation of contracts, says, "as every contract derives its effect from the intention of the parties, that intention, as expressed or inferred, must be the ground and principle of of every decision respecting its operation and extent, and the grand object of consideration in every question with regard to its construction." 2 *Pothier, n.* 5. Vide also 5 *chap. Shepherd Touchstone,* 1 *Fonblanque Equity, b.* 1, *c.* 6. *Powell on Contracts, head "Interpretation."*

By adverting to these and other modern authorities, it will be found, that in pursuance of this great and leading principle, "the intention of the parties," the courts of our own as well as other countries, as the science of jurisprudence has advanced, have unshackled themselves from the unjust restraints imposed by the earlier, but arbitrary rules of construction, as well in contracts as in treaties.

MARTIN, J. delivered the opinion of the court. Our attention in the decision of this cause is first claimed by several bills of exceptions.

1. The contract between the parties having been produced by the plaintiff's counsel sub-

scribed and sealed by the defendant, and attested by a subscribing witness, and proof made of the handwriting of both the defendant and witness; the latter being shewn to reside out of the state: the defendant's counsel objected to its being read, and the district court overruling this objection, a bill of exceptions was taken.

We are of opinion that the district court was correct. The witness being out of the jurisdiction of the state, his attendance in court could not be compelled, neither could it be before a commissioner. His testimony, thus affording the best evidence of the execution of the instrument, was not in the power of the plaintiff, who therefore was for this very reason dispensed from producing it. The defendant's signature, as it was not formally denied, was properly proven by a witness acquainted with his handwriting. *Clarke's ex.'s* vs. *Cochrane*, 3 *Martin*, 360.

2. The next bill of exceptions is to the opinion of the district court in ordering the reading of a report of certain individuals, appointed by the parties, offered by the plaintiff, for the sole purpose of lessening the credit due to the deposition of one of these individuals, examined as a witness for the defendant.

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It appears to us that this report, although it was not sworn to, was properly admitted for the purpose of shewing a discrepancy between the statement to which the witness had sworn, and that in the report which he had attested by his signature. It is in every day's practice to prove declarations made by a witness contrary to what he swears: but the use of such evidence must always be restricted to what was the avowed object of the plaintiff, who offered it, viz. to lessen the credit of the witness.

3. The third bill was taken to the opinion of the court in sustaining an objection of the plaintiff's counsel to the following question put by the defendant to Commodore Patterson, a witness introduced by the former, for the purpose of establishing the soundness of the Vesuvius. "If you had contracted for the purchase of a steam boat, in all respects sound and in good order, and a boat had been tendered to you, under this contract, with one third of her important timbers, including her lower futtocks, rotten, would you deem such a boat answering the description in the contract, or being in all respects sound and in good order?"

We are not apprized, by any thing on the record, of the nature of the objection to which the district court judged this question liable, and

we believe it ought to have been answered; although it might perhaps, which we do not determine, have been modified, so as to answer the present, by limiting the supposed, case to that of a steam boat in good order; instead of extending it, as was done, to that of a boat sound and in good order. As this bill, however, was taken by the defendant, and the most favorable answer could not avail him, the stipulation being for a boat in good order, and not for one sound and in good order, we think it useless to remand the case on this account.

4. A fourth bill was taken by the defendant's counsel on the refusal to swear Charles K. Lawrence, in chief; this gentleman having on his *voire dire* declared, that about the 24th of November, 1818, he purchased ten shares in the Natchez Steam Boat Company, and expected to pay his proportion of the price of the Vesuvius, if this court declared it to have been purchased by that company.

The interest, which this witness has in the present action, was sufficient to repel him. But it was contended that he acquired it, by his own act, after the contract now sued upon was entered into, and consequently that he could not, by so doing, deprive the defendant of the right which he had to his testimony. The record does not

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shew whether the fact, which he was called upon to establish, was anterior to his acquisition of the shares; although the circumstance of its date being particularly set forth, raises some presumption that such is the case. But the bill of exceptions is one of the defendant's, whose duty it was, if any particular circumstance entitled him to the testimony, notwithstanding the interest of the witness, to have made it clearly appear, in order to take the case out of the general rule. This we cannot presume, and are consequently bound to conclude that the district court correctly refused to swear the witness in chief, as the bill does not enable us to say that it erred. We do not, however, wish to be understood to determine that a witness who has acquired an interest by his own act, since the party who offers him had a right to his testimony, may be sworn: a question which admits of considerable doubt. *Phillips on Evidence*, 99, 102.

5. The last bill is on the refusal to permit the defendant to offer in evidence what Samuel A. Bower, a witness introduced by him, had heard the clerk of the steam boat say. It is difficult to tell on what ground he could have been permitted to relate this. Hearsay is not evidence.

The plea in abatement appears to us to have

been correctly overruled. The defendant was personally bound by the contract. He is admitted by the pleadings to be a stockholder of the Natchez Steam Boat Company, and he subscribed the contract. According to the common law of England, which is shewn to prevail in the state of Mississippi, all the members of an unincorporated company are bound, as members of ordinary partnerships. *Watson*, 3. The contract is clearly shewn to have been entered into by the authorised agents of the company, acting within the powers delegated to them; and cases are cited in which a partner or agent, contracting under his own seal, as the defendant did in this case, becomes personally bound.

The nature, validity and effects of this contract must be enquired into, according to the laws of the country, in which it was celebrated, even when the delivery of the thing, or the fact stipulated for, is to take place abroad. 1 *Gallison*, 375. Were we to test this case by the laws of this state, still the defendant would be found under a liability, as a member of the company, upon a contract entered into with his consent. But he shews that, in the state of Mississippi, his plea would prevail on the principle recognised in the case of *Rice* vs. *Shute*, viz. that a

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partner who is sued alone, may abate the suit, stating and naming his co-partners.

The law of this state must regulate us on this point. It is according to it that the remedy is sought for and to be administered. Here in cases of solidary obligations (which are the joint and several obligations of the common law, existing between partners) the creditor may sue either of his debtors alone, and is not bound, even on the plea of the latter, to bring all or any of the rest of the co-debtors in court. But it is contended that the act of the legislative council, 1805, 26, requires, that the petition should contain the names and residences of all the parties, and that the seventy and odd persons, named by the defendant in his answer, were parties to the contract, and their names not being in the petition, the suit must abate. The act, in our opinion, requires the insertion, in the petition, of the names and residence of parties to the suit alone, not of the the parties to the contract, on which the suit is grounded.

Partners cannot, by any clause in the partnership contract, alter the joint and several liability, which the law imposes on them, in favor of those with whom they contract. *Watson*, 172, 234.

We cannot admit that the act by which the

company was incorporated, being posterior to the contract, can affect the rights of the plaintiff.

On the merits, it is contended that the plaintiff ought not to recover, as he did not comply with his part of the contract by which he bound himself to deliver the boat in good order; as she had at the time her head beam broken, her boiler leaky, and a considerable part of her main timbers defective or rotten.

It is true her head beam, a considerable piece in the machinery of a steam boat, was broken and fished. But the plaintiff shews that this was by an accident which happened since the contract was entered into; that, as soon as he heard of it he ordered a new one to be made in New-York, which was on the way at the time of the tender, was offered to be delivered on its arrival, has since arrived and has been put in the place of the broken one. If, however, the plaintiff did not shew any thing else, this circumstance would most likely be holden, as a justification on the part of the defendant in refusing the boat. But the plaintiff shews that the defendant was satisfied with the measures taken for procuring a new beam, and assured the plaintiff that if there were no other deficiency in the boat, this would be waived

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Had the defendant wished to avail himself of the insufficiency of the head beam, he ought not to have thus waived his right to object thereto. For in such a case, the plaintiff might perhaps have procured another beam, out of some steam boat on the river. We therefore think that this objection cannot prevail.

It is further contended that the boiler was old and leaky. The age of it appears to be that of the boat, and the presumption is that the vendees could not well expect a newer one. The witnesses inform us that all boilers leak and lose some steam, and that this does not appear very deficient in this respect. But, it is alledged that it was worse than it appeared, because, before the examination, the plaintiff, in order to hide its defects, caused it to be covered with a thick coat of oil and lampblack. It is in evidence that this was done without any order from the plaintiff; that it is done at the end of every voyage, and even oftener, is necessary to guard the iron from the rust, and constitutes a part of what is called putting a boat in good order. Farther, it is in evidence that the vendees had a fair opportunity of viewing and examining the boiler before the contract.

A considerable number of pieces of timber, which at first appeared to this court as of mate-

rial importance, are shewn to be defective and rotten, but on a close examination of the testimony, and more mature reflection, they think these first impressions must yield to the depositions of carpenters, masters and owners of ships, examined on this head. These, almost unanimously assert, that notwithstanding the rottenness and defects of these pieces of timber, they consider the boat to be what is understood by a boat in good order. They make a distinction, to which the court has with great reluctance yielded, between a boat in good order and a sound one. They seem to allow the epithet of sound to ships on their first voyage only, and assert that afterwards every ship has some rotten and defective timber. Yielding, therefore, to the weight of the testimony in this respect, we are bound to say that the boat was in good order when she was tendered, if we except the absence of the new head beam, which the defendant did not complain of, and which would, he declared, make no difference: and this piece of machinery has since been supplied within the time mentioned. Further, it is in evidence, that the old head beam was in a condition to serve until the arrival of the new.

The contract of sale describes and ascertains

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the quality of the boat bargained for—a boat in good order: a worse could not have been tendered; a better cannot be insisted upon.

We leave out of view, as we are bound to do, all the conversations and correspondence of the parties before the contract. The conversations cannot affect the literal evidence. Every point started in the correspondence, if it does not appear in the contract, is abandoned and merged in the written agreement.

The defendant further urges that the plaintiff ought not to recover, because he has not proven, nor even alledged his capacity and readiness to make the conveyance stipulated for. We think this was unnecessary. He needed not to alledge his capacity, for his own title or conveyance was alone stipulated for. As to his readiness or his actual tender of the conveyance, the conduct of the defendant rendered an allegation or proof of these useless: for the defendant declared his unwillingness that the contract should be carried into effect, so that any further step on the part of the plaintiff was vain and useless. *Lex neminem cogit ad vana.*

It appears to us that the district court erred in making a deduction of $20,000, a sum greater

than that which it is proven would be required to repair the boat entirely, by substituting a new piece of timber to every decayed one. The boat was not sold as a new and perfectly sound one. According to the testimony, the vendees could not expect to find her without some decayed timbers. If the principle that a sound price implies a sound ware was to be understood, as the district court appears to understand it, no vessel could be sold for a sound price after her first voyage: for the witnesses depose that every vessel has some decayed timber after her first voyage.

The contract shews that the vendees were willing to give 65,000 for a boat which they must have known to have decayed timber in her. They stipulated that she should be delivered in good order, and this, on a close examination of the evidence and the best judgment we can form, means only in such a condition as to be fit to be employed immediately and during a reasonable time, without any repairs, and in this condition was the Vesuvius tendered by the plaintiff.

He is clearly, in our opinion, entitled to receive the price he stipulated for; and we deem ourselves bound to say, he is entitled to recover it from the defendant, not as chairman, as one

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of the directors, nor as agent of the company, but as a stockholder, a member of it. In unincorporated companies, like in all other partnerships, according to the law of the place where the contract was entered into and the domicil of the defendant, the members are jointly and severally liable: either of them may be coerced for the whole debt, an evil consequence which an act of incorporation can alone prevent, though it cannot remove it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and this court proceeding to pronounce such a judgment, as in their opinion, ought to have been given in the district court, do order, adjudge and decree that the plaintiff do recover from the defendant the sum of sixty-five thousand dollars, to be discharged by the payment of fifteen thousand dollars with interest, at the rate of five per cent. a year from the inception of this suit, and the delivery of the notes of the Natchez Steam Boat Company for the sum of fifty thousand dollars in four instalments at three, six, nine and twelve months from the nineteenth of February last. But no execution shall issue till the plaintiff shall deliver to the vendees, or lodge

for them in the office of the clerk of the district court a conveyance of the steam boat Vesuvius, according to the terms of his contract: and it is ordered that the defendant pay costs in both courts.

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LYNCH vs. POSTLETHWAITE.

See same case, December term.

SPICER & AL. vs. LEWIS & AL.

APPEAL from the court of the first district.

If there be no suggestion of fraud or simulation, parol evidence cannot be admitted to shew that a deed of sale was intended only as collateral security.

MATTHEWS, J. delivered the opinion of the court. This case comes up in a bill of exceptions to the opinion of the district court in refusing to admit a witness, and an account current, to prove that an act of sale of the Barilla, (concerning which vessel the present suit is brought) was not intended, as it purports, to convey an absolute property in her to the vendees, but, that the transfer was intended as a collateral security only.

The pleadings do not alledge fraud on the part of any person concerned in this suit, nor is there any allegation of simulation in the contract. We are, therefore, of opinion that the district court was correct, and as there is no

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statement of facts, nor any thing equivalent on which this court might decide the case on its merits,

It is ordered, adjudged and decreed that the appeal be dismissed at the appellant's costs.

Morse for the plaintiffs, *Duncan* for the defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, AUGUST TERM, 1819.

FULTON'S HEIRS vs. *GRISWOLD.*

APPEAL from the court of the sixth district.

The vendee cannot refuse payment of the price, nor can he require surety from the vendor, till suit be actually brought to evict him.

DERBIGNY, J. delivered the opinion of the court. This action is brought by the heirs and representatives of the late Alexander Fulton, to recover from William Griswold the first instalment of the price of some land by him purchased at the public sale of said Fulton's estate. Griswold refuses payment on the ground that the land by him bought is claimed by other persons. The evidence, however, is not that actions have actually been brought by such persons, but that they hold adverse titles, in consequence

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of which Griswold is exposed to be evicted. On that evidence the district judge thought it equitable that, before Griswold should be compelled to pay, his vendors should make him secure against eviction. From so much of his decision as requires from them this security, the heirs of Fulton have appealed.

It is a provision of our code, originating in the ancient laws of the country, that "when a purchaser is disquieted in his possession, by an action on mortgage or any other claim, he may suspend the payment of the price, until the seller has restored him to quiet possession, unless said seller prefers to give security." But the disturbance must be an actual disturbance, not an anticipated one: the danger of eviction must be that which arises from an actual suit, not from a suit which may hereafter be brought. Domat on that question has gone farther, when he said, "if before payment, the buyer discovers that he is in danger of eviction." &c. But the text of the Roman law does not warrant that interpretation; the expressions are, "*ante praetium solutum, dominii quaestione mota, praetium emptor solvere non cogitur, nisi fidejussores, &c. Dominii quoestionæ mota*, means not any discovery of danger on the part of the buyer, but an actual investigation of the title of

ownership; and is consonant with the provision of our code, which gives this remedy to the purchaser, only in case of a disturbance by an action on a mortgage or any other claim, or, as the French text expresses it, *par une action soit hypothecaire, soit en revendication.* So far, and no farther, does the law authorize the buyer to retain the purchase money: and, however hard may be some cases, in which an impending claim threatens the purchaser with eviction, it does not belong to courts of justice to extend to him the remedy which the law has limited to the case of actual disturbance by suit. Even before payment, says Pothier in is contract of sale, no. 252, if the buyer suffers no disturbance, he cannot require from the vendor any security for the price which is demanded of him. *Civ. Code*, 360, *art.* 85.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the appellant do recover from the appellee the sum of twelve hundred and fifty six dollars, with interest at ten per cent from the first day of March, 1818, and costs of suit.

Baldwin & Blanchard for the plaintiffs, *Porter* for the defendant.

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August, 1819.

PHILLIPS
vs.
JOHNSON & AL.

PHILLIPS vs. *JOHNSON & AL.*

APPEAL from the court of the sixth district.

The payment of property, part of a succession, to a person declared heir to it, by the judgment of a court of competent jurisdiction, unappealed from, is valid, even after the judgment is reversed.

MARTIN, J. delivered the opinion of the court. A. Phillips, the plaintiff's brother, died intestate, leaving a large estate, real and personal, to which a curator was appointed, who brought suit against the defendants, as purchasers of a part of the real property of the estate.

During the late war, the present plaintiff, being an alien enemy, was prevented from instituting any action to obtain the estate.

In 1816, one James Rogers, for himself and others, as his co-heirs, applied to the court of probates to be recognised as heirs of the deceased, and they were accordingly admitted by a decree of that court, of the sixth of May of that year, on which day, the present defendants paid him the amount of the judgment obtained against them by the curator. On the next day, Rogers entered satisfaction of the judgment, on the re-record; and the curator appealed from the decree of the court of probates, which recognised Rogers and others as heirs of the estate.

In June following, Phillips, the present plaintiff, intervened in the appeal, and the dis-

trict court reversed the decree of the court of probates, and decreed Phillips, the then appellant, to be heir of the personal estate, and Rogers and others the then appellees to be heirs of the real. Ten days after, no appeal from this decision of the district court having as yet been taken, Rogers, for himself and his co-heirs, whose powers he had, acknowledged the payment of the amount of the judgment, obtained by the curator, against the present defendants.

In September, 1816, the present plaintiff appealed from the judgment of the district court to this; and in October, 1818 obtained a judgment reversing that of the district court, recognising Rogers and others as heirs of the real estate of the deceased, and declaring him to be heir of the whole estate, real and personal. 5 *Martin*, 700.

He then brought the present suit to recover the amount of the judgment, obtained by the curator, against the then and present defendants, for the amount of part of the real estate purchased by them. There was judgment against him and he appealed.

We are of opinion that the judgment is correct. The defendants, having paid the amount of the real property to persons declared heirs by a competent tribunal, from whose judgment no

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PHILLIPS vs. JOHNSON & AL.

appeal had been taken, after the time had elapsed, within which a suspensive appeal could have been taken, cannot be said to have made payment wrongfully, while the persons to whom they paid might have compelled payment by legal means.

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

Baldwin for the plaintiff, *Johnson* for the defendants.

DAVIS vs. *TURNBULL & AL.*

One cannot be charged with goods on the testimony of a witness who was present when they were contracted for, though not at their delivery. Interest cannot be claimed, under the custom of merchants, when the goods do not appear to have been bought for the purpose of trade and the vendee is not a merchant.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The defendants appealed from a judgment rendered against them, on an agreement of theirs to pay a claim of the plaintiff against one John M. Martin.

The amount of the claim was proven by the plaintiff's bookkeeper, who exhibited an account of sundry goods furnished by the plaintiff to said John M. Martin, which he swore to be correct: observing, however, that two items therein, one of 77 dollars, the other of 55 dol-

lars were for goods delivered in the witness' absence, although those charged in one of them were goods contracted for in his presence. There was also in the account a charge of $191,49 for interest, which the witness deposed was due, according to the custom of merchants in the parish of Rapides.

The defendants' counsel urged that judgment had been erroneously given for the sums in these three items: there being no legal evidence in support of the two first, and the latter having been allowed, against the provision of the statute, *Civ. Code*, 408, *art.* 32, and the decision of this court in the case of *Cavelier & al.* vs. *Collin's heirs*, 3 *Martin*, 188.

We are of opinion that the district court erred. The goods having been delivered in the absence of the witness, his deposition cannot charge the defendant with their amount. The circumstance of part of them having been contracted for in the witness' presence cannot avail; as it is by the delivery of the goods only that the party could become liable for them.

The plaintiff cannot claim interest, according to the custom of merchants, as the goods do not appear to have been purchased with a view to trade, but for the party's own use, and there is no evidence that he was a merchant.

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DAVIS
vs.
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It is, therefore, ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and that the plaintiff do recover the sum of two thousand six hundred and twenty-six dollars and fifty-one cents, (the balance appearing to be due, after a deduction of the three items excepted to) with legal interest from this date, and costs in the district court; those in this to be borne by the plaintiff and appellee.

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

PHILLIPS vs. *CARSON*.

Payment of *personal* property, belonging to the succession, to a person recognised as heir to the *real*, is invalid.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The late A. Phillips left a large real and personal estate, to which a curator was appointed, who, on the 22d of September, 1810, recovered a judgment against the then and present defendant, for the amount of the personal property of the estate, purchased by the latter.

During the late war, Thomas Phillips, brother of the deceased, was prevented from instituting any proceedings in order to obtain the estate, he being an alien enemy.

On the 16th of March, 1816, James Rogers and others whom he represented, were admitted by the court of probates, as heirs to the estate, but, on the succeeding day, the curator appealed, from the decision of the court of probates in this respect, to the district court. In June following, the plaintiff intervened, as a party appellant, in the district court, who, on the 25th of that month, reversed the judgment of the court of probates, and decreed that the said Thomas Phillips, the then appellant, "be received as heir at law of the late A. Phillips, as to the moveable effects which were of the said A. Phillips at the time of his death, and as to the immoveable property which was then of the said A. Phillips that the said James Rogers and others, the appellees, be admitted and received as heirs of the late A. Phillips, each of them to take a legal portion among themselves; and that the aforesaid persons, so admitted as heirs as aforesaid, be put in possession of the succession aforesaid, *i. e.* each of them of the portion thereof to which he is entitled as heir aforesaid—that the debts already paid by the succession be deducted from the shares of said heirs, in proportion to the share they take therefrom; and that those which yet remain due, as well as the costs and charges

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PHILLIPS
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of the succession, be satisfied and discharged by said heirs, each in proportion to his respective share, and that the curator be dismissed from the administration and curatorship of said estate."

From this judgment Phillips appealed, on the 7th of September following, to this court, who, in October last, reversed it, and decreed the whole estate, real and personal, to him. 5 *Martin*, 700.

He then brought the present suit, in order to recover the amount of the part of personal property of the estate, bought by the defendant, for which the curator had judgment in 1810. The defendant resisted his claim, on the ground that he had paid the amount of the judgment to James Rogers, on the 1st of July, 1810. This was not denied, but the plaintiff contended that Rogers had no legal capacity to receive it. There was judgment for the plaintiff, and the defendant appealed.

At the time of this payment, a judgment of the district court, rendered on the 21st of June preceding, not appealed from, recognized James Rogers and others, whom he represented, as heirs of the real estate of the deceased. But the claim, the amount of which was then paid to him, related to the personal estate only, of

which the present plaintiff was recognized as heir, by the same judgment: Rogers was then without capacity to discharge the present and then defendant.

It is further urged, that the curator had no right to appeal from the judgment of the court of probates, which had admitted Rogers and his co-heirs, as heirs to the real and personal estate of the deceased, and finally that the judgment of the district court decrees to the present plaintiff the real estate, after the claims against it are paid.

If the curator had no right to appeal, the then appellees, Rogers and others, might have pleaded this matter and obtained the dismissal of the appeal; but they joined issue with him, pleading only that there was no error in the judgment, and as they would have had the benefit of the decision of the district court, if the judgment of the court of probates had been affirmed, they must be concluded by its reversal.

The district court, after reversing the judgment of the court of probates, decreed the then appellant and present plaintiff and appellee to be heir of the personal estate of the deceased, and Rogers and his co-heirs to be heirs of the real. The legal portions spoken of in the judg-

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ment are not those of the then contending parties, Phillips on the one part, and Rogers and others, on the other, in relation to each other: but the respective shares of Rogers and his coheirs among themselves. It appears to us that the judgment appealed from is perfectly correct.

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

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

CURTIS vs. *MUSE & AL.*

APPEAL from the court of the fifth district.

If a tract of "100 acres on the side of the lake," be sold out of a larger tract, and the vendee ties himself on the whole front of the large tract on the lake, which is less than 10 acres, running two perpend cular lines, to include 60 acres, if he do not take more than a fair proportion of the good and bad land, and improves the

DERBIGNY, J. delivered the opinion of the court. John Curtis, the appellant, is the owner of a tract of land, of nineteen hundred arpens, in or about the centre of which is situated a tract of 100 arpens, sold by his vendors to the appellees. The expressions in the sale of this last tract are, "that it is situate and lying on the south-west side of the lake, in the tract of land containing two thousand arpens, bounded on one side by the bayou Castur, and fronting bayou Jean d'Jean." It does not appear that

this tract of one hundred arpens ever was measured out and located by the vendors to the appellees; but the appellees, under the description given in the deed of sale, caused it to be located so as to have its front on the south-west side of the lake. The difficulty between the parties is this: the appellant contends that it ought to be located in a square form: the appellees maintain that the manner in which they have located it is more equitable, because it gives them a proportionable share of good and bad land.

ground, he will not be removed afterwards on the allegation that he ought to have taken the land in a square form.

In a contest of this nature the first thing to examine is, whether the description given in the bill of sale is sufficiently certain to fix the situation of the land; for if it is, there is no occasion for any enquiry into the other circumstances of the case.

The land is said to lie on the south west side of the lake; we take that to signify that it has its front on that side. Now, according to the plans exhibited and made a part of the record, the length of that side falls far short of the ten arpents front, which a location of one hundred arpens in a square form would call for; such a location then would not be conformable to the expressions of the sale. But taking the whole length of the south-west side of the lake for the

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front of the tract in question, and running perpendicular lines on each end till they include a superficies of one hundred arpens, is evidently the location intended by the deed; and that is the location which the appellees have caused to be made. If we add to this that the location, as insisted on by the appellant, would give to the appellees nothing but pine hills & swamps, and that, if left as already surveyed, it gives them a proportionable share of good land: if we farther take into consideration that one of the appellees has built, since more than two years, a saw-mill on the bayou which bounds that tract of land behind; and that more than one year was suffered to elapse before the appellant complained of any trespass; we will be more and more confirmed in the opinion, that the location, as made by the appellees, is not only conformable to the deed of sale, but agreeable to the understanding of the parties.

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

Baldwin for the plaintiff, *Wilson* for the defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, SEPTEMBER TERM, 1819

West. District
Sept 1819.

PHILLIPS
vs.
CURTIS.

PHILLIPS vs. *CURTIS.*

APPEAL from the court of the sixth district.

If payment be made of a debt of the succession to a person declared heir to it, pending the appeal of the judgment which declared him so, and on the affirmance of the judgment a devolutive appeal is taken from the affirming judgment, the payment will be valid notwithstanding the payee is at last decreed not to be the heir.

MARTIN, J. delivered the opinion of the court. This case differs from that of *Phillips* vs. *Johnson & al.* determined during the last term *ante*, 226, in this particular only; the payment was made on the 22d of May, 1816, that is to say, pending the appeal in the district court; while in the former case, there was evidence of it after the judgment in the district court.

The present plaintiff having neglected to resort to such an appeal to this court; as would have suspended the execution of the judgment

West. District
Sept, 1819.

PHILLIPS
vs.
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of the district court, the right of James Rogers to retain the payment made to him by the present defendant, became absolute. If the latter had contended that he had paid to Rogers what he had no right to demand or receive, and claimed restitution, Rogers would have repelled his claim by the production of the judgment of the district court, the execution of which was not suspended, authorising him to compel by legal means the payment of that very money, which it could have been before successfully contended he had no right to demand.

If, before the judgment of the district court, he had no right to the money, his receipt thereof made him a debtor to the present defendant. But the subsequent judgment rendering him a creditor, the debt was extinguished by confusion; and he became the absolute owner of the money, as if it had been paid to him after the judgment.

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

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

DAY vs. *FRISTOE & AL.*

West District
Sept 1819

DAY
vs
FRISTOE & AL

A process verbal of the sale of real estate, not subscribed, nor shewn to be in the handwriting of the officer selling, cannot support a writ of seizure.

APPEAL from the court of the sixth district.

DERBIGNY, J. delivered the opinion of the court. In this case, an order of seizure was obtained by the plaintiff against two lots of ground in this town, struck off to James Cannon at the public sale of the estate of the late Lloyd Day, the plaintiff's ancestor. The defendants are third possessors of these lots, and plead that if the plaintiff has any title to them, it is not such an one as could authorise the summary mode of proceeding by seizure. They further alledge that one of them is the legal owner of the lots, by a regular claim of conveyance from the original proprietor of the town.

We consider that in the present state of the cause, the only question submitted to us is, whether the title of the plaintiff is one of those upon which an order of seizure may at once issue; for the decree, from which an appeal is claimed, goes no further than setting aside the order obtained, and condemning the plaintiff to the costs of that proceeding.

The priviledge of proceeding by seizure is a remedy granted by the Spanish law in cases where the plaintiff is bearer of a title which imports a confession of judgment. The title of

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DAY
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FRISTOE & AL

the vendor of real estate is of that class; and as our laws give him a priviledged mortgage on the thing sold, it has always been deemed sufficient (and we think reasonably) to produce the evidence of such sale, in order to be entitled to the benefit of that mode of proceeding But that evidence must be such as the law requires; an authentic public act in due form. Here the instrument, on which the order of seizure appears to have been granted, purports to be a copy of a process verbal of the public sale of Lloyd Day's estate; but that process verbal neither bears the signature of the public officer who made that sale, nor is shewn even to be written by him. Whether it may be supported by other proof, upon a trial of the plaintiff's title in the ordinary course of proceeding, is not a question here: we have only to say that, in its present shape, it is not sufficiently authentic to authorise a summary proceeding by seizure.

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

Wilson for the plaintiff, *Baldwin* for the defendants.

West. District.
Sept. 1819.

PHILLIPS
v.
FULTON'S HEIRS

PHILLIPS vs. *FULTON'S HEIRS.*

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. No circumstance distinguishes this case from that of *Phillips* vs. *Curtis* just decided, *ante*, 237.

If a debt be paid to the person who had, at the time, the right to demand it, it is extinguished.

The defendants' money having been in the hands of the person, who was authorised to receive what they owed to the estate of the late A. Phillips, the payee had a right to retain it; and the payors could not reclaim it: so the debt was *ipso facto* extinguished.

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

Baldwin for the plaintiff, *Blanchard* for the defendants.

HUBBARD & AL. vs. *FULTON'S HEIRS.*

APPEAL from the court of the sixth district.

It cannot be opposed to the endorsee, that the note was given to the original payee, in discharge of a debt, which it appears he

MARTIN, J. delivered the opinion of the court. The plaintiffs, as endorsees, brought this action on a note of the defendants' ancestor to James Rogers.

West. District.

H. BR. & CL. vs. FULTON'S HEIRS.

had no right to demand or receive.

They pleaded the general issue, and, that their ancestor gave the note, on which the present suit is brought, to James Rogers, in discharge of a judgment obtained against him, Fulton, by the curator of the estate of A. Phillips, deceased, to which James Rogers was decreed to be heir, by a judgment of the district court, which has since been reversed by the supreme court, who has decreed the whole of the estate of the deceased to Thomas Phillips, who has brought suit for the amount of the judgment intended to be paid to James Rogers, by the note on which the present suit is brought; so that, if the defendants fail in it, they will be compelled to pay the money twice.

The execution of the note, and indorsement was admitted; and the allegations in the special plea were proven—there was judgment for the plaintiffs; and the defendants appealed.

Admitting that the matter, pleaded in avoidance, would have repelled the claim in the hands of James Rogers, the original payee, his indorsees cannot be affected thereby.

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

Johnson for the plaintiffs, *Scott* for the defendants.

West. District.
Sept 1819.

PHILLIPS vs. KILGOUR.

PHILLIPS vs. *KILGOUR.*

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. This case differs from that of *Phillips* vs. *Johnson & al.* determined in August term, *ante*, 226, in no material circumstance.

A debt is extinguished by payment to a person decreed to be entitled thereto, twenty days after the time, during which an appeal might have suspended the execution of the decree.

The payment to James Rogers having been made on the 23d of July, 1816 (twenty days after the time was elapsed, during which, an appeal might have suspended the execution of the judgment of the district court) discharged the debt.

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

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

HALL vs. *SPRIGG.*

APPEAL from the court of the sixth district.

One who purchases land for, paying it with the money of, another, will be compelled to convey it. Parol evidence will be received that it

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellant complains that the appellee retains for himself and pretends to keep possession of a tract of land, which he had

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7 m 243
44 453

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49 987

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purchased for the appellant, and the price of which he paid with the appellant's money. The jury found the facts to be as represented by the plaintiff; and judgment having nevertheless been rendered against him, he appealed.

was so bought and paid for although the purchaser took the deed in his own name.

The principles in matter of agency are generally so certain, and the duties of the agent so well understood, that we do not deem it necessary to enter into much demonstration on so plain a subject. *Sicut liberum est mandatum non suscipere, ita susceptum consummari oportet.* The obligation once contracted must be complied with. If the proxy, who bought a thing for his principal, caused the contract of sale to be made in his own name, instead of the name of his constituent, there remains something to be done on his part to fulfil his obligation, and that is, to transfer the purchase to the person for whom he bought. To pretend that, by causing the instrument of sale to be executed in his name, he must be considered as the owner, because it so appears on the face of the instrument, is to misunderstand the rule by which parol evidence is made inadmissible against or beyond the contents of a written act. No such thing is attempted here as contradicting the contents of the act; the plaintiff admits the whole of it; but he says that, no such act ought

to have been executed to the defendant in his own name, because he purchased as agent; and he says that after having caused the instrument to be so made, he is bound to transfer the property to his principal.

The defendant is equally mistaken, when he thinks that the plaintiff can demand nothing more of him than a compensation in damages. Such indemnity is due by the agent in cases of nonfeasance or misfeasance through neglect; but, when the obligation of the agent has been fulfilled in part, and it is in his power to fulfil it altogether, the principal has a right to require the contract to be carried into effect to the end.

The plaintiff, in the course of the trial below, had prayed leave to discontinue, and entered a bill of exceptions against the refusal of the judge to grant his request. But being of opinion that he must succeed as the case now stands, we deemed it useless to investigate that question.

It is adjudged and decreed, that the judgment of the district court be reversed: and this court proceeding to give such judgment as ought to have been rendered below, do order and decree that the plaintiff and appellant do recover from the appellee the tract of land in contro

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versy, and, that the appellee do transfer and convey the same to him; and it is further ordered that the appellee do pay costs.

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

PHILLIPS vs. *CARSON.*

Payment, of money due to an estate, to a person authorized at the time to receive the debts, is valid and extinguishes the obligation.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. This case differs from that of *Phillips* vs *Johnson & al.* determined in August last, *arte*, 226, in this circumstance only—that the payment to James Rogers was made on the 1st of July, 1815, that is to say, after the judgment of the district court, but before the expiration of the time during which an appeal suspending the execution might have been obtained.

We are of opinion that this circumstance does not vary the rights of the parties. No appeal, suspending the execution, was taken; and Rogers was the only person in whose hands the judgment against the present defendant, in favor of the estate, could be paid, from the date of the judgment of the district court the 22d of June, 1815, until the term of this court, in Octo-

ber, 1818, when it was reversed. 5 *Martin*, 700. During this period of upwards of two years the payment made to Rogers could not be legally recalled. It, therefore, extinguished the debt. The debt once extinguished cannot be said to have been revived by a judgment of this court, to which the present defendant was not a party.

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

Bullein for the plaintiff. *Johnson* for the defendant.

PHILLIPS vs. *SACKETT.*

APPEAL from the court of the sixth district.

A debt is extinguished when the amount of it reaches the hands of the person authorized to receive it at the time.

MARTIN, J. delivered the opinion of the court. This case is perfectly similar to those of *Phillips vs. Curtis* and *Phillips vs. Fulton's heirs*, just determined, *ante*, 237, 241.

The defendant's debt to the estate of the late A. Phillips was extinguished: the amount of it having reached the hands of the only person authorised to receive it at the time.

It is, therefore, ordered, adjudged and decreed,

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that the judgment of the district court be affirmed with costs.

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

*** MATHEWS, J. was prevented by indisposition from attending in the western district this year.

Owing to a raging epidemy, the October term was not holden.

There was not any case determined in November term.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, DECEMBER TERM, 1819.

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LLOYD *vs.* M'MASTERS & AL.

LLOYD vs. *M'MASTERS & AL.*

If a ship be hypothecated for a sum lent to fit her out on a voyage to Liverpool, to become payable on her arrival and the freight is to be received by the lender, who is authorised to insure, &c. and it is provided that the borrower shall be liable for all expenses and in the mean

The petition stated, that the plaintiff lent the defendant, M'Masters, 12,000 dollars, for the purpose of fitting out his ship, and received for the security of the loan a mortgage and hypothecation of her; that $5865, 61 of the said sum remain due and unpaid—he obtained a provisory writ of seizure, and prayed judgment against M'Masters.

The deed of hypothecation, annexed to the petition, provided that the ship should proceed to Liverpool, and be consigned to Barclay, Salkeld

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while the ship be sold, she will not be liable in the hands of the latter, for the expenses of the homeward voyage.

and co., and on her arrival there the said sum of 12,000 dollars should become due and payable; and the ship with her appurtenances and the whole freight, accruing or to accrue on the voyage, were to be bound for the loan: all disbursements, commission, costs and charges, whatever incurred and necessary on said vessel or her freight on the intended voyage, either at New-Orleans or Liverpool, to be borne by M'Masters; with all costs of exchange, as well as those of effecting insurance, which the plaintiff was authorised to procure. He was further authorised, by himself or assigns, to collect the freight and place it to M'Master's credit, in liquidation of the said 12,000 dollars and expenses aforesaid. Further, it was agreed that the ship and her appurtenances should remain liable till full payment was made.

The ship having in the mean while been sold by M'Masters to James Martin, subject to the hypothecation, the latter was made a defendant.

M'Masters pleaded the general issue.

Martin pleaded his property in the ship; that the hypothecation was invalid, and that, if it was valid, for a part of the claim, that part was paid. He further pleaded the general issue.

It appeared in evidence, that the plaintiff's

claim was composed of three items, viz; the sum loaned and interest—the expenses of the ship till her cargo was unloaded at Liverpool and the freight received—lastly, the expenses in Liverpool in preparing for her return voyage.

The district court was of opinion, that the hypothecation of the ship extended only to the security of such expenses as were incurred on the outward voyage, ending when the ship was unladen at Liverpool, and that any expenses incurred afterwards were not covered by the deed of hypothecation: and gave judgment for these expenses only, amounting to $537, 38 The plaintiff appealed.

Workman, for the defendants. Is the act of hypothecation, on which this action is founded, a valid one?—This, to say the least, is very doubtful. When a vessel is pledged by the owners, it is called an hypothecation: when by the master a bottomry. But no other distinction, than in name, exists between those contracts. Whatever is necessary in a bottomry made by the master, is indispensable in every hypothecation made by the owners.

One of the essential conditions of every such contract is a stipulation that the debt shall be discharged and annulled, if the vessel be lost.

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Such a clause is found in every bottomry bond or bill to be met with in the books of precedents. Without such a clause it is expressly declared by the best authorities that the bond would be void. *Abbot, American Edit.* 98. *Park,* 410. *Jacobson,* 11.

But the instrument on which this suit is founded contains no such condition or stipulation. Therefore it is void as a maritime hypothecation. The *bonâ fide* third possessor, Martin, cannot be affected by it; and the plaintiff must be left to his recourse against the defendant M'Masters, as for a mere personal obligation.

We may test this opinion unequivocally, by the following case: suppose this vessel, the Ajax, had been lost in her voyage to Liverpool? If the hypothecation be a good one, the debt would then of course be annihilated. But, what is there in the deed which could lead to such a conclusion? Not a word: nor can its silence be supplied by any inference. Were an action, after the loss of the vessel, to be brought against M'Masters, by the plaintiff for the money, advanced by him, could he be told that the debt was extinguished? He would reply, with the instrument in his hand, that it contained no such provision; but that though void as a

maritime hypothecation, it was still valid and binding as a personal contract.

If the hypothecation were a valid one, the debt secured by it must be considered as destroyed, to within a very small amount. That hypothecation was made to secure a debt of 12,000 dollars. Now by the account annexed to the plaintiff's petition, it appears, from the three articles on the creditor's side, that the plaintiff has already received the sum of 11,055 dollars, 75 cents, the amount of freight, &c. These payments must first be imputed to the debt secured by mortgage before they can be applied to the chirographical or simple contract debts, according to the well known maxims of the civil law, explained and illustrated by 2 *Pothier's Obligations*, *n.* 530; and recognised and reinforced by our statute. *Civ. Code*, 290, *art.* 156. But it appears on record, from the testimony of Capt. Carson, that a large portion of the expenses of the vessel at Liverpool with which the defendants are charged, were incurred and disbursed for the sole purpose of fitting and preparing the vessel for her homeward passage from Liverpool to New-Orleans. Whereas the contract of hypothecation, or whatever it may be, stipulates only for a voyage from New-Orleans to Liverpool. The words of the

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deed, (near the commencement) are "in order to enable him to fit out and provide said vessel for an intended voyage to the port of Liverpool." Surely a contract made for the purpose of securing the expenses to be incurred on such a voyage cannot be extended to secure the expenses disbursed for any other and subsequent voyage. Were then both the preceding points to be decided against the defendants they would evidently be entitled, on this last ground, to an affirmance of the judgment of the court below. It was in fact upon this ground that the judgment of that court was rendered.

Grymes, for the plaintiff. The objection, taken by the defendant to the validity of the hypothecation by the owner, is certainly without foundation.

There is no distinction more clearly established than that which exists between a simple loan and a maritime loan on bottomry, or *respondentia*.

In the first case the money is at the risk of the borrower, and only legal interest can be reserved. In the second, it is at the risk of the lender, and marine interest to an indefinite amount may be reserved as a compensation for that risk, and can only be resorted to in case of

great necessity. 2 *Mars. on Ins.* 736, 748, 9. 741 (*in note*) *Emerigon (Hall's translation)* 36.

But both description of loans are equally susceptible of being secured by hypothecation.

Mortgages upon ships are familiarly spoken of in all the books. 8 *Johns. Rep.* 159. *Lex. Merc. Am.* 73, 4. *Emerigon (Hall's translation)* 217. *Id. (in note.)*

In all the cases referred to, mortgages to secure simple loans or pre-existing debts are alluded to because they speak of prior mortgages having the preference, which could not be in respect to marine loans or bottomry: because in such cases the last lender is preferred on the principle that he furnishes money to preserve the common pledge. *Wesket on Ins.* 56.

By the laws of Spain, every thing that is a subject of commerce, and in which a man had any property can be hypothecated. *Febrero Escrib. n.* 57; and our own statute, in exempting personal property from mortgage, specially exempts ships and vessels. *Civ. Code*, 455, *art.* 38; and by the Roman law, the very act of lending money for the outfit of a ship created a loan.

Inquiry, upon this subject, however, may be superfluous, as the district court has by its judgment supported the validity of the mortgage,

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and reduced the plaintiff's claim by a construction of the instrument; and from this judgment the defendants have not appealed.

It then only remains to examine the second point made by the defendants, upon the construction of the act itself: and in doing this, it will be necessary to lose sight of the defendant, Martin, and first, see how the instrument would stand between the plaintiff and the defendant M'Masters, the mortgagee and mortgagor.

It appears that the ship arrived at the port of Liverpool, in the voyage mentioned in the act of hypothecation. That the freight was received by the consignees; a large portion of it applied to the use of the ship in paying the necessary port charges, &c. and the balance carried to the credit of the plaintiff's debt.

The defendants contend, that after paying the charges alone necessary to get her into port and discharge her cargo, that all the rest should have been applied to the extinguishment of the hypothecary debt; and they cite Pothier and our code. But the irrelevancy of these authorities becomes obvious from the least attention. They are based upon the supposition of the existence of several debts due by the same debtor, to the same creditor; here there was but the

one debt existing between them, and the expenses of the ship while on voyage were necessary to the preservation of the thing hypothecated: incidental to its nature are the freight, the most natural and proper fund for supporting it. *See judge Washington's opinion, in note.* 2 *Mar. on In.* 741, and the payment was for the mutual advantage of mortgagor and mortgagee.

But supposing the principles quoted from *Pothier* and the *Civil Code* to be applicable, and, that this case is to be tested by them, the result must be the same.

Pothier says that, when imputation is neither made by the debtor nor the creditor, it ought to be made to that debt which it is most for the interest of the debtor to pay. The Code says the same. Compare it with the circumstances of this case. The ship Ajax is an American ship; she is described in the act of hypothecation as the ship Ajax of this port, New-Orleans. The master, in his testimony tells us that M'Masters gave him no instructions to apply elsewhere for money, for the use of the ship, while in Liverpool, or to bring her home, but to the consignees, Barclay, Salkeld & co. and that he does not think he could have procured money in Liverpool on M'Masters' or any other

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person's personal credit. It does not appear that M'Masters had any other fund in Barclay, Salkeld & co's. hands, but that arising from the freight earned by the ship. It is clear he had not, because if he had, Barclay, Salkeld & co. who were the agents of the plaintiff, would have preferred extinguishing his debt and charging the disbursements to M'Masters' account, than to appropriate the fund hypothecated for the plaintiff's reimbursement. And it is no where pretended or alledged that he (M'Masters) had any such funds.

In this state of things, either the ship must have remained in the port of Liverpool, perished, or be seized and sold for the debts contracted there; or the master must have raised money by bottomry or pledge of the ship, and subjected the owner (the defendant M'Masters) to a heavy marine interest. The plaintiff's debt bore no interest; none is reserved in the act.

Hence the inference is clear, that it was most for the interest of the debtor that the freight should be first applied to the payment of the ship's disbursements than to the extinguishment of the plaintiff's debt.

It would have been improper, and an act of bad faith, on the part of the consignees to have, with this freight in their hands, driven the mas-

ter to such extremities, they being the agents of both parties and bound to protect the interest of both. *Washington's opin. 2 Mar. on Ins. 741. (in note.)*

The plaintiff cannot be accused of making this application of the freight from interested views, or from a disposition to injure the interest of the defendant. His debt was payable in Liverpool, it was manifestly his interest to have it paid there, and as soon as possible; for as has been shewn he was receiving no interest for the protracted payment. According to the defendant's own doctrine he might have seized upon the freight appropriated to the discharge of his debt, and left the ship to provide for herself in a foreign port.

He has furnished the means of bringing her home in a state of present usefulness, a capacity to earn future freights; at the risk of losing his security by perils of the sea, without any interest for the delay or compensation for the risk; and this is alledged as a reason why he should not now recover his just debt; and this reason is urged by the defendant M'Masters, who alone has profited by it.

But the purposes for which this money was borrowed, as set forth in the act of hypothecation, are invoked to the defendant's aid. It is said

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to be to enable him to fit her out on a voyage to Liverpool. It is totally immaterial for what purposes he borrowed the money; it was unnessary to state it in the deed.

He borrowed it on the pledge of the ship; if he afterwards chose to send her to Liverpool he must pay the expenses of the voyage. and whether he sent money to pay with, or whether he borrowed it there, or whether paid out of the freight, ought to be totally immaterial to him, as he was to pay at all events; he had the whole control of the ship, she was in his possession, and if, after the loan and hypothecation, he had ordered the captain to go to China, instead of Liverpool, we might with the same propriety be told that the mortgage was cancelled, because she never went on the voyage mentioned.

The defendant has totally failed to shew that he has received any injury whatever, from the manner in which the freight money was applied; there is, therefore, no principle of equity that can entitle him to be sustained in the ground he now takes.

The intention of the parties, as it is fairly to be gathered from the act, has been fully complied with.

It is there stipulated "that all disbursements, commissions, costs and charges which shall be

incurred by him, or be necessary to the said vessel on her freight on said intended voyage, either in this port or in the port of Liverpool, aforesaid, shall be borne," &c. Again, "the said George Lloyd or his assigns are hereby fully authorized to collect the said freight, and to place the same to the credit of Samuel M'Masters in liquidation of the said $12,000 and expenses aforesaid." The words of the first clause are sufficiently ample to cover all the expenses of the ship, incident to her entering the port, and while she was there, and in the second the appropriation of the freight to that purpose is expressed; that the parties so intended it is evident, not only from the whole tenor of the circumstances heretofore detailed, but it comes more clear as we advance with the instrument itself. It will be observed, that in the clause, immediately preceding the first above quoted, the ship and freight are clearly pledged and hypothecated for the payment of the loan, and this was amply sufficient for all the purposes of the parties, if they contemplated the application of the whole freight to this debt and its extinguishment at Liverpool. But, in the clause immediately succeeding the one last quoted, it is said (and lastly, &c.) "the said ship shall be at all times liable to and chargeable for the pay-

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ment of the said 12,000 dollars until full payment is made."

From this, it is clear, that the parties contemplated a balance would be due, after appropriating the freight that could be spared from the expenses. That they contemplated the ship's return from this voyage, and her being at all times and places, where found, bound for that balance; and, that the defendant, M'Masters, could not have contemplated being left to provide money for her maintenance while in Liverpool, and bring her home from other sources; because it is in evidence, that he made no such provision, nor can it be presumed that the plaintiff could have contemplated the necessity of such provision, since it could only be procured to his great injury, weakening his security by incumbering the ship with a bottomry which would take precedence of his mortgage for the amount of the sum necessary, with the addition of a heavy marine interest.—All contracts of this nature are to have a favourable construction, and where there is obscurity, such as will best answer the intentions of the parties. *Wesket on Ins.* 130. All promises are to be taken most strongly against the promisor. *Ib.*

The only remaining subject of discussion is, as to the rights of Martin, the other defendant,

who claims this ship under a purchase from M·Masters, the other defendant.

The facts are these: the act of hypothecation from M·Masters to the plaintiff, is dated June the 8th, 1819; at this time M·Masters was the sole owner, Martin had no interest whatever. On the 16th of April, 1819, Martin purchased of M·Masters for the price of $4000. The only circumstance that could possibly give him any equitable right to interfere, or insist upon a different construction of the instrument from that which it ought to have between the original parties, would be a want of notice.

This is completely taken from him, on the exhibition of his own bill of sale, the instrument under which he claims, by the last clause in which he expressly agrees to take the ship subject to this mortgage and the amount, the date, the place of enregistry, and all are recited He lives in the same town with the plaintiff. and could in five minutes have learnt from him the nature of all the transactions, and the amount of his claims against the ship: by completing the purchase under these circumstances, he has subjected himself to all the equity existing between M·Masters and the plaintiff, and there is strong reason to believe he was fully acquainted with the amount of plaintiff's demands

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when we find him giving only 4000 dollars for a ship deemed worth 12,000 not a year before.

The amount of the loan being certain, the money paid by the plaintiff for disbursements, &c. being admitted and proved, as stated in his account annexed to his petition, the result is, that if the law be with him he is entitled to a judgment for $5685,61.

Workman, in reply. In the present stage of this cause, this court may undoubtedly render such a judgment in it as they think the district court ought to have done. The whole case being before them, they are authorized, by the equitable and liberal provisions of the statute, to do complete justice between the parties.

The plaintiff's attempt to distinguish the hypothecation in question from the contract of bottomry, will be defeated, by the account which he himself has presented, annexed to his petition. From that account it is seen that no more than 11,000 dollars were actually paid to M'Masters on account of the 12,000 dollars for which he mortgaged the vessel. It also appears that the plaintiff was to charge the enormous commission, on the advance and freight, of seven and a half per cent. These two circum-

stances would by themselves form a considerable maritime usury, and give to the instrument the decided character of a bottomry bond: but these circumstances are not all: for it further appears, that the defendant was to be charged with the full amount of the insurance of the vessel; which from New-Orleans to Liverpool is generally, I believe in time of peace, from a to 4 to 5 per cent. This, for a period of two months, would amount to from 24 to 30 per cent. per annum, the ordinary rate of maritime usury. Maritime interest is allowed in these contracts chiefly as a compensation for the lender's risk of losing the whole loan, if the vessel should be lost. And whether he takes this interest at a fixed rate, and becomes his own insurer, or charges the premium of insurance to the borrower, is to the borrower immaterial. Perhaps indeed the borrower may be a lose, by stipulating to pay the insurance instead of the nautical usury. If, in the present case, for example, a war had broke out between the United States and any European power, the premium of insurance would probably have been increased far beyond the highest rate of maritime interest at this port when the vessel sailed.—Add this stipulation

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to the defalcation of one thousand dollars from the money supposed to be advanced, and the exhorbitant commission, and the result will be a more extravagant allowance for maritime usury than often occurs in this or any other maritime place. And yet the plaintiff contends that he is entitled to all these advantages without being liable to any of the risks for which such advantages can be lawfully stipulated.—If this be, as the plaintiff contends, a simple hypothecation, to secure money lent, it is void for gross usury. If it be a contract of bottomry, it is void. as I have before stated, for want of the stipulation that the debt should be discharged if the vessel were lost.

On the second point, I still contend that the rule of law is general and absolute; to wit, that payments, made generally on account, must be imputed to hypothecary, rather than to chirography debts. The particular circumstances which might perhaps form an exception to this rule, in the case of M'Masters, as stated by the counsel are not applicable to the defendant Martin, who bought the Ajax, subject only to the liens legally imposed by, or arising from the deed on which the plaintiff sues.

On the remaining question, respecting the expenses of fitting the vessel for her return

voyage, the principle on which the district court has determined is so clear and correct, that it is deemed unnecessary to trouble the court further on that subject.

MARTIN, J. delivered the opinion of the court. The testimony and documents, which come up with the record, establish the quantum of the plaintiff's claim. Indeed, that does not appear to be disputed, and the contest is only as to the right of hypothecation.

With regard to the defendant, M'Masters, the district court certainly erred in withholding from the plaintiff a judgment for that sum; and its judgment is, therefore, annulled, avoided and reversed.

Proceeding to inquire what judgment ought to have been given in the district court, as to the claim of hypothecation, we cannot admit the position of the defendants' counsel, that the deed of hypothecation is void on account of the absence of a clause, providing that the debt shall not be demanded, but held to be extinguished in case of the loss of the ship: but we think with him and the district court that the hypothecation claim does not extend to the expenses of the outward voyage. When, by the collection of the freight, the sum loaned was paid in whole

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or in part, the hypothecation was in like manner destroyed, and could not be revived by subsequent disbursements.

It is, therefore, ordered, adjudged and decreed, that the plaintiff do recover from the defendant, M'Masters, the sum of five thousand eight hundred and sixty five dollars, and sixty one cents; and that the ship Ajax be sold to satisfy the sum of five hundred and thirty seven dollars, and thirty eight cents, the balance of the sum borrowed, and the expenses of the outward voyage, as part of the aforesaid sum, with costs of suit in this and the district court.

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If the return of a note be specifically prayed for, with general relief, the court will decree the payment of its amount, with a proviso that it may be satisfied by the return of the note.

APPEAL from the court of the second district.

The petition stated that the defendant is indebted to the plaintiffs, in the sum of 350 dollars, with damage for the following cause, viz; that in March, 1818, they purchased from him fifty barrels of molasses, which he assured them he had on a plantation which he had lately sold. and gave to them an order therefore on his vendee, taking their notes for the said sum; that on application to the latter person, the plain-

tiffs found that the defendant had not any molasses at the said plantation. The petition concluded with a prayer that the defendant might be decreed to return the plaintiffs' note, and, that they might have other and further relief.

The defendant was required to answer on oath to two interrogatories: 1. Whether the name of J. Anderson, at the foot of the order for the delivery of the molasses, was not written by him?—2d, Whether he did not receive the plaintiffs' note for 350 dollars, in payment of the molasses mentioned in the order?

He pleaded the general issue. He answered the first interrogatory in the affirmative: to the second, he answered that he received the plaintiffs' note, there mentioned, for all the molasses remaining in the cisterns of the plantation, after one of the plaintiffs had sent a young man to examine the molasses.

There was a verdict and judgment for the plaintiffs for 350 dollars, and costs.

The defendant appealed.

With the record came up copies of all the testimony, taken by the district court, and a bill of exceptions.

This bill stated, that the plaintiffs having closed their testimony, and the defendant hav-

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ing read his answer, he attempted to read his answers to the interrogatories put to him by the plaintiffs, when the latter stopped him, and moved the court to strike off the latter part of the answer to the second interrogatory, as not being responsive thereto, but the allegation of a separate and independent fact, not called for in the interrogatory. This was opposed on two grounds; that a motion to strike off part of the answer to an interrogatory must be made in writing within three days after the answer is filed, and, that the part prayed to be struck off was pertinent. But the court sustained the motion, holding that there is a material difference between an insufficient answer, and one which proceeds to alledge a separate and independent fact, not called for in the interrogatory; that in the latter case the motion may be made orally and during the trial.

Ory deposed that he was present when the parties contracted for the sale of a quantity of molasses, which the defendant said he had in his cisterns, averring that there were not less than forty, and he believed at least, fifty barrels.

Lawrence said he purchased Anderson's plantation, and took possession of it in March, 1818, when there were not more than sixty or seventy gallons of molasses in the cisterns, and

the same quantity was still there in March following, when one of the plaintiffs came to receive it, that this quantity was in one of the cisterns, and in the other there was nothing but some very dirty syrop, which was not worth any thing; that the cisterns were good; and he does not think that the molasses could have been wasted or lost, in the least degree, between the time he took possession of the plantation, and that when Chapdell came for the molasses.

Manade deposed, that he is a sugar maker by profession; and, at the request of the plaintiffs, he went with A. Duplantier to examine the quantity and quality of some molasses, purchased by them from the defendant, that, in the sugar house, he found in the upper cistern about sixty gallons of molasses, and in the lower, a small quantity of dirty, black looking, water, which was neither syrop nor molasses, and worth nothing.

A special error was assigned by the counsel of the defendant, and appellant, viz: that the prayer of the petition is for a special performance, and the judgment for a sum of money.

DERBIGNY, J. delivered the opinion of the court. The defendant having sold to the plaintiffs a quantity of molasses, represented to be not

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less than forty barrels. They gave him in payment their negociable note of hand for the sum of 350 dollars. But having found, when they went to receive the molasses, that it fell short of the quantity represented, they refused to take it, and brought the present suit against him to obtain restitution of their note. They further ask for such other relief as equity and justice may demand It is in proof, that instead of forty barrels, the quantity of the molases was not more than fifty or sixty gallons; so that there was evidently error or fraud in this transaction. But the appellant relies on other grounds of defence. In the first place, he complains that one of his answers to the interrogations propounded to him was not admitted to its full extent, and that a part of it was improperly struck off as irrelevant. But we are of opinion, that had this answer been received unconditionally, it contains nothing that could avail him. We therefore think it useless to examine whether the part struck off was or was not pertinent; because, should we find that it was, we would not send the case back to be tried anew, with the addition of evidence which we deem insignificant.

The appellant further contends that the judgment of the district court is wrong and ought to be reversed, because it awards to the appellees

that which they did not ask for; the petition praying for the restitution of the note, and the judgment decreeing payment of a sum of money. We think with the appellant that the judgment ought to have been for the thing prayed for; but in awarding the restitution of a note of hand, which the plaintiffs are liable to pay, if not returned, the court had a right further to provide that, in defect of such restitution, the amount of the note should be paid. At any rate, the prayer for general relief surely embraced that additional remedy.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed; and this court, proceeding to render such judgment as they think ought to have been given below, do order, adjudge and decree that the appellant shall pay to the appellees the sum of three hundred and fifty dollars, which payment may be satisfied by the surrender of the note sued for; it is further ordered that the defendant pay costs.

Grymes and *Canonge* for the plaintiffs. *Livermore* and *Eustis* for the defendant.

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vs.
SONGY'S ESTATE

ABAT & AL. vs. *SONGY'S ESTATE.*

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

Where a court has no jurisdiction over the *subject* of the suit, no admission of the parties can give it.

The jurisdiction of a court of probates extends over the acts of persons appointed under its authority; but not over claims against the estates which they administer.

DERBIGNY, J. delivered the opinion of the court. The petitioners were joint owners of the brig Olivia, with the late Vincent Songy, who was, at the same time, captain of that vessel. Songy, had been with the brig at Santiago de Cuba, where he transacted the business of the concern, and was on his return to this port, when he died. The petitioners, having to settle accounts with his estate, and to claim their share of the property which Songy had managed for their joint concern, sued his curator in the parish court; but the judge, being of opinion that the cognizance of the case more properly belonged to the court of probates, ordered the removal of it into that court; and both parties having acquiesced, the cause was there investigated and tried.

From the judgment, which was rendered by that court, the petitioners have appealed; and the first error which they assign is, that the court acted without jurisdiction. It is objected to them that they submitted voluntarily to the decree of the removal, and carried on the suit

through all its stages to the end, without ever objecting to the jurisdiction of the court; but to this, they answer, that if the court had no jurisdiction over the subject, no submission of the suitors could give it any.

The appellants being certainly correct in this position, it remains to inquire whether the court of probates had or had not any jurisdiction over the case.

It is to be regretted that the nature and extent of the jurisdiction of courts of probates, in this state, should not be better defined and more precisely determined. In its present unsettledness, it seems to be generally supposed that it does not extend to the cognizance of any suit or litigious claim; but to lay that as a general rule is, we apprehend, incorrect; for there are cases where such cognizance is expressly given to them.

These courts were created in 1805, with very limited powers, indeed, none else than proving wills, delivering letters testamentary, and appointing administrators to the estates of persons deceased intestate. Afterwards, although no subsequent law had intervened, they were recognised in our code to have other powers, such as the appointment, confirmation, removal or discharge of testamentary executors, tutors and

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curators of minors, interdicted and absent persons, the settlement of the accounts of these administrators, the inventory, appraisement and sales of estates, where absent heirs are interested, and generally all judicial acts relative to said persons, and to the administration of their property. Of these powers some are purely ministerial or administrative; but others carry with them, of necessity, the cognizance of suits or judicial contests. For example, an application for the destitution of a tutor is certainly a suit, and one indeed which may involve the parties in most serious litigation. There the court of probates is vested with full power to decide upon a legal controversy; so in a contest where opposition is made to the discharge of a tutor or a curator; so where they are called upon by the heir or other owner to render their accounts, and pay the balance; and so in many other cases which may arise under the jurisdiction of the probate court. Hence, it has been thought by some, that when a demand is directed against a tutor, curator, or any other administrator, subject to the control of the court of probates, that is the proper tribunal where application is to be made. The distinction, however, may be easily drawn between those demands which are directed against an administrator for

the acts of his administration, and the claims which are brought against the estate which he represents. The first are cognizable by the probate courts, the others not. In other words, the jurisdiction of a court of probates extends over the acts of the persons appointed under its authority; for those acts they are accountable before it; but where the contest is between the estate and some other party, that court is without jurisdiction.

The present case being evidently a litigious controversy between the partners of the late Songy on the one part, and his estate on the other, we are bound to say that the court of probates had no jurisdiction over it, and to avoid the judgment which it has rendered.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates of New-Orleans, rendered in this case, be annulled, avoided and reversed, and that each party pay his costs in both courts.

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

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vs
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BERNADON vs. *NOLTE & AL.*

APPEAL from the court of the first district.

If the freighter refuse to receive goods, on the ground that they are damaged, and the master say they may be received and the matter will be settled, the freighter may stop the freight till an allowance be made for the damage.

MARTIN, J. delivered the opinion of the court. The petition states that the defendants are indebted to the plaintiff, in the sum of $333, 58, for freight of a quantity of coffee, by them shipped on board of the plaintiff's vessel in the Havanna, for New-Orleans, which was accordingly brought into the latter port and delivered to the defendants, who accepted the same, and refuse to pay the freight.

The answer sets forth that part of the coffee, mentioned in the petition, viz. 25 bags belonged to the defendants, was so much injured in the transportation, as to occasion a damage amounting within twenty six dollars to the freight claimed; and the rest amounting to 47 bags, was so much injured in the transportation, as to occasion a loss of $253, 05 more than the amount of the freight claimed therefor; further, that the said 72 bags of coffee were not delivered in the like good order in which they were shipped, and great damage was occasioned thereto by the fault and negligence of the master of said vessel, or by the defects of said vessel.

The district judge gave judgment for the defendants; and the plaintiff appealed.

Our attention is first drawn to the absence of any of the reasons, and of the citation of any law, on which this judgment was rendered; wherefore, it is ordered, adjudged and decreed, that the judgment, being contrary to the constitution, and the act of the legislature, be annulled, avoided and reversed.

Proceeding to inquire what judgment the district court ought to have rendered, we find the testimony in the case spread on the record.

Baldwin, the weigh master of the custom house, deposed that he weighed the coffee that came in the plaintiff's vessel, and observed that 20 bags of it belonging to the defendants were damaged and when he returned from dinner he took notice that some of the coffee which he had weighed in the morning remained on the levee. On his cross examination, he added, that he knows of no coffee remaining at night; that he saw some one evening pretty late. Two days it rained, while he was at dinner; but the coffee was removed before he returned. The 20 bags he speaks of, as damaged, were sent to the defendants' store. The captain observed that some of the coffee was damaged, but he could not ac-

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count for it. He returned the 20 bags to the collector as damaged, and told him he did not observe that the rest of the coffee, returned as damaged, was so. This was after the survey. There were four or five bags damaged belonging to Brandegee, who received 119, and 83 bags of coffee in good order, except a few bags which were partially damaged.

Barker, a witness for the defendants, superintended the lading of the coffee in the Havanna; it was in good order; some of the bags were torn, and others clumsily put up; but the coffee was perfectly good and dry. When it arrived in New-Orleans he took notice that some damaged bags were landed, and expostulated with the captain on the impropriety of landing such bags without a survey, and was answered, that it was presumed to be of no consequence, and, that the damage must have happened when the vessel was driven ashore in the hurricane. He inquired why a protest was not made, and the captain answered he did not believe it to be very important, but he had written to his consignee to have a protest noted, and send down a surveyor. The captain once told the witness the coffee was wet when it came on board; and being asked why he signed the bill of lading, made no reply. The defendants sold 30 bags of

the coffee to Lieutaud, brothers & Delhonde, which they took from the levee as it was landed; and immediately sent word that the coffee was damaged. On receiving this message, the witness went down and found it so; though, from the looks of the bags, he could not have supposed it. He took the thirty bags, and gave others from another vessel. The whole was not then landed. The captain and consignees were desired to come to the defendants' store to view the damaged coffee. The captain did not come, but the witness believes that Price did, in behalf of M'Lanahan & Bogart, the consignees.

Lieutaud confirmed what was said by Barker, as to the thirty bags bought by Lieutaud, brothers & Delhonde.

Collins, a clerk of the defendants deposed that, he received the coffee from the plaintiff's ship, that the landing of it began on the 28th of June; three days after, he discovered that some of it was damaged. He requested the captain to take it back, who replied "it was all one; the defendants might go on and receive the coffee, and they would settle afterwards." After reporting this to the defendants, he continued to receive the coffee, which lasted till the 3d of July.

It was admitted that R. D. Sheppard & co.

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received 14 bags of coffee by the same vessel, not damaged; nine of them being taken out on the first, the rest on the second day of the discharging.—That Gordon, Grant & co. received 15 bags not damaged; a part of them being landed at the same time with the defendants' coffee. That J. Hagan received 19 bags; and M'Lanahan & Bogart about 20, which were not damaged.

Proof was exhibited by witnesses and documents, that the loss sustained by the damage of the coffee was, at least, equal to the freight claimed.

It appears, from the testimony of Barker, that the coffee was delivered in the Havanna, in good order; and by that of Collins and Lieutaud that a considerable part of it was damaged at the time it was delivered in New-Orleans; but the petition alledges that the defendants received and accepted the coffee; which if not accounted for must prevent the defendants from opposing the ill state in which the coffee was delivered, as a bar or set off against the claim for freight; but Collins deposes, that on his objecting to receive any more coffee, and desiring that the damaged bags might be taken on board again, the master observed, that the delivery might continue, the coffee be landed, carried to the store of the defendants, and the matter would

afterwards be settled. This, in our opinion, qualifies the receipt and acceptance of the coffee, and authorizes the defendants to claim a settlement afterwards: and if they can shew that the coffee was damaged, in such a manner as to have authorized them to refuse receiving it without an allowance being made to them, they may now indemnify themselves by retaining the freight, if they shew injury equal to its amount.

The testimony of Baldwin, the weighmaster, raises but a small presumption of the coffee having been wet by a protracted exposure to the rain, after its landing, which is not sufficiently encreased by the outward appearance of the bags inducing a belief that the coffee was sound, nor by the coffee of the other shippers not being damaged.

When goods are shewn to have been delivered in good order, and are landed otherwise, the fact is evident that the deterioration happened on board; and as the master is able to shew the cause of this deterioration, the presumption of the law is, that when he does not exhibit proof of this cause, that his neglect occasioned the deterioration. In this case there has been on the part of the plaintiff, or his agent, such a gross neglect of the means which the law and custom

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point out, in order to establish a deterioration of merchandize by any of these causes, for which the owner and master cannot be made liable, that he cannot be permitted to recover.

It is, therefore, ordered, adjudged and decreed, that there be judgment for the defendants, with costs of suit in the district court; but the judgment of that court being reversed in this, they must pay the costs of the appeal.

Livermore for the plaintiff, *Livingston* for the defendants.

JENKINSON vs. *COPE'S EX'RS.*

A thing deposited, must be returned to the depositor, and the owner of it, if the deposit be not made in his name, has no action to recover it without a cess on of the depositor's right.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The petition states that Hiram Edmundson, the patroon of the plaintiff's barge, having in that capacity received 400 dollars for and on account of the plaintiff, deposited them with the defendants' testator for safe keeping. That the testator died without having refunded the said sum to the said Hiram. The defendants pleaded the general issue; there was judgment for the plaintiff, and they appealed.

The testimony, which is all spread on the

record, although it does not leave the question of fact absolutely clear of doubt, preponderates in favor of the plaintiff: but the defendants' counsel assigns as an error of law, that it is not stated that the money specified in the petition was deposited for and on account of the plaintiff, and the testimony shews that the name of the plaintiff was never mentioned to the depositary, who to his death believed the money belonged to Edmundson.

It appears to us that the defendants' counsel is correct, and that the district judge erred in giving judgment for the plaintiff, who had no right to demand the money from the defendants, until he had obtained a cession of Edmundson's right, or had established his claim in a suit to which the latter was made a party.

The depositary must return the thing deposited only to him who deposited it, or in whose name the deposit was made, or who was pointed out to receive it. He cannot require him who made the deposit to prove that he is the owner of the thing. Yet, if he discover that the thing was stolen, and who the owner of it is, he must give him notice of the deposit, requiring him to claim it, in due time. *Civ. Code*, 414, *art.* 19, 20.

If you delivered me a thing, which Peter

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had desired you to deposit with me, without telling me that Peter gave it to you to bring it to me, the deposit is made in your name. You have an action to recover it from me, though Peter may compel you *mandati judicio* to cede your action to him. *Pothier, Depot. n.* 48.

Thus it is clear that, even if the plaintiff had shewn that he had directed Edmundson to deposit his money with the testator, it could not be recovered in this action, without a transfer of Edmundson's right having been previously obtained; because Edmundson did not inform the testator that the money was deposited in the plaintiff's name, or for his account.

The case is not mended by the circumstance of Edmundson having attended in this case, as a witness, and having proven the deposit: because as he might be compelled to testify, without an inquiry into his right to the money, his attendance does not shew a voluntary transfer of it, and no compulsory one has been obtained. The right is still in him exclusively, and the plaintiff cannot have any action against the defendants except through, or contradictorily with, him.

The decision, in this case, will seem in contradiction with that in the case of *Musson* vs.

Bank U. S. & al. 6 *Martin*, 707. It is not, however, so. We then pronounced on the rights of Musson and White. The bank did not appeal, does not appear to have resisted the claim in the district court, and was satisfied to pay the money deposited to the one of the contending parties legally entitled thereto. As it did not appeal, the judgment of the district court could not be amended in its favor.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendants, as in the case of a nonsuit, with costs in both courts.

Preston for the plaintiff, *Workman* for the defendants.

ARNOLD vs. *BUREAU.*

APPEAL from the court of the first district.

The indorser of a note, cannot claim its amount, if it be not re-indorsed to him, unless he has paid it to one of the subsequent indorsees.

MARTIN, J. delivered the opinion of the court. This cause is brought on two promissory notes of an equal sum, amounting together to 447 dollars, payable to the plaintiff sixty days after date. They are of the 8th and 18th of January, 1801.

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The answer sets forth, that on the 15th of May, 1811, the plaintiff gave to the defendant his promissory note for one fourth of the sum now claimed, in full satisfaction and discharge of it, which was so received by the plaintiff. Further, that on the same day, in pursuance of an agreement made by the defendant with his creditors, before a notary public, which is annexed to the answer, he delivered to W. & J. Montgomery, the plaintiff's agents, his notes for $111 75, payable nine months after date, endorsed by Deshon & Allen, which were received by them, according to the aforesaid agreement, in full payment and satisfaction and discharge of the two notes now sued upon, which said note has since been paid.

A few days after, the defendant filed a further plea, viz.—that W. & J. Montgomery were the owners and proprietors of the aforesaid two notes, on the 15th of March, 1811, and the defendant made the aforesaid agreement with them and they received the note for $111 75, annexed to the answer, in full payment and discharge of those now sued upon.

There was a verdict and judgment for $325 25, for the plaintiff, and the defendant appealed.

The case is submitted to us on the following statement and bill of exceptions.

J. Montgomery deposed that W. & J. Montgomery were the proprietors, by endorsement of the notes annexed to the petition, at the time they became payable, and until and after the 15th of March, 1811. They were duly protested. The small note, annexed to the answer, was received, according to the agreement between the defendant and his creditors, and it was afterwards paid. This agreement was signed by W. & J. Montgomery.

While the cause was on trial, the plaintiff's counsel asked J. Montgomery, a witness for the defendant, whether his house had received the remaining three fourths of the amount of the notes in suit, from the plaintiff. The defendant objected to the question and the objection being sustained by the court, the plaintiff's counsel took a bill of exceptions.

The plaintiff offered to prove, by witnesses, that several persons, who were creditors of the defendant in March, 1811, and remaining so till the 15th of May following, resided in New-Orleans, and did not sign the agreement between him and his creditors. This was objected to by the defendant's counsel, and the objection sustained by the court, and the plain-

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tiff took a bill of exceptions. The court in signing the bill expressed, as the reason for which the testimony was rejected, that none but creditors could impeach the agreement: and the plaintiff is not a creditor, the maker of the note having been discharged under the agreement.

In the charge to the jury, the court said that the plaintiff, not being a creditor of the defendant at the time, could not take advantage of any want of compliance; by the defendant, with any of the stipulations of the agreement, and that the act of W. & J. Montgomery in receiving the note for one fourth of the debt was of itself a presumptive evidence, and wanted nothing further to effect a discharge of the drawer, and of course of all the endorsers. The plaintiff's counsel took a bill of exceptions to this part of the charge.

As the plaintiff did not appeal, there is no necessity of examining the opinion of the judge, which he excepted to, before we consider the case on its merits, and not even then unless the judgment of the district court be reversed.

The plaintiff's original cause of action, charged in the petition, is not denied; but the defendant contends that the action has been extinguished: first, because the plaintiff received

another note in full discharge, satisfaction and payment of the two original ones. The same plea is repeated in the answer under another form, viz. that W. & J. Montgomery, the plaintiff's agents, did receive, &c. A further and last plea followed, by which the two former appear abandoned, and the case put on another issue, viz. that W. & J. Montgomery were the owners of the notes on the 15th of May by endorsement, &c. If this be proven, the plaintiff is without interest, and cannot recover: for the Montgomerys cannot be the owners of the notes in this manner, unless the plaintiff, the original payee, endorsed them, and so parted with his original interest; and he cannot have any claim, unless the notes were either endorsed back to him, or he paid their amount, on the failure of the defendant.

The latter plea is inconsistent with the former, in which the Montgomerys, are said to have been the holders of the notes, as agents, and in the right of the plaintiff. The permission to file this plea must be considered as a permission to withdraw the former, with which it is inconsistent.

The latter is proven by the testimony of J. Montgomery, who says that the firm were holders by indorsement. If so, they had the legal

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right to the amount, and nothing shews that the plaintiff had retained the equitable one.

The judgment of the district court is therefore annulled, avoided and reversed.

It remains for us to inquire whether the district court ought to have given judgment for the defendant or dismissed the plaintiff's petition.

This must be preceded by an inquiry whether the plaintiff has been permitted to produce all the legal evidence which he has presented, in other words by an examination of the bills of exceptions.

If the plaintiff shew that he paid the remaining three fourths of the amount of the notes which he had endorsed to the Montgomerys, he will have the right of shewing that several persons, creditors of the defendant in March 1811, remaining so till the 15th of May following, resided in New-Orleans, and did not sign the agreement.

The same observations apply to the part of the charge excepted to.

It is, therefore, ordered, adjudged and decreed that the case be remanded for a new trial, with directions to allow the plaintiff to prove the payment to the Montgomerys; on his doing so to prove that there were creditors of the de-

fendant, residing in New-Orleans, who did not sign the agreement between him and his creditors; and in such a case that the court conform the part of the charge excepted to, to the principles expressed in this opinion; and it is ordered that the costs of the appeal be borne by the defendant and appellant.

Morse for the plaintiff. *Wilson* for the defendant.

LYNCH vs. *POSTLETHWAITE*, *ante* 84.

Amendment denied.

This case came again before the court, on a motion to amend the judgment.

Livermore, for the plaintiff. Our motion is to amend the decree so as to give to the plaintiff the benefit of his contract, and the relief to which he is entitled, according to the opinion of the court. By the contract, the defendant and his partners did covenant and agree to pay the plaintiff 65,000 dollars in manner following, that is to say, 15,000 dollars at the time of the delivery of the boat, 12,500 dollars in three months thereafter, 12,500 in six months thereafter, 12,500 dollars in nine months thereafter, and 12,500 dollars, the residue, in twelve months thereafter with interest at six per cent

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upon these instalments. Then follows an additional covenant to give notes, and a farther covenant for a mortgage. This covenant for the notes was introduced for the convenience of the plaintiff, that he might have a security which could be negociated, and upon which he could raise money. But there is no condition that these notes should be accepted as a discharge of the principal covenant in the agreement. All the advantage which the plaintiff might have expected from the possession of these notes is lost by the delay in giving them. The covenants of the defendant in the deed are a sufficient security for the instalments; and he has no advantage in the possession of securities of an inferior degree. Why should he desire the notes of the defendant for sums of money already due? On the 19th of February last, when the boat was tendered, and when the defendant was bound to receive her, the plaintiff might have waived the covenant for the notes; inasmuch as a party may dispense with a condition introduced for his benefit. Or if he had accepted the notes, he need not have accepted them as payment. If he had received them, and they had been regularly paid, it would have been a payment; but if they had not been paid, he would not have been obliged

to bring his action upon the notes, but might have brought it upon the covenant. Even in the case of a debt of no higher nature than a a note, the taking of a note is not payment, unless it is specially agreed to be so taken. *Packford* vs. *Maxwell*, 6 *T. R.* 52. *Owenson* vs. *Morse*, 7 *T. R.* 64. *Tapley* vs. *Macturs*, 8 *T. R.* 451. *Marsh* vs. *Pedder & others*, 1 *Camph. N. P. C.* 257. By this contract it is not provided that the notes shall be a discharge of the principal covenant, and therefore I conceive that in this respect the decree should be amended. In the above cases the original debts were of no higher nature than the securities given, and the case of a covenant is much stronger. In this case, the effort is to discharge a debt by specialty, by giving a mere simple contract security.

The next point concerns the interest to be paid. I contend that we are entitled to interest at the rate of six per cent. per annum upon the whole sum, from the nineteenth of February. It is expressly provided by the contract, that interest shall be paid upon the instalments, and as the non-payment of the 15,000 dollars was not then calculated upon, this shews the intention of the parties that the vendor should have interest for all the purchase money not paid

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Therefore, by the cases of *Robinson* vs. *Bland*, 2 *Burr.* 1083, and *Eddowes* vs. *Hopkins*, *Dougl.* 376, he is entitled to interest at six per cent. upon the whole sum.

The contract also entitles the plaintiff to a mortgage upon the boat as a collateral security for the purchase money unpaid.

I have considered the question respecting the rights of the plaintiff growing out of this contract, according to the common law of England, by which the nature and effects of the contract must be determined. The question, how far the court can make a decree which will give effect to those rights, must be determined by the laws of this state. When we attempt to ascertain the nature and extent of the remedies pursued here, by reference to the complicated systems of practise in the English courts of chancery and common law, we are sure to be bewildered and led astray. We have nothing analogous to the systems of those courts. In England the ordinary remedy, for a breach of contract, is in a common law court, in which damages for a non performance can alone be recovered. The extraordinary jurisdiction of the court of chancery, in decreeing a specific performance, has been established after a severe conflict with the ordinary tribunal, but not in a

full extent. This extraordinary jurisdiction extends only to cases which affect real property. But, in Louisiana, we have no such distinction between courts administering justice according to the ordinary forms of law and courts giving relief beyond the ordinary rules. Almost every action which is here brought upon a contract is in effect an action to enforce a specific performance. When a penalty is stipulated to be paid upon a breach of the contract, the party has his election by our laws to sue for the penalty, in which case the action is for damages, or upon the contract, which is for a specific performance. *Pothier, des Obligations* 342, 343. When the party sues upon the contract, the terms of that contract and the breach of it are stated in his petition, and he concludes with a prayer for relief adapted to the nature of his case. When the prayer for relief is sufficient to give him an adequate remedy, it can hardly be maintained that, in our practice, his rights will be impaired by joining another prayer for an inadequate remedy, particularly when he adds a general prayer for further relief according to the equity of his case. At all events, when the petition, and the evidence contained in the record, give a full view of the injury which he has sustained, and of the redress to

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which he is entitled, the powers of this court are fully adequate to give him full relief, even if he has mistaken the nature and extent of the relief to which he is entitled. By the act of the legislature of 1813, it is provided, that "no judgment or decree shall be reversed for any defect or want of form, but the said supreme court shall proceed and give judgment according as the rights of the case and matter in law shall appear unto them, without regarding any imperfections, or want of form, in the process or course of proceeding whatever." 1 *Martin's Digest*, 444. This would seem to be conclusive. Accordingly this court decreed, in the case of *Decuir* vs. *Packwood*, 5 *Martin*, 300, that the plaintiff should recover the whole money. In that case the sugar was to be paid for by instalments, the defendant was to give notes for the instalments; the action was brought before either of them became due, and the petition prayed for notes.

The judgment in the present case must, of course, be given as of the last term. The plaintiff was then entitled to 15,000 dollars, together with one instalment of 12,500 dollars and interest, upon these two sums, at six per cent. from the 19th day of February. He was also, I humbly apprehend, entitled to a decree, that

the defendant should pay him the further sum of 12,500 dollars on the 19th of November, and the further sum of 12,500 dollars on the 19th of February, 1820, with interest upon these three last instalments at the rate of six per cent. per annum, from the 19th of February, 1819; and also to a mortgage upon the boat. This would be a specific performance, according to the terms of the contract. The defendant might also be required to execute notes, in the form prescribed in the contract, for the last payments, but not to have these notes taken as a discharge of the judgment. Such is the relief, which I have no doubt, this court has the power to grant. Nor do I doubt that an English court of chancery would grant the same relief. Where the vendor of real estate, to be paid for by instalments, sues in chancery for a specific performance, such must be the decree. And if the defendant does not perform the decree, by making the payments at the times prescribed, process of attachment against his person, and sequestration against his property, would be awarded for the contempt.

Hawkins, for the defendant. By examining the common law authorities to which the plaintiff's counsel have referred, in support of their

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motion, it is difficult to find their applicability.

Tested by the principles of the common law the question presents no difficulty. The only remedies known to the common law are by action of covenant, where the instrument declared on is a deed or bond under seal, or action on the case where the writing declared on is not under seal—in both of which actions recovery of damages only is had. It is true, in the action at law for damages, the plaintiff would have a right to assign as many breaches as he deemed proper; or, from time to time, to sue so often as the breaches on the part of the defendant gave cause of action. Yet it is equally true that, in no action at law, could the plaintiff recover damages beyond the breaches assigned and sustained against the defendant.

The position contended for by the plaintiff's counsel, that the stipulation for the delivery of the notes of the Natchez Company should be deemed a covenant for the benefit of the plaintiff, and he had a right to wave the reception of the notes and go for money, is so untenable as to need no comment. To sanction such doctrine would be to annihilate all the principles which govern mutual or reciprocal covenants.

It would in fact not only authorise recovery against the defendant, for all his breaches of

the contract, but enable the plaintiff to take advantage of his own wrong, by first refusing to receive the notes of the company, which he is bound to do by the contract, and convert his refusal into new and extended grounds of recovery against the defendant for money, when he had stipulated in the contract to deliver the plaintiff the notes of the Natchez Company only. We can only time in repelling a doctrine like this could be construed into little else than a want of proper respect for the tribunal we address.

The plaintiff, not having sued in a court of common law jurisdiction, seeking his recovery of damages only, but having appealed to a court vested with equitable jurisdiction for a specific performance of the contract; the only necessary enquiry is, has specific performance been decreed by this court. If so the question is at rest, and the decree cannot be amended or altered.

By the contract sued on the plaintiff sells to the Natchez Steam Boat Company a boat for $65,000 to be discharged by the payment of $15,000 at the time of delivery; and the residue $50,000 in the notes of the Natchez Company, payable in four instalments of three, six, nine and twelve months, with interest.

Upon this contract, the plaintiff commenced

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his action, alledging that "the defendant was personally bound, and had refused to comply with and fulfil the part thereof which he was bound to perform"--Wherefore the plaintiff prayed that the defendant be cited to appear, and decreed to execute the promissory notes and make the payment of $15,000 with interest and costs.

The supreme court have decreed that "the plaintiff recover from the defendant the sum of $65.000; to be discharged by the payment of $15.000, with interest from the inception of suit, and the delivery of the notes of the Natchez Steam Boat Company for the sum of $50,000 in four instalments of three, six, nine and twelve months from the 19th February, 1815, the day on which the plaintiff alledged his readiness to deliver the boat."

If this is not decreeing performance of this contract in its broadest and most comprehensive sense against the defendant, it is difficult to conceive what performance is.

The plaintiff obtains all that is stipulated to be given him—its execution is decreed in the fullest extent of the covenant, and in the manner claimed and prayed for by the plaintiff, and yet the court is now urged to do still more.

By this motion the court are called on to go

out of the record and pleadings in the cause, to make out a new and better case for the plaintiff, whereby he is to be absolved from his own covenants, and a new and hard covenant imposed on the defendant; to wit, the payment of money, when he has stipulated only for delivery of the notes of the Natchez Company.

The efforts of the counsel to give some colour to their motion by appealing to what they call the liberal rules of practice which govern courts of equity, (to which they assimilate our own) were as unsuccessful as the ground they take in support of the motion is untenable.

In vain were the counsel of the plaintiff appealed to for a single authority, either from the common or civil law writers, which sanction the alteration in the decree now required of the court.

We were referred, in general terms, to the liberality of courts of equity in matters of contract. We cannot too much admire that system of jurisprudence which effects the objects of justice without regard to mere form and technicality. Yet no court, in this nor any other country, has ventured to place itself above all rule and precedent in regard to its proceedings. Go the length contended for in this motion, and the equitable discretion, to which

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our admiration has been called, would sink into arbitrary oppression.

Equity has been well defined to be the "correction of that wherein the law (by reason of its universality) is deficient."

Courts of equity have grown into use, not by altering or changing the principles of law or interpretation of contracts, or established usages of other courts, but as mere helpmates to the various remedies necessary to the ends of justice.

According to the English and American authorities, where the remedy is adequate at law a court of equity will not interfere. But, when it does interfere, a court of equity is as implicitly bound down by established precedents and influenced by the same just rules of interpretation, whether of law or of contract, which govern the common law judge.

And where this not the case, courts of equity would rise above all law either common or statute, and be a most arbitrary legislator in every case. Neither a court of law or equity can vary men's wills or agreements; both are to understand them truly and uniformly; one court cannot abridge, nor the other extend; and the rules of decision in both courts are equally opposite to the subjects of which they take

cognizance. 1 *Black. Com.* 61; 3 *id.* 50, 429, 435, &c.; 2 *Powell on Cont.* 3.

The principal reason urged why the court should now alter their decree is, that since the inception of this suit in the court below, some of the notes of the Natchez Company, prayed to be delivered to the plaintiff in his petition, would be now due, if they had been so delivered; and, therefore. the plaintiff is entitled to have a decree against the defendant, Postlethwaite, for money, in lieu of notes.

With the same propriety could it be urged that the plaintiff, holding a covenant for four parcels of cotton, at different and distant periods, deliverable at Natchez, might (because he had one other parcel deliverable at New-Orleans) at his own option waive reception of cotton, hold on to the contract, until the last period of delivery, and then demand money for the whole amount in New-Orleans. Could it not as well be urged that the plaintiff holding four several promissory notes of the defendant, pending a suit for one note another became due, and, therefore, the plaintiff would be entitled to a judgment for the amount of both notes?

With equal justice, but certainly not less absurdity, could the plaintiff's counsel contend, that in a suit for assault and battery, or other

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wrong, the plaintiff could, not only recover for torts committed previous to the commencement of the suit, but for every other battery or tort between the inception of the suit and time of pronouncing final judgment.

At the commencement of the present suit, by Jasper Lynch, had he any right of action against the defendant, Postlethwaite, for the amount of either of the notes of the Natchez Company? No such cause of action existed; none such was urged or prayed for; but the defendant was sued to compel him only to deliver the notes of the company together with the cash payment of 15,000 dollars.

If the plaintiff is entitled to a decree now, for the amount of one note, and for which no cause of action existed, or was urged, at the inception of this suit, the plaintiff had nothing to do but commence his action, delay trial until the last note arrived at maturity, and then demand judgment for the whole amount in money, when he had expressly stipulated to receive, and had sued to recover, notes.

Was this court, or any other intelligent tribunal, ever before urged, in the rendition of their judgment, not only to award damages and recovery for all the causes of action which actul ally existed and were prayed for when the

action was commenced, but to include in their decree all damages and debts which might have arisen or accrued between the inception of the suit and rendition of judgment?

But this court is called on to do more; to merge its appellate character; to erect itself into a tribunal of original jurisdiction; to make out a new cause of action, and found a decree upon new matter not tried, or ever urged, before the court below.—Indulge doctrine like this, and where its mischiefs would terminate is difficult to conceive. No precedent or authority from the civil law books was produced by the plaintiff's counsel; none can be produced, sanctioning proceedings like this.

The reference to Pothier, so far as it goes, is good authority for the defendant: for it is there declared that the "plaintiff ought to elect either to claim the execution of the principal obligation or the penalty: that he ought to be satisfied with one of them." Here the plaintiff has sued for specific execution of the contract. And the court are called on to violate all the established principles of practice to give him more. *Pothier Obl.* 342. *Civil Code accord.*

As to the act of our own legislature declaring "that no judgment shall be reversed for any defect or want of form," &c.: we have not,

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nor is it at all necessary to question the soundness of this legislative enactment. No want of form is complained of in this case; the court are called to remedy no technical defect of pleading whereby injustice has been done. The plaintiff has sued for, and prayed and obtained a decree for, all that his contract gave him. No principle of law or justice will justify the court in going farther. We are referred, however to the case of *Decuir* vs. *Packwood* as conclusive in favour of the plaintiff.

There is no analogy between the cases. In that case the plaintiff had a right to sue, and enforce either specific execution or damages for non-compliance. He did so sue; the parties appealed to a jury to award on their contested claims, and the jury awarded a verdict for damages to the whole amount due, instead of awarding specific performance.

The jury had a right to give the one or the other; the debt, in the case of Packwood, was the individual deb of the defendant; the whole amount of the debt had become due, and the defendant did not even urge his right to a specific performance, but submitted the whole cause to the jury. In that case, there was no covenant to make payment for the sugar purchased, by the delivery of notes on a third person, and

them payable in another state, at different and distant periods, as in the case now before the court.

There is surely no ground for this additional benefit to the plaintiff, on the score of favor.

It is admitted, on all hands, he has obtained a decree for an enormous sum of money, considered in regard to the value and condition of the subject of purchase.

In the decree pronounced by this court, they express a reluctance at decreeing the whole amount claimed, having on the first view of the subject deemed an abatement justifiable.

With this view of the subject, I cannot presume this court will now step out of the usual course of practice to add new benefits to the plaintiff, by imposing new penalties and exactions in what the court considers already a hard case against the defendant.

As to the question of interest, it was submitted to the court. They have correctly fixed it at five per cent. on the 15,000 dollars cash payment at New-Orleans, that being the interest allowed by law in this state.

As to the interest on the notes of the Natchez Company, that will be regulated by the laws of Mississippi where the notes are payable.

As to the mortgage, it is an after thought

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altogether, to give some pretence to open the present decree. It never was demanded or required: and it would be executed as a matter of course whenever the plaintiff thinks proper to require it.

MARTIN, J. delivered the opinion of the court. The plaintiff prays that the judgment of this court, pronounced in this case, at last July term, may be amended. An amendment can only take place on account of some error of the court in rendering the judgment. If the principles of the case have been misunderstood, if the court has mistaken the law, in other words, has erred in forming their judgment, a remedy must be sought in a rehearing, so that the whole case may be re-examined, and the judgment rather changed than amended.

In the present case, the court is not sensible of any thing in the judgment rendered that requires, or is even susceptible of amendment; nor that any other judgment might have correctly been given.

The petition called upon the court *à quo*, not to award damages against the defendant for failing to perform his part of a contract, but to enforce a specific performance. This decree was, according to the provisions of the contract, for the payment of 15,000 dollars, and the exe-

cution and delivery of four notes of the Natchez Steam Company of 12,500 each. The prayer of the petition was for the payment of that sum, and the execution and delivery of these notes, or in the alternative, the payment of 65,000 dollars.

The district court could not have decreed copulatively what was asked only in the alternative. It would have been monstrous to have given judgment for the notes and their amount. For, after the judgment might be satisfied by a levy of the 65,000 dollars, the defendant would have remained liable to pay his notes, in the hands of an indorsee, without the possibility of legal relief against them.

If it had given judgment for 65,000 and interest against the defendant, without its having been prayed for in the alternative, it would have done an injustice to both parties, in the interpretation of the contract: to the plaintiff in withholding from him the benefit of the greater security, which he had contemplated in notes, binding the defendant and all his copartners: to the defendant in making him liable alone, and aloof from his copartners, as to the deferred instalments, for which he had expressly and tenaciously stipulated that he should not give a note, which might be tendered as a set off against

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any private demand of his, and on which he had right to command the aid of his copartners, according to the law of his domicil and the place of contract, by resisting the plaintiff's suit, till all his debtors within the state were made parties.

Whether a judgment for the sum of 65,000 dollars, with interest, the execution of which should be partially suspended to meet the terms of the contract, ought not to have been decreed, if the plaintiff had not prayed for a specific performance, but sought his relief in damages, is a question which made no part of our inquiry in the present case.

The judgment of the district court appeared, therefore, to us perfectly correct, except in the deduction of 20,000 dollars, and ours has rectified this error.

It is true, since the judgment of the district court, one of the instalments had become due at the time that the judgment of this court was pronounced, and two have become due since. If the amount of the instalment which had become due when we gave judgment, had been a sum of money which might have been opposed by the creditor of, it as a set-off against a claim of the debtor, if the latter had been alone absolutely bound therefor, perhaps that the imme-

diate payment of it would have been ordered. But this is not the case; the sum is one for which he is solidarily bound *sub modo* only.

We, therefore, conclude, that the judgment cannot be so amended as to substitute the absolute payment of 12,500 dollars, in lieu of the note decreed to be executed.

As to the other two instalments, which were then not yet payable, there is not any semblance of reason, in the proposition that the judgment ought to be amended.

It is said that the judgment ought to be amended, and six instead of five per cent. allowed for interest on the sum of 15,000 dollars, the first payment. We allowed the legal interest of this state, for the failure of the timely payment of a sum stipulated to be paid therein. But it is said that, as to the deferred instalments to be paid at Natchez, six per cent. was agreed to be paid, and consequently the presumption is, that six per cent. was intended by the parties, as the just indemnification, in case of a failure of payment of the first sum. Had this first sum been made payable in New-York, where seven per cent. is the legal rate of interest, it would have been contended, and it is believed with

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success, that as the contract was silent, as to the interest to be paid on the first sum, the law must regulate it, and that law must be that of the place of payment. In this respect the judgment needs no amendment.

As to the interest on the instalments the contract and the law of Mississippi are sufficiently explicit.

We are requested to amend the judgment by declaring that the notes decreed to be given are not those of the incorporated company. We have decreed what notes are to be given; we need not say what are not to be given.

A mortgage of the boat was not prayed for in the petition; a general performance was not there demanded; its not being denied by the district court was not presented to us as a ground of complaint against the judgment; our attention was not drawn to this part of the case, which was entirely overlooked by the plaintiff's counsel, and it did not appear our duty to consider it.

It is ordered that the plaintiff take nothing by his motion.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JANUARY TERM, 1820.

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MEEKER'S ASS. vs. *WILLIAMSON & AL.'S SY.*

MEEKER'S ASS. vs. WILLIAMSON & AL.'S SYNDICS

APPEAL from the court of the first district.

On a rule to shew cause, why syndics should not be ordered to pay a sum claimed, they may demand that the facts they suggest in opposition to the claim, be tried by jury

MATHEWS. J. delivered the opinion of the court. This is a case in which the plaintiffs and appellees claim a priviledge on the proceeds of certain property, which belonged to the insolvents, and has been sold by the defendants and appellants.

The claim is made, in a summary way, on a motion for a rule on the defendants, to shew cause why they should not be ordered to pay to the plaintiffs the money arising from the sale of the property: which rule having been made absolute by the decision of the district court, the present appeal was taken.

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MELKER'S AS. *vs.* WILLIAMSON & AL.'S SYNDICS.

On the part of the defendants and appellants, it is contended that this mode of proceeding is irregular and not warranted by law; that it is an original suit and ought to have been instituted by petition. In a case like the present, it is clear, from the records of our courts, that both modes (by motion and petition) have been indiscriminately resorted to. As proceedings in court, which may be necessary to a just distribution of the insolvent's estate, are incidental to the original action by which he makes a surrender of his property, we are of opinion that the ranks and priviledges of the claims of creditors may be legally settled, without the formality and delay of an original suit by petition. But, if in the more speedy mode of proceeding by rule, facts be suggested by either party, and a jury be prayed for to try them, it ought to be allowed.

In this case, the defendant and appellants, in shewing cause against the rule obtained against them, answered by suggesting facts and praying a jury to try them.

We think that the district court erred, in refusing a jury to be summoned to decide the facts of the case.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annul-

led, avoided, and reversed; and it is further ordered, adjudged and decreed that the cause be sent back to be again tried, with directions to the district judge to order a jury to be summoned, as prayed for by the defendants and appellants, and that the costs of this appeal be paid by the plaintiffs and appellees.

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Smith for the plaintiffs. *Livingston* for the defendants.

CANFIELD & AL. vs. *NOTROBE.*

APPEAL from the court of the first district.

A note, payable in merchandise, cannot be offered in payment of a cash debt.

DERBIGNY, J. delivered the opinion of the court. The defendant and appellant bought from the plaintiffs and appellees a quantity of goods, which were sold to him at cash prices. On the next day he tendered to them in payment, their promissory note, payable in merchandize out of their store, at fair market prices, to the order of J. Brandegee, and by him endorsed in blank.

Is this a payment of his debt in money? We think not. The contract between the parties was a sale of goods for cash, the note of the plaintiffs and appellees is an obligation to deliver merchandize.

It is by no means clear that the note could

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be tendered in payment of a cash debt, even if it had been payable in merchandise at cash price: but it is, at least very plain that it cannot, when payable in merchandise at some other than a cash price. A witness, heard in this case, says that the plaintiffs and appellees consider the difference to be equal to twenty per cent. Whether it is or not is of no consequence: any difference is enough.

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

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

THURET & AL. vs. *JENKINS & AL.*

If a ship be sold in New-York, while she is at sea, she cannot, on her arrival at New Orleans, be attached for a debt of the vendor.

APPEAL from the court of the first district.

The plaintiffs instituted this suit by attachment, and the undivided half of the ship Favorite was levied upon. Philotas Havens intervened, claiming the said half, as his property, under a bill of sale of the defendants. There was judgment for him, and the plaintiffs appealed.

The statement of facts admits the plaintiffs' claim, the execution of the bill of sale, and the insolvent circumstances of the defendants at the time. Its date is of the 17th of June, 1819, and the consideration of it was a debt which accrued to the claimant, by the payment of several notes of the defendant, endorsed by him.

The attachment was levied on the 14th of July following.

The original bill of sale was sent to New-Orleans and lodged in the custom house on the 16th.

The claimants' agent, in New-Orleans, gave notice to that of the plaintiffs of the transfer of the defendants' interest in the ship to the claimant, immediately on receipt of the bill of sale.

Livermore, for the plaintiffs. The assignment to the claimant was made, by the defendants, after their insolvency. It was made with the intent to prefer a favourite creditor, and it was not perfected by delivery. According to all the decisions of this court the property in this ship remained in the defendants at the time our attachment was laid.

In the case of *Durnford* vs. *Syndics of Brooks*, 3 *Martin* 222, the principle is established, that the contract of sale does not transfer the property of the thing sold; but that such transfer is

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the effect of the delivery. And the present case is stronger than that of a sale, being rather a *dation en payement* than a sale. In the case cited the court recognize the doctrine that delivery is of the very essence of this contract.

Norris vs. *Mumford*, 4 *Martin*, 20, is also expressly in point. In that case the goods attached were in New-Orleans, and all the parties were citizens of New-York; so that an actual delivery at the time of sale was impossible. It was determined, that as no actual delivery took place before the attachment was laid, the attaching creditor should hold the goods.

The same point was again determined in *Ramsay* vs. *Stevenson*, 5 *Martin*, 23, after full discussion. In that case the insolvent, the assignee, and the attaching creditor, were all citizens of Maryland, and it was argued, with great zeal, that by the laws of that state, the transfer was complete, and the property vested in the assignee. But the court decided, that a delivery was essential to transfer the property, and supported the attachment. In the case of *Fisk* vs. *Chandler*, 7 *Martin*, 24, the same judgment was rendered; and in that case all the parties were citizens of Massachusetts.

In the present case, the district judge decided in favour of the claimant, because he considered

that there was a distinction between the sale of an entire ship and the sale of a part, and that, in the case of a part owner selling his share, no delivery was required, because it was impossible. With great deference I conceive the distinction is not sound. It is true, that upon the construction of the statute of Elizabeth, against fraudulent conveyances, a distinction has been made by the courts in England between cases where the grantor was enabled to give possession but retained it, and cases where delivery was impossible. When the property conveyed was abroad, there seems to have been an impression that the conveyance would be good against creditors upon this principle. But all the cases, in which such doctrines were supposed to be maintained, were brought before this court upon the argument of *Stevenson* vs. *Ramsay*, and it was solemnly decided that no such doctrine could be here admitted. The judgments of this court do not proceed upon the ground of fraud, but upon the principle of law that delivery is essential to the perfection of a sale. In cases where property is abroad, an actual delivery, at the time of sale, is impossible. It is no more impossible in the case of the sale of a part than of the whole. The written evidences of title may be given in one case, as easily as

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in the other, and possession may be taken of the part, in the same time and in the same manner as of the whole. The necessity of taking actual possession seems to have been well understood by these parties. For the bill of sale was sent on to New-Orleans, by the claimant, to his agent Benjamin Story; and if it had arrived two days sooner, the sale would have been effected before our attachment was laid. But the creditor was more vigilant, and is to be preferred.

Morse, for the claimant. The principle decided in the case of *Durnford* vs. *Brookes' syndics*, seem, to have been considered as the foundation of the decisions in the subsequent ones. It was there the opinion of the court, relying on the doctrine laid down in *Pothier, Traité du contrat de Vente, part* 3, *chap.* 1, *art.* 2, (and the only authority cited in the argument of the cause,) *that delivery only, in a contract of sale, transfers property.* This decision, however hard, as it may have borne upon the plaintiff, who was admitted to have been a purchaser in good faith, was nevertheless within the letter and spirit of the civil law. Yet, from a comparison of the facts in that case with the present, I am satisfied that the acutest mind cannot

trace the slightest resemblance between the two cases.

In the former, the contracting parties resided, and the sale was executed in the state of Louisiana, a country governed by the civil law. In the present, the parties reside and the sale was executed in the state of New-York, where it is admitted the common law prevails. Until the counsel for the plaintiffs can reconcile these differences, he will surely cease to press the case of *Durnford* vs. *Brookes' syndics*, as an authority in point.

The cases of *Norris* vs. *Mumford*, and of *Ramsay* vs. *Stephenson*, are relied on: the parties in one case being residents in Maryland, in the other in New-York. This brings us at once to the consideration of a question of the highest importance, viz. by what laws is this court to be governed in its examination of the import, validity and effects of the sale in question in this suit, whether by the *lex loci contractus*, or the *lex fori*?

I should not trouble the court with an argument, on a point which seems to have been well settled among all civilized nations for many centuries, was it not for an impression that seems to exist in the mind of the plaintiffs' counsel, that the question has been decided

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against me by this court, in the two cases last referred to, and that the *lex fori*, and not the *lex loci contractus*, is to prevail.

If such be the fact, I have only to deplore the result of a decision from which so many inconveniences and embarrassments must necessarily flow. Arguments *ab inconvenienti*, though generally of little weight, may be urged, with peculiar force, against a decision in one state, hostile in itself against the laws of a sister state, and destructive of the rights of its citizens. I cannot believe that the judges of this court ever have been, or ever will become, the advocates of such a monstrous doctrine.

The case of *Norris* vs. *Mumford* was an attachment, levied on a parcel of cotton; in the hands of the defendants' agents. The cotton had been previously sold to the claimants. From a careful review of this case it does not appear that a decision on the question of *lex loci* or *lex fori* was ever contemplated by the court in its judgment. On the contrary that the subject was merely glanced at by one of the counsel, more as an incidental circumstance, than relied on as a matter of argument; as we find the substance of his observations on that subject comprised in this short sentence: "this court will respect *legem loci contractus*." And

the court, in pronouncing their final opinion on the case, pass over the whole doctrine *sub silentio.*

The case of *Ramsay* vs. *Stephenson* seems at best but of doubtful authority in the present. That was a claim on the part of certain individuals, styling themselves assignees of the defendant, in the state of Maryland, under a voluntary assignment, made there of property in New-Orleans. It is true the counsel for the assignees contended that the law of Maryland, and not the law of Louisiana, ought to govern this court, in their construction of the contract.

But the facts, in that case, differ materially from this—In that, the assignment was voluntary, in which the parties had thought proper to make their own law, to which they appealed, and not to the law of Maryland, as we find the following reasoning of the court clearly establishes the fact, that the assignment relied on, so far from being in conformity to the laws of Maryland, was directly in violation of them, and invoking the laws of Maryland, in support of such a contract, was neither more nor less than invoking laws that never existed. "Were it necessary (said the learned judge in his opinion) to a proper decision of this case, we are of opinion that it would not be difficult to shew such a

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difference between assignments made at the mere will and pleasure of debtors, in which they attempt to lay down rules for the payment of their debts and the distribution of their estates, and those executed under a commission of bankruptcy, as would require the application of principles almost totally different in different cases."

Again, it will be seen from a review of the facts, in the above case, that the act of assignment never was completed, and consequently could not be considered as a contract in the state of Maryland or elsewhere.

It was a voluntary transfer for the use of *all the insolvent creditors. All* his creditors did not assent to it, as clearly appears from the fact that the plaintiff in the suit disavowed the transaction, and, withholding his assent, proceeded to attach the defendants' property as if no assignment had ever been made, or what is the same, an attempt to assign, without perfecting it. The court, therefore, decided correctly in saying, what, I presume, is all they have said or intended to say in this case, that the pretended assignment was in reality none, and that it ought not to have any binding force upon a creditor not a party thereto. The court have not said in that case, nor in any other that I have met

with, that a contract complete in itself, and made in conformity to the laws of one state, should be construed or have effect by any other laws than that of the place where the contract was executed.

Could it then be possible for a doubt yet to remain, I apprehend that it must yield to the decision of this court, in the recent case of *Lynch* vs. *Postlethwaite*, *ante* 69, which, I presume, puts the question completely at rest.

In this case, it appears from the facts admitted or proved, that the contract had been entered into in the state of Mississippi, for the delivery of a steam-boat in the state of Louisiana. In the opinion of the court we find the following emphatic and conclusive language. "The defendant was personally bound by the contract. He is admitted, by the pleadings, to be a stockholder of the Natchez Steam Boat Company; and he subscribed the contract. According to the common laws of England, which is shewn to prevail in the state of Mississippi, all the members of an unincorporated company are bound as members of an ordinary partnership."

Again, says the judge: "the nature, effect and validity of a contract like this are to be inquired into, according to the law of the place in which the contract is celebrated, even when the delivery of the thing, or the act stipulated for, are to be performed abroad."

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This decision carries with it a precision and certainty which must silence all cavil; uniform and consistent with itself, it is no less so with the laws of Spain, and the general commercial law of the United States.

In the partidas of Spain it is said: if the laws or jurisprudence of another country, over which our authority does not extend, should be appealed to, We order that, in our dominions, they shall not be received in evidence, except in disputes arising between individuals of such foreign country, or contracts made there. *Partida* 3, 14, 15.

This doctrine is in strict conformity to the established usages and commercial laws of the United States, and of England, as laid down in a variety of cases which it is unnecessary to read, and to which I beg leave to refer the court. 2 *John.* 235; 4 *John.* 285. 3 *Cain.* 154. 1 *East.* 6; 5 *East.* 121. 8 *T. R.* 609. 2 *H. B.* 313. 1 *Emerigon, ch.* 4, § 8.

In *Preimsdyk* vs. *Kane & al.* judge Story observes: "The rule is well settled, that the law of a place, where a contract is made, is to govern as to the nature, validity and construction of said contract, and that being valid in such state, it is to be considered equally valid, and to be enforced every where with the excep-

tion of the cases in which the contract is immoral or unjust, or in which the inforcing it in a state will be injurious to the rights, the interest or the convenience of such state, or its citizens. This doctrine is explicitly avowed, in *Huberus de conflictu legum*, 2 *tom. lib.* 1 *tit.* 3, and has become incorporated under the code of national law in all civilized countries." 1 *Gal.* 375. These authorities, I trust, are sufficient to induce this court to decide that the contract, now in question, must be governed by the laws of New-York, in other words, the common law of England.

The next inquiry is, whether, according to the laws of that state, or the common law, the contract is valid; and whether a debtor in insolvent circumstances is permitted to prefer one creditor to another.

For deciding this question, the court will find but little difficulty. In 15 *Johnson*, 571, in the case of *Murray* vs. *Briggs*, we find the doctrine clearly and explicitly established by the decision of chief justice Thompson: "I think, says the the judge, that I may then assume it, as a settled and unshaken principle, both at law and in equity, that a failing debtor has a just, legal and moral right to prefer in judgment one creditor

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to another." The same doctrine will be found in 5 *Johnson*. 335 *Wilkes* & *Fontaine* vs. *Ferris*. In 2 *P. Williams*, 427, the court will find the case of *Small* vs. *Oudley*, in which the master of the rolls observed: "There may be just reason for a sinking trader to give a preference to one creditor before another, to one that has been a faithful friend, and for a just debt lent him in extremity, when the rest of his debts might be due from him, as a dealer in trade, wherein his creditors may have been gainers. Cases, says he, may be so circumstanced, that the trader may, nay ought to, give the preference."

This principle applies with great force and propriety to the case now under consideration; the claimant being a creditor for advances, and endorsements on the defendants' paper for their exclusive benefit, and some part of which, if not the whole, may reasonably be presumed to have gone to the benefit of those creditors who now contest this claim. Creditors by endorsement have been uniformly considered as having strong claims to priority and the protection of the courts of justice. In support of the same principle, I refer the court to 10 *Mod.* 489. 5 *T. R.* 424; 8 *T. R.* 528. 2 *Johnson*, 84.

The validity of the sale being sufficiently established, it remains only to be ascertained whether

the claimant has pursued the necessary steps to obtain possession of the property sold. Is a delivery, of a ship sold, necessary to complete the sale? I humbly contend a sufficient, and the only, delivery of which the thing is susceptible has been made in this case; and that it is all that is requisite by the laws of England, the laws of the United States, or even by the civil law. In 2 *Durnford and East*, 462, *Atkinson* vs. *Maling*, it was the unanimous opinion of judges Ashhurst, Buller and Grose, "that if a ship be sold whilst at sea, the delivery of the grand bill of sale amounts to a delivery of the ship itself. It is the only delivery, says justice Buller, the subject matter is capable of." Again, *id* 466, "the bill of sale is the only evidence of property."

In the same case, justice Grose observes; "there is a great difference between the sale of a ship at sea, and of other goods; a person by being in possession of a ship does not thereby acquire any credit; if he has no bill of sale to produce, his bill of sale amounts to nothing, therefore it has been invariably held, that the delivery of a grand bill of sale, is a delivery of the ship itself."

See *Lex Mer. Am.* 73, and the cases there cited, 2 *Vezey*, 272. *L. M. Am.* 526, 527. 4 *T. R.* 161.

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In the United States, we have no grand bill of sale, yet the execution and delivery of the ordinary bill of sale, used in the conveyance of vessels is all that is necessary. On this point I refer the court to 4 *Mass. Rep.* 661. *The Portland Bank* vs. *Stacey & Mansfield*, a case reversed, in which chief justice Parsons observes, "that he knew no difference, and believed there was none, between what is called the grand bill of sale in England, and the bills of sale for vessels used in this country."

It being, therefore, clearly established that the claimant's title was made for a *bona fide* consideration, and according to the laws of New-York, and the title paper duly delivered, was it incumbent on him to use any further exertions to perfect his title? It may be contended that actual possession of the ship should have followed the sale: this I presume will not be considered essential. The ship not being in New York, at the time, no actual possession could possibly have been taken there, but the court has already seen that an act tantamount to taking possession was executed in the delivery of the bill of sale, and, although no further act was necessary, yet it see ns by the statement of facts, that not the slightest negligence or delay can be inputed to the claimant; he has done what

prudence might have suggested, but which the law did not require. Presuming the ship might arrive in the port of New-Orleans before she returned to New-York, he forwarded the bill of sale to his agent in New-Orleans, who forthwith lodged the same in the custom-house, within thirty days from its execution. This mode of proceeding in taking possession, if at all necessary, might have been suspended until the return of the vessel to the port where the transfer was made, as is clearly established by the doctrine in the case of the Portland Bank before referred to. Even under the statute of 21 James, the purchaser of a ship was bound to nothing more than to take possession of the vessel as soon as she was within his reach. "By the construction of that statute, says chief justice Parsons, a sale of a ship and cargo abroad is good, although possession be not immediately delivered, provided the evidence of the title be delivered, and the vendee take possession as soon as the property is within his reach."

In that case the schooner Ann and her cargo, then lying in Charleston, South-Carolina, was transferred by bill of sale, dated in Massachusetts on the 26th of December, 1807, and on the fourth of January following the Ann arrived at Gloucester in Massachusetts, and was on that

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day attached by the *bona fide* creditors of the vendors. The vendees did not take possession of the schooner and cargo until the 15th January. The court decided that there was no unnecessary delay in taking possession, and gave judgment for the claimants.

Here I might safely rest the cause of my client. The court, however, will probably have observed that all the cases, cited as authority on the part of the claimant, are in relation to the *entire* ship, which is susceptible of some kind of actual possession. But in the case of the sale of part of a ship the necessity of taking any kind of possession does not exist, nor does the law require it, neither is it possible in the nature of things to effect it. This doctrine is, at this day, well settled law, under a variety of decisions.

In *Lex Mer. Am.* 72, it is stated, "If an entire vessel be bought, possession should invariably be given. When from existing circumstances it is impossible to comply with the rule of law, as should the vessel be at sea at the time of her sale, a symbolical is tantamount to an actual delivery, because it is the best of which the nature of the case will admit. If only a part is disposed of, possession need not

be given, because the possession of one part owner is the possession of all."

Again, in same book, 527, 528, "where the sale is only of a share of a ship, the taking possession is not necessary even though the grand bill of sale have not been delivered." See also the cases *Gillispy* vs. *Coutis*, *Ambler* 652. 1 *Vezey, junr.* 163.

Livermore, in reply.—It has been attempted to distinguish this case from those heretofore decided in this court, and cited in the opening. The distinction, taken between this and that of *Durnford* vs. *Brooks' syndics* is, that here the defendants and claimant are citizens of New-York. This distinction will not, however, apply to either of the other three cases. In all of those cases the same attempt was made to distinguish them upon this ground, but without effect. That, in fact, there is no distinction, the claimants' counsel does not deny. But he contends that, in *Norris* vs. *Mumford*, this point was not made. By reference to the argument, however, 4 *Martin*, 21, 2, it will be seen that the attention of the court was expressly called to this point. In *Ramsay* vs. *Stevenson*, it was argued at great length, that the question ought to be decided according to the laws of Mary-

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land, and that by those laws the property was fully vested in the assignees. The effect of this case the gentleman endeavours to avoid, by alleging that that was a voluntary assignment for the use of all the creditors of Stevenson, and that it was not perfected, because all had not consented to the terms of it. The answer is, that the effect of the deed was to vest the legal estate in the trustees; and, in deciding the case, the court clearly intimate, that the trustees might hold, for the purposes of the trust, such property as came into their possession. But the language of the court is express, that the cause must be determined upon the principle of *Durnford* vs. *Brooks' syndics;* that giving to the assignment all the effect of a sale to a *bona fide* purchaser, a delivery of the goods was necessary to perfect it, 5 *Martin*, 77. The last case, of *Fisk* vs. *Chandler* has not been noticed by the claimants' counsel. I shall merely observe, that the facts in that case were the same as in this, and that all the gentleman's arguments would have been equally applicable there.

But it is contended, that the decision of this court in *Lynch* vs. *Postlethwaite* is inconsistent with the previous cases, and that these cases must be considered as having been overruled. The case of *Lynch* vs. *Postlethwaite* has intro-

duced no new doctrine of international law. It is then merely decided, that, between the parties to a contract, the construction of the contract must be according to the laws of the place where it is made. The parties are considered to have these laws in view, when making the contract, and that there is a tacit assent on their part to be governed by these laws, in expounding it. But there is no such assent on the part of third persons, not parties to the contract. If the present contest were between the claimant and his vendors, the defendants in this action, there might be some force in the argument drawn from the case cited; but between the claimant and the plaintiffs, who were no parties to his assignment, it can have no effect. The judgment in *Lynch* vs. *Postlethwaite* decides nothing more than the questions then in dispute. These questions respected the defendant's liability, as member of an unincorporated company established in the state of Mississippi, and upon a contract made there, and the quality of the article which was the subject of the contract. It was determined that, upon these points, the contract must be construed by the laws of that state. When the *lex loci contractus* is called in aid of the construction of a contract, it is not

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done with the view of enforcing the laws of a foreign state; because the general rule is that the courts of one country do not enforce the laws of another country. But it is done for the purpose of ascertaining the intentions of the contracting parties. It is for the purpose of knowing to what they intended to bind themselves, at the time of entering into the contract. The rule cannot be extended further than the reason upon which it is founded, and consequently cannot apply to a case where the interests of third persons are involved.

The quotation from the Partidas is against the claimant's doctrine, and not in his favor. The prohibition against appealing to the laws of other countries is general; and the exception manifestly applies only, to the parties, to contracts executed abroad.

The case cited from *Gallison* was also a case between the parties to a contract; and the observations of judge Story must be understood with the same limitation. Another exception is there made, even in questions between the parties. The case excepted is one, "in which the enforcing a contract in a state will be injurious to the rights, the interests, or the convenience of such state or its citizens." This is an exception, to which I beg leave particularly to

call the attention of the court. The interests, or convenience of a state may be affected by the establishing of general principles in their nature injurious, although a citizen of the state may not be the immediate sufferer. In the present case, the plaintiffs reside in France. But can it be said that the decision of the court shall be other than it would be, if they were citizens of Louisiana? Our laws recognize no such distinction. The remedy of an attachment against the property of absent debtors is given to foreigners, as well as to citizens. The same general rules must be applied, without reference to the citizenship or residence of the parties; and the same decision must be made in this cause as if the plaintiffs were resident in New-Orleans. That the effect of the principles maintained by the claimant's counsel would be inconvenient and injurious, cannot be doubted. The legislature has given the remedy of attachment as a beneficial remedy, and the laws of the state give effect to the attachment upon all property of the absent debtor within the state, and not previously transferred by delivery to a *bona fide* purchaser. Such has been the tenor of all the decisions of this court. When the creditor institutes his suit, he is required, by these decisions, to look no further,

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than to the original ownership and continued possession of his debtor. But if these cases are to be overruled, the remedy of attachment will be destroyed; and after great expenses have been incurred by the attaching creditor, he will find himself defeated by collusion and fraudulent conveyances. This mode of proceeding to enforce the payment of debts is in fact peculiarly intended for the benefit of the state and its citizens. The benefit is extended to aliens and citizens of other states, and they occasionally enjoy it. But in nearly all cases the debtor is an alien to the state, and this is the sole remedy to compel an appearance or obtain security for the debt. Can there be a doubt, then, that the interests and convenience of the state and of its citizens require that the rule heretofore established should be adhered to, and that the property of absent debtors, found within the state, should be subject to its laws of attachment, instead of being portioned out by the debtors among his favoured creditors, who will always be citizens of the same state with himself, or fraudulently covered for his own use?

The claimant's counsel contends, that this assignment is valid by the laws of New-York. The decision reported in 15 *Johnson* may per-

haps be taken as evidence of the law of New-York; but it does not go the length of this case. It is there merely decided, that a failing debtor may lawfully prefer one creditor to the others. But it does not establish the doctrine, that the debtor may divest himself of his property, by a mere bill of sale without delivery, so as to place it beyond the reach of his other creditors. East'n District. Jan. 1820. T ET & AL. vs. JENKINS & AL.

The deficiency is attempted to be supplied by two or three cases decided in England, and by one in Massachusetts. That decisions in Massachusetts are evidence of the laws of New-York, is denied. And the claimant does not shew, as he ought to have done, that English decisions are authorities there. But what is the amount of these decisions? *Atkinson* vs. *Maling* is cited to prove, that in the sale of a ship at sea the delivery of the grand bill of sale amounts to a delivery of the ship itself. Why was it so decided? Because, says Buller, J. "the grand bill of sale is the only muniment of property." The quotation from the argument of Grose, J. is more full. The distinction, made by him between the sale of a ship at sea and of other goods, is this, that the possession of a ship, without the grand bill of sale, does not give a false credit. But the gentleman's quotation is not complete. Grose, J. says, that

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"a person by being in possession of a ship does not thereby acquire any credit; because whoever is requested to advance money thereon will require to be shewn how the holder is owner; and if he has no bill of sale to produce, his possession alone amounts to nothing. Therefore it has been invariably held that the delivery of the grand bill of sale is a delivery of the ship itself." There is some substance in these observations, as applied to the grand bill of sale. But there was no delivery of a grand bill of sale in this case. The gentleman says, however, that we have no grand bill of sale in this country; and he cites a case from 4 *Massachusetts Reports* to prove, that there is no difference between the grand bill of sale in England and the bills of sale in this country. With great deference to the opinion of chief justice Parsons, I conceive that there is an essential difference. The English grand bill of sale is a bill of sale from the builder of the ship, and it is a muniment of property which always accompanies it. The first owner transfers it to his vendee; the first vendee to the second; the second to the third; and this title paper, or sole muniment of property, passes from hand to hand through all the assignments of this species of property. It is, therefore, with rea-

son held to be a symbol of the property itself; and a delivery of it is regarded as a symbolical delivery of the ship itself. Possession of this is at least *prima facie* evidence of property, and the possessor gains credit accordingly. Is there any resemblance between such a bill of sale, and the bills of sale known among us? With us, the only evidence of ownership to which persons look, and which gives credit to the possessor, is the register. The person, in whose name that stands, has credit as owner. The possession of a bill of sale gives no credit. It may be evidence that the holder was once owner; but not that he continues owner. For he does not deliver up his bill of sale, when he sells the ship to another person. This is taken to the custom-house; the former register is cancelled, and a new one made out in the name of the vendee. How can it be contended, then, that the bill of sale delivered in this case was a delivery of the ship, more than that a bill of sale of any other moveable property is a delivery of the property? In *Norris* vs. *Mumford* it was argued that the delivery of the order upon Talcott and Bowers was a symbolical delivery; but it was decided not to be; and the court with great force shewed that the property being at a distance and possessed by the de-

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fendant only, through his agents, was a circumstance against the claimant, and not in his favour.

In the case cited from 4 *Mass. Rep.* chief justice Parsons makes no distinction between the ship and cargo, and none can be made. *Norris* vs. *Mumford* is, therefore, precisely in point. It is contended here that the delivery of the bill of sale is tantamount to a delivery of the ship; and in that case it was contended that the same effect should be given to the delivery of the order upon Talcott and Bowers. But Mathews, J. said, "The order to Talcott and Bowers, in the opinion of this court, is only evidence of the sale by Mumford to the persons intervening and claiming the property, and does not amount to a transfer of the legal ownership and dominion of it, so as to prevent the creditors of the vendor from seizing and having it sold to satisfy their just claims, before actual delivery under the order." The same remarks will apply in this case. The bill of sale is evidence of the sale by Jenkins and son to the claimant; but the legal ownership was not thereby transferred, so as to prevent the creditors of Jenkins & son from seizing the property, before a delivery under the bill of sale. In *Norris* vs. *Mumford*, the defendant had possession of the cotton only by means of this

agent. In this case the defendants had possession of the ship by means of their agent, the captain; and the only evidence of their title, to which their creditors could look, was in the custom-house at New-Orleans. The defendants, therefore, could make no real delivery, except by the intervention of their agent in New-Orleans, by notice to the captain, and by lodging the bill of sale in the custom-house.

Another distinction is urged, that this was the sale of a moiety, and not of an entire ship. When a part of a ship is sold, the gentleman says, no delivery is necessary. I know of no such distinction in our laws. It is said, that in the case of the sale of part, delivery cannot be made. But when the property is abroad no delivery can be made at the time, in any case. And when the property is present, an actual delivery, or what is equivalent to it, can be made of a part, as well as of a whole. As I observed, in the opening of this cause, if the bill of sale had arrived in New-Orleans two days sooner than it did, the register might have been changed, the captain might have been instructed to hold for the new part-owner, and the delivery would have been complete. In support of this distinction the claimant's counsel quotes some observations from *Caines' Lex*

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Mercatoria Americana. The authority of these observations must rest entirely upon the author's character. The only cases which are cited by Caines, to support his position, are those which the claimant's counsel has also cited, *Gillespie* vs. *Coutts*, *Ambler*, 652, and *Ex parte Studgroom*, 1 *Vez. jun.* 163. In the second case there was no decision. And in the case of *Gillespy* vs. *Coutts* this point was not decided, as is supposed by the claimant's counsel. The case was this: the owner of eight sixteenths of a ship mortgaged them to the defendants, Coutts and Stephens, and afterwards sold the same shares to different persons by assignments. One of these persons, the plaintiff, took possession of the whole ship, and got possession of the grand bill of sale, upon which the names of all the purchasers were endorsed, but there was no date to it. He brought his bill to be preferred. For the defendants it was argued, "that they were honest creditors, and that if they had been guilty of neglect all the other persons had been so also; that the indorsements were without date, and it did not appear on what occasion they were made; that possession is not required upon sale of a ship, which in many cases is impossible; that Coutts and Stephens' debt was lent only upon a part of the ship, and

therefore if possession ought to be delivered in case of a sale or mortgage of the whole ship, yet it was not requisite, nor hardly possible, of a part only; that the mere possession of the grand bill of sale was not sufficient to give a preference: and that it did not appear how or when the plaintiff got possession of it." The reporter says that, "Lord Camden was of opinion with the defendants Coutts and Stephens, for the above reasons; and added, that the plaintiff and the other seven purchasers, are to be considered as standing in the place of the vendor, and took the shares subject to the debts charged upon them." This is all that is contained in the report. The Lord Chancellor gives no reasons for his opinion, but merely refers to the reasons urged for the defendants. The relevancy and force of this decision must, therefore, be tested by those reasons, and we have no means of judging as to which of them weighed most with the court. Some of them appear to proceed upon the ground of fraud, or negligence in the plaintiff. It is said that possession is not required upon the sale of a ship, or of part of a ship, because it is hardly possible. This is the only reason given for not requiring delivery. I believe that sufficient has been said, to show that this reason is not en-

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titled to any weight. There is nothing said in the cases cited of the other part-owner's possession being the possession of the vendee, nor any thing to justify the broad principle cited from Caines. This notion is, however, borrowed from a book of authority, *Abbot on Shipping*. But the limitation is not taken also. In referring to these cases it will be observed, that Abbot speaks with great caution. He does not speak of this distinction as of one settled by any judicial decision; but rather as of one suggested by counsel and not decided. He also accompanies it with a most material limitation. His words are these: "but in case of a sale, or agreement for sale, of a part only, it has been thought sufficient, if the vendor, having delivered the muniments of his title, ceased from the time to act as part-owner, actual delivery of a part *being said* to be impossible. This, however, should be understood with some limitation; for if a part-owner has the actual possession of the ship, it is not impossible for him to deliver the possession: if he has not the actual possession, the possession of the other part-owners may reasonably be considered to be the possession of the vendee, after the sale." *Abbot*, 10.

In the case before the court, the defendants

had actual possession of the ship, by means of their captain; and it was in their power to deliver actual possession to the vendee, by an order to the captain, their agent. Upon receipt of such an order the captain would hold the ship for the vendee as his agent, and the property would be changed. The case supposed by Abbott, where the property in a part of a ship would be transferred without a delivery, and where the possession of the other part-owner may be considered the possession of the vendee after the sale, is one where the vendor has no concern in the actual management of the ship, where he is merely a dormant partner, who receives his proportion of profit and pays his portion of the ship's expenses, but has no concern in the direction of her voyages nor in the appointment of her captain. In such a case, the managing part-owner might reasonably be considered as representing, not only his own share, but the share of the other part-owner, as having possession for himself as owner, and for the other as agent. In such a case, a bill of sale from the secret part-owner, accompanied by notice to the acting part-owner, might be considered as a complete transfer, and that the share, which the latter had represented as agent, would pass to the vendee through the interven-

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tion of the same agent. It would be necessary, however, for the claimant to make out such a case, before he can take this property from the attaching creditors. He would shew, that the defendants had not the actual management of this ship, that the other part-owners had the exclusive control, and that notice of the transfer was given to them previous to the attachment. Nothing of the kind appears, or is pretended, in this case. And the burthen of proof is upon him. The defendants were part-owners when their acceptance became due; the claimant derives title from them through a subsequent transfer; and it is his duty to shew, that the title was fully divested from his vendors, and vested in him before the attachment of the plaintiffs.

I owe an apology to the court for occupying their time in the discussion of a question which has been so solemnly and repeatedly decided. But the assignees of failing debtors are pertinacious in the support of their claims, and persevering in search of distinctions where no distinctions are to be found. There is, I believe, no real difference between the principles of the civil and common law, concerning the transfer of property. To be complete, the transfer must be by delivery. This may be an actual delivery,

or a mere transfer of title, where the vendor is already in possession upon another title. The first requires no explanation. The last is not pretended here. In England, the grand bill of sale is held to be a symbol of the ship; and perhaps if the property of ships, in this country, were attended with an instrument of the same nature, the same effect might be given to it. That the delivery of a common bill of sale can have such an effect, is a doctrine which finds no support, except in a solitary case decided in Massachusetts. That case is, however, directly contradictory to the case of *Norris* vs. *Mumford*, and cannot, therefore, affect the decision of this cause. It is also, I conceive, contrary to all the principles of the civil and common law. A delivery of some kind is in all cases required. Even in the case, stated by Abbot, of a part owner selling his share, the manner in which he limits the exception evidently shews that he considered a delivery of some kind not to be dispensed with. Possession may be taken by an agent for the use of his principal; and it can only be upon this principle, that the possession of the part owner can be deemed the possession of the vendee. But a person cannot possess as agent unless with the will of doing so. A part owner not knowing of the transfer cannot, even by the

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most subtile course of reasoning, be considered as taking possession for the assignee. *Per procuratorem nobis adquiri possessionem ita demum, si velit nobis possidere, si operam nobis solis suam accommodet, si possessionem apprehendet nostro, non suo nomine, et mandatu similiter nostro. Cujas, ad l.* 1. §. 20 *ff. tit. de adq. vel amitt. poss.* If the mere circumstance, of the vendor not having the actual corporal possession at the time of sale, be a reason for construing the possession of one man to be the possession of another. without any knowledge or communication between them, then the possession of Talcott & Bowers should after the sale have been decreed the possession of the vendees. With great confidence I leave this case with the court, believing that a process of reasoning so refined and insubstantial, as that which is required to support the claim of the intervening party, will not be sufficient to shake the principles which have been so well established by this court.

MARTIN, J. delivered the opinion of the court. This case differs from that of *Norris* vs. *Mumford*, in a very material point. There, the cotton, the subject of the sale, was in New-Orleans; and we held that, as the sale of it, if made in this city, would not divest the vendor

from his property, with regard to his creditors, it could not, though made in New-York, affect the rights of the latter. As to them, the cotton remained the property of the vendor, their debtor, till after a delivery to the vendee. A contrary decision would have given effect, in our own state, to the laws of another, to the injury of our own people. If A. and B. be partners, in New-Orleans, and C. purchases from A. a quantity of cotton, in the ware-house of the firm, will his right thereto, if he take instant possession of it, be affected by a sale made a few days before, by B. in Natchez or Mobile? Will not C. be listened to, in his own state, when he shews that by the *lex fori*, that *loci contractus*, that of the domicil of his vendors and his own, the sale and delivery vested the property?

In the present case the ship, the subject of the sale, was at sea, was a New-York ship, and the vendors and vendee resident in New-York. If, therefore, according to the *lex loci contractus*, that of the domicil of both parties, the sale transfers the property, without a delivery, it did so *eo instanti*, or not at all. In transferring it, it did not work any injury to the rights of the people of another country, it did not transfer the property of a thing, within the jurisdiction of another government.

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If two persons, in any country, choose to bargain, as to the property which one of them has in a chattel, not within the jurisdiction of the place; they cannot expect that the rights of persons, in the country in which the chattel is, will there be permitted to be affected by their contract. But, if the chattel be at sea, or in any other place, if any there be, in which the law of no particular country prevails the bargain will have its full effect *eo instanti*, as to the whole world; and the circumstance of the chattel being afterwards brought into a country, according to the laws of which the sale would be invalid, would not affect it.

The laws of another country, even of a sister state, are foreign laws, and foreign laws ought to be proven as facts. This court has so very often indulged parties, in establishing any particular part of the common law of England as it prevails, it is believed, in every one of these states but this, by the production of books of reports and elementary works, that it would work great injustice, if we rigidly refused to listen to the counsel in this respect, because the part of the common law invoked makes no part of the statement of facts. Neither of the counsel require it, and both are willing we should pronounce on the evidence of that law, which they have presented.

There is not the least room to doubt that the interest of the vendors in the ship passed to the vendee, under the principles of the common law of England, as they are understood by the supreme court of the state of Massachusetts, and the circuit court of the United States for that district. In a case perfectly similar, in every respect, to that under our consideration, the supreme court of Massachusetts determined that the *bona fide* conveyance of a vessel and cargo, by deed, to secure the payment of money, the vessel being abroad, at the time of the sale, is valid against creditors; provided the vendee takes possession of her without delay, upon her return: and there is no difference between the grand bill of sale, used in England, for the conveyance of vessels, and the bills of sale used in this country. *Portland Bank* vs. *Stacy & al.* 4 *Mass. T. R.* 661.

But, the plaintiffs' counsel contends that the above case is in direct opposition to the decisions of this court? Is it strange that the judgments of two courts, deciding according to different systems of laws, should be dissimilar?

Further, it is urged that the decisions of the supreme court of Massachusetts are evidence of the laws of that state, but not of those of New-York. It is admitted that the common law of England prevails in both those states.

East'n District
Jan 1820.

THICHER & AL.
vs.
JENKINS & AL.

The supreme court of the state of New York holds that a regular bill of sale is not absolutely necessary to transfer the property of a vessel, that it passes by delivery like another chattel. *Wendover & al.* vs. *Hogeboon & al.* 7 *Johns.* 308.

Judge Story, in *Meeker & al.* vs. *Wilson*, says that, by the common law of England, a grant or assignment of goods and chattels is valid between the parties, without actual delivery, and the property passes immediately upon the execution of the deed: but, as to creditors, the title is not considered as perfect, unless possession accompanies the deed. 1 *Gallison*, 323. This is the principle, which has regulated this court in the decisions cited at the bar. But, the learned judge continues: an exception to the rule is, where the possession of the grantor is consistent with the deed, or where the property conveyed is, at the time of the conveyance, abroad and incapable of delivery. In the latter case, the title is complete, provided the grantee takes possession, in a reasonable time, after the property comes within his reach.

The laws of Louisiana do not, it is true, recognize the last exception. Property does not pass here by contracts, but by delivery: *traditionibus, non pactis.* If the ship had been within the state, at the time of the sale, the rule

in *Norris* vs. *Mumford* would have regulated the decision of this court: but as at that time she was not within the state, the sale ought not to be tested by our laws. It must be by those *loci contractus*, against which those of no other country ought to prevail.

Farther, there seems to be great weight in the position that no delivery can take place of an undivided part of a chattel, not susceptible of division.

The case cannot be distinguished from that in Massachusetts, and from the evidence adduced to us, from which we are to determine what is the rule of the common law of England, we conclude that the district court did not err, in sustaining the claim.

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

D'AUTERIVE vs. *NETO.*

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

If a rule to shew cause is neither enlarged nor made absolute, on the day given, it cannot afterwards be discharged, without notice to the party who obtained it.

MATHEWS, J. delivered the opinion of the court. It appears in this case, by the record, which the the judge has certified, to contain all the facts upon which it was tried, that it was, after no-

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D'Auterive vs. Neto.

tice of trial had been given to the plaintiff, submitted to the jury on the part of the defendant, who obtained a verdict; and a rule afterwards was taken against him to shew cause why the verdict should not be set aside and a new trial ordered; that two days after that given to shew cause, the rule was set aside and judgment given for the defendant, in pursuance of the verdict, without notice to the plaintiff, who appealed.

On this statement of the case, we are of opinion that the judgment proper to have been rendered in the parish court was a judgment of nonsuit; and that the parish court erred in discharging the rule by which the defendant was required to shew cause. No cause having been shewn, the rule unless enlarged, might have been made absolute, on the plaintiff's motion; but, as it seems to have been left open, notice of the time at which it was afterwards to have been argued, ought to have been given him.

It is, therefore, ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and that the cause be remanded, with directions to the parish judge to reinstate the rule and proceed thereon, according to law.

Grymes and *Canonge* for the plaintiff, *Duvergé* for the defendant.

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Jan. 1820.

STRINGER
vs.
DUNCAN & AL.

STRINGER vs. *DUNCAN & AL.*

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

If the record does not shew the facts of the case, and that the appeal was taken for delay only, damages cannot be given.

DERBIGNY, J. delivered the opinion of the court. This appeal comes up without the testimony taken in the court *a quo*, either in the shape of a statement of fact or any other. We have, therefore, nothing to do, but to dismiss it.

The plaintiff and appellee has prayed for those damages, which the law authorises this court to grant, in cases of appeals taken for the sake of delay only. But, in order to support such an application, it was his duty to have brought the testimony himself, to enable us to understand the natnre of the case, and see whether nothing but delay was intended by the appeal.

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

Preston for the plaintiff, *Hawkins* for the defendants.

GORHAM vs. *DE ARMAS.*

Three judicial days must elapse before a judgment by default becomes final.

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

MATHEWS, J. delivered the opinion of the court. This is a case in which the appellant,

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GORHAM vs. DE ARMAS.

who was defendant, in the parish court, moved, on an affidavit that he had a good defence to make, that a judgment, which had been obtained against him, might be set aside, and that he might be allowed to file his answer to the petition.

A judgment by default, obtained on a liquidated claim, becomes final after the lapse of three days, if no defence be offered within that period. But, we are of opinion that, these must be judicial days, in which the court holds its sessions.

In the present case, it is admitted that, the parish court was not in session three days after the judgment by default, and three days before the defendant's application to be permitted to answer to, and defend the suit brought against him.

It is our opinion that the parish court erred in its decision, by which the defendant was denied the right of making his defence.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the cause be remanded, with directions to the parish judge to permit the defendant to file his answer, and to proceed to trial, according to law.

Hennen for the plaintiff, the defendant *in propriâ personâ.*

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MONTEGUT & AL. *vs.* TROUART & AL.

MONTEGUT & AL. vs. *TROUART & AL.*

APPEAL from the court of the first district.

The tacit mortgage on a natural tutor's estate, begins with the tutorship.

MATHEWS, J. delivered the opinion of the court. This is a case, in which the appellees, who were plaintiffs in the court below, claim a preference over other creditors, on the property of their father and natural tutor, to the amount of the dowry and matrimonial acquets and gains of their deceased mother.

So far as it relates to the dowry, their right of priviledge and preference is not disputed. But, it is contended, on the part of the defendants, that they ought not to be preferred to creditors of their father, merely personal, for the amount of the acquets; because there is no evidence of there being any at the death of the mother—and because the tacit mortgage, given by law to minors, on the property of their tutors, takes effect only from the completion of the inventory, and, in the present case, no inventory was made.

The first ground of opposition rests principally on matter of fact, and although with a little more industry, on the part of the plaintiffs, it is very probable that fuller and more satisfactory proof of the amount of property possessed by

East'n. District
Jan. 1820.

MONTEGUT & AL. vs. THOUART & AL.

the father, at the death of the mother, might have been obtained; yet it is believed that sufficient evidence has been adduced to shew that it exceeded the sum for which judgment has been rendered in the district court.

It is true, that there is no testimony, shewing that this property was acquired during the mariage, but on the dissolution of the community every thing holden by the husband and wife is to be presumed common, unless proof of its being particular be exhibited. *Nueva Recop.* 5, 9, 1.

As to the second objection to the plaintiffs' right of preference, it is necessary first to determine by what laws the case is to be determined, by the present code or by the ancient laws of the country, should they differ; of which it is needless to enquire, as we believe, from the evidence in the case, that the rights of the plaintiffs originated before the promulgation of the code, and that they must be ascertained according to the laws, which previously governed the community.

The tacit mortgage, which is given by these laws on the property of tutors and curators, in favor of minors, began to operate with the tutorship, which takes place in various ways, either by the appointment of the judge, by will or by na-

ture. A father, being natural tutor, has no need of the interference of courts of justice to assume the rights and priviledges which belong to the office. With the commencement of these must also begin the legal mortgage on his property, for the faithful and due performance of his duties. This hypothecation is allowed, even against those who interfere with the estates of minors without any species of authority. *Febrero*, 2, 3, 3, § 2, *n.* 53.

On this view of the subject, we are of opinion that the tacit mortgage claimed by the plaintiffs has existed since the death of their mother, and that, although their claim carries with it no priviledge over other mortgage creditors, it gives them a preference to mere personal creditors.

We are also of opinion, that the court below was correct in allowing to one of the defendants the amount, secured by a mortgage anterior in date to that of the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed: the costs of this appeal to be borne equally by the parties, as they have chosen, in the statement of facts, to be both considered as appellants.

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

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Jan 1820.

HENNEN
vs.
JOHNSTON & AL.

HENNEN vs. *JOHNSTON & AL.*

The endorser is discharged, if the holder neglects the proper means of discovering the maker's residence, and makes no demand.

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

MARTIN, J. delivered the opinion of the court. The petition states that the defendant, Laston, made his promissory note for the sum of $3 0,50, on the 12th of June, 1819, payable to the defendant, Johnston, or his order, sixty days after date, which the latter for a valuable consideration, endorsed to the plaintiff, and which, having been lodged for collection in the Planters Bank, was protested, on the 14th of August following, whereof the defendant, Johnson, was duly notified. Annexed to the answer is a copy of the note and protest. The notary, in the protest, does not set forth that he made any demand of the amount of the note; but that he "went to the places of most public resort in the city, and inquired for the maker of said note, in order to demand payment of the same, and none would designate the dwelling of the maker, or would pay the note for his honor."

Johnson, in his answer, denied being indebted to the plaintiff, and required proof of the demand from the maker, as well as of the due and legal notice to the endorser. Laston pleaded the general issue.

Pollock deposed that he is the notary of the Planters Bank; that the note was put into his hands on Saturday the 14th of August; that he made no other demand than that stated in the protest; that he gave notice to the endorser on Tuesday the 17th, between the hours of nine and ten in the morning.

Spencer deposed that he has known the defendant, Laston, in New Orleans for about two and a half years; that he now keeps, and for about eight months past has kept, a grocery store or shop, on the levee.

Crocket deposed that he has known the defendant, Laston, for nearly three years; that during that time he has resided principally in New-Orleans, and for the last eight months he kept a grocery store in the suburb St. Mary, on the levee, fronting the river; that he always kept his name on the front of his house, and took out regular licenses from the mayor's office, as a grocer and retailer of liquors, and still continues the same business in his own name, and at the same place.

It was admitted that the defendant, Johnson, lives in New-Orleans and kept a store before, at the time of, and since the protest; that the note was made by Laston, and endorsed by Johnson; that the latter was informed by the

East'n. District. Jan. 1820.

HENNEN vs. JOHNSTON & AL.

plaintiff, on the 17th of August, that the note was not paid, and had been informed before that it was in the Planters Bank, and had received, from the plaintiffs, the bank's notice of the time of its becoming payable.

There was judgment in the parish court, for the plaintiff against the maker of the note; but the endorser was held to be discharged; the notice, in the opinion of the court, having been given too late. The plaintiff appealed.

The first point, which presents itself for investigation, is whether there was a proper demand made from the maker. It is in evidence that he has, for upwards of two years resided chiefly in this city, and that for the eight months preceding the day on which the note became payable, he kept a grocery store in a conspicuous part of it, with his name over his door. It is not alledged that his residence was unknown to the plaintiff, and we are left to infer that it was so to the notary, from the information he gives that he inquired for it, at several public places. The endorser having received the note from the maker within a short period, at the time of the protest, the presumption is very strong that the plaintiff might on application to the former have been informed of the residence

of the debtor. From the neglect of the most apparent means of obtaining knowledge of the place, where the demand was to be made, it is to be inferred that no other was resorted to, except that which is mentioned, viz. an inquiry from persons accidentally met at public places, none of which are described.

It seems the note was given to be protested, without any information of the place towards which the notary was to direct his steps.

The evidence shews, that with a little previous trouble, the plaintiff might have easily discovered the residence of the maker. It does not appear that he was ignorant of it. The law, imposing on him the obligation of making the demand, imposed that of making the necessary inquiry in due time. *Unicuique sua mora nocet.* It appears that very soon after the protest, the sheriff found the maker of the note, and served the process of the court on him.

It appearing to this court, that no legal demand was made, through the plaintiff's neglect or that of his agents, it is useless to inquire into the legality of the notice of the protest to the endorser.

It is, therefore, ordered, adjudged and decreed

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that the judgment of the parish court be affirmed with costs.

The plaintiff in *propriâ personâ*. *Marse* for the defendants.

7m 368
105 135
7m 368
117 934

WATSON & AL. vs. *M'ALLISTER.*

A motion to dissolve an attachment cannot be made after the trial has begun.

A witness who deposes of his belief, without giving the grounds of it, makes no proof.

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

MARTIN, J. delivered the opinion of the court. This suit is brought on a promissory note, made by the defendant, duly endorsed to the plaintiffs. The property of the defendant was attached in the hands of Linton & Wilkins, who neglecting to answer the interrogatories, judgment was rendered against them, for the amount of the debt to be recovered against the defendant.

After the trial had been begun and proceeded on, and two witnesses had been examined, a motion was made by the defendant that the attachment be dissolved. This was resisted by the plaintiffs' counsel, on the ground that the motion was too late: the law only permitting such a motion to be made at any time, before the trial of the cause, 2 *Martin's Digest*, 516.

There was judgment for the plaintiffs, and the defendants appealed.

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WATSON & AL *vs.* M'ALLISTER & AL.

The case is submitted to us without argument.

A motion to dissolve an attachment is in the nature of a plea in abatement, and, if successful, its effect is perfectly the same. It ought, therefore, to be made *in limine litis*, and cannot be attended to after the trial of the cause has begun. The parish court was correct in disallowing the motion.

On the merits, the action being brought by the endorsees of a note, and the general issue being pleaded, it behooved the plaintiffs to prove the signatures of the maker and endorser.

Two witnesses depose that they have often seen the maker write, and they believe that he subscribed the note: this so far suffices; as to the endorser's signature they believe it to be genuine. But nothing shews, in the least, that they are acquainted therewith.

As they inform us, they have often seen the maker write, and produce a letter of his, in order to satisfy our minds that they know his signature, and, as they are perfectly silent in this respect, with regard to that of the endorser, we cannot conclude that they spoke, as to it, with the like certainty.

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WATSON & AL.
vs.
M'CALLISTER
& AL.

To believe and to know are different things. The mere belief of a witness, without any additional circumstance, raises but the slightest presumption. If a man, with whom I have the least acquaintance, and of whom I know nothing disadvantageous, offer me a note, I will believe it genuine, and not suspect him of intended fraud. But this belief will not induce me to stake a large sum thereon: before I do so, I will expect something further. Now, if men will not trust their important interests on mere belief, those whose duty it is to dispose of the property of others, cannot proceed on the assurance which an honest man gives them, that he believes the disputed fact to be as the plaintiff asserts, contrary to the defendant's denial.

A belief, which results from the inspection of the handwriting of a person whom we have often seen write, or whose letters we have often received, is *prima facie* evidence, strong presumption & *stabit presumptio donec contrarium probetur.* But when we have not the ground of the belief of a witness, his naked assertion, that he believes, raises only the slight presumption, which moveth not at all. *Part.* 3, 16, 29.

The parish court, in our opinion, erred in giving judgment for the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that there be judgment for the defendants, as in the case of a nonsuit, with costs in both courts.

Workman for the plaintiffs, *Carleton* for the defendants.

PALFREY vs. *RIVAS.*

If the taker-up of a runaway keeps him four or five days in irons, sends immediately word to the owner, offering to purchase him, and the latter enters into a treaty therefor, and in the meantime the slave escapes, and the jury find for the defendant, the supreme court will not disturb the verdict.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. The petition charges that the defendant having arrested the plaintiff's runaway slave, instead of pursuing the means which the law directs, in order to secure him, kept him at work on his own plantation for fourteen or fifteen days; after which the slave escaped, and has never been heard of since. There was judgment for the defendant, and the plaintiff appealed.

From the statement of facts, which consists of the depositions of a number of witnesses; it appears that the defendant arrested the plaintiff's slave on a Sunday, secured him in strong iron fetters and informed the plaintiff of the capture, proposing to purchase the slave. He also procured a gentleman of the neighborhood

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PAL[illegible]CY vs. RIVAS.

to address the plaintiff on the same subject. Both letters reached the plaintiff, who immediately addressed the gentleman who had written, at the defendant's request, inclosing a small sum to defray the expenses of the capture, and requesting him to inform the defendant that he might have the negro for a price which was then fixed. In the mean time, during the night between the Thursday and Friday following the slave's arrest, he effected his escape.

In the letter of the plaintiff to his friend, desiring him to offer the slave for sale to the defendant, he requested that, if the offer was not accepted, the slave might be taken to a blacksmith, put in strong irons, and kept till an opportunity to send him to New-Orleans presented itself; but, if none could be had shortly, that he might be sent to jail.

The fetters put on him, by the defendant, are sworn to have been very strong, and in the opinion of the witnesses such as precluded the idea of his escape. The defendant, it appears, treats thus the negroes whom he arrests, and makes no charge against the owners.

The plaintiff relies on the act of 1816, 2 *Martin's Digest*, 514, *n.* 6. which provides that whenever a slave shall be apprehended, he shall be taken before the parish judge or the

next justice of the peace, who shall make inquiry as to his name, and that of his owner, and send him to jail, &c. He contends that, as the defendant did not comply with the requisites of the law, he must be liable for the consequences.

On the part of the defendant, it is insisted that the positive charge in the petition, viz. that the slave was kept at work for the defendant is disproven, and the implied charge of a neglect to comply with the requisites of the act cited, is not presented as a substantial cause of action, which the defendant was bound to disprove.

We are of opinion that the petition charges the neglect of the defendant, in a manner sufficiently positive to put him on his defence.

The act requires a person who takes up a runaway slave to carry him before a magistrate, but it does not fix any particular time for doing so. The taker up cannot be expected instantly to abandon his own work and go accompanied by his own negroes to the justice. A reasonable time must be allowed for that purpose. And this is a matter of fact. If he has business of his own pressing on him, which does not admit of a delay, he may secure the runaway during a reasonable time. If the owner resides nearer

Bast'n District. Jan. 1820.

PALFREY vs. RIVAS.

to him than the justice, he may well send him word to come and take his slave away. If the latter escape in the mean while, it is not clear that the taker up is to bear the loss. *Nemini debet suum officium esse nociosum.* Taking up a runaway slave is generally a kindly office. No private man is bound to undertake it. It is true the law provides a compensation, but few persons demand or accept it, and the defendant appears to be one of those.

The law of this case is pretty plain, and the jury who passed on it had but two facts to consider. Did the defendant neglect to carry the slave to a magistrate, for too long a time? Did not the plaintiff approve of the slave being kept as he was?

They have found for the defendant generally; and we are far from seeing that they erred.

This is certainly a very hard action, and every allowance must be made, in favor of the defendant, who acted with the best intentions, desirous of avoiding any useless expense to the plaintiff, and who treated the slave in the very manner in which the plaintiff desired he might be treated, if the defendant did not purchase him. The jury, who knew the situation of the defendant, his distance from the next magistrate, and his ability to spare hands to guard

the slave on the way, have said the plaintiff ought not to recover.

Fast'n. District. *Jun.* 1820.

PALFREY *vs.* RIVAS.

The plaintiff in two letters, before and after he heard of the escape of the slave, does not appear to have disapproved—did not complain of the conduct of the defendant. On the contrary, he used expressions therein, which might be construed into an approbation of his conduct; and if the verdict was grounded on a belief that it was approved and ratified by the plaintiff, we cannot say that the jury erred.

Upon the whole, the verdict and judgment appear to us correct.

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

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

CARREL'S HEIRS vs. *CABARET.*

APPEAL from the court of the first district.

7m 375 48 482 7m 375 105 582

The action *inofficiosi testamenti* is barred by the lapse of five years. The testator's concubine may prescribe under his will, against his bro-

Joseph Carrel, the plaintiffs' brother, died in 1806, having instituted the defendant his universal heir: his executor put her in possession of the estate, shortly after the testator's death, and

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she remained in the undisturbed enjoyment of it till the 24th of June, 1817, when the present suit was brought: the plaintiffs claiming the estate as legal heirs of the deceased, and alledging the invalidity of the will, as not being made with the requisite solemnity, and the incapacity of the defendant to take under it, averring her to have been the testator's concubine.

thers and sisters.

There was judgment for them, and the defendant appealed.

Moreau, for the plaintiffs. 1. The plaintiffs have the ations *inoffitiosi testamenti*, in order to have the will of their brother annulled, as he instituted the defendant, his concubine, his universal heir. *Part.* 6, 7, 12. *Id.* 8, 12. *Code* 3, 28, 27. 1 *Hulot*, 447. 1 *Gomez Variæ Resolut.* 340, *ch.* 14, *n.* 37. 5 *Febrero anadido* 8, 1, *n.* 3, *p.* 375.

Concubines are considered in law as persons of evil life, *de mala vida, turpes personæ. Greg. Lopez on note* 2. *Partidas* 6, 7, 12. 1 *Gom. Var. Res. ch.* 11, *n.* 38. 1 *Morillo, cursus juris civilis*, 3, 26, *n.* 242.

The defendant opposes to our action the prescription of five years, under *Part.* 6, 8, 4. If this law be attentively considered, it will be discovered that it extends only to persons dis-

inherited for a cause they seek to disprove, and not those who were pretermitted in a will.

Even if this law could ever have been applicable to a case like this, it could not be invoked by the defendant, as it was repealed by a posterior one, which extends prescription in all personal actions to twenty years, and in all mixt actions to thirty years, notwithstanding any contradictory disposition, in the laws of Alphonso the wise. *Recop. de Cast.* 4, 15, 6. Indeed the *Partida* 6,15,4, speaks only of actions purely real, but it is clear that these, like mixt ones, are prescribed by the lapse of thirty years. 1 *Sala, Derecho de Espana*, 2,2, *n.*10.

2. Even if the plaintiffs were prevented by the plea of prescription of five years, from exercising the action *inofficiosi testamenti*, they should have that of nullity, which was heretofore prescribed by the lapse of thirty years, and since our code civil, by that of ten.

The will is void, either as a public or private one; if a public one, the notary, who received it, not having been present at its making. *Recop. de Cast.* 5,4,1, of the old edition, answering to 10, 18, 1, 1 *Febrero*, 1, 19, *n.* 203. If a private one, because it is not attested by the competent number of witnesses. This is fatal. *Recop. de Cast.* 5. 4. 2.

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It is true, the number of witnesses required by *Part.* 6, 1, 1, in nuncupative or open wills, was reduced to three, when the will was received by a notary, and to five in all other cases. *Recop. de Cast.* 5. 4, 1. But, according to this last law, the will is invalid, as there were but four, instead of five, witnesses. The defendant contends that the Spanish lawyers do not all agree, as to the necessity of the will being made before five witnesses, and that many hold that 3 witnesses suffice. This is the case only when the will is made in a place in which more than three witnesses cannot be procured. *I so lo hiciere sin escribano publico que sean al, a lo menos, cienco testigos, vecinos, segun dicho es, si fuere lugar donde los pudiere aver: i si no pudieren ser avidos cinco testigos ni escribano en el dicho lugar, a lo menos sean presentes tres testigos vecinos del tal lugar, &c. Rec.* 5, 4, 1.

It is then only in cases in which the will is made in places so thinly inhabited, *si locus sit ita desertus*, as Gomez says, that no more than three witnesses can be had, that a will, with that number, is valid. 1 *Febrero*; 1. § 19, *n.* 205. *Covarrubias*, 1 *Opera omnia. ch.* 10, *n.* 1, 2. *Gomez L.* 3 *de Toro, n.* 47. 3 *Azevedo Recop.* 5. 4. 1, n. 23.

The only point in which the Spanish jurists appear to have differed, in the construction of the law of the recopilation cited, is in regard to the notary mentioned therein. Covarrubias and Gomez held that if a will was made in presence of 3 witnesses only, in a place in which a greater number could not be procured, but in which a notary could have been had, it was valid, while Azevedo maintained the contrary; contending that no distinction could be made, where the law has not made any. His opinion, according to Sala, a modern Spanish writer, seems to have prevailed. 1 *Derecho real de Espana*, 2, 4, *n.* 5.

Neither is the will valid, as an oral one: for the same number of witnesses is requisite in wills of this kind. 1 *Febrero, anadido* 1, § 1, *n.* 4, *id.* § *final.*

If it be considered as a private will, it is void on another ground; as it was not signed by the testator, nor by any person for him. *Partida* 6, 1. 1.

3. The defendant cannot have acquired, by the prescription of ten, nor that of 20 years, the estate of the testator, because these prescriptions do not avail a possessor without title, nor with one void in its form.

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In order to invoke either of these prescriptions, in regard to immoveable property, it is necessary, besides a possession in good faith, that there be a title transferring the property, as a sale, donation, or will. *Part.* 3, 29, 18.

The will in this case is not such a title, because it was not proven, and possession decreed under it, contrarily with the heirs at law, who had an interest in contesting it.

The instituted heir cannot, of his own private authority, take possession of the estate devised to him, when there is an heir at law. *Recop.* 4, 13, 3.

A will cannot be executed before it is proven before the judge: and the Spanish law did not distinguish, in this respect, the will received by a notary, from that made before witnesses. *Part.* 6, 2, 4.

As it does not appear that the defendant was sent into possession by the judge, the presumption is, that she took it of her own authority. She can only prescribe, as those who possess without a just title, viz. by the prescription of thirty years.

Further, the will could not be valid as a private one, without being proved by the subscribing witness: a proof which does not appear

ever to have been made. So it cannot be said that the defendant has a title, enabling her to avail herself of the prescription of ten and twenty years.

Whilst she was without a title. it is immaterial whether she believed she had one. A putative title cannot support a prescription. *Falsus vel opinatus titulus non est titulus ? Clef des Lois Romaines*, 363, *verbo Prescription*, *ff.* 41, 3, 27 & 29, 6 *Hulot*, 330.

It is true, error on the part of another may render a putative title sufficient, but the law has expressed in what cases. *Clef des lois Romaines*, *loco citato*, *ff.* 41, 10, 5. 1 *Domat.* 1, 3, 7, §4, *l.* 14. *Partida* 6, 14, 7.

The prescriptions of ten and twenty years cannot avail, because the will, under which the defendant's title rests, is void in its form.

Generally, a void title cannot support a prescription: for it is as no title. *Pothier*, *Prescription*, *n.* 85, *La Porte*, 25, 26, *C.* 8. 33. 7, 3 *Hulot*, 218.

The principle is the same in the Spanish law. Gregorio Lopez in his 3 l note, on *Part.* 3 19, 18, treating of the prescriptions of ten and twenty years, asks whether one may prescribe in a void title. *An titulus nullus priestat justam causam prescribendi?* According to an

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author, whom he cites, he answers in the affirmative; adding, but, by conforming one's self to the dispositions of the law 14 in the same title. It is, however, apparent that there is a typographical error: he intended to refer to the 15th law, for the 14th does not mention at all the void title, while the former expressly treats of the possession of a thing under a legacy, in a will in which irregularities might exist. It is then according to *Part.* 3.19. 15. that we must understand Lopez. This law mentions only moveable property held under a void or irregular will; we cannot then, without going beyond its expressions, extend what Lopez says of prescription under a void title; to immoveable property; as the lot which is the object of the present suit.

In this respect the consequence drawn from Lopez's opinion; is conformable to the principles of the French and our laws, which do not consider the prescription of moveable property as sufficiently important to be submitted to the rules established in regard to the prescription of immoveable property. *La Porte.* 37. In our statute, the rule that one cannot prescribe under a void title does not prevent the *bona fide* possesssor, without title, of acquiring the fruits of the estate claimed from him. *Civ. Code* 103. *art.* 6. 481. *art.* 20. 482.

Will it be contended that the *Part.* 6, 14, 7 provides that the instituted heir, who has possessed in good faith, may prescribe in ten years, among present, although there exist a posterior will? We admit that there are exceptions to the general principle in this case as that which has been cited to the one that disallows prescription under a putative title. We have shewn the rule of the Spanish law, and only contend that the exceptions must be likewise shewn and ought not to be extended.

Let it be noticed that the case in which a putative title may be the basis of a prescription, cited in *Part.* 6, 14, 7, is not that of a title absolutely void under the general rule, but which is avoided by a posterior will. The law incapacitates from being the basis of a prescription, the title, void on account of its irregularity in point of form, false or illegal, on account of the incapacity of the instituted heir. A will revoked by a posterior one, the existence of which is unknown, may nevertheless be regular in its form, and it is such a will the law is speaking of. For if the first will, besides being revoked, was void in point of form, there cannot be a doubt that the law cited would not enable one to prescribe under it, in regard to immoveable property.

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The quotation from *Gregorio Lopez*, and the expressions of the *Part.* 3, 39, 15, shew that the nullity of a title, which renders it an obstacle to prescription, as to immoveable property, without being so in the case of moveable, is that resulting from a defect of form which renders it irregular and illegal. "Men," says the law, "make legacies of moveable things, in a way which is not valid according to law, or make such a legacy by a will and revoke it by another," &c.

A nullity in point of form is meant, when wills are spoken of, which are not valid according to law, or the incapacity of the legatee or instituted heir, as we may see by and by. In order to prescribe, says Sala, there must be a legal reason, a real & existing rule. *Derecha razon, el titulo debe existir real y verdaderamente.* 4 *Derecho real de Espana*, 16, 2, 2, *n.* 3 *&* 4. *Usucapio, non precedente vero titulo, procedere non potest. C.* 7, 29, 4. 3 *Hulot*, 210.

The Roman law has a striking example of the principle that an illegal title cannot be the basis of a prescription in the case of an adopted son, cited in C. 7, 33, 8.

Lastly, we have a positive text in law, which silences discussion: a provision that when a title is defective with respect to [illegible]

become the basis of the prescription of ten and twenty years. *Civ. Code* 488, *art.* 70.

Although the will and death of Carrel, in 1806, be anterior to the promulgation of the Code, in 1808, we contend that its dispositions must regulate the prescription invoked by the defendant. Prescriptions do not result from contracts, but from the mere disposition of the law. The legislature then which establishes a prescription may establish rules in relation to it, and violates or infringes no contract by the extension of the time required: or in making the acquisition of it to depend on circumstances or conditions more favourable to the proprietor. The defendant, if she ever could prescribe, according to the laws of Spain, under a title null in its form, did not actually do so, although the period of prescription began to run. If before its completion a new law abrogated the former, and prevented a prescription under a title null in its form, it is not easy to see on what grounds she may contend that she can prescribe in spite of the new law.

As to the defendant's incapacity, on the score of concubinage, to inherit to the prejudice of the testator's brother and sisters, the law is so plain, that it suffices to refer thereto. *ff.* 41, 6, 4, 15 *Rodriguez* 164. *ff.* 41, 9, 9, 15 *Rodriguez* 72.

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The reason why the nullity in the form of an act is fatal to prescription, is that the possessor cannot alledge his ignorance of an apparent defect. *Ignorantia juris non excusat.* 2 *Clef des lois Rom.* 363, *verbo Prescription, ff.* 41, 3, 31, 6 *Hulot* 332.

Hennen, for the defendant. The plaintiffs' brothers and sisters of the whole blood of Joseph Carrel, deceased, claim his estate from Magdalen Cabaret, the defendant, instituted his universal heir by a will made the 25th of September, 1806, before a notary public in New-Orleans, on two grounds.

1. Magdalen Cabaret, the universal legatee, lived in open and notorious concubinage with their brother, previously to, and at the time of his death; and she is, therefore, infamous, and unworthy to be instituted heir.

2. The will itself is null; and though approved by the court of probates, on the 4th of October, 1806, at the request of the executor, conferred no right to their prejudice.

I. The plaintiffs, in their petition, have united what was considered as two actions in the Roman and Spanish laws; the *actio inofficiosi testamenti*, which embraces the first ground; and the *petitio haereditatis*, which embraces the

second: both, however, permitted, under the provisions of our statute, to be instituted at the same time.

The *actio inofficiosi testamenti* is admitted by the Spanish and Roman laws, in favour of ascendants and desendants, disinherited, except in the cases stated in *Partida* 6, 7, 4, 7 & 11. But it was required that the heir should be expressly disinherited, *totidem verbis*, and the cause mentioned in the will. *Partida* 6. 7. 10. A testator, however, leaving no ascendants nor descendants, could disinherit his brother without giving any reason for it in the will: and no express words were necessary to effect it. *Dezimos, que el hermano puede deseredâr al otro con razon, e sin razon. E aunque non fiziese mencion del en el testamento, puede dexar lo suyo a quien quisiere, quando no ouiere fijos, nin otros que descendiessen del de la lina derecha, nin padre, nin abuelos; fueras ende, si estableciesse por su heredero a tal ome, que fuesse de mala vida, o enfamado. Partida*, 6 7, 2, The same provisions are made in *Partida*, 6, 8, 2. *E como quier que non faga emiente del hermano en el testamento, nin le dexe ninguna cosa de lo suyo, non le pertenece al hermano, de fazer querella del testamento que el otro su hermano ouiesse fecho, nin lo*

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puede quebrentar. Fueras ende, si aquel que juesse establecido por heredero, juesse ome de mala fama.

The only difference in these two laws is, that the last forbids the institution of an heir of bad fame, *mala fama*, and the latter, an heir of bad life, or infamous, *mala vida, o enfamado.*

The plaintiffs contend, that a concubine is embraced in the above description of persons; and to that point, opinions of Spanish commentators have been cited.

In reply to this, I observe that all these commentators refer to the Roman or cannon law, in foundation of their opinion; and no one of them founds his opinion upon the words of the text. In fact, the only semblance of such an opinion, in the text, is to be taken from the words, *mala vida*. which, it is evident, are used as synonimous with *mala fama* and *enfamado*. The conjunction, *o*, is used for the very purpose of explaining the preceding words, *mala vida:* in the latter part of the law itself, *Partida* 6, 7, 12, where it was necessary to make the same specifications, the words, *mala vida*, are omitted, and the word, *enfamado*, only used. In the *Partida* 6. 8, 2, the same provisions are likewise repeated, and the word, *enfamado*, only used. For these reasons only, I would conclude that

the Spanish commentators quoted, are incorrect when they consider the provisions of the Roman code, or canon law, as embraced by the above laws of the Partidas. But a more convincing proof of their error is drawn from the 4th Partida, 14th title, where are mentioned the different descriptions of women, other than wives, with whom men may live without any temporal punishment, though they commit a mortal sin. In the three laws of this title, various provisions are made respecting *baraganas*, concubines; and it is expressly declared that it is lawful for a man to take such an one: nay some men, in some cases, are restricted to them and forbidden to marry. Assuredly then such persons cannot be infamous in law, whatever opinion we maintain of their moral character; nor be disabled from taking as legatees by the very same laws which recognize their existence.

Should I however err in my interpretation of the laws of the Partidas on this subject, yet the action *inofficiosi testamenti* is barred by five years. The defendant has plead prescription generally to the petition of the plaintiffs: and more than ten years elapsed between the time the defendant took possession of the testator's estate, and the institution of the suit. In the *Partida* 6, 8, 4, is found this prescription of five

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years. *Dezimos, que si alguno que fuesse desheredado, callasse fasta cinco anos despues que el heredero ouiesse entrado en la heredad del testador, que de los cinco anos en adelante non se podria querellar: e magner se querellasse, queriendo mostrar razon per que non devia ser desheredado, non dever ser oyido.* The same prescription is stated in 1 *Sala* 176; 3 *Rodriguez, Digesto*, 64, 95; and in the codes of Theodosian and Justinian. *Codex Theodosi.* 2, 19, 5, with the Paratille and note of D Godefroy. *Pothier's Pandects of Justinian, l.* 5. *t.* 2, *no.* 51. *ff.* 5, 2, 28, § 1.

II. Thus much for the *actio inofficiosi testamenti:* as to the second ground on which the plaintiffs claim, averring the will to be null and that the probate thereof gives no right to the defendant. I answer, that from a careful examination of the text of the *Novisima Recopilacion, (lib.* 10, *tit.* 18, *l.* 1,) where we have all the formalities requisite in making wills, it does not appear that any one of them was omitted in that of Joseph Carrel.

1. It is no where said, not even by a single Spanish commentator, that the will must be in the handwriting of the notary. On the contrary Febrero directly tells us that the testator may

write the will himself, particularly if he is a foreigner, and in case he cannot write, it may be done by a person acquainted with his language: in both which cases the notary and witnesses have only to sign the writing. *Febrero, edit.* 1817. 1, 1. *n.* 279.

2. It was not necessary that the witnesses and notary should all have been present at the same time when the testator declared to them his will: it is even usual for the notary to write down the will from the dictation of the testator in the absence of all witnesses. *Febrero, ibid. no.* 275. And if the testator at any time before or after the will was reduced to writing, declared it to the notary, it is valid on the same principle. But supposing the will to be void, for the reasons (not appearing on the face of it) that have been alledged by the plaintiffs, even then they cannot maintain the present action; it is barred by the lapse of ten years.

The good faith of the defendant is admitted; indeed it could not have been disputed; she had every just reason to believe the will good and her possession of the estate of the testator legal, when the court of probates had approved of the will and authorized the executor to discharge the legacy it contained. *Civil Code* 103, *art.* 7. But the plaintiffs contend, that as the

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will is null, it cannot be the basis of the prescription of ten years: they formed their doctrine on the 70th article of the *Civil Code*, *page* 488, which is as follows: *When a title is defective with respect to form, it cannot become the basis of the ten or of the twenty years prescription.*

On this article I observe, that there may be null titles which however may serve as a basis for the prescription of ten and twenty years. Let us take the example, put in the *Partida* 6, 14, 7, of a person instituted heir by a will subsequently revoked, though unknown to the heir. In this case, if the heir has been in possession of the estate ten years, not knowing that the will had been revoked, he acquires a good title to the property against all claimants who were present. Such is the provision of this law of the Partidas, and such would be the decision under our own code. There, though the nullity of the title is incontestible, it is not apparent on the face of it. The will was not defective with respect to form.

What then is the limitation to be affixed to this general principle of our code? Plainly that affixed in the text; a defect of form, apparent on the face of the title: not a nullity to be established by proving facts which contra-

ample of a will made by a testator *non compos mentis:* such will would clearly be void; yet, if all requisite forms were pursued in making it, legatees, in good faith, would acquire a valid title under it by prescription.

But, further, there may be titles defective in form, and the defect appearing on the face of them, and yet serve as a basis for prescription under certain circumstances. Our own code, page 303, art. 204, will furnish us with an example. A married woman, without the authority of her husband, disposes of a plantation, her dotal property; such act would he void: yet if she does not claim it within ten years after the death of her husband, the purchaser would acquire a good title thereto by prescription. We may then safely conclude that a very extensive limitation is to be put on the general terms of the code: but where is the limitation to stop? The limitation then I state to be this, that wherever the act, against which a nullity of form is alledged, may be ratified by a new consent, or regards only individuals and not the public, in all such cases, if the nullity is not insisted upon during ten years, it is too late to do it after that lapse of time. 2 *Cotille* 439—41. There is another point of view in which the possession of the defendant may be placed,

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which will shew most conclusively that she has gained the estate of J. Carrel by prescription. The plaintiffs, the brothers and sisters of the testator, all residing in the same district, within a few miles of each other, could not have been ignorant of his death: they state in their petition that they knew of the possession of his estate by the defendant. The executor of the will, it is to be presumed, did his duty before he delivered the estate to the universal legatee of the testator. He required then the consent of the heirs, the present plaintiffs, to this delivery; for such was his duty, 5 *Pothier's posthumous works*, 12*mo.* 293: nay, it will even be presumed, after the lapse of ten years, that he formally cited them to be present at an act so immediately affecting their interests: *Vide Gloss. no.* 2 *of Gregorio Lopez, on Partida* 6, 2, 4, *Sufficit longum tempus, id est decennium, ut praesumatur ista solemnitas intervenisse.* Under these circumstances the plaintiffs are totally barred from any action: the defendant has acquired a complete title, however defective or null it may have been in its commencement. This I prove from the *Partida* 3, 29, 19. *Sabiendo, o creyendo ciertamente, el que enagenasse cosa que fuesse rayz, que non avia derecho de lo fazer, estonce aquel que la recibiesse*

del, non la podria ganar por menor tiempo de treynta anos; fueras ende, si el senor de la cosa, que avia derecho en ella, supiesse que enagenava, e non la demandasse, del dia que lo supiesse fasta diez anos, seyendo en la tierra, o fasta veynte anos, seyendo en otra parte. Ca estonce ganar la ya por el uno destos tiempos. A law agreeing with the 119 *Novel. cap.* 7, and the authentic of the code 7, 331. The law of the Partida, supposes a case much more unfavourable than that of the defendant, but after a silence of ten years, the true owner, if cognizant of the alienation, loses all his rights, and the possessor acquires a good title. On the same principle our Civil Code, 303, *art.* 204, limits the action of nullity to ten years. Silence for such a length of time is properly considered as a ratification in whatever form it was made. See also the same reason given, 2 *Clef des lois Romaines*, 360.

Our Civil Code, 5, *art.* 16, gives us a good rule for interpreting doubtful or ambiguous expressions in laws: which is, to compare the different parts with each other, and thereby to reconcile them, wherever it can be done. It is necessary, also, to limit general expressions and provisions in such manner as not to destroy particular ones. With the limitations and ex-

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planations which I have given from Cotille of the 70th art. page 189 of the Civil Code, we reconcile it, with art. 203d, page 303, and put the whole in harmony with the 3 *Partida*, 29, 19, which has not been abrogated or superseded by any provision of our statutes.

Wherever the defects in form of a title, or its nullity, is known to those who wish to take advantage thereof, it must be done within ten years, or they lose all their rights. *Vigilantibus, non dormientibus, subveniunt leges.*

The counsel for the plaintiffs, in answer to these authorities and principles which are incontestible, oppose the opinions of Pothier, that a null title cannot serve as the basis of prescription, and that error in law destroys good faith. *Pothier, Prescription, no.* 29 & 85, supported by various quotations from the Roman law. It is not my business to reconcile Pothier with our Civil Code and the Spanish law; nor with the 119 *Novell.* 7 *chap.*, which I believe may be done: I have only to shew what is the law of our own state, found in our statutes, or the Spanish code; and if Pothier or the Roman lawyers have entertained other opinions, they cannot control the decisions of the supreme court of Louisiana.

I would, however, ask of the advocates of the

plaintiffs, what was the error in law of the defendant; and where are the defects in form of her title? Point them out, put your finger on them. Did the defendant err in her opinion of law, when she believed she might, though the concubine of Joseph Carrel, be instituted by him universal heir to his estate, to the prejudice of brothers and sisters of the whole blood? Be it so: does not the law, however, limit your action in such a case to five years?

Where are the defects in form of the defendant's title? The will was not made in presence of the notary: you prove that; but as far as form is concerned, the will states it was made in the presence of the notary and the witnesses. The form is right; but the fact contradicts it. And here it is, gentlemen, that your erroneous opinions of law have taken their origin. You have mistaken a nullity in substance for a nullity in form. Pothier may have led you into this error; for he speaks of null titles in general; and does not limit their nullities to those of form, as is done by our civil code. Let the court take the will of Joseph Carrel, certified by the notary, without any of your evidence to contradict it; there will appear no defect of form on its face; and this court must consider it, as the court of probates did, a valid, legal will.

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You are guilty, gentlemen, of a palpable contradiction in terms when you extend the meaning of a defect in form to a defect in substance. These two kinds of defects are as intelligible and distinct as latent and patent ambiguities in the will itself. The one class are apparent from the writing; the other must be shewn by evidence. I repeat it, the will of Joseph Carrel is not null for defect of form; if it is null, it is because the form is contradicted by evidence. Had this will been forged, as was insinuated, and no defect of form been apparent on the face of it, the legatee, being in good faith, would have prescribed under it, though null, because forged.

Where there is error in fact, it is admitted on all hands, prescription runs. Well, now, what more was there in this case? An error in fact only; an error too, let it be observed, produced by a judicial act, the homologation of the will of the testator by the only tribunal to which it could be referred, the court of probates: all this, moreover, known to the plaintiffs, without a word of disapprobation or opposition on their part. Their silence alone was a sufficient fact for the defendant, on which to ground her belief that the title under which she claimed was good. The putative, and the null title, as

well as the null judgment, where there is good faith, are each a sufficient basis to form prescription, as we are informed by the Spanish commentator, Gregorio Lopez. *Gloss.* 3, on the *Part.* 3, 29, 19. The counsel for the plaintiffs, aware of this opinion have made a very blundering explanation of it. They make Lopez say that this is to be understood with the explanations of the 15th law of the same title. But his words are very plain, *quæ dixi*, what *I have said*, not what the law says; on the 14 *l.* of this title: nor is there any error in the ciphers as the counsel suppose; different editions of the Partidas, which I have compared, agree; and if there was an error, it would not avail them; it is still, *what I have said*, not what the law says

While I am on the errors and mistakes of the counsel for the plaintiffs, I cannot forbear to remark on a very glaring one: that concubines could not receive a legacy by the Roman law. Let us read the Pandects, 25, *De concubinis*, and we will find that they had many legal rights. And it is said expressly that they can take by legacy. *ff* 32, 1, 41, § 5, 34, 9, 16, § 1. *Dig. lib.* 32, *t.* 1. 5 *Hulot's translation*, 97. 1 *Dict. du Digeste*, 96; *Dict. Digest*, 338. *Taylor's civil law* 273, 2, 7 *Heineccii Opera*, 164, 187. To which might

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be added many more. Another error is, that it was necessary for the defendant to be put in possession of the testator's estate by the order of the judge.—No such thing; the executor had the right, and it was his duty to put the defendant in possession (*Partida* 6, 10, 2, with the gloss of *Lopez n.* 1) if no opposition was made on the part of the heirs.

I admit that our statute must furnish the rule for determining whether prescription has accrued in this case: and I rely with perfect confidence on the provisions of it. *Civ. Code* 303; *art.* 204, 311, *art.* 240, 487, *art.* 67.

I hope enough has been said to shew the court that the action of the plaintiffs is not sustainable, and that the defendant's title by prescription is good. I think it, therefore, unnecessary to say more than a very few words on the subject of some facts which were drawn up on the part of the defendant's counsel to be submitted to the jury, and rejected by the judge. Had the defendant been permitted to prove those facts, the present appeal would have been easily determined.

1. The plaintiffs cannot recover the estate from the defendant, before they reimburse all sums paid by her for the testator, (*Partida* 5, 14, 36. 5 *Rodriguez's digest*, 119) nor until

they pay her what the testator owed her, *idem, ibid.* and what she contributed towards the purchase of the lot.

2. The executor delivered the estate of the testator to the defendant, with the knowledge, consent, and approbation of the plaintiffs; they are, therefore, barred in the present action. *Civil Code* 311, *art.* 240. 1 *Sala*, 176. 3 *Rodriguez*, 106. *Partida* 6, 8, 6. *Partida* 3, 29, 10.

3. Good faith and the belief that the defendant was owner, were also proper facts to go to the jury. *Pothier*, *Prescription*, *no.* 96.

4. The delivery of the testator's estate by the executor, was another fact proper for the jury to find. It has been said that the defendant took possession of it violently, without the consent, acquiescence and approbation of the plaintiffs; surely then, it was a proper fact for the jury to pronounce on.

DERBIGNY, J. delivered the opinion of the court. In the discussion of their respective means of defence, the parties have taken a most extensive range. But although due attention has been paid to their arguments, we find no necessity, for the decision of this cause, to inquire into any other points than the following:

1. As an action *inofficiosi testamenti*, is this

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claim barred by the silence of the plaintiffs during five years?

2. Is the defendant's title one on which prescription could run?

I. Heirs in the direct, descending or ascending, line, may be disinherited for cause assigned; collaterals with or without cause. No distinction is made in the Spanish laws, between the express disinherison of the heir at law and the mere omission of his name in the will; both are called disinherison: *un hermano puede desheredar al otro con razon é sin razon. Part.* 6, 7, 12. Against the disinherison, the heir at law may claim within five years, after the instituted heir has taken possession of the estate: past that time he cannot. *Part.* 6, 8, 4. Is this law applicable to the present action? An attentive perusal has convinced us that it is.

The law begins by saying that there are many reasons for which the disinherison cannot be removed: "as when the heir instituted proves that the heir at law was really guilty of the act for which he is declared to be disinherited; and this takes place whether the heir at law be a descendant, an ascendant, or a collateral." So much of the law is, of course, applicable only to cases where the disinherison is for cause assigned. But what follows is uncon-

nected with the preceding part: "We moreover say that if a person, who has been disinherited, remains silent and does not complain for five years after the instituted heir has taken possession of the inheritance, he shall not thereafter be heard, though he should offer to shew why he ought not to have been disinherited." This provision is a general one; we cannot undertake to say that it was intended to apply only to cases of disinherison for cause assigned. The plaintiffs, however, contend that the case of disinherison without cause is not comprehended within the purview of this law. Let us see if any good reason may be found in favor of that interpretation. Disinherison, without cause assigned, can take place only against collaterals; and the law gives them no relief against it, except in one case, and that is, where the instituted heir is infamous, and the heir at law a brother of the testator. We do not mean here to examine whether the defendant be one of those persons whom the Spanish laws deem infamous; but taking it for granted, we say that to support the construction of the above law as, insisted on by the plaintiffs, the institution of the infamous person should be absolutely void; for then, no application being necessary on the part of the heir at law to have it avoided, no

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lapse of time would be fatal during which he might neglect to bring suit against the instituted heir. But the institution of an infamous person as heir is not absolutely void, it is only voidable: *el hermano puede quebrantar el testamento, probando esto ante el judgador;* "the brother may have the will annulled, on proving the fact before the judge;" and in *law* 2, *tit.* 8, *seyendo el heredero tal como sobredictoes, estonce bien podria el hermano querellarse ante el juez, é quebrantar el testamento en que fuesse establecido por heredero.* "The heir being such as is abovesaid (infamous) the brother may bring his complaint before the judge, and cause the will to be annulled, in which such heir is instituted." Finally, it is certain that the infamous character of the instituted heir does not make the institution absolutely void, that the disinherited brother cannot even complain of it, if he is himself guilty of any act against the testator, by which disinherison is incurred: *Pero si este hermano sobradicho hubiesse fecho contra el testador alguna de las cosas porque los hermanos pueden ser deseredados, segun diximos en el titulo de los deseredamientos, estonce non se podria querellar, sin desatar el testamento dél harmano.* The defendant, therefore, if the plaintiffs had brought their action against her

within the five years, might have repelled it, by proving that the plaintiffs were guilty of some one of those acts; and if she had succeeded, she would have had judgment in her favour What then, if they said nothing during five years? Why, the will must remain valid in the same manner as a disinherison, for cause assigned will be maintained, if not attacked within that time.

But the plaintiffs say that, supposing their action *inofficiosi testamenti* to be barred according to the above quoted law of the Partidas, that provision is repealed by the *law* 6, *tit.* 15, *book* 4, of the *Recopilacion de Castilla*, which fixes general rules for all kinds of prescriptions of actions. It is a principle well known, and which this court has recognized on several occasions, that general provisions do not repeal special laws, when these may subsist without clashing with them. We think that the prescription of five years established by the *law* 4, *tit.* 8, *part* 6, against the action *inofficiosi testamenti* is not repealed by the *law* 6, *tit.* 15, *book* 4, of the *Recopilacion*, which provides generally, that personal actions shall be prescribed by twenty years, and actions real or mixed by thirty.

It is too late, then, for the plaintiffs to avail themselves of the action of inofficious testament:

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let us see whether they can succeed on the other ground, the nullity of the will on account of the omission of some solemnity required by law.

II. For the decision of this point, attention must be had to the present situation of the parties. The defendant was in possession of the late Joseph Carrel's estate since more than ten years, when the present suit was brought. The will was her title, and under it she may have prescribed, provided that title was a just one and she a possessor in good faith, for all the distinctions resorted to by the plaintiffs upon that point, will, on examination, be found to centre in that "a just title and good faith."

Much labour, in the opinion of this court, has been wasted in proving that this will was not, in reality, such, as it appeared to be on the face of it; that an instrument outwardly perfect in its form, had, in fact, not been executed as it purported to have been. When the law says that a title defective in point of form shall not be the basis of prescription, what does it mean? A title, which, though apparently good, has some latent defect? Certainly not. A title, which, though apparently clothed with all the formalities required by law, may be proved defective by extensive evidence? No. It means

a title, on the face of which the defect is stamped. And why? Because the holder of such a title cannot pretend that he possesses in good faith; for he is supposed to know the defect of form which his title shews, and cannot plead ignorance of law. But admit latent nullities, unknown in point of fact to the possessor, to prevent prescription, and what does good faith avail him? Or rather what becomes of the whole doctrine of prescription?

But if the ignorance or the misconduct of the notary, from which it results that this will was in reality null, protects the defendant, the plaintiffs say that it is not so with respect to a defect which she must have known, to wit, her own incapacity to inherit from Joseph Carrel. It is true, that, if the latent defect is known to the possessor, he cannot prescribe: why? Again, because he does not possess in good faith. I may contract with a madman, believing him to be of sound mind, and prescribe under such a title, notwithstanding its absolute nullity: *si a furioso quem putem sanæ mentis emero, constitit usucapere utilitatis causâ me posse, quamvis nulla est emptio. (l. 2. § 16. ff. pro empt.)* But if I knew him to be mad, I cannot prescribe under pretence that I was ignorant of his incapacity to contract. So here, the defendant was

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the concubine of the late Joseph Carrel; if the law had provided that the institution of such a person as heir was absolutely void, she could not plead ignorance of her incapacity to inherit. But the law, as we have seen, is very different. Far from making the institution void, it has made it only voidable, at the suit of the brother, and by him only in certain cases; and it has provided that if the disinherited brother remains silent five years, he shall not thereafter be heard. The defendant was capable of inheriting: her title was good, provided the plaintiffs acquiesced in it by their silence. At the end of five years, she could prescribe under a will in every respect valid: at the end of ten, she has prescribed under a will apparently perfect in point of form. The objection of the plaintiffs to this will as a just title, on which prescription would run, does not appear to us of sufficient weight to require any particular consideration.

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

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DURNFORD vs. SEGHERS' SYNDICS.

The proceedings of the meeting of the creditor of an insolvent are irregular, when the proceedings are in the French language.

DURNFORD vs. *SEGHERS' SYNDICS*

APPEAL from the court of the first district.

MARTIN. J. delivered the opinion of the court. The petitioner instituted this suit, as one of the creditors of the insolvent, in order to set aside the proceedings of the meeting of the creditors, on the ground that they were recorded in the French language. The district court having accordingly set them aside, the syndics have brought the present appeal.

It appears to this court that the decision appealed from is perfectly correct. The proceedings of the meeting of the creditors, of an insolvent, are judicial proceedings. They are ordered by the court, and constitute a part of the proceedings in the suit, instituted by the debtor against his creditors, and are the basis on which rests the judgment which terminates it. They, therefore, are a part of those written proceedings which are required to be promulgated, preserved and conducted in the language in which the constitution of the United States is written. *Const. art.* 6, § 15, 1, *Martin's Digest* 114.

It is, therefore, ordered, adjudged and de-

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creed that the judgment of the district court be affirmed with costs.

Hennen for the plaintiff, *Grymes* for the defendants.

KNIGHT vs. *HALL.*

When the property, taken under an order of seizure, is in the hands of a third possessor, judgment must be had against the original debtor.

APPEAL from the court of the third district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff sold to the defendant a negro slave, and took his promissory note, which not being paid at maturity, he obtained an order of seizure on the exhibition of a deed of mortgage, executed by the vendee. It appears that the slave was then in the possession of a third person, Charles Tessier, who had bought him from the defendant, and who made opposition to the sale, and obtained a writ of injunction. In this state of things the cause was set down for trial, and judgment was given for the defendant. The plaintiff appealed.

The record contains all the facts, and nothing appears on the face of it that can enable us to understand the reasons of the decision. The debt is proved, and although the judge may have thought that the plaintiff could not proceed

by seizure, in the hands of a third possessor, without having first obtained a condemnation against the defendant, he ought to have given judgment for the amount of the note, and let the plaintiff have his remedy afterwards against the third possessor, in the manner pointed out by law.

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 plaintiff, and appellant, against the defendant, and appellee, for the sum of eight hundred dollars with costs, except those of the seizure, which must be supported by the plaintiff.

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

TESSIER vs. *HALL.*

A parish judge may record his own bill of sale. The thing mortgaged cannot be seized in the hands of a third possessor, till after judgment against the mortgagor.

APPEAL from the court of the third district.

DERBIGNY, J. delivered the opinion of the court. This suit, though carried on separately, is only an incident of the preceding. The plaintiff, claiming to be the owner of the slave seized, applied for, and obtained an injunction

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staying the sale, which injunction was, after the trial, made perpetual.

A question arose on this application, which made Tessier's claim appear doubtful. His bill of sale from Knight, the defendant's vendee, was a private one, and had been recorded by himself in the book which he kept for such purposes, as parish judge. Is this such a sale as could affect the rights of third persons? We are of opinion that it is. The object of recording a private bill of sale is to give public notice of its existence. Surely the notary may as well give such notice of his own acts as of those of others: at least, we see no good reason why he should not; principally where it is not possible for him to have it done by another, as is the case with parish judges.

The seizure of the slave, sold to Tessier, and in his actual possession, could not take place without a previous judgment against the mortgagor, and previous notice, according to law, to the third possessor, who had then a right to make his election between paying the amount of the judgment, and abandoning the slave.

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

appellant his right as mortgagee on a future application.

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

WATSON & AL. vs. PIERPOINT.

The property of a merchant, who has a store in the state, and is accidentally absent on a voyage to the United States, cannot be attached, as that of a non-resident.

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

The petition stated that the defendant was indebted to the plaintiffs on a promissory note, that he resided out of the state, but had property in it, whereupon process of attachment was obtained, on the affidavit of one of the plaintiffs, and levied on a quantity of dry goods in the hands of the defendant's agents.

A motion was made for a dissolution of the attachment, and witnesses were examined in open court.

Noyes deposed that he knows the defendant, and came to New-Orleans in the same ship with him, on the 9th of November 1818. The defendant has carried on business, as a merchant, ever since that time, and has kept a store in Canal-street, where it is still kept, and left the city for New-York on the 10th of July, 1819.

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leaving his store under the care of his boy, and having appointed W. R. Palmer his agent, with the avowed intention of proceeding to New-York on business, and returning in the fall, and it was so understood by his neighbors.

W. R. Palmer, having heard the above testimony, deposed he believes the facts to be true; that he expects the defendant every day, and believes he would have been back before the present time, had he not been prevented by the sickness prevailing in New-York.

The parish court dissolved the attachment, and on the appeal,

Workman, for the plaintiffs, assigned for error, that the attachment was dissolved, although it appeared in evidence, as it does now appear on the record, that, when it was laid, and long after, the defendant was absent from the state.

MATHEWS, J. delivered the opinion of the court. This is a case in which the plaintiffs obtained an attachment against the property of the defendant, who was absent from the state. The attachment was afterwards dissolved, on the disproval of the facts by the latter, in conformity with the provisions of our attachment laws; whereupon the plaintiffs appealed.

In support of this action, in its present form,

the appellants contend that any kind of absence of the defendant from the jurisdictional limits of the state will authorise a proceeding by attachment against his property. They rely on the act of the territorial legislature, in 1807, which provides that "in all cases, when an attachment is prayed for, against a debtor, absent from the territory, the plaintiff shall, previous to his obtaining the attachment, give bond, &c." 1 *Martin's Digest*, 518, *n.* 3.

This law must be taken and construed in conjunction with the other acts on the same subject. It seems to have been intended for the benefit of the defendants, in cases of attachment, and does not enlarge the privilege granted to the creditor, in case of the absence of the debtor.

The kind of absence or rather non-residence, on which an attachment may be supported, is well defined in the act of 1805, § 11, 1 *Martin's Digest*, 512, *n.* 1, and in our opinion does not embrace the present case.

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

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

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APPEAL from the court of the third district.

The marshal of the United States is suable in a state court for a trespass, committed under color of an authority, under a process issued out of a court of the United States.

The defendant was charged with the wrongful taking and detention of a slave of the wife, and the plaintiffs prayed he might be decreed to return the slave, pay damages for the wrongful taking and detention, and be enjoined in the meanwhile from selling or otherwise disposing of the slave.

He answered, that as deputy marshal of the United States, for the Louisiana district, he took the slave, named in the petition, by virtue of an execution issued out of the court of the United States, for that district, against the husband in whose possession the slave was found. He pleaded to the jurisdiction of the state court, denying its authority and jurisdiction over him, as deputy marshal of the United States, and its power to suspend, arrest, or in any manner interrupt the proceedings of the court from which the execution had issued. Lastly, he denied the slave to be the property of the wife, and averred it to be that of the husband.

The district court gave judgment that the plea to the jurisdiction be sustained, and the proceedings dismissed, for want of jurisdiction, at the plaintiffs' costs. They appealed.

By the statement of facts, which was signed by the counsel, it appeared that the only point, acted upon in the court *â quo*, was the plea to the jurisdiction, and the only pieces of evidence adduced were a commission from the marshal of the United States for the Louisiana district, appointing the defendant his deputy, and a writ of *fieri facias*, issued out of the district court of the United States for that district, against the husband.

Turner, for the plaintiffs. Three questions present themselves for consideration.

1. Has there been such an injury done to the petitioner, in disturbing her in the enjoyment of her property, as affords grounds of complaint before a court of justice? If so,

2. Before what court ought that complaint to be made, as regulated by our state laws?

3. May the court of the United States entertain jurisdiction of suits, similarly situated as this is? If that court cannot, by means of its limited jurisdiction, afford to the plaintiffs relief, in the same manner as the state court could do, then the state court, of necessity, must have power to relieve, without resorting to that court.

I. It is a truth, needing no argument, that

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every person may come before a court with a petition for redress of wrongs.

Our act of assembly concerning the execution of the judgments of courts, authorizes the clerk to issue a writ of execution, directed to the sheriff of any parish in this state, where the petitioner supposes the defendant may have property. That writ commands the sheriff to demand payment of the debt, and if not paid, to make the same out of the personal estate of the defendant; and in default thereof, then out of the slaves and real estate, by the seizure and sale thereof, after advertising the same for a certain number of days. *Acts* 1805—1813, *&c.*

The only authority for making the seizure and the sale is the writ of execution; and it must be levied on the property of the defendant. It cannot be on that of any other. But should the sheriff actually seize and take away the property of another, it is an unauthorized act, for which he is immediately responsible to the owner, as any other person would be, who should unlawfully seize and carry it away.

In truth, the sheriff, who levies an execution, acts at his peril; he must take care not to infringe on the rights, or to intermeddle with the property of third persons: for if he does so, he is a trespasser, and as such, answerable to

that person. *Prevost & wife* vs. *Hennen*, 5 *Martin*, 221. 4 *Bac. Abr.* 459. *Sellon's Practice*, 556.

When such an injury has been done, what is the remedy?—It is an action in court to recover the property so unlawfully seized, or the value thereof, with damages for the wrong done. *Sellon's Practice*, 556. *Black. Rep.* 832. 3 *Wilson's Rep.* 309. But, where the action is for the recovery of the property, it would be fruitless, unless the wrongdoer, could be restrained from selling and disposing of it.

This consideration justifies the plaintiff in making him the party defendant, and the court in making an order enjoining the sale of the property, until the rights of the party can be heard and decided on. Unless this mode of proceeding can be maintained as legal and correct, the courts afford only an incomplete remedy for the injury. Shall the plaintiff have a favorite and trusty slave seized and sold for the debt of another, and have no means of preventing it? shall his jewels and his plate, which h has inherited from his ancestors, be seized and sold in an unlawful manner, and he have no means to prevent it?

Certainly our laws cannot be so deficient. There is a remedy, and there is a power to pre-

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vent a change of possession, during the suit concerning the title.

II. The act of 1805, *c.* 26, § 1, says the action shall be by petition addressed to the court, which shall state the names of the parties, their place of residence, and the cause of action, and conclude with a prayer. The act of 1814, *c.* 25, § 1, provides "that no person shall be sued in any civil action, in any other parish, but that, wherein he, she, or they, shall habitually reside; any law to the contrary notwithstanding."

It is, therefore, a matter of no importance, where the cause of action originated, it must be instituted in the parish, where the defendant resides.

Executions on judgments may issue to any parish in this state, directed to the sheriff; when, therefore, an execution issues from the court of the district of New-Orleans, to the sheriff of East Baton Rouge, or to the parish of Ouachita, and a contest shall arise between the sheriff of such parish, and a third person, that is, one who was not a party to the execution, concerning the right of property seized by the sheriff, that matter, if it affords cause of action to such person, must, by the law of 1814, be

sued upon in the parish of the residence of the sheriff, which by an article of the constitution, as well as by the civil code, must be the parish whereof he is sheriff. *Const. art.* 4, § 7. *Civ. Code* 12, *art.* 6.

Be it always understood, that for the wrongful act of the sheriff, inflicting injury to the person or property, the action is between him and the person injured: and the plaintiff, in the execution, is not at all involved in these matters.

This subject came under examination in the cases of *Vieunier* vs. *Duperron*, 3 *Martin*, 285, and *Prevost & wife* vs. *Hennen*, 5 *Martin*, 221.

But it is a plain principle that he who does the injury, must answer for it, to the person injured.

Now, the consequence of the doctrine, laid down in the district court, is, that, in the case supposed, of the execution from Orleans to Ouachita, that although both the plaintiff and defendant in this new controversy reside in Ouachita, and the property in contest is also there, that the action for redress of these wrongs must be instituted in Orleans; and the plaintiff and defendant, and the witnesses or the depositions are all to be drawn to litigage, and to prove the case at Orleans, three hundred miles from their homes.

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Moreover, if the injured party was to file his petition at Orleans, no process upon it could issue to the parish of Ouachita, to stop the sale, nor to cite the offending party to appear. Because there is no law authorizing it: and because it is inconsistent with our system of courts, and contrary to the express prohibitions of the act of 1814. The sale, therefore, of the property illegally seized, would be made.

If all suits must be brought in the parish where the defendant resides, is there any thing in the nature of this case, which renders that court incompetent?

Reason, justice, and the practice, all conspire to teach us, that questions about the right of property, seized in execution, should be decided in the most summary way, and with the least expense to those concerned.

By the jurisprudence, as practised in England, and in the United States (unless Louisiana shall have a different rule) the right of property seized by a sheriff is tried by a jury summoned *instanter*. If they find it to be the property of the defendant, he may sell it, and that verdict shall excuse him from damages; the owner or claimant can still have his action for the property, or the value of it. 5 *Bacon's Abr.* 186; 1 *Sellon's Practice*, 556, 7.

By the practice in Louisiana, the owner or claimant makes a petition to the judge praying restoration of the property, and an injunction or interdiction to the sheriff to desist from the sale until the right is decided upon.

This is very easy, when the seizure is made in the same parish or district where the execution issued. But will be very difficult, if not impossible, when the seizure is in another district, out of the jurisdiction of the court whence the execution issued. Unless the question of property can be decided by the judge of the district, in which the seizure is made.

If the ancient laws of Spain are inconsistent with our acts of assembly, they are not in force here. If they cannot be applied in their practice to our local institutions, they can have no effect here. None of them but such as harmonize with our form of government, such as are applicable to our system of courts, and such as are consistent with the laws enacted by our own legislature, are in force with us or have any obligation upon, or afford a rule of conduct to, the citizens or courts of this state. The Partidas, if examined accurately, will be found to have no principle inconsistent with those I have advanced, although the Spanish practice may be, and in fact is different in many respects from

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our own; and so far as respects the main question of this case, there is really no difference in principle or practice between the laws of Spain, and those pursued here; saving, however, the prohibition against sueing a defendant, out of the parish of his domicile.

The Partida 3, 27, 3, has this provision: "That if, in proceeding to execution, any dispute should arise respecting the right of property about to be seized under execution, as if one should claim it as his own, or that it is not the defendant's: the judge shall take summary cognizance or information of the truth of the fact. And if he finds the opposition well founded, he ought not to seize the property. But he ought to execute the judgment upon other property belonging to the debtor, about which there is no dispute."

Who is the judge here spoken of? Is it he who rendered the judgment about to be executed? It may be so in some cases; and I suppose it generally is he. But then I contend, if it means only him, who rendered the judgment, as to that, the law has no force here; it forms, at most, only a rule to shew what ought to be done in such a case, before the judge, who by our own system of courts ought to hear the opposition, or claim of right to the property, not

"about to be seized," but actually seized and carried away and about to be sold by the sheriff.

I think this would be the interpretation in Spain, in a case like the one now under discussion: and I am persuaded that such should be the practice there, from what appears in the 1st and 6th laws of the same title.

The first provides "that judgments shall be put in execution by the judge, who rendered them, if the thing is in the place." But if it is not in the place, what is to be done? Why the same law proceeds to inform us "that when it is in another place, the judge of that place shall put it in execution, or the judge may order some other to do so, as the Alguazil, &c."

We are, furthermore, informed by the same law, and by the sixth, "that the property seized is to be put into the possession of the plaintiff, to hold until the defendant makes payment of the judgment. But if he will not pay it within a reasonable time, the judge shall permit him to make sale of it: and if no one will purchase, whether through fear or partiality, then the judge may pass it to the plaintiff, at such a price as he may adjudge it to be worth.

Thus we find that it is the judge who puts the judgment in execution: whether it be the

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judge who pronounced the judgment, or the judge of the place where the thing is.

Apply these laws to a case easily supposed. The judge of the first district at Orleans, renders a judgment, which cannot there be executed, because the thing or defendant's property is at Ouachita, then the judge at Ouachita is to execute that judgment.

Now the third law of the Partida above quoted, says, " if, in proceeding to execution, any disputes shall arise about the right of property, about to be seized, &c. the judge shall take summary cognizance, &c. of that matter." What judge is this who is to take summary cognizance, &c.? Is it he, who is about to seize the property which is disputed, or is it some other? I hold that the plain meaning of it, as well the propriety of the construction, shews it to be him, who is putting in execution the judgment.

What is said in *Curia Philipica*, 2, 26, *n.* 2, is evidently taken from the Partida, because it is quoted.

The Partidas are the text of the law, and the Curia is a kind of abridgement, or text book, of the law, as well of the Partidas, as of the Recopilation, &.

Upon comparing them there will be found nothing in the Curia, which in reason, law or

propriety, can vary the law of the Partidas, where both books treat of the same matter; and if there should be any doubt, it will be found principally in that obscurity, which arises from too much brevity in the Curia, and may be explained by looking into the law, more at large, in the Partidas.

Having shewn that, as well by own legislative acts, as by the laws of Spain, the matters in controversy in this case, are judiciable in the third district; and whether any other, or some other court, might have alike jurisdiction of the controversy. I think they can form no ground for denying to that court jurisdiction where the plaintiff has made his election to sue there.

Has that court the power legally to hear the plaintiffs' case, and to decide on their rights, or has it not? This is the question, and I do not find any thing in our laws by which its powers are denied.

That my construction of the law of the Partidas is the correct one, will be found by consulting the commentators on the same law in the *Curia Philipica illustrada*, 2, § 26, *n.* 2, and 2 *Febrero*, 3, 2, § 6, *n.* 359, where it is expressly said that the third opposer shall make his claim before the judge who executes the sentence, and in those cases, where the claim is

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made of the property, on the ground that it is his, and not the defendant's, it shall not only be the duty of the judge, to receive the claim, but he must decide on it, although he acts by the requisition of the judge who pronounced the sentence, because the sentence is not impugned by such claim. But where the opposition tends to annul the sentence, or to make any alteration in it, then the judge, required to execute the sentence shall receive that opposition and send it to the original judge, for him to adjudicate upon.

I beg leave to ask a particular attention to these commentators, because they are so plain and full to my purpose, and the reasons so satisfactory that I am persuaded the court will find that the application of the law of the Partidas has been wrongly made the grounds of the decree of the district court.

Now, as we have no such practice as that in Spain, of the judge executing his own sentence, when it can be done in the place of his jurisdiction, and when it cannot be done there, of sending it to be put in execution by the judge of another jurisdiction, we must come at the remedy in the manner, by our law, best adapted to the end.

If the sheriff had judicial powers, he might stand in the place of the Spanish judge, but he

has not; his are merely executive. His mandate is not from the judge, it is derived from the law, in virtue of his office; the writ gives authority to him, to seize and sell in such and such a case.

In Spain, the seizure is made by the judge, and the property deposited until payment; but, if that is not made in due time, then the judge makes an order for the sale.

But here, the sheriff acts independently of the judge; as soon as final judgment is rendered, in a cause, the judge has done with it.

But the sheriff, like all others, must be subordinate to the court in the district where he resides, and where he acts. It is then to the judge of that district, the third person must apply to have his rights determined; and in doing this, he does not interfere with the sentence rendered in the cause; his complaint is of matters foreign to it; and if his claim is decided in his favor, it has only the effect of restoring to him his rights, and does not in any manner impair those of the plaintiff in execution against the defendant; that judgment is left in full force unaltered, and the execution likewise.

In Spain the judge stays the seizure—he suspends the order of sale until the opposition is heard; and when that is decided upon, he

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either restores the effects, or proceeds with the execution of them, as the case may require. When he returns the property to the claimant, he then proceeds to seize other property, belonging to the defendant, about which there is dispute.

So in our case, the judge of the district, where the property is seized, ought, upon application, to suspend the sale, until he can decide on the claimant's rights. But in doing this, he does not conflict with the jurisdiction of the court, who adjudicated the first cause, neither does he stop the execution of the sentence, nor injoin the execution; he stops only the sale of that specific property which the sheriff has wrongfully seized. But, after this injunction, the sheriff may proceed to sell other property of the defendant, and may sell it and thus satisfy the execution.

III. Has the United States court, from which the execution issued, jurisdiction of the trespass complained of?

From what has already been shewn, it is plain, the contest is a new one, and does not belong to the cause already adjudicated in the federal court.

Febrero, in the number quoted, 359, express-

ly declares, that the right of controversy about the right of property, claimed by the third person, may be, and ought to be, decided on by the judge, delegated to make execution of the sentence, without transmitting the complaint to the primitive judge, who had adjudicated the cause. Because this new controversy does not import the nullity of the sentence, nor does it tend in any manner to modify it.

By the common law of England, an action of trespass lies against the sheriff for taking property of a wrong person in levying an execution. 4 *Bacon's Abr. tit. Sheriff, n.* 457, 8. *Sellon's practice* 556. 1 *Blackstone's Com.* 345, &c. &c.—Of this there is no doubt.

An action of trover, for the property so taken, will also lie against the sheriff.—Same books, and others.

The courts of the United States are governed by these rules and these principles. This is undeniable. 3 *Cranch*, 337. Case of trespass against a court martial. 2 *Wheaton* 1 *to* 12.

We will now see whether this case can be brought before that court, and if it can, is the plaintiff bound to sue only there?

The act of congress, giving jurisdiction, limits it to those cases, "where the matter in dispute exceeds in value five hundred dollars, and

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where the United States are plaintiffs—or an alien is a party—or the suit is between a citizen of another state; and this jurisdiction is concurrent with the state courts. Here we are to observe that the parties are to be citizens of different states, and one of them must be a citizen of the state where the suit is brought, for if they are both citizens of the same state, the federal court has no jurisdiction.

The courts have been very strict on this point, as may be seen by several cases in Cranch, as well as in other reporters of cases. 1 *Cranch*, 343. 2 *Cranch*, 9—126, 445. 3 *Cranch*, 267, *&c. &c.*

In the present controversy, all the parties are citizens of this state; and, therefore, the federal court cannot entertain jurisdiction of that case: therefore, the court of the third district, by the laws of the United States, was the only court in the world, where the suit could be maintained for the recovery of the property: therefore, the cases was properly brought in the third district, and the plea to the jurisdiction ought to have been disallowed.

Dick, for the defendant. Understanding that this controversy had been settled by the parties, no preparation was made for an argument, on

the point to which it is supposed to give rise. After, however, having heard the observations of the counsel for the plaintiff, I deem no apology necessary, as I cannot conceive that any view, which the most mature consideration could give, would be different at all from that which presents itself.

I will not state the case; it is clearly set forth in the record. The attention of the court will be necessarily drawn to the execution on the judgment of the court of the United States, the petition and answer, and the decree. They present a case, very unlike that which is laboured by the plaintiffs' counsel.

The only question is this: can the state court interfere with the process of a court of the United States? In this case, property has been seized by the marshal to satisfy an execution. A third person interposes and says that it is not the property of the defendant in the execution, and obtains an injunction from a state court to stay the proceedings, until the property can be inquired into. The court, on being made acquainted with the nature of the application, dismisses its own injunction, on the ground of a want of jurisdiction. The supreme court is now asked to reverse the judgment and to order the district court to take cognizance of the ques-

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tion. The plaintiff's counsel contends there is, in all this, no clashing with the powers of the court of the United States—that it does not concern the suit, for that has advanced as far as the judgment, and is at an end; that it does not affect the execution, but only lays hold of the property seized. What is the order of the state court? It enjoins proceedings, under an execution. Now, if an execution has nothing to do with the cause, there is then no interference with the cause, before the court of the United States: and then it follows, that that court sits merely for the purpose of deciding, in the abstract, that a debt is, or is not due, and has no right nor power to secure to the successful party the fruits of its judgment.

Nothing is more important than that all clashing of jurisdiction between the state courts, and those of the United States, should be avoided. In the case of *Diggs* vs. *Keith*, 4 *Cranch*, 179, it is said that a court of the United States, will not enjoin proceedings of a state court. Justice and comity require that the state courts should observe the same rule.

It is attempted to consider this as a question of trespass against the deputy marshal. An examination of the record will not support any such view. I am not prepared to say that an

action of trespass cannot be brought, in a state court, against an officer of a court of the United States. But, here, although something about damages be said in the petition, yet the prayer is that the proceedings be stayed on the execution, and an enquiry gone into as to the right of property. The order of the state judge, granting the injunction, is in compliance with the prayer, and the effect has been to stop the sale of the property, seized under an execution issued out of a court of the United States, and yet we are told that this is no interference with its proceedings.

Turner, in reply. I am ignorant of the grounds, on which the defendant's counsel imagined this cause was settled, and gratified that my argument has placed him so much at his ease.

I have laboured, and I hope the event will shew with success, to present my case to this court as it is made out in the record: a suit for the wrongful taking and detention of my client's slave. My hope of a final judgment in her favor rests on the belief, that I will be able to establish the fact.

The defendant has sought to avert the judgment of the district court, by a plea in abate-

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ment, which I trust this court will say was erroneously sustained. If his object was to prevent what he calls an interference with the process of the federal court, the proper course would have been a motion to dissolve the injunction provisionally obtained; but this would have required an affidavit that the slave is the property of the defendant in the execution, which could not safely be made. The counsel declares himself unprepared to deny our right of action, at least for damages, in the court in which we brought our suit. Yet the object of the ea was clearly to defeat our attempt to bring the merits of our case before it.

Martin, J. delivered the opinion of the court. It is clear that the plaintiffs had a right to sue for the alledged trespass, and that neither the defendant's commission as deputy-marshal, nor the writ of *fieri facias*, alluded to, can afford him any protection, if the facts set forth in the petition be true.

We do not mean to say, that the injunction obtained, in this cause, can be so enforced as to prevent or delay the execution of the process of the court of the United States; but if, under color of it, the defendant has committed a trespass on the property of a citizen of his state,

he is, in the opinion of this court (DERBIGNY, J. dissenting) suable in her courts, for he is not suable in those of the United States.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and this court proceeding to give such a judgment as, in its opinion, ought to have been given, in the district court, it is ordered, adjudged and decreed that the plea in abatement be overruled and set aside, and the cause remanded, with directions to the district judge to proceed to the trial of it, on the merits: and it is ordered that the defendant and appellee pay the costs of this appeal.

S. DUNN vs. *VAIL.*

APPEAL from the court of the third district.

This case was almost perfectly similar to the preceding; differing only in the circumstance that the slaves, who were the object of the suit, were not the property of the wife of the defendant, in the district court of the United States, but of another person of the same family name. The same judgment was given.

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

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EASTERN DISTRICT, FEBRUARY TERM, 1820.

LEFEVRE vs. BARITEAU.

LEFEVRE vs. *BARITEAU.*

A report of referees cannot be used, in another suit, unless it was confirmed.

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

DERBIGNY, J. delivered the opinion of the court. Lefevre, the present plaintiff, was formerly defendant in a suit where Bariteau, the present defendant, claimed a balance of accounts against him. The claim was sent before referees, who reported not only that Lefevre owed nothing to Bariteau, but that Bariteau was indebted to him in a sum of 1235 dollars, 85 cents; that report was made the judgment of the court, so far, as it settled the demand formed in that suit; but so much of it as went to award a balance in favour of the defendant was not confirmed, because the defendant could not recover in

a suit from which he had merely prayed to be dismissed. The present suit is now brought to recover that identical balance, and he offered that same report as evidence of his claim. The defendant objected to its introduction, and being overruled, took a bill of exceptions, on which turns the only question to be decided on this appeal.

We are of opinion that a report of referees, in one case, cannot be used in another, unless it was made the judgment of the court; and consequently that a report confirmed in part is of no force as to the rest. The reasons are obvious and many; but among them the plainest is that, in the case where the reference takes place, the defendant, knowing that nothing further is to be decided than that which is at issue between the parties, may waive any objection to the defects of the report, and suffer it to be confirmed for so much as he considers to be just; but, the greatest injustice might be done him, could that report be afterwards used against him, beyond that which made the judgment of the court, perhaps, for want of opposition.

The report could not be received in evidence, in any shape; it could not be offered as a judgment, for it was no judgment, without the con-

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firmation of the court; it could not be produced as testimony, for the referees, far from being witnesses, act as judges, and hear the testimony of others.

It is, therefore, ordered, adjudged and decreed that the judgment of the parish court be annulled, avoided and reversed; and that this case be remanded to be tried anew, with instructions to the judge not to admit in evidence, in support of this claim, the report of the referees, appointed in the case of *Bariteau* vs. *Lefevre*.

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

DEHART vs. *BERTHOUD & AL.*

The court need not give any reason, in a judgment taken by default on a liquidated claim.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This case is, in all its circumstances, similar to that of *Allard* vs. *Ganushau*, determined in this court, at March term, 1817. 4 *Martin*, 662.

The reasons, in support of the judgment then pronounced, being completely applicable to the present case, it is deemed useless now to repeat them. *Stare decisis* is a convenient and perhaps a sound legal maxim. But, whilst there

is only one decision, which establishes a principle in law, a court of justice, when required, ought to examine the question, without prepossession in favour of its first opinion.

In the case under consideration, we have done so, and cannot discover any good cause to induce an alteration of the construction, given to the constitution and law, in the case cited. The decision in that of *Montserrat* vs. *Godet*, 5 *Mart.* 522, has been referred to, as contradictory to the former; but the apparent inconsistency of the judgments, in the two cases, vanishes on the slightest examination. The latter was an action on an unliquidated demand, wherein the court is bound to interfere and fix the quantum of the debt or damages, and being bound to act, must, according to the provision in the constitution, assign reasons for its judgment; which is not necessary in cases of liquidated claims, on which judgment by default has been taken.

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

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

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STERLING
vs.
FUSILIER.

STERLING vs. *FUSILIER.*

APPEAL from the court of the third district.

The vendee is not bound to call his warrantor to defend him, when sued, but, if he does not, the latter may shew, when sued, that he had means of defence which would have proven successful if he had been called on to defend the title.

MATHEWS, J. delivered the opinion of the court. This case is submitted to us, without any argument, on the part of the appellee, the appellant having failed to appear, on the day appointed for its hearing.

The action is against the warrantor of the title to a slave, described in the plaintiff's petition, whom he bought from Martin L. Hannie, who sold as sole owner and warranted the title. The answer of the defendant denies any right of action, as set forth by the plaintiff, and also all the allegations in the petition.

The facts agreed upon by the parties, and the evidence spread on the record, fully establish all the material allegations in the petition, viz. that Hannie sold the slave to the plaintiff, that the defendant bound himself to warrant the title, and that the slave was taken from the purchaser by the judgment of a competent tribunal. At the time of the eviction, the vendor was dead, and his representative was called in to warrant and defend the title of his vendee.

Whether the defendant and appellant be con-

sidered as a surety or principal obligor, it is believed that he is responsible to the plaintiff and appellee, in damages. It is true, that he was not called to defend the title, according to his contract, in an action of warranty, nor in the action by which the defendant lost the slave. As surety, it is doubtful whether the latter was bound to call him in warranty; because the vendor is rather to be supposed to know the means of defence than his surety; *Pothier, Contrat de Vente, n.* 111: but, admitting that he was entitled to all the priviledges of a vendor, the neglect of the vendee, in failing to call him in to defend the suit, has no other effect than to cause the warranty to cease on proof, in the present suit that the warrantor had sufficient grounds or means of defence, to have obtained a judgment in his favor, of which he could not avail himself for want of having been called on. *Civ. Code, 365, art.* 64. This species of defence has neither been pleaded nor proven: nor was the exception of the discussion of the property of the principal debtor used as a defence, admitting that the defendant is in the situation of a surety, which would have been useless, as it is agreed that the vendor was insolvent.

It is, therefore, ordered, adjudged and de-

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creed that the judgment of the district court be affirmed with costs.

Turner for the plaintiff. *Duncan* for the defendant.

LLOYD & *AL.* vs. *MARTIN.*

A surety, in a custom-house bond, is bound to reimburse his part, to the co-surety, who has paid the whole amount, although the goods were delivered and sold by the latter.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is an action to compel the defendant to refund to the plaintiffs one half of the amount of a custom house bond, in which he was bound with them as surety for M'Masters & co. who failed to pay it, when it became due, and who have since become insolvent. The plaintiffs, having paidt he whole, now claim one half thereof from the defendant, their co-surety.

Their right to recover is contested on the ground of the United States having a lien on the cargo, the duties on which were secured by the bond, which was put, by the principal obligor, in the possession of the plaintiffs. No objection is made to their right of action.

There cannot be any doubt that when bonds are given to secure the payment of duties on

merchandize, in conformity with the laws of the United States, the importer is at liberty to dispose of it, as he pleases, and there exists no lien on it, in the hands of a *bona fide* third possessor, in his own right.

In the present case, it appears from the testimony, that the cargo was placed in the hands of the plaintiffs and appellees, to secure them for advances which they had made to M'Masters & co. and not as a security for the payment of the custom house bond: a great proportion of it has been sold and the proceeds applied to the discharge of these advances.

This contract is presumed to have taken place before the failure of the persons for whom the parties to the suit are sureties, and the fairness of the transaction is not to be questioned. Whether they would have a right to retain the part of the goods which still remains in their possession, in kind, against a priviledged creditor of the insolvents, may be questioned. But the defendant and appellant cannot be considered as a creditor till he shall have paid his part of the bond, in which he is a co-surety with the plaintiffs. What priviledge he may then acquire by subrogation to the right of the United States, it is needless now to inquire.

We are of opinion, that the plaintiffs and ap-

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LLOY & al. *vs.* MARTIN.

pellees having paid the whole amount of the bond, for the principal debtors, who are insolvent, have an equitable right to be reimbursed by their co surety, the sum for which he became responsible.

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

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

DENIS vs. *BITON.*

If the judgment appealed from contain none of the reasons on which it is grounded, it will be reversed, and if the record contain not the evidence the cause will be sent back.

APPEAL from the court of the second district.

MATHEWS. J. delivered the opinion of the court. This is a case in which there is no statement of facts, bill of exceptions, special verdict, or a certificate that the record contains all the evidence on which it was decided, in the district court.

The want of reasons in support of the judgment is assigned as error, and as none appear to have been given, as required by the 12th section of the 4th article of the constitution we are bound to reverse the judgment.

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It is, therefore, ordered, adjudged and decree that the judgment be annulled, avoided and reversed; and, as there is not sufficient matter found in the record on which judgment might here be rendered, it is ordered that the cause be remanded, with directions to the judge to give judgment therein according to the said article of the constitution.

The plaintiff *in propriâ personâ*, *Livermore* for the defendant.

THE STATE vs. *MONTEGUT & AL.*

Martin. 7m 447 108 138

On a notice that an order will be moved for, that a treasury execution be put in force, the court cannot give judgment for the state, for the amount of the sum, in the execution.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. On the 19th of November last, a treasury execution issued, directed to the sheriff of St. John the Baptist, of which the defendant Montegut is sheriff, and the other defendants, his sureties, for the taxes of the preceding year, not accounted for. There being no coroner in that parish, the treasurer wrote to the attorney general, desiring him, in pursuance of the twenty-first section of the act supplementary to the several acts relative to the revenue of the state, to use every exertion for the recovery of the sum due.

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THE STATE vs. MC KNIGHT & AL.

The attorney general addressed a letter to Montegut, on the 15th of the same month, giving him notice, that on the 29th he should make a motion in the court of the district, to put in force the execution, issued by the treasurer. A copy of this letter was served on all the defendants, and on the 29th, on the attorney general's motion, the district court gave judgment against all the defendants for the arrearages of taxes mentioned in the execution. The defendants appealed.

The attorney general attended, and prayed this court not to notice the appeal, as in his opinion the state was not suable by any of her citizens: none of whom, he said, could bring her into court, even by appeal.

He also desired the court to take notice that the citation of appeal had been served on him alone: while it could not be served on an attorney, unless the principal was out of the state.

The defendants contended that the district court had erred in giving judgment for the state, as no notice had been served on them that any judgment would be moved for.

We are of opinion that the constitution and the law having provided that the jurisdiction

of this court should extend to all civil cases, where the matter in dispute exceeds the sum of three hundred dollars, civil cases, in which the state is a party, are necessarily included; as neither the constitution nor the law have made any distinction, the court cannot make any. *Ubi lex non distinguit, nec nos distinguere debemus.*

The attorney general, the only person authorized to act in suits in which the state is interested, having been served with the citation of appeal, having attended in this court and prayed a dismissal, without pleading what he now calls an illegal or insufficient service in abatement, this court is bound to proceed to the examination of the case on its merits.

The district court has not given any of the reasons on which its judgment is grounded; but the judge has certified that the record contains all the evidence on which the cause was tried.

It is true the law authorizes the attorney general to obtain judgment on motion, or to proceed in any other summary manner, after giving to the party ten days notice. He saw fit, in the present case, to inform the defendants that he would make a motion to the dis-

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THE STATE *vs.* MONTEGUT & AL.

trict court to put the treasurer's execution in force. On this, we see not that it was either necessary or proper for the defendants to appear. The execution could not acquire any additional strength by the order of the district court that it should be put in force. If it did, they might as well remain quiet at home, if they had no valid reason to oppose to the motion. But, a notice of a motion for an order to put a treasury execution in force, does not appear to us sufficient to authorise the court to pronounce a judgment, for the sum mentioned therein, with interests and costs. The execution did not carry interest, and under it the money could be raised by the sale of the property of the debtor and his sureties only. Under the judgment, their bodies are rendered liable to imprisonment.

We are of opinion that the district court erred in giving judgment for the state on this notice, at all events in failing to adduce the reasons on which its judgment is grounded.

It is, therefore, ordered, adjudged and decreed that it be annulled, avoided and reversed.

Proceeding to inquire what judgment ought

to have been rendered by the district court, it appears to us that it could not grant any other against the defendants than that which they had been informed would be moved for, viz. that the execution be put in force. We are not aware of any law that authorizes, or would render available, the interference of the district court in this respect.

It is true the attorney general is authorized to proceed in any other summary way: but this summary way, alluded to in the act, must be a legal one; unless summary and arbitrary be synonimous expressions, which we cannot admit.

The only judgment we can render is, that the attorney general take nothing by his motion.

Robertson, attorney general for the state, *Seghers* for the defendants.

WIKOFF vs. *TOWNSEND & AL.*

APPEAL from the court of the first district.

If the vendor points out a vacant lot for sale, telling the vendee it has 200 feet in front, and it turns out that

DERBIGNY, J. delivered the opinion of the court. The defendants withhold the price of a lot of ground, purchased by them from the plaintiff,

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alledging they were led into an error by his agent, as to its extent.

It appears that this agent accompanied one of the defendants on the premises, and there shewed him a vacant space, which he represented as the ground which was for sale, telling him it measured two hundred feet on Bienville street, and one hundred and twenty on Rampart street: that he gave this defendant to understand, as the latter thought, that the lot extended over the whole of the vacant space, up to the next inclosure, and it turns out that twenty feet front, on Bienville street, of that ground are the property of another person.

space shewn consists in the lot, and a space of thirty feet in front belonging to another, the error of the vendee, who believes that the two hundred feet include the thirty, does not vitiate the contract.

The defendants do not complain that they were not put in possession of a lot of two hundred feet on Bienville street; but they say that they were shewn a place said to measure two hundred feet, while it incloses two hundred and thirty, and that, as they were induced by this misrepresentation to purchase, the sale ought to be rescinded.

We do not think that this is an error which vitiates the contract. The defendants understood they were purchasing a space of two hundred feet in front: they knew, or at least must be supposed to have known, what extent that was. If they wanted to satisfy themselves on

that score, they might have had it measured: but, if relying on their own judgment they made any mistake, as to the real extent of the two hundred feet, they cannot plead such a mistake as an excuse.

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

Livermore for the plaintiff, *Smith* for the defendants.

TAPPAN & AL. vs. *BRIERLY.*

If two persons jointly ship a cargo, and the consignee sell it and credit each for his share, his demand is subject to the attachment of his private creditors

After the general issue pleaded, the defendant can not shew that the property attached is not his

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The defendant is sued by attachment on two promissory notes. The process was levied on property of his in the hands of W. Boyd & son, who being interrogated as garnishees, answered that they were the consignees of a cargo shipped to New Orleans by the defendant and the firm of N. A. & Jno. Haven, and that there remained in their hands a balance of $584,97 due to the defendant, and an equal one to the other shippers.

There was an attorney appointed to attend

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TAPPAN & AL. vs BRIERLY.

to the interests of the defendant, and he pleaded the general issue.

The plaintiffs having introduced W. Boyd, one of the garnishees, to prove the defendant's signature, the counsel of the latter inquired of him, on what ground he had asserted in his answers to the interrogatories, that the defendant was owner of part of the cargo there mentioned, and was answered from a knowledge derived from the defendant's letter, and information from the captain. The question was excepted to and the exception overruled.

The district court was of opinion that the property attached, being partnership property, was not liable to the attachment of the defendant's private creditors, and dismissed the appeal. The plaintiffs appealed.

It appears to this court that the answer was irrelevant. The defendant had pleaded the general issue, and it was too late to complain of an irregularity in the execution of the process of attachment; but this does not affect the case; laying it aside, we find the interest of the defendant, in the property attached in the hands of the garnishees, sufficiently described in the hands of the garnishees.

There is not any evidence of an existing

partnership between the defendant and the other joint owners of the cargo. The joint ownership was at an end, with the transaction in which the interests of the joint owners were united. By the accounts, referred to as part of the answer to the interrogatories, and which are the only evidence of the defendant's property in the hands of the garnishees, it appears that he is entitled to $584,97, for one half of the cargo, and stands credited with that sum by the garnishees. This severed demand of his is clearly attachable for his debt.

We do not mean to intimate whether partnership property, viz. the share of a partner in it, cannot be seized by his private creditors, as the district court thinks: the solution of this question being unnecessary in the present case.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed; and it is ordered, adjudged and decreed that the plaintiffs recover from the defendant the sum of five hundred and fifty-one dollars and seventy-nine cents, with interest at five per cent. from the inception of the suit, and that the garnishees pay the said sum out of the clear funds in their hands, or the balance which they acknowledge

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to the credit of the defendant in their books, and that the defendant pay costs in both courts.

Pierce for the plaintiffs, *Carleton* for the defendant.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, MARCH TERM, 1820.

East'n District. *March*, 1820.

THE STATE vs. JUDGE LEWIS.

THE STATE vs. *JUDGE LEWIS.*

If a motion to inhibit a sale be overruled, the applicant may appeal.

7m 457
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Morel read the affidavit of P. Tricou, stating that in the month of August last, in consequence of an advertisement published in the newspapers, the sheriff of the parish of Orleans, exposed to sale a tract of land, situated in that parish, seized in the suit of *Durnford* vs. *Degruys:* the deponent, J. Tricou, and D. Bouligny, became purchasers of said tract, which was adjudicated to them for the sum of 2700 dollars, and in consequence they took possession of it; whereupon, one J. Jourdan, claiming title thereto, has instituted a suit against them therefor, which is now pending in the court of the first district, whereby they are in

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danger of being evicted from the best part of the land. The institution of this suit appearing to them a just motive to withhold the purchase money, they offered to deposit it to the order of the court; but their application therefor was overruled, and a *venditioni exponas* was directed to issue for a second sale, when in order to prevent it, under the belief that the plaintiff in the execution was able to refund the money in case of eviction, they paid to the sheriff the aforesaid sum, who having received it made his return of the *venditioni exponas* accordingly; and they hoped no further proceeding would be had thereon. But the said Durnford, the plaintiff in the execution, took a rule on the sheriff to shew cause why he should not be ordered to proceed and sell the land; and, after an argument, in which they intervened, the district court ordered a second *venditioni exponas* to issue, and the land is accordingly advertised for sale. Thinking themselves aggrieved, they moved for an injunction, which being denied, they presented a petition to the judge of said court for an appeal, who refused to allow it, although a bond with surety was offered.

On this affidavit a rule was granted on the district judge, to shew cause why a *mandamus* should not issue, commanding him to allow the appeal.

He accordingly shewed cause that the applicants were not parties to the suit, and consequently were not entitled to an appeal.

Hennen, of counsel against the rule, observed that the record did not even shew that the applicants were the party who had opposed the last order.

Morel replied, that it was otherwise, and they were certainly entitled to bring, not the cause, but the decision of the district court, on this motion, before the supreme court.

MARTIN, J. delivered the opinion of the court. The proceedings were certainly conducted very loosely, but the record which has been submitted to us, enables us to ascertain who were the applicants and their character P. L. Morel, an attorney in the district court, moved for the inhibition of the sale; the entry does not mention whose attorney he was: but the sheriff's return shews that the applicants were the last bidders at the sheriff's sale, and the reasoning in the opinion of the court that the motion overruled was that of these bidders.

If the bidders application was overruled, they have the right of bringing it under the consideration of this court. The district judge,

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therefore, erred in disallowing their prayer for an appeal. Let the *mandamus* issue.

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A note payable "on the first of May next *fixed*" is payable on that day, and no days o. grace are allowed on it

If a bank neglect to present a b ll in due time, i becomes thereby liable o the party who lodged it for collection.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. On the first of April, 1819, James Patterson made his promissory note, to the order of the defendants, payable on the first day of May, following. The expressions are "on the first day of May next *fixed*, I promise to pay Patterson & Philpot, or order, &c." The plaintiff having put this note in the Louisiana bank for collection, the bank caused a demand to be made of the maker, at the expiration of the three days of grace, to wit, on the fourth of May, and on that day had it protested for nonpayment. The plaintiff now sues the endorsers; and in case it should be decreed that they are exonerated, he calls upon the Louisiana bank as answerable for the amount, on account of neglect.

The question between the plaintiff and the endorsers is, whether a promissory note, payable on a certain day *fixed*, must be paid on that day exclusive of the days of grace. If it should

be so adjudged, the enquiry which will arise between the plaintiff and the Louisiana bank, will be, whether, as agents, they have incurred any responsibility on this occasion.

It appears that this mode of making notes payable on a certain day, with the addition of the word *fixed*, is not usual in the United States, for no case has been found where any such thing is mentioned. We would, therefore, look in vain in the law merchant, as it prevails generally through the Union, for any rule on the subject. This is an usage peculiar to our own state, and whatever be the rules by which it must be tested, they must be found at home.

By recurring to the authors who have written on the laws which formerly governed this country, we find that this manner of making promissory notes was well known to them. *Febrero, de contrs. ch.* 1.3, § 15, *no.* 11, after mentioning the different bills of exchange which are entitled to the delay of the days of grace, makes this remarkable observation; *pero i la letra dice, à tantos dias prefixos, ó à tantos dias sin mas termino, no hay cortesia, y asi debe pâgarse en el de su vencimiento.* But, if the bill says at so many days *fixed*, or, at so many days without further term, there are then no days of grace, and the bill must be paid on

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the day it becomes due. Such an authority on a point, on which the law merchant of the United States is silent, ought to be conclusive. — But the defendants oppose to it the opinion of a foreign jurist, who thinks that the word *fixed*, added to the time of payment of a bill or note, has no meaning, and ought to be considered as surplusage; and as in commercial matters Spanish laws and Spanish usages cannot, as we have already said, be deemed absolutely binding, it is not improper to examine and compare both these contrary opinions, and see which is more consonant with justice.

Jousse, in his comment on the French ordinance of 1673, declares it to be his sentiment, that in a note payable on such a day, the insertion of the word *fixed* adds nothing to the sense; and does not prevent the allowance of the days of grace; but he acknowledges, that if the note was made payable on such a day, exclusive of the days of grace, it would be payable on that day absolutely. It must be confessed, that in this latter case, there would be but little room for interpretation, and he would be obstinate indeed, who would insist on the days of grace, after such a stipulation. But, although the word *fixed* is not quite so expressive, is it true that it has no meaning? Among the definitions of

the verb *to fix*, one is *to direct without variation*, another *to establish invariably*: take either; the idea of invariability is attached to both. The word is used evidently with a view to make the payment on that day more certain, than it otherwise would be. It is a general rule, for the interpretation of contracts, to endeavor to give all the words some meaning, and to reject only those which can have no meaning at all.—Another rule to ascertain the sense of a doubtful word is, to examine with what intention the parties may have inserted it. *In conventionibus contrahentium voluntatem potius quam verba spectari placuit.* Can it be supposed that the parties in this case introduced this expression in the note without any intention, and for no purpose; an expression never used in the common manner of making notes, and which, under the former laws and usages of this country, had the effect, as *Febrero* informs us, to prevent any allowance of the days of grace? It cannot be believed. We, therefore, think that the word *fixed* was in roduced here with the intention of making the note payable on the first of May, absolutely and invariably; that a demand of payment ought to have taken place on that day: and that for want of such a demand, the endorsers

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are, according to the laws of commerce, exonerated.

The question now to be decided between the Louisiana bank and the plaintiff, is, whether the bank has incurred any responsibility as agent from neglect or unskillfulness in the management of this business? The principles in matter of agency are generally well understood. If he who undertakes the business of another is capable of managing it, and neglects to do so, with due care, he is answerable. If he is not capable, he is still answerable, for he ought not to have engaged to do that which he could not perform; *á procuratore dolum & omnem culpam, non etiam improvisum casum præstandum esse, juris auctoritate manifeste declaratur. C. L.* 13, *mand.* In this instance the bank either knew (as the defendants offered to prove) that such a note was payable exclusive of the days of grace, and not demanding payment on that day was a neglect; or they were ignorant of it, and then they undertook to perform a thing for the execution of which they had not sufficient information. In either case they have incurred responsibility. The obrervations made by their counsel, as to the nature of their agency, which was gratuitous, are of no force. The prin-

ciples above laid down govern as well in cases of gratuitous agencies, as in others. The truth is, that they are derived from the Roman law, to which no such thing was known as agency for a salary.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be reversed; and proceeding to give such judgment as we think ought to have been rendered below, we do further adjudge and decree that judgment be entered for the defendants, Patterson & Philpot, and that the plaintiff do recover against the Louisiana Bank the amount of the note here sued for, to wit, nine hundred and sixty-four dollars and ninety-three cents, with costs.

Livingston for the plaintiff, *Smith* for the endorsers, *Moreau* for the bank.

DURNFORD vs. *GROSS & WIFE.*

APPEAL from the court of the first district.

The wife is not bound by a note executed jointly with her husband.

Hennen, for the plaintiff. This is an action on a promissory note, whereby the defendants, Charles Gross and Marie Gross, his wife, bound themselves jointly and severally, to pay

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the plaintiff the sum of $3,600, for value received. The defendant, Marie Gross, contends she was not authorised by her husband to subscribe the note, and that she is not bound as the security of her husband. In discussing the question of the liability of Marie Gross, it will be necessary to examine in what manner married women may contract, and to what extent they can bind themselves by their contracts.

Though the present contract was made under our civil code, it will be useful, if not indispensable, to trace the history of the jurisprudence on the subject, down from its origin in the Roman civil law, through the codes of Spain to our own state.

The senatus consultum Velleianum prohibited all women, married and unmarried, from contracting for others. *ff.* 16. 1, *Code*, 4, 29, *Pothier's Pandects* 16, 1, 12. *Merlin's Repertoire de Jurisprudence*, 382. Verbo Senatus-Consulte Velleien. 2 *Dictionaire du Digeste* 2 9, *n.* 1610. But to the general rule were a multiplicity of exceptions, as may be seen by a recurrence to the above citations; and in all cases where the woman renounced the priviledges granted by the senatus consultum, she could bind herself. *ff.* 16, 1, 32, § 4, with Godefroy's comment, no. 15. Code 4, 29, 21, with Gode-

froy's commentary—*Voet in Pandectas* 16, no. 9. 7 *Mulleri Pomptuarium*, 760, 773. From the Roman law, the same principles were transplanted into the laws of Spain by Alphonso the wise, *Partida* 5, 12, 2 & 3. See also, the gloss of Gregorio Lopez. Further provisions were introduced by the 61st. law of Toro; *Novisima Recopilacion* 10, 11, 3. But in Spain, as well as at Rome, by renouncing in due form the above laws, the contract of a married woman became binding on her; 6 *Rodriguez's Digest*, 106. 1 *Sala*, 371, 3. 2 *Febrero, edit.* 1817. 81. *Ibid. nos.* 114, 121 The senatus consultum Velleianum was in full force in most part of France, prior to the code of Napoleon.

The present contract, under all the above laws, would have been invalid, as far as regards Marie Gross.

But I contend that our civil code has abrogated the laws of the Partidas, which introduced into Spain the provisions of the senatus consultum Velleianum; also, the laws of Toro, which prohibit women from contracting jointly with their husbands.

In the first place, the concurrence of the husband in the act is a sufficient authorisation on his part. *Civil Code*, 29, *art.* 22. And if the

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wife can bind herself at all, she has all the authorisation requisite from her husband, who binds himself jointly and severally with her.

Now, in the second place, the civil code, 341, *art.* 85, recognizes expressly the power of the wife to obligate herself jointly with her husband: it likewise, 333, *art.* 53. § 3 & 455, *art.* 17. § 3, gives the wife a priviledge or tacit mortgage on the estate of her husband, for her indemnification against any contracts for which she may have bound herself jointly with him.

In short, our civil code gives power to married women, to contract and bind themselves in all cases, except those particularly excepted by law. *Civil Code*, 265, *art.* 23, 24 & 25.

No other change was introduced by the civil code, than dispensing with the senseless formality of renouncing before a notary, in due form, the laws of the Partidas and of Toro; for, as I have already shewn, married women could, by this means, always obligate themselves.

It appears to me, no doubt can remain that these laws were abrogated by the civil code. The expressions of the code are clear, and totally irreconcilable with the old law.

Repeated decisions of the court of cassation have determined that since the publication of the

code Napoleon, the senatus consultum Velleianum has been abrogated in those parts of France, where it was followed. Our own civil code contains verbatim, the same provisions on this subject, with the code Napoleon: as far then, as the decisions of the highest court of judicature in that country can have weight, the question is settled. 12 *Merlin's Repert.* 396, 8. 5 *Merlin's Questions de Droit*, 509, 518. *Pailliet's Manuel* 81, 279.

The very case, now before this court, has been decided by the court of cassation. A married woman who subscribed a negotiable note, binding herself jointly and severally with her husband, was condemned to pay its amount, though she was not explicitly authorized by her husband. *Duchau* v. *Jaquan*, 1 *sess.* 1806. 7 *Sirey*, 2 *part*, 813. So the wife who accepts a bill of exchange, drawn on her by her husband, is sufficiently authorised by him, to bind herself as his security; and an action can be maintained on such bill against her. 4 *Sirey*, 2 *part*, 3 9. *Lamote* v. *Lacauve*. Unless the defendants' counsel can shew that these cases were incorrectly decided, this court will certainly give the same decision.

Livingston, for the defendants. In this case

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the facts on which I shall rely are simply these. Charles Gross, the husband of the defendant, Marie Gross, negociated a loan with the plaintiff for them: the money was paid to him and he secured it by a note, subscribed jointly by him and his wife. He has since become insolvent, and the defendant, Marie Gross, has obtained a separation of goods and estate. This suit is brought to make her personally responsible on the joint undertaking.

The following questions arise on these facts.

1. Can the wife bind herself without the express authorisation of the husband?

2. Are not all contracts by which a married woman, whether authorised or not, binds herself for the debt of her husband voidable by the laws now in force in this state?

3. Can the laws be renounced so as to violate the contract?

4. If they can, must not the renunciation be formal and express?

I. It is conceded on the part of the plaintiff, that, prior to the promulgation of our code, the wife could not contract without being expressly authorised by the husband: and if it be not fully admitted by the plaintiff that an implied authority was not sufficient, it is clearly

shewn by all the authorities. 2 *Febrero* 1, 8, § 4, *n* 109.

But it is argued that our *Civil Code*, 28 *art.* 22, has made the concurrence of the husband in the act a sufficient authorisation. The decisions under it in France, I acknowledge, go the full lengths contended for by the plaintiff. As these decisions carry with them no authority beyond the force of judgment, and to support them, those arguments may without presumption be canvassed, and if they are not found to support the conclusions, or if there be any difference in the law on which they are founded, the decisions themselves will have no weight. The case relied on is in 7 *Sirey*, *2nd part*, 812. There the point is indeed decided, but the decision is only supported by an assertion. *Attendu que suivant l'article du Code le concours du mari vaut autorisation*, without any reasoning whatever to support it. The next case from 14 *Sirey* contains the same assertion nearly in the same language, but no argument whatever on this point. To determine, however, whether the article relied on (*Civ. Code* 22. *art.* 28) ought to authorise this conclusion, let us examine it more closely and compare it with the pre-existing law. This law required the express, not the implied, authorisation of the hus-

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band to give validity, not only to *alienations, grants, mortgages*, or *acquisitions*, but to *promises to pay money*. By the act promulgating the code, 2 *Martin's Digest*, 96, no other part of the ancient civil laws is abrogated but what is contrary to the civil code or irreconcilable with it. The article of the code declares that unless the husband *concur in the act*, or give his consent in writing, the wife cannot *alienate, grant, mortgage, or acquire*, admitting, therefore, that the concurrence of the husband was made equivalent by this section to the authorisation formerly required, it does not touch the present case, because this is neither an *alienation*, a *grant*, a *mortgage*, nor an *acquisition*: and these are the only cases in which the law is changed, in all others it remains in force.—If the law had been intended to make the change apply to all other cases, a single word, *contracts*, would have effected the object without any enumeration of the different species of contracts. That enumeration, by the rule *expressio unius est exclusio alterius*, shews that the change was intended in the enumerated cases only, and though we have nothing to do with the wisdom of the law when it is clear, yet very good reasons may be found for the restriction. The mortgage, alienation, or acquisition

of property are always acts of more solemnity and deliberation, than the mere personal contract to pay money; and they most commonly require the advice of counsel, or friends, and generally the intervention of a notary and the presence of witnesses. It might reasonably be supposed, therefore, that the concurrence of the husband, in a solemn act of this nature, should be deemed equivalent to an express authority, but that it should not be dispensed with in the informal act of borrowing money or signing a note.

This section, also, clearly applies to property, or contracts, exclusively of her own. Our law making a clear distinction between the two cases, rendering the contracts of the wife, relative to her own affairs, valid when authorised by the husband—but giving her the power to avoid those in which she becomes bound for him, unless she knows and renounces the laws in her favor.

But a conclusive reason, that must have operated in omitting to enumerate contracts for payment of money, and rendering them more difficult of execution, is the facility that would be given to evade the laws made to secure dotal property.

The alienations mentioned in the 22nd article

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do not relate to this species of estate, because even if the husband authorized the sale, or concur in the act, it cannot be disposed of. What avail would this be if the wife, ignorant of her rights, merely by the husband's joining in a note for money borrowed, on his own account, should give the creditor a right to seize and sell the dotal property on an execution in default of payment? Therefore, I should conclude that this article relates solely to the wife's separate property and separate acts relating to it; but does not extend to contracts for the payment of money simply; still less to a contract for the use of the husband, where the wife joins only as his security. This train of reasoning appeared so conclusive, that I was at a great loss to discover why it should not have occurred to so learned a tribunal as that of cassation in France, until I discovered that there was an essential difference between the effect of the Napoleon code and that of our digest, even in cases where the one is an exact transcript of the other. Because the French code repeals all prior laws and customs in *pari materia*, whereas ours only repeals such provisions as are inconsistent with it—The last section of the law, for the promulgation of the Napoleon code, declares "From the day in which these laws are in force

—the Roman law, the ordinances, the customs, either general or local, statutes and regulations, shall cease to have the force of general or particular law, in the matters which *are the object* of the said laws which compose the code."—Now, the power of a married woman to contract, being one of the objects of the new code, all former laws on the subject are in France repealed; and as there is no authorization required by any article of the Napoleon code, other than in the particular cases there enumerated, their tribunals could give no other decision than they have given.

II. This species of contract is of a different nature from the separate personal contract of the wife. It is the subject of separate laws, and is guarded with more care.

There are several statutes in the Spanish law on the subject: one *Recop.* 5. 3 9. This expressly declares, "that the wife shall not be bound by any contract entered into for securing the husband's debt, or by any obligation in *solido*, with him to others, unless they can be shewn by the creditor, to have been applied to her benefit."

Has this law been repealed? The plaintiff thinks it has; and to shew it, he calls our at-

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tention first to our statute. *Civ. Cod.* 265. *art.* 23, 24, & 25. These provisions, however, merely say, that "married women are incapable of contracting only in cases *expressed by law*." Hence inferring, that unless the incapacity be expressed in the code, it does not exist: but the words of the articles are in cases *expressed by law* generally, not by *the laws of this code*. If, therefore, the incapacity existed in the prior law, it is not taken away by this. The next articles relied on are, first, the 55th: which declares, that notwithstanding a renunciation of the community, the wife continues bound to the creditors of the husband, *when she has obligated herself jointly with her husband*. Secondly, 53d: giving the wife a tacit mortgage for the amount of the debts for which she has bound herself jointly with her husband. And lastly, that which repeats verbatim, the provisions of the last article quoted. *Civ. Code*, 455, *art.* 17.

These are all: and these prove only that, there are circumstances under which the wife may bind herself with her husband. But they, in no sort, shew that the law allowing her to avoid her contract, is not in force. If she will not avail herself of the priviledge given by the Spanish statute, and pays the money due on a joint obligation, she shall have a lien on her

husband's property for the amount; or she may renounce the advantages secured to her by these laws. Here the debt was contracted as security in *solidum*; and then, according to the 53d article, quoted by the plaintiff, she continues bound to the creditor, although she gives up her right to the community: and thus, all the passages quoted may be satisfied, without supposing an abrogation of the Spanish law on this subject.

III. This right of renunciation, has been so repeatedly recognized in this court, that it is deemed unnecessary to argue it. It is called by the plaintiff's counsel, a senseless formality; because, by performing it, the wife could always bind herself with her husband for his debts, and render the prohibition of the law ineffectual. It is true, that by the practice established under these Spanish statutes, and by the application of the maxim, that any one may renounce what is for his benefit, a married woman may make herself the surety of her husband. But in order to effect this, the act must be passed before a sworn officer, who, before he passes it, is bound to explain fully to the wife the priviledges she enjoys and the effect of her renunciation. Surely, then, that cannot be called a sense-

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less form, which gives time for deliberation, puts the rights of the woman (frequently acting from undue influence) under the protection of the magistrate, protects her against domestic tyranny, prevents her acting until she is fully informed of her rights, and deprives her of the power of renouncing them unadvisedly.

Whether senseless, however, or wise, it has been determined to be the law, and though the plaintiff asserts that it has been abrogated by our civil code, he refers to no article as abolishing it.

Having proved that the restrictions of the Spanish law still exist, and that the provisions of the code, which recognise the force of an obligation entered into by the wife for the security of the husband, are not inconsistent with those laws, but, that they apply to the case of a renunciation which is permitted by them, I have only to shew: that

IV. Such renunciation must be express, and it is never implied, and, of course, it does not exist in the present case. *Febrero Juicios, c 3, § 1, p. 392. Contratos, ch. 4, § 4, no. 119. 117.* fully recognised in the case of *Bourcier* vs. *Lanusse*, 3 *Martin*, 585.

The undertaking, therefore, of Marie Gross,

the defendant, considered merely as her act, is void for want of express authorization of her husband.

Considered as an undertaking *in solido* with her husband, or a security for his debt, it is voidable, if not void.

And, lastly, never having renounced the right of pleading it to be void, she may in this suit exercise that right, and claim a judgment for the defendant.

Hennen, in reply. It is contended on the part of the defendant, that our civil code limits the cases in which the concurrence of the husband gives validity to the act of the wife, to those expressed in the article, to wit: mortgages, donations, grants, acquisitions; and that an express authorization is requisite, where she intends to contract jointly with her husband. But the defendant's counsel overlook the most important, because the most general, word in the text; *alienate*. The wife may *alienate* her property with the concurrence of her husband in the act.

Alienation, certainly includes every species of obligation, whereby one binds his property, or engages to perform any act, or make a payment. Such is the plain import of the word,

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alienate ; and such is the meaning given to it, by the authors of the Pandects Fran caises. *Les termes de cet article comprennent virtuellement tous les actes, tous les contrats qu'une femme peut faire, de quelque espêce & nature que ce soit ; car, tous contiennent necessairement, ou une alienation, ou une tendance a l'hypotheque ; en sorte que cet article maintient la disposition de la coutume de Paris, ne aucunement contracter.* 3 *Pand. Franc.* 398, commenting on the corresponding article of the code Napoleon, from which the article in our own is copied *verbatim.* Therefore, if the concurrence of the husband in an act of mortgage, made by his wife, is sufficient, it is, likewise, in a note of hand, where they bind themselves jointly and severally.

In further support of what I advance, I will quote the same authors, *ainsi, l'acte dans lequel le mari aura paru avec sa femme, dans lequel il aura ete en nom, soit pour y donner seulement son approbation, soit pour y stipuler conjointement avec sa femme, sera valable, et obligera regulierement la femme.* 3 *Pand. Franc.* 408.

I think there can be no doubt that the present contract is embraced in the term *alienate ;* and that there is sufficient authorization from

the husband to the wife by his concurrence in it, as a party jointly obligated.

A second question then is made by the defendants' counsel; can a married woman bind herself at all, without expressly renouncing her rights? If the civil code has abrogated the Spanish laws, or contains provisions irreconcilable with them, the question is decided.

The civil code says expressly, that married women may contract with their husbands, without any restriction, or limitation: *page* 341, *art.* 85. *page* 333, *art.* 53 *page* 455, *art.* 17. They may contract with them jointly, also, when separated in goods. *Civ. Code*, 333, *art.* 91. Now, these provisions are clearly inconsistent and irreconcilable with the 81st law of Toro, which says that a married woman cannot contract jointly with her husband *a mancomun*. And, in consequence of this change, in our jurisprudence, it was necessary to protect the rights of women, by giving them a priviledge, which they had not before, on the property of their husbands, for an indemnity of the debts contracted jointly with them. In the present case, the defendant is not simply security of her husband; she contracted and bound herself jointly and severally, *solidaire-*

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ment, with him, and is equally a party to the contract.

The defendant's counsel admits, that a contract by a married woman unauthorised by her husband, is voidable only, and not void: this is clear from the statute. *Civil Code*, 303, *art.* 204. From the same article, also, an induction may be drawn, that in all acts where the wife is authorised by her husband, the contract is valid.

The above passages from the civil code being so plain, and so directly irreconcilable with the 61st law of Toro; the defendants' counsel has resorted to a method of reconciling them which certainly cannot be supported on legal principles. He insists, that those passages of the civil code refer only to the private property of the wife, and that, in order to bind herself, she must renounce the above laws; and it was contemplated that she would do so.—But is this not adding and restricting the legislator's words, in a manner totally inconsistent with the rules of interpretation given by the code itself. "When a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit." *Civil Code*, 4, *art.* 13.

The law of Toro had become a dead letter

from the effect given to renunciations of it.— How the effect of a prohibitory law could be done away by renouncing it, appears absurd and illegal to the annotator on *Febrero*, *edit.* 1817, *vol.* 2, *page* 92, note to *n.* 117, and must revolt common sense. But, such being the old law, and the evil of it being evident, the civil code gave power to married women to contract, with the authorisation of their husbands, in all but specified cases; and, in order to secure them against the loss of their property, to which they were before exposed, gave them an indemnity on the estate of their husbands.

Thus our civil code reduced the laws to the standard of common sense, and introduced a most important remedy for the effect of those interpretations which repealed laws by renouncing them. For, where was the advantage of such laws in favor of women, if they could at any time renounce them, and thus expose themselves to the very evils which they were intended to remedy, and that too without any hope of an indemnity.

The counsel for the defendants acknowledges that the cases, I have quoted from the Sirey, go the full length that I contend for; but says that, the general provision repealing all the Roman laws *in pari materia*, with the code Napo-

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leon is the foundation of those decisions. The court of cassation, however, refer (12 *Merlin*, 393) to the 1481 art. of the code Napoleon, as proof of the power of a married woman to bind herself jointly with her husband. That article is substantially the same, as the art. 53 § 3 of the civil code, in page 333, and art. 17, in page 455.

The decisions of the court of cassation, I do not urge as absolute authority in this court. I refer to them only as the reasoning and opinions of learned men; they throw much light on this subject, and are, in my opinion, conclusive.

DERBIGNY, J. delivered the opinion of the court. The defendant has subscribed, conjointly with her husband, a promissory note to the order of the plaintiff. Her husband is now insolvent, and the plaintiff demands of her the full amount of the note.

To that demand she opposes several objections, the most important of which are,

1. That she was not authorised by her husband, in the manner required by law, to contract this pretended debt.

2. That supposing such authorization to have been given, the obligation on which she is sued is void, or at least, voidable.

I. The wife cannot contract without the authorisation of her husband, that is the general principle. How is that authorisation to be given, is the question to be examined here.

It was by the ancient laws, and we believe it is still, required that the authorisation be express, not tacit *La licencia ha de ser expresa, pues no basta la tacita*," says Febrero. The plain sense of which is, that the authorisation must appear from some declaration or act of the husband, and shall not be implied from his silence or tacit acquiescence. The defendant seems to think that nothing will amount to an express authorisation, unless the word authorise be itself used, and he quotes Pothier, who calls that word sacramental, consecrated, indispensable. It appears, indeed, that such was formerly the general opinion of French jurisconsults, within the jurisdiction of the parliament of Paris, founded, as that of Pothier, in the expressions of the 223d article of the custom of Paris. *See Merlin's Repertoire de jurisp. V. autorisation maritale, sect.* 6. But with any opinion, which may have been entertained there, as to the correct interpretation of that article, we have nothing to do. Our own authors, commenting upon our own laws, have told how an express authorisation is under-

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stood to be given by the husband to the wife. With them the word authorise has no peculiar and exclusive power. Any expression, or any act, which clearly shews the intention of the husband to authorise his wife, amounts to an authorisation: a construction, we must confess, which, however inferior it may be, in technical nicety, is certainly more satisfactory to reason. Among the variety of instances enumerated by Febrero, where the authorisation, though not called by its name, is deemed sufficiently manifest, is the very case under consideration. The authorisation needs not be expressly mentioned, where husband and wife enter jointly into a contract with a third person, for by that fact itself, it is evident that, the husband gives it, though it is not expressed: *Ni la necesita quando ambos juntos de mancomun ortogan algun contrato, con tercero, pues por el mismo hecho es visto darsela, aunque no se exprese. Febrero de escr. c.* 4, § 4. *n.* 111. Upon this point, then, there is no difficulty. Whether we follow the doctrine laid down by the Spanish jurists, or the present opinion of the French under the code, the result must be that the concurrence of the husband, in the act, amounts to an express authorisation.

II. The other question is far more important, and we approach it with diffidence. Has our civil code so altered the former laws, that the wife can now bind herself jointly with her husband in every case absolutely and unconditionally?

Our code has, in several places, recognised, in a collateral manner, that the wife may contract debts jointly with her husband. Is that an innovation? The plaintiff contends that it is, and relies on the 61st law of Toro, so often cited, as establishing that the wife could not formerly enter into any such contract. It is, therefore, necessary first to resort to that law in order to verify whether it contains the alledged prohibition; the words of it are as follows: *De aqui adelante la muger no se pueda obligar por fiadora de su marido, aunque se diga, y alegue que se convertió la tal deuda en provecho de la muger. Y asimismo mandamos que quando se obligazen à mancomun marido y muger en un contrato, ó en diversos, que la muger ne sea obligada à cosa alguna: salvo si se probare que se convertió a tal deuda en provecho de ella; ca entonces mandamos que por rata del dicho provecho sea obligada; pero si lo que se convertió en provecho de ella fue en las cosas que el marido le era obligado à dar, asi como vestir la y darle de*

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comer, y las otras cosas necessarias, mandamos que por esto ella no sea obligada á cosa alguna. "From henceforward, it shall not be lawful for the wife to bind herself as security for her husband, although it should be alledged that the debt was converted to her benefit; and we do also order that when the husband and wife shall obligate themselves jointly in one contract or severally, the wife shall not be bound in any thing, unless it shall be proved that the debt was converted to her benefit, and she shall then be bound in proportion to what shall have been so applied. But, if the debt so applied to her use, served only to procure that which her husband was obliged to supply her with, such as food, clothing and other necessaries, then we say that she shall not be bound in any thing." The simple reading of that law shows not only that it was not forbidden to the wife to contract jointly with her husband, but that it was expressly recognized that she could. The prohibition, which it contains, is only as to her being security for her husband, which is, in no case, permitted. But it is positively said that she may contract obligations *in solidum* with him. The only restriction is that she is bound conditionally; if the debt is converted to her benefit, she is

bound; in the contrary case she is not. Now when our code speaks of debts, which the wife may contract jointly with her husband, does it innovate? No: so far from innovating it must be taken as referring to the existing laws, for the wife could make such contracts before. Does it remove the restriction imposed in such cases? It would, if that restriction was contrary to the dispositions contained in the code, or irreconcilable with them. Is there any such incompatibility? We cannot perceive any.

We are, therefore, bound to say, that the restriction imposed by the Spanish laws on the obligations, contracted by the wife jointly with her husband, has not ceased to be in force, and that, according to it, when the creditor wishes to compel her to the performance of such an obligation, he must prove that the debt was converted to her benefit. Whether that restriction was attended with inconvenience is not for us to consider. Our duty is to declare the law, not to modify it.

In this case, therefore, no proof having been made that the debt contracted by the defendant jointly with her husband was applied to her use, in the manner required by law, we must

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say that the plaintiff cannot recover; and this view of the subject precluding the necessity of investigating the other points of the defence, we dismiss their consideration.

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

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An appeal lies from a judgment of nonsuit. There cannot be a nonsuit after a general verdict. If the judgment is reversed, and there is no statement of facts, the supreme court cannot proceed to judgment on issues found generally, in which the jury pronounced on the law and the fact.

APPEAL from the court of the second district.

The plaintiffs claimed an undivided half of a tract of land, which they alledged to have been, at the death of their father, the common property of their parents.

The defendant pleaded the general issue, expressly denying that the plaintiffs' father had any title to the land; alleging that, if he had, at his death, it became the property of the widow, according to law; that he bought it of her, and one of the plaintiffs, attested the bill of sale, as a witness; that he had been in quiet possession since 1816, and the plaintiffs have, respectively, received from the widow, the price of

* MARTIN, J. did not join in this opinion, having some interest in the decision of the question of law arising in it.

their portion of the land, which made part of the estate of their father.

The case was submitted to the jury, on the following issues:

Was not the land, the common property of the plaintiffs' parents, at the death of their father?

How long had they been in possession of it?

Was the heir, who attested the bill of sale, of age at the time?

Had not the defendant been in quiet possession one year, at the commencement of the suit?

Did not the land become the property of the widow, *by adjudication, or the plaintiff's consent*, at its valuation?

Did she not pay this valuation?

Did not the plaintiffs reside in the parish, at the time the widow sold the land to the defendant, and was not her deed attested by one of them?

The jury found that the land belonged to the plaintiffs' parents.

That it had belonged to them for fifteen years.

That the heir, who attested the deed, was then of age.

That the defendant had been in quiet possession a twelvemonth, at the inception of the suit.

That the widow remained the real proprietor

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of the land, for the price of its valuation, at the death of her husband.

That she paid to all the plaintiffs, except one, their respective shares of the price.

That the plaintiffs were in the parish, when the widow sold the land to the defendant, and one of them attested her deed.

After the finding of the jury was recorded, there was judgment of non suit, with costs to be paid by the plaintiffs, on their own motion, and the defendant appealed.

Eustis, for the defendant. It is incumbent on us to shew, that, an appeal will lie in this case, and that there is error apparent on the record, that injustice has been done, and that we are entitled to relief.

This appeal is taken from a non-suit, as it is styled. This is a final judgment. It is such an one, as will support an appeal. 2 *Martin*, 135, *Lefevre* v. *Broussard*. The law of 1807, authorised appeals to the late superior court, from all final judgments and the court sustained an appeal, from a judgment of non-suit, under this act. "By the court—An appeal surely lies from a judgment of non-suit. If it was otherwise, the party injured would be without a remedy."

It appears from the record, that the matter in dispute exceeds the sum of $300, as the plaintiffs claim one thousand.

The court below erred in permitting the plaintiffs to be non-suited, after a verdict was pronounced and recorded. The term non-suit, though not recognized by any of our statutes, has crept into the practice of our courts. It is frequently used in their rules and proceedings, and is mentioned in the reports. It is a common law expression, and our courts have given it the same effect as it has at common law. Thus, it is held to be no bar to another action, and is sometimes ordered on the non-appearance of the plaintiff. If we consider a non-suit, in its common law import, a non-suit after verdict, would be quite an anomaly in judicial proceedings. 3 *Blackstone's Com.* 376. *Sellon's Practice*, 463, 4: in the latter it is observed, "If once he suffers the jury to pronounce their verdict, he cannot prevent its being recorded and elect to be non-suited."

A discontinuance has been granted after a special verdict. 1 *Salkeld*, 178. The difference between a discontinuance and a non-suit, is evident, and is fully shewn in 3 *Blackstone's Com.* 296.

If the court should consider the non-suit as

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merely a *renunciatio litis* on the part of the plaintiffs in the court below, from the principles laid down in the case of *Hunt* v. *Morris*, 6 *Martin*, the judgment of the court must be annulled. In that case, the court say that in matters of this sort, the judge is bound to exercise a "sound legal discretion;" and the decision of the district court, in refusing to grant a discontinuance after the evidence was closed and the argument opened, was sustained. It cannot be called legal discretion to permit a party to withdraw from court after there is a verdict against him, after the matter in dispute has been decided by his peers. Indeed, if this practice be introduced, our trials by jury will become useless: the defendants will be at the mercy of plaintiffs; for, if a verdict is against them, they can retire, renew their strength, return and persevere in the contest, until a jury can be found, who will decide in their favor. The only mean of avoiding these difficulties is to make a verdict, in the court where it is rendered, *res judicata* between the parties; subject, at the same time, to motions for new trial, and in arrest of judgment, and to appeals to this court. The party, if he thinks himself aggrieved, has the remedies afforded him by law, which are sufficient to meet every case of grievance which

can be imagined: and, it is conceived, that it is inexpedient in the present liberal state of our practice, to render it still more difficult to bring suits to a termination.

This case comes up without any statement of facts, or bill of exceptions. The special verdict alone, affords to this court every means of forming a proper opinion of its merits. Nothing appears on the record to impair its validity; and this court must support it. On the part of the appellant, we respectfully request such a judgment from this court, as the court below ought to have given on the verdict. We think we have shewn that the court erred in permitting the plaintiffs to become non-suit, and will attempt to satisfy the court of the propriety of rendering a judgment for the appellant, quieting him in the possession of the land in question.

It has been decided that, "the finding of a jury must be understood with a reference to the pleadings." 5 *Martin*, 454. This rule is equally the dictate of common sense, and the principles of law. The practice in our courts, of submitting facts to the jury, requires such a rule as this to prevent abuses, which might be made of ignorance of juries. In the statement of facts, law terms are frequently used; which all juries cannot be expected to understand; and their

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verdicts are returned in common language, which would not be decisive of the questions propounded, did not courts give effect to their import under the principle just quoted.

The plaintiffs, in this case, claim one half of a tract of land described in the petition, as belonging to their deceased father, of whom they are the heirs. They aver, that at the death of their father, the property of the *community* (which subsisted between their mother and deceased father; in which this land must have been included, as they only claim one half of it, as heirs of their father) was inventoried and sold: that the land in question was not sold: that their mother took possession of it, intermarried with one Augustin, and with her husband, sold the land to defendant in 1816, who is now in possession.

The answer denies generally, the allegations of the petition: pleads in substance, that at the death of the plaintiffs ancestor, the land was adjudicated to his widow; that he has been in peaceable possession more than one year.

The only question which now presents itself is, whether at the death of Chedoteau, the ancestor, his widow became proprietor of the portion of the land, claimed by the plaintiffs.

It is admitted by the petition, that the defendant

purchased of the widow Chedoteau and her second husband, and that he has been in possession since 1816.

The jury find that the land belonged to Chedeteau and his wife—that the defendant has been more than a year in peaceable possession; that the widow Chedoteau remained real proprietor of the land at the price of the estimation, at the death of Chedoteau; that the widow has paid the price to all the heirs except one. The other facts found are immaterial.

The fifth fact found by the jury decides the cause. They have determined that the land was the joint property of the husband and wife, and on the demise of the former, the latter became proprietor of the land at the price of the estimation.

The jury was not composed of civilians; their verdict is not couched in the technical language of the law. It is not probable that they all knew the meaning of "adjudication," and they certainly evinced their discretion in not dealing in language, which they might not fully have understood. They have expressed their meaning in plain language, which no ingenuity can distort, and which cannot be misunderstood. All we ask is, that effect may be given to the verdict, that the defendant may not

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be harassed with another suit, after a jury have decided this in his favor.

Morse, for the plaintiffs. The defendant's counsel, to shew that an appeal lies in this case, relies alone on the decision of the late superior court, in the case of *Lefevre* vs. *Broussard*. 2 *Martin*, 135, in which the court has said "an appeal surely lies from a judgment of non-suit." Had the court stopped here, the question would have been settled; but they have thought proper to proceed, in giving their reason for that opinion, in the following words: "If it was otherwise the party injured would be without a remedy."

Now, if this court should find, upon examination, that the present case differs so materially from the one cited from *Martin*, that the reason given by the court, in the latter case, cannot be made to apply to the other, I should imagine this court would not hesitate to say, that the case cited was of no authority; it being a maxim of reason as well as law that where the reason of the principle or authority ceases to apply, there the authority must also cease. Let us examine the two cases and ascertain wherein the difference exists.

The case, cited as authority from 2 *Martin*,

was that of a peremptory nonsuit, ordered by the court against the will and consent of the plaintiff, and from which, considering himself aggrieved, he prayed an appeal to the superior court. Here, we find, the reason of the learned judge applies with full force in maintaining the appeal: "If it were otherwise," says he, "the party injured would be without a remedy. For," continues the same judge, "although he might bring a new suit, the parish court would likely give the same judgment," and the party injured would never obtain justice.

Here also we find the injury, and the injured party appealing to a higher tribunal to obtain redress, and the reason of the court was well applied in sustaining the appeal in such a case; were it otherwise there would have been a denial of ordinary justice.

In the case now before the court, is there the slightest resemblance in any feature? In that case the nonsuit was the unsolicited order of the court, against the consent and the interests of the plaintiff.

In the present case, the nonsuit was a voluntary act of the plaintiffs', and solicited by them from the court, and for which they were willing to pay the costs. In that case, the party injured appealed. In this, the party defendant,

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who has sustained no injury. In short, in that case there was an actual injury, which the appellate court was bound to enquire into and remedy. But in this case, there has been no other injury sustained than to the plaintiffs, which it appears was at their own solicitation, and which they are willing to submit to.

Whether the plaintiffs had sufficient reasons for adopting this course, is not, I presume, a question for the decision of this court.

Hundreds of cases may, and do daily, occur wherein it is prudent in plaintiffs' counsel to submit rather to the inconvenience and expense of a non-suit, than risk the final decision of an important cause. New and important points may arise in the progress of the cause, which counsel did not foresee, or were unprepared for; the establishment of facts rendered necessary on the trial of the cause, and after the jury had passed upon those submitted to them, which were not before deemed important; these and many others, which will suggest themselves to the court, may render it advisable to pursue the course which the plaintiffs have done in this case.

Of what, then, does the defendant complain? Actual injury; it is admitted he has sustained none. The plaintiffs have already paid the

price of their non-suit. What more, then, can the defendant, in justice, wish or desire? For my part I cannot conceive, unless like one of Cervantes' kings, "he wants better bread than that made of wheat."

But the counsel tell us, that although his client has yet sustained no injury that can give this court jurisdiction, yet that he is in dread of something that is to happen, from which he may possibly suffer.

This something we are gravely told is this, that if the plaintiffs are permitted to avail themselves of their non-suit, "they can retire, renew their strength, return, persevere in the contest until they can find a jury who will decide in their favor," which means, I presume, in plain English, that the plaintiffs can institute another suit—admitted—in doing this, the plaintiffs' object must be either to oppress the defendant, and impose on the court, or to obtain justice; if the latter, I really see nothing in the attempt, calculated to alarm the defendant or his counsel, much less to cause all those disastrous consequences which they seem to apprehend.

If, however, the plaintiffs are influenced by a disposition to harrass and oppress the defendant and trifle with the court, ought we not to presume that the learned judge of the district,

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possesses sufficient discernment to distinguish, and energy enough to protect the one and punish the other. What danger can possibly result to any one, in leaving to the district judge the exercise of a proper discretion to act as circumstances may render it expedient? The conduct of both parties is before him, and the insult, if any, is to the court over which he presides.—In whom then, I would ask, can this discretion be so properly invested? The appellant's counsel says in this court, and tells us that the only mean of avoiding these difficulties is for this court to make a verdict in the court where it is rendered *res judicata*, between the parties.

This, I conceive, could have no other effect than to deprive the district judge of all discretionary powers, and render him worse than a nullity on his own bench.

II. Is there error apparent on the face of the record, or, has the district judge erred in giving judgment of non-suit? It is contended by the appellant's counsel, that the appellees were not entitled to a nonsuit after verdict recorded. Trial by jury being unknown to the civil law, we are referred by the appellant's counsel to the common law of England, whence we have bor-

rowed that mode of trial with all its incidents, and we are told by the same counsel, that "if we consider a nonsuit in its common law import, a nonsuit after verdict would be quite an anomaly in judicial proceedings." If, as the gentleman contends, the common law is to be our rule of decision, I apprehend the gentleman has entirely mistaken it. I contend that, by the common law judgment of nonsuit might be rendered at any time either before or after verdict. In support of this principle I have high, and, I presume, unquestionable authority. Such, I am prepared to shew, was always the common law of England, and so considered there by the judges, until the passage of the statute of 2 *Henry* IV.

I refer the court to Coke on Littleton 140, § 209 *N.* where we find the principle clearly established. "At the common law," says the author," "upon every continuance or day given over before judgment, the plaintiff might have been nonsuited, and, therefore, before the statute of 2 *Hen.* 4, *after verdict given*, if the court gave a day to be advised, at that day the plaintiff was demandable, and, therefore, might have been nonsuit."

The same doctrine is also found in 5 *Bacon's Abridgment* 144. "At common law upon eve-

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ry continuance the plaintiff was demandable, and upon his non-appearance might have been nonsuit," and in 5 *Modern*, 208, if further authority is required, a strong case is presented, it is said "at common law, if the plaintiff did not like the damages given by the jury, he might be nonsuit." Unless the appellant's counsel is prepared to shew that the statute 2 *Hen.* 4, is in force in Louisiana, the powers of the judges must, I presume, remain as at common law.

These authorities, as well as the statute 2 *Hen.* 4, the court will observe, relate to general verdicts, and should there still remain any doubt in the minds of this court, as to the propriety of nonsuiting the plaintiff, after a general verdict, I believe it has never been seriously questioned, that after a special verdict it may be done: such is the daily practice in England, even subsequent to the statute of *Henry*. Bacon, observing on this statute, says, "but, notwithstanding this statute, the plaintiff may be nonsuited after a special verdict, or after a demurrer and argument thereon." 5 *Bacon's Abridgment* 144.

Will it be contended that the verdit in this case is a general verdict? In my opinion it resembles every thing else but that. It decides no law, nor is there any general finding either

for plaintiff, or defendant, but a special finding of certain facts submitted to them, and upon which no general verdict under the law could have been found by the jury, or received by the court.

If, then, the verdict is special, the district judge did not err in granting judgment of nonsuit after verdict rendered and recorded. But here a question of some considerable importance to the practice of our courts presents itself for examination.

Has the verdict in this case ever been legally rendered, or recorded?

If the common law practice is to be our guide, this question must be answered in the negative.

By that practice it is necessary to call the plaintiff before the verdict is rendered or recorded; this does not appear from the record to have been done, and what does not appear there, this court is bound to presume, did not take place. "Whereupon, says judge Blackstone, the crier is ordered to call the plaintiff, and if neither he nor any body for him appears, he is non-suited—the jurors are discharged—the action is at an end, and the defendant shall recover his costs." 3 *Comm.* 376. When the jury returned with their verdict, in this case, it should appear on record that the plaintiff

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was duly called, before the verdict was rendered, in order to give him an opportunity of being present and electing to receive the verdict, or by withdrawing submit to a non-suit, which he could have no opportunity of doing if the verdict can be recorded in his absence, and become final and conclusive without any notification to him, unless the court can presume that the plaintiff is like the king of England always present in court.

III. It is contended, in the third place, that injustice has been done to the appellant, and that he is entitled to relief.

On this point I do not think it necessary to trouble the court with any further remarks. I have not been able to discover any injury which the appellant has sustained, or is likely to sustain.

But, on the other side, I see a serious and irreparable injury to the appellees, should they be excluded by a final judgment from the further pursuit of their just claims against the appellant.

Livermore, in reply. The district court erred in not giving to the appellant a judgment upon the verdict, and in allowing the plaintiffs to become non-suit. The defendant is injured

thereby, and this court has the power to grant relief.

The counsel for the appellees maintains, that a plaintiff may be non-suited at any time before final judgment; even after a general verdict for the defendant. The process of reasoning, by which he attempts to establish this doctrine, is rather singular. Such, he says, was the common law of England, before the statute 2 *Henry* 4, *ch.* 7; and such, he adds, must be the rule here, unless we can shew that statute to be in force in Louisiana. I will answer the gentleman in this way: the statute 2 *Henry* 4, *ch.* 7, is as much in force in Louisiana, as the old common law of England.

When the ordinance for the government of the northwestern territory gave to the people of that territory the priviledge of a trial by jury, it was not intended that this trial should be according to the course of the old common law, as it stood in the earliest age of the English monarchy, but the trial by jury with all its improvements, as it existed in England, at the period of our independence in 1776, and in the original states of the union, at the time of the ordinance in 1787.

In the time of Henry the fourth, the trial by jury differed in many most essential points from the trial by jury of the present day. At that

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time, new trials were unknown; and the only mode, by which a party could be relieved against a false verdict, was by process of attaint against the jury. The effect of this process was, not only to relieve the party, but to render the former jurors infamous; to confiscate their goods, and to plough up their lands. Will the gentleman pretend that these are incidents of the trial by jury, as established by the ordinance of 1787.

The ordinance was afterwards extended by an act of congress to the territory of Orleans; and the trial by jury, given by our laws since the territory became a state, must be taken to be such a mode of trial as had been previously introduced. The right to a trial by jury is given in general terms; but the incidents to that mode of trial are not enumerated. Will the the court go back to the 12th, 13th, or 14th centuries, to ascertain what are those incidents? Will it not rather be considered, that the legislature intended to establish the mode of trial which existed in the United States?

The common law existing in the United States, at the time this country was ceded by France, is not the common law of England which existed at the time of William the conqueror, or of the Plantagenets. It is the com-

mon law of England with all its improvements, to the time of our revolution. Many of these improvements have been introduced by positive statutes; others by judicial decisions. The state of society has altogether changed; and a general amelioration of the laws has kept pace with the improvement in manners. Much has been done by the courts, in applying the general principles of law, to the new questions arising out of a change of manners and an enlarged commerce. But the authority of parliament has been often required, to supply the defect of power in the courts of law. Statutes have therefore been made to amend the common law; and in all the states in the union, where the common law is in force, these statutes in amendment of that common law are considered as a part of it. The statute *de donis* of Edward the first, has never been a favorite in this country; and yet it has been considered as law, and all the devices, invented in England for eluding its provisions and docking entails, have been used, and legislative enactments have also been made to facilitate the same purpose. The statute of wills of Henry the eighth, the statute of Elizabeth, against fraudulent conveyances, the statute of uses, the statute of frauds, the statute of additions, the statute of jeofails, &c. &c. have

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all the force of law in the original states of the union, as a part of the common law. Costs were first given by the statute of Gloucester. These are merely taken as instances.

Whatever, then, may have been the rule of the common law previous to the statute of Henry the fourth, I believe the court will have no hesitation in saying, that, at this day, a plaintiff cannot be non-suited after verdict. But, independent of that statute, the plaintiffs were not properly non-suited in this case. When this non-suit was entered, the plaintiffs were not demandable. Before a verdict is received, the plaintiff may be non-suited; but not *in the same term afterwards*, even by the old common law. The plaintiff is demandable to hear the verdict, and he may prevent the verdict from being received, by voluntarily withdrawing himself, and submitting to a non-suit. But if he suffer the verdict to be received, he is concluded. Even according to the old law, it was only where the court gave a day until the next term to consider of their judgment to be rendered upon the verdict, that the plaintiff might then be called and non-suited. This will appear by the authorities cited by the counsel for the appellees. "Upon every continuance or day given over before judgment," are the words of Lord Coke,

quoted by the gentleman. In the case now before this court, the district court, *gave no day to be advised;* but the non-suit, was granted upon the plaintiffs' own motion immediately after the verdict was recorded. I will refer the court to some further authorities. "The plaintiff cannot be non-suited on the same day that he has appeared in court." 2 *Roll. Abr.* 131. *D. pl.* 1. cites 3 *H.* 4, 2. Here the plaintiffs were in court to receive the verdict. "If the defendant wage his law, and the plaintiff impart until another day of the same term, on that day the plaintiff cannot be non-suit. 2 *Roll. Abr.* 131. *D pl.* 9. cites 3 *H.* 6, 50. "But otherwise, if the impartance be to another term." 2 *Roll. Abr.* 131. *D. pl.* 10. cites 3 *H.* 6, 50.

That the plaintiffs were in court to hear the verdict is a presumption of law, which cannot be controverted, when the verdict has been recorded. It is said that this ought to appear of record. Such is not the practice; and it is not necessary. It was formerly usual to call the plaintiff, when the jury were about to give in their verdict; but it was done for a very different reason from that stated by the appellees' counsel. *Tidd's Practice*, 796. It is not the practice in Massachusetts or New Hampshire; though it is in New-York and Maryland. It

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is not the practice here, and it never appears as part of the record. But a court will not receive a verdict in the absence of the plaintiff and his counsel. Therefore, he must be presumed to be present when the verdict is received.

It is contended, in the next place, that this is not a general, but a special verdict, and that a plaintiff may be nonsuited after a special verdict. The gentleman says, that it is a common practice in England, for the plaintiff to be nonsuited after a special verdict. He has shewn no case in support of this assumption; and I have not been able to find any. We are merely referred to Bacon's Abridgment, and we have merely that to rest upon; for Bacon cites no case which supports him. There is no such case. After the verdict is received and recorded, the plaintiff could not be demanded the same term. It was only in a case, where the court gave a day until the next term to consider of their judgment to be rendered upon the special verdict, that the plaintiff could be nonsuited. It is of this case, rather than the case of a general verdict, that Lord Coke speaks; for a judgment upon a general verdict does not require deliberation. The fact is, that Bacon has inaccurately confounded a non-suit with a

discontinuance. A discontinuance is a side-bar rule, which may be granted at any time; but always under the direction of the court. It is necessary to ask leave. *Phillips* vs. *Echard*, *Cro. Jac.* 35.

The verdict in this case was not however a special verdict. It was a general verdict. We must not be misled by names; but consider the substance of this verdict as connected with the pleadings. In applying the rules of the common law to the trial by jury in this state, it is necessary that the court should attend to the distinctions growing out of the different state of pleading. In England, an issue is agreed upon by the parties in pleading, and a jury is impannelled to try this issue. In Louisiana, the science of pleading is unknown; and a cause is submitted to a jury upon the petition and answer, without a replication, and with no precise issue fixed by the pleadings. By an act of the legislature, the parties are entitled to submit facts to be found by the jury; and it is provided that these facts shall be such as naturally arise upon the petition and answer, and that the finding of the jury shall be conclusive. Although, under this system an issue, which must decide the cause, is not technically and formally presented to the jury; yet I conceive

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that it was substantially done in this case. A general verdict is not necessarily in the terms of a general issue; but is properly defined to be "a finding by the jury, in the terms of the issue, or issues, referred to them." *Tidd's Practice*, 798. Now, in this case, the plaintiffs claimed the land as belonging to the community formerly subsisting between Chedoteau, their ancestor, and his wife; and they alledge, that she has sold the land to the defendant. The defendant answers, that the land had been legally adjudicated to the wife; and the question is put to the jury, whether there had been such an adjudication. This is an issue agreed upon between the parties, and the jury have found it generally for the defendant. If they had found certain facts, and prayed the advice of the court, whether these facts amounted to an adjudication or not, it would have been a special verdict. But they have found the very fact in issue between the parties; and this is a general verdict.

I have so far considered this question according to the rules of the common law. It may, however, admit of some doubt, whether the doctrine of nonsuits is necessarily introduced, as an incident to the trial by jury. After the verdict is received, the jury have nothing

more to do with the cause. It is then before the court, and the question, whether the plaintiff may be permitted to discontinue, must be decided according to the principles settled in *Hunt* vs. *Morris*, 6 *Martin*, 676. In that case it was decided, that it was discretionary with the court, before whom the cause is pending, to permit, or not, a discontinuance; not an arbitrary discretion, but a sound legal discretion, of the proper exercise of which the supreme court may judge. *Broussard* vs. *Trahan's heirs*, 4 *Martin*, 489. If the doctrine contended for on the part of the appellees is to be admitted, the consequence will be that the act of the legislature, under which special facts are submitted to a jury, will give to plaintiffs a most unreasonable advantage; such an advantage as is given to a party by no other system of laws. A defendant cannot be nonsuited, nor can he discontinue. Any judgment against him must be conclusive. He cannot take the chance of a verdict in his favor from one jury, with the liberty of submitting the cause to another jury, in case the decision should be against him. The argument of the court, in the case of *Hunt* vs. *Morris*, was very strong against the plaintiff's right to discontinue after a cause had been submitted to the judge but before a decision; but

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this case is much stronger. In that case the discontinuance was asked for, upon the plaintiff's own conviction that his evidence was insufficient, and without taking the chance of any decision in his favor. But in this case, the plaintiffs took the chance of the jury finding the issues in their favor; and, if the issues had been found in their favor the defendant would have been concluded thereby. The same course may be pursued in any other cause, and, if the argument on the part of the appellees be correct, the plaintiff can in no case suffer, but may deprive the defendant of all the benefit of a jury trial by submitting facts.

It is contended, that the defendant has sustained no injury from this judgment, and the gentleman has brought his wit in aid of his argument, and quoted *Cervantes* among his other books of authority. The defendant wants no "better bread" than he is entitled to. He wishes to be quieted in his title; and he finds a serious injury in having a suit hanging over him, and affecting his title to his land, when it ought to have been determined by the verdict of the jury. The defendant may wish to sell this land; but, so long as his title is disputed by these plaintiffs, he cannot find purchasers.

If we are to consider this as a discontinuance

granted by the court in the exercise of its discretionary power, we must enquire whether this discretion was properly exercised? It is found by the jury, that this land was adjudicated to the widow of Chedoteau, that the portions of the heirs, the plaintiffs in this cause, were paid to them by the widow, according to the price at which the land was estimated; and, also, that one of the plaintiffs was a witness to the sale to the defendant and did not object. The verdict decides the legal title to be in the defendant, and it, also, decides, that the plaintiffs have no equity; for they have received the price of the land. It only remains to be enquired, whether the record contains sufficient matter, upon which the court can pronounce a conclusive decree in favor of the defendant; and whether the cause is properly before the court upon the appeal, so as to enable them to make such a decree. Upon this part of the case, I shall add but little to what my colleague has advanced in the opening. Was not the plea, that this land had been legally adjudicated to the widow of Chedoteau, and that she had sold it to the defendant, a complete bar to the plaintiffs action? Of this there can be no doubt.—Has not this fact been found in favor of the defendant? The finding of a jury is not to be

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construed with the same strictness as a plea.—Because every one must order his plea according to the rules of law; but it is otherwise of a verdict, for that is the saying of laymen. 2 *Saunders' Rep.* 97. *Cro. Eliz.* 482. 6 *Rep.* 26. *Vaughan*, 77.

The last question is upon the appeal. If the defendant was entitled to a peremptory judgment in the court below, and that judgment has not been given to him, but the cause has been suffered to go off, leaving him exposed to a new action for the same cause, there can be no doubt that an appeal lies. An appeal lies upon interlocutory judgments, when a party would suffer an irreparable injury, if the appeal were not sustained. As in the case stated by *Scævola. ff.* 49, 5, 2; and, as this court has decided, upon the refusal to grant a continuance, *Broussard* vs. *Trahan's heirs*, 4 *Martin*, 489. Upon all final judgments an appeal lies. And upon all final judgments the party, in whose favor the judgment is rendered, may appeal, provided the judgment does not give him the full relief to which he was entitled. In *Lynch* vs. *Postlethwaite*, the judgment of the district court was in favor of the plaintiff; but this court sustained his appeal, because that judgment did not give him full relief. In this case there can

be no doubt that the judgment of nonsuit was a final judgment. It made a final disposition of the cause before the court; but it did not dispose of it in the manner that it should have been disposed of. If the plaintiffs were to bring a new action, it would not be a continuance of the former action, but a new suit. A new *contestatio litis* must intervene. The judgment in this case was a final judgment. It was not the judgment to which the defendant was entitled, and I have no doubt this court will render that definitive judgment which the law requires upon the finding of the jury.

MARTIN, J. delivered the opinion of the court. The plaintiffs' counsel contends that the judgment, in this case, was not appealable from, and that they had a right to demand a nonsuit. These positions are denied by the defendant, who contends that judgment ought to have been rendered for him.

There is not any statement of facts, but the defendant has assigned error on the face of the record.

A judgment of nonsuit may be appealed from; for it is final, not indeed as to matter in controversy, but as to the suit, to which it puts an end. In the act of 1813 the word final is

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used in contradistinction with the word interlocutory. Interlocutory judgments may be appealed from, where they work an irreparable injury: final ones, in every case where the value of the thing claimed authorises it.

It is contended that the plaintiffs had a right to a nonsuit, because at common law, and until the statute of Henry IV. plaintiffs could be nonsuited, even after a verdict. Further, that the statute of that king does not forbid a nonsuit after a special verdict.

The plaintiffs urge that the trial by jury came to us from the common law of England, and therefore must be considered according to common law principles, unmodified by any statute, while the defendant argues that the common law must be understood with all the amendments introduced by the statutes passed before the declaration of independence.

The trial by jury came to us a part of the law of England, both common and statute, which the first English settlers brought over, when they left England. At that time the common law was modified by the statute, so far as to prevent a nonsuit, as a matter of right, after a general verdict at least. It had been so for upwards of two centuries. How far the English statutes posterior to the departure of the

first settlers, be in force in the United States, or any of them, is a question which it is unnecessary to determine in the present case.

It appears also unnecessary to inquire whether a nonsuit may be claimed after a special verdict, because we think the finding of the jury a general one.

The plaintiffs claim the land as the property of their ancestor; the general issue is pleaded and the title of the ancestor expressly denied. It then behoved the plaintiffs to establish this title; that was the first point in issue. The jury have found that the land belonged to the plaintiffs' ancestor. Whether by purchase or descent, or by what title, they have not informed us. They have pronounced on the fact and the law; their verdict is a general one. On the issue of *non est factum*, a finding that the instrument is the defendant's act and deed is a general one; yet, it seems to find the facts as particularly as they are in the present instance.

The jury have found that "the widow Chedoteau remained the real proprietor of the land, at the price of its valuation, at the death of her husband," without answering whether she remained so *by adjudication, or the consent of the plaintiffs.* In order to arrive at this conclusion, the decision of two points of law

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must have been obtained. What constitutes real proprietorship? How is it acquired? In order that the court, whose province it was to solve the questions of law arising on a special finding, might give judgment thereon, the facts must have been known, and they do not appear. As she was not the real proprietor of the whole before the death of her husband, according to the first issue, she could not *remain* so after it. We must have understood the jury to have meant that she became the real, *i. e.* sole proprietor, viz. that she acquired a title to the half which was part of her husband's estate. She may have become so, by a purchase at the price of the valuation, as the question was put to the jury, or it may have been adjudicated to her at that price: but the jury do not find in which of these modes the land became wholly hers. In the latter case, her right depends on many facts, which are not proved and which the court could not assume from the circumstance of the jury having come to a legal result, which they could not correctly arrive at, unless these facts were established. Was there before them satisfactory evidence of the minority of the heirs, the consent of the family meeting, the approbation of the under tutor, &c.?

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We are therefore of opinion that the district court erred in allowing a nonsuit after this general finding.

It remains for us to inquire, whether we may give judgment on this general verdict. We think we cannot. A general verdict is not conclusive in this court as to the matter of fact; we must pronounce on it after the consideration of the statement of facts.

Was it the duty of the defendant and appellant to have procured one? It is shewn to us that the judgment of the district court contains not any of the reasons, nor the citation of the law on which it is grounded. He has therefore a right to have it set aside and demand, as we cannot proceed to judgment, that the cause be remanded to be proceeded on to judgment, since the record does not enable us to pronounce on the merits.

It is, therefore, ordered, adjudged and decreed that the cause be remanded with directions to the judge to proceed therein as if no judgment of nonsuit had been given; and it is further ordered that the costs be borne by the plaintiffs and appellees.

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

The jurisdiction of the court of the parish and city of New-Orleans does not extend o contracts or torts, originating out of the parish.

Turner, for the plaintiffs. This case originated by attachment sued out, under the acts of assembly of 1805, § 11. and of the second session of the same year, pa. 46, § 8. and of 1811, 1 *Martin's Digest*, 512, *n.* 1, 516, *n.* 2, 518, *n.* 4. 5, & 6, by which the courts are authorised to issue attachments, directed to the sheriff of the county where the defendant hath lands, &c. when he is a non-resident, &c.

The object of the suit was, to recover from the defendant as endorser of a bill of exchange, the sum of $8200, with the damages, interest, and costs.

The bill of exchange was drawn at Nashville, in Tennessee, by C. Stump, on the house of Stump, Eastland & Cox, at New-Orleans, in favour of Thomas H. Fletcher; and by him, endorsed to the plaintiffs, then residing also at New-Orleans, to whom he remitted it. The bill was duly accepted, and when at maturity, was duly protested and notice thereof forwarded by mail to the defendant.

The defendant being absent, and permanently residing at Nashville, but having property to

large amount in the city of New-Orleans, and being in failing circumstances, the plaintiff in order to secure themselves, caused the attachment to be levied on 80 hogsheads of tobacco, and summoned as garnishees, Messrs. M'Neil, Fisk & Rutherford. The property attached, was released by the appearance of the defendant's agents, who bonded the same.

The defence set up is a general denial, and a plea to the jurisdiction of the court.

On the trial, the plaintiffs' case was fully established by the proofs.

The court overruled the plea to the jurisdiction, and gave judgment for the plaintiffs for the amount of the debt, with damages, interest and costs.

From that judgment, the defendant appealed.

If the parish court had jurisdiction of this case, then the judgment must be confirmed.

There is no dispute about the facts of the case, the merits are manifestly with the plaintiffs.

The question, therefore, which I am to examine is that of jurisdiction. And upon this, I should have as little doubt of success, as I have on the merits, if I was not met by a decision pronounced some time ago, in the case of *Johnson* vs. *Dunwoody*, quoted by the defendant's

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counsel and by them relied upon in the court below. 6 *Martin*, 9.

That case is distinguishable from this in fact, if not in principle. But whatever may be the similitude of the two cases, I do not think that case deserves the weight attempted to be given to it, by the defendant. It was a decision given by the court without argument, in a case of small moment, and without any plea to the jurisdiction of the court; and I may venture to suppose without any very great deliberation, research or analysis of our judicial system: this, I think, may be presumed from what appears on the case itself. It is not easy to see on what principle that case was decided: the decree is so vague, and uncertain, that one does not know whether the action was supposed to be local by being on a judgment rendered at Mobile, or because it was for an assault and battery committed there, or whether the court did not consider it a criminal case, for indeed no other reason is assigned for the reversal, but that the case was *coram non judice*, as appeared on the record. Now all that was apparent on the record is this, "that it was a suit brought in the parish court, to recover the balance of a judgment obtained by the plaintiff at Alabama, in an

action of assault and battery, committed in the to wn of Mobile."

Such a decision as this, made without plea, without argument at the bar, and in a case of such small moment, the value only of a few hundred dollars, scarcely worthy the notice of any one, surely can never be considered as settling the law, on the maxim of *stare decises.*

Cases, which pass without argument and debate, are never considered as affording a precedent, 4 *Co. Rep.* 94; nor is a single case deemed of much more effect. One case does not establish the law on the principle of *stare decisis.* This has been often held in courts elsewhere, and lately by the supreme court in the case of *Dehart* vs. *Berthoud & al. ante,* 441. But where a long succession of cases have been decided and no objection made, they do form precedents, and will not be disturbed. 4 *Coke's Rep.* 94. But if *Johnson* vs. *Dunwoody* was decided on the principle that it was a criminal case, and that the cause of action originated at Mobile and was local to that place, I have nothing more to say about it than merely to remark, that it is not a precedent in point.

But if it was intended to establish as law, that no civil suit can be instituted in the parish court, where the contract was made out of the parish,

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although the defendant or his property be within it, then I contend, the decision goes farther, than the sound construction of the law will authorize: and is directly contrary to the practice of that court, ever since its establishment, and contrary to the course of decisions of the supreme court, in appeals from that court.

The parish judge in his reasoning, in this case, says thousands of suits have been instituted in his court, upon contracts made abroad, and I may venture to assert, that most of the important cases, which have been prosecuted in that court, have been those where the contract was made out of the parish: and those suits have been prosecuted and defended by the ablest lawyers at the bar; such has been the usage ever since the establishment of that court.

Even the *sub silentio* case, of *Johnson* vs. *Dunwoody*, has not prevented even this court, from deciding, as they were accustomed to do before, as will be shewn by citing a number of cases, which have gone through the supreme court, from first to last, in which the jurisdiction has been sustained.

The first, was that of *Smith* vs. *Elliott*, an attachment case, on a note made at Gibson Port, in the Mississippi territory, where all the parties resided, but afterwards when Elliott

had property in Orleans, it was attached and the jurisdiction sustained. 8 *Martin*, 366.

Las Casgas vs. *Larionda's syndics.* This was a case from Trinidad, in the island of Cuba. 4 *Martin*, 288.

Rion vs. *Rion's syndics.* This was a case of dowry, on a contract made at Bordeaux in France. 4 *Martin*, 34.

Forsyth & al. vs. *Nash.* This was a case, where the rights if any existed, in the plaintiffs, to the services of the defendant, was on a contract made at Detroit, Territory of Michigan. 4 *Martin*, 385.

Cooley vs. *Lawrence.* This was a contract made at Pointe Coupee. 4 *Martin*, 639.

Ralston vs. *Pamar.* This was a case of goods purchased by plaintiff and shipped from Liverpool in England to the defendant. 5 *Martin*, 3.

Perry vs. *Flower & Finly.* This was a case for freight from Louisville, Kentucky, for the benefit of Wilkins, &c. at Lexington in that state. 5 *Martin*, 388.

Ferry vs. *Le Gras.* This was a case where all the parties resided at Cape Francois, and on a contract made there. 5 *Martin*, 393.

Johnson vs. *Dunwoody.* This was a case to recover the value of a judgment rendered in

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Alabama in an action of assault and battery committed in the town of Mobile, being that, in which the judgment was reversed, because the case appeared to be *coram non judice*. 6 *Martin*, 9.

Smith vs. *Flower*. This was a case on a contract of affreightment made at Louisville, Kentucky, for a voyage from thence to New-Orleans, and in which the jurisdiction was called in question, but sustained. 6 *Martin*, 12.

Harvey vs. *Fitzgerald*. It is not easy to say where the contract was made, or where the defendant received the plaintiff's goods, or where they were sold, or how disposed of; as, therefore, the cause of action did not clearly appear to have originated in the parish of Orleans, if there be any thing in the case of *Johnson* vs. *Dunwoody* as applicable to contracts, this case must have fallen within its principles, and certainly it was a case, in which such a plea would have been resorted to by the counsel, if it could have availed. But neither was there any objection made by counsel, nor was any defect of jurisdiction perceived by the court. 6 *Martin*, 530.

These cases are sufficient to shew what has been the practice. To reverse the judgment in this case, would be to overturn all the cases,

that have ever been decided in the parish court, where the contract on which the suit was founded was made out of the parish, and would give ground to the anomalous proceeding of overthrowing the very cases heretofore decided on and confirmed in this court. Hundreds of suits must be dismissed from the docket of that court, and hundreds which have been decided upon and fully executed must be stirred up, and the money refunded where it has been paid: all the floodgates of litigation which had been for years closed, are again to be opened, and the district court overwhelmed in the turbid stream: consequences too mischievous to be even thought of!

I beg leave to be permitted to quote the words of that great judge, the lord chief justice Parker, as applicable to this case. He says, in pronouncing a judgment in the court of king's bench: "We are all of opinion, that this clause (meaning a clause in the statute) might have been extended to a case of this kind had the objection come earlier; yet the constant practice ever since the making of the act, having been otherwise, and all the precedents both in the crown office, and in the exchequer, (in cases not expressly excepted) being *de vicineto;* to make a contrary resolution in this case,

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would be, in some measure to overturn the justice of the nation, for several years past; besides we consider that it is matter of no great consequence; since it only gives the defendant a priviledge of challenge, which otherwise he would not have."

"It is a rule indeed, that precedents *sub silentio* are of little or no authority: but that is to be understood of cases, where there are judicial precedents to the contrary. But here there are none on the one side or the other (how applicable this reasoning when Johnson's case was under consideration! but it was not discussed.)

His lordship proceeds, "The chief baron mentioned a case in exchequer, which I remember: it was an information about the drawback upon salt, and there (as also in some other both here and in that court) all the exceptions were taken that the wit of man could invent. But this was not so much as mentioned; we did not think fit to break in upon an entire practice, and shake so many judgments, upon a matter of so small moment, and therefore are all of opinion that the *venire* is well awarded." *Peer Williams*, 223, 4.

The reasoning of this judge is so lucid and so cogent, and withal so strictly applicable to

the present investigation, that I can add nothing of my own to it.

I have therefore done with the case of *Johnson* vs. *Dunwoody*, and shall take up this case on its merits, as one of the first impression, and consider it upon the law, and evidence as presented by the record.

By taking a retrospect of the laws made under the territorial government, we shall find the true reason of the practice in the parish court being general in all civil matters.

The law of 1805, *c.* 25, § 3, for establishing courts of inferior jurisdiction, enacts "that the said judge (county judge) shall hold a court in each county, for the trial of all civil causes under the restrictions and limitations therein after contained. In § 4, the jurisdiction of the county judge is in these words: "that the said county courts shall have jurisdiction in all cases, to the value of fifty dollars and upwards, which shall arise upon contracts where the debtor resides, or is found in the county,—and also shall have exclusive jurisdiction of all causes for personal wrongs or injuries to real or personal property where the damage demanded do not exceed one hundred dollars."

By this law it seems civil causes have reference only to those actions which arise on co-

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tracts, and those which arise from wrongs done to property or to the person, without regard to the place where the contract was made, or the injury done. Civil causes here mean, suits in court; and these causes may arise upon contracts, or upon torts.

In the year 1807, *ch.* 1, county courts were abolished, and parish courts were created with similar jurisdiction.

By § 11 of that act it is enacted "That the jurisdiction of the said parish courts shall extend to all kind of contestations arising on contracts, notes, bonds, covenants and agreements, &c. and generally to all civil matters, which may be originally brought before their court," &c.

By the 28th §. the court for the parish and city of New-Orleans is established to consist of one judge, "who shall have the jurisdiction, power and authority, and shall perform all and singular the same duties, and the terms of session and rules of proceeding shall be in all respects in, and in relation to, the said parish, the same as by law are now possessed, performed and observed by the county court, of the county of Orleans."

That jurisdiction power and authority of the county courts, here spoken of, extended to all

causes of the value of fifty dollars, and upwards, which should arise upon contracts where the debtor resided in the county, or was found there.

Thus stood the law in relation to the parish court, of the city and parish of Orleans, when the state government was formed. No matter where the contract was made, no matter where the tort was committed, if the defendant resided or was found in the parish, the court had jurisdiction of the case.

At that time, the superior court of the territory had jurisdiction over the whole state, as well civil as criminal, without regard to the circumstance of the *venire* of the contract: and within the city and parish of Orleans, the parish court had jurisdiction concurrent in civil matters.

Under the state government, it became necessary to organise the courts, and it was done in a manner so similar in principle, to that system which before existed, that no room is left to doubt, that any change of jurisdiction was intended to be made, but such as was required by the constitution, in regard to the appellate jurisdiction of the supreme court.

And yet we find the legislature have used words less precise, more vague, and indefinite,

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and less technical and scientific, than those of the law of 1805: and hence has arisen the doubts if, any really exists, upon a hasty view of the wording, of the law of 1813.

In creating the district courts, it was necessary to assign them jurisdiction; because they were necessarily to be inferior courts. And in the §. 4, of the act of 1813, 2 *Martin's Digest*, 188, it is enacted, that a court shall be held in each parish by the district judge, *for the trial of all civil cases which may arise in the parish.* But the court of the first district, shall be held in the city of New Orleans every month: whereas, in the other districts, the courts are to be held three times a year.

By the § 15, of that act, pa. 28, the district courts are invested with jurisdiction in criminal matters.

By the § 19, of that act, parish judges are to be appointed with the same functions as then existed by law to that officer, but whose jurisdiction in civil cases is reduced in personal actions to 300 dollars.

The legislature during the same session, no doubt recollecting that it had been found expedient to have a parish court for the city and parish of New Orleans, with concurrent jurisdic-

tion with the district courts in civil matters; afterwards by an act in page 114, enlarged the jurisdiction of the parish court which had been previously established, with a jurisdiction of only 300 dollars, to a concurrent jurisdiction in the limits of the parish with that of the district court, in civil cases originating therein.

But, under the latitude of construction, which was given to the words of these laws, all cases of a personal and transitory nature, were supposed to be cognizable before any of the district courts, or the parish court of the city and parish of New-Orleans, and persons were sued, when they went from home, on contracts and obligations. The legislature the next year, 1814, §. 1, 2 *Martin's Digest*, 204, enacted "that no person or persons having a permanent residence, shall be sued in any civil action in any other parish, but that wherein he, she or they shall habitually reside, any law to the contrary notwithstanding."

This last act proves two things: first, that persons might before its passage, be sued out of the parish of their residence;—and secondly, that since the act, they cannot be sued elsewhere than in the parish of their habitual residence, where they have one, whether the cause of action originated there or elsewhere.

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Now, if it be a sound rule of law that, all courts of inferior jurisdiction must see, on the face of the record, that the case comes within the limits of their jurisdiction, it follows that no civil case can be cognizable before any of the district courts unless it appears expressly, in the first district that the case did arise there, and in the other districts, that it did arise in the parish where the suit is commenced. But if, perchance, the defendant should not reside in the place where the case did arise, he cannot be sued at all. He cannot be sued out of his parish, nor can he be sued but where the case does arise: these are the effective words of the law as it regards the district courts.

But as it regards our parish court, the words are different, but their signification is the same. They are "a jurisdiction concurrent with that of the court of the first district in all *civil cases originating* in the parish." These latter words became necessary from the manner in which the sentence is constructed, and not with any intent to limit the court to the locality of the contract, or of the tort complained of. When the sentence is analysed and compared with the jurisdiction of the court of the first district, this will be very evident. That court has jurisdiction over five parishes, though it sits only in the city.

It had also unlimited jurisdiction in criminal matters. When, therefore, it was said "the parish judge should have a jurisdiction concurrent with the court of the first district," if no more had been added, he must have had both civil and criminal powers; and that over the whole district. But, it was not intended to give him criminal jurisdiction; and therefore, they used the words "civil cases." Nor was it intended to give him jurisdiction territorial over the district, and therefore they added the words, "originating in the parish."

I contend, therefore, that there is no difference, certainly none, in the legal sense of the phrases "civil cases arising in the parish," and "civil cases originating in the parish." They are both loose modes of expression. Adopting, therefore, that mode of expression as allowable we may say, this suit arose in the parish, or we may say this case originated in the parish, or this case arose in the parish, and when we so express ourselves whether by using the words "arising" or "originating" we mean precisely the same thing.

It therefore follows, as a necessary rule of construction, that whatever civil cases may be sued on in the court of the first district, may be sued on in the parish court, subject in both

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cases to the restriction of the act of 1814 in favor of actual residents.

But unless we adopt the principle which judge Blackstone says, "prevails all over the world, that actions transitory follow the person of the defendant," neither the parish court nor the district court have jurisdiction or can take cognizance of any debt contracted out of the parish in the one case, and out of the district in the other. 3 *Bl. Com.* 384.

But there is no truth better known, nor any legal maxim better established, in every country in the world, where law has the semblance of science, than that pecuniary obligations and personal torts are transitory: my debtor owes me the debt wherever he is. The wrongdoer owes me damages wherever he is; and unless he is protected by some such law as that of 1814, he may be sued wherever he may be found, and in any court whose jurisdiction is not restricted to sums of less amount than that due me.

This rule is as well known in the Roman civil law, and in the Spanish law, as in the common law of England.

"An action," say Justinian's Institutes, "is nothing more than the right of sueing in a court of law for our just demands." "*Actio nihil*

aliud est, quam jus persequendi in judicio, quod sibi debetur." According to that definition my action arises in that jurisdiction where I find my debtor; and so I say the case originates, when I commence my suit, on my action, which attends me wherever I am, that is my right of sueing my debtor wherever I can find him.

By the laws of Spain there is a provision in favor of the domiciliated debtor similar to that contained in our act of assembly of 1814. In the 3 *Partida*, *title* 2, and *law* 32, it is declared that, the suits must be brought before the court which has jurisdiction over the defendant." But there are several exceptions to this rule, the first of which is, "that vagrants and transient persons may be sued where they may be found."

This exception clearly shews, that in Spain actions are transitory and attend the person, but where a person has a fixed domicile, he is so far priviledged as to be sued there rather than elsewhere.

Without the existence of such a principle, of what avail would be our attachment laws? Without it, how could debts ever be recovered, or obligations enforced, when the debtor removed out of the place where he contracted the debt? Upon what principle would bills of ex-

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change have a credit, or circulate in commerce, and pass by new endorsements in every city and in every state, through which they circulate, unless the holder could have recourse against all and every one, wherever they were to be found in case of protest? Sure it never before was doubted. Having said so much on general principles supposed to be involved in the consideration of this case, I now come to apply them: and here I shall be under no necessity to detain the court but for a few minutes.

The facts are as follows:—The plaintiffs reside in the city of New-Orleans; the defendant resides at Nashville. He being the payee of a bill of exchange drawn at that place by C. Stump, on Stump, Eastland & Cox, at New-Orleans, endorsed it in blank, and transmitted it to the plaintiffs in payment of a debt. The bill was presented for acceptance—accepted—and when at maturity not being paid, was duly protested. Notice of protest was sent by the ensuing mail.

Thus it will be seen that the plaintiffs received the bill at New-Orleans: it was payable here. It could not be even demanded any where else. No action on it existed, until it was dishonored. The instant it was protested for non-payment, the plaintiffs, being the holders, were invested

with the right of action against the drawer, endorser and acceptors. That right accrued here at New-Orleans, and no where else. It originated here in the parish of New-Orleans. Had the defendant been here at the time, he might have been arrested and sued in the ordinary mode. But being absent, his property being in the parish, under our attachment laws, is made to represent him. It was attached, but it has been released by bond and security. *Chitty on Bills*, 88, 107, 8, 9.

Upon such a case as this, what in reason, in law, or common sense, can be offered against the plaintiffs' right of action in the parish court?

That court sustained its jurisdiction, for reasons so strong, that I might have spared myself the labour of this argument. But the importance of the subject to the plaintiffs is such, as to require all my attention to the maintenance of this suit. They have ten thousand dollars at stake upon it. The whole of which will be lost if the judgment is not affirmed. The drawer, the acceptors and the endorser, are all believed to be insolvent: even the property, which was attached, is gone. It was bonded for the defendant, and removed from this city.

These are considerations which, it is hoped, will not only induce the court to pardon the

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counsel for detaining them so long, on so plain a case, on the merits: but likewise, to excuse him from the solicitude he has manifested in the discussion of the general principles, which he has brought into review in the course of the argument.

The case is of the utmost importance as it regards the extent of injury it will produce to hundreds of others, who have judgments and suits depending on the same principles, before that court; should it be now decided that cases depending on contracts made out of the parish, are not cognizable in the parish court.

I believe, and I trust confidently, that there is no good ground on which to rest the plea interposed to the jurisdiction in this case, that it is one, on principle and fact, as well as by long and constant practice, which may as well be brought in the parish as in the district court.

Eustis, for the defendant. It is to be regretted, on our part, that the opinion of Chief Justice Parker, cited by the plaintiffs' counsel, was not stronger than it is; and that it decided a question of no great consequence, since it only gives the defendant a privilege of challenging, which otherwise he would not have. We con-

tend that the precedent is in our favor. This court decided fifteen months ago, that the jurisdiction of the parish court extended only to civil cases originating in said parish; which decision has been considered since that time as law and has been acted upon in this court and by the parish judge, in deciding on pleas to the jurisdiction of his court. On the trial of the cause of *Dunwoody* vs. *Johnson*, the arguments of precedents might have been urged with some little plausibility (if they ever could be applied to a question of the jurisdiction of an inferior court) but now they are against the plaintiffs.

The case cited of *Dunwoody* vs. *Johnson*, 6 *Martin*, 9, settled the law as to the jurisdiction of the parish court. Before the decision of that case, appeals had been brought before this court from judgments of the parish court, in civil cases which may have originated out of the parish; but the question of jurisdiction was not raised. There was no plea to the jurisdiction in the court of the first instance; no assignment of error or suggestion of counsel on that point, in this court. And the court, not having the subject brought before them in the manner which the rules of court and of law prescribe, did not give an opinion on it, until called upon in the case cited.

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In the case of *Delisle* vs. *Gaines*, 4 *Martin*, 666, an objection was made to the jurisdiction, but was overruled; the contract having been made at the Bayou St. Jean. The court then decided incidently, what they afterwards recognised by a positive decree.

The gentleman has cited two cases which this court has decided, since that of *Dunwoody* vs. *Johnson*, which he supposes would have failed for want of jurisdiction in the court below, had this court considered their decision in the case cited as binding.

The first is the case of *Smith* vs. *Flower et al.* 6 *Martin*, 12, which was heard on an appeal from the parish court; the question of jurisdiction was there raised and the court sustained the jurisdiction; because the obligation on which the suit was brought, was contracted by the defendant, by receiving the merchandize, which was proved to have been delivered, in New-Orleans. *Per Curiam.* "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 to pay the freight; and this is the obligation on which they are sued." Is not this answer to the objection

made to the jurisdiction, an express and positive recognition of the principle heretofore established in the case of *Dunwoody* vs. *Johnson*.

The other case is equally unfortunate for the plaintiffs. *Harvey* vs. *Fitzgerald*, 6 *Martin's Reports*, 530. It was an action brought against the defendant, to recover the price of a quantity of merchandize which was consigned to him by the plaintiff; and the contract was expressly alledged to have taken place in the city of New-Orleans.

The suggestions of the gentleman, that the principle was established without any very great deliberation or research, and that it is entitled to less weight because the amount in dispute was small, and the action savoured of criminality, we do not pretend to answer; but content ourselves with shewing that the law and the decisions, which he has cited in favor of the plaintiffs, are the best possible arguments on our behalf.

II. Of the construction of the act under which the jurisdiction of the parish court is maintained, we must first observe, that the parish court is an inferior court of limited jurisdiction. After the organization of the state government, it was limited as to the amount of the matters in dis-

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pute between the parties; but the limitation now extends only to the origin of the cases, and is taken away as to the amount. It surely cannot be pretended that the former laws organizing parish courts can be adduced to explain an ambiguity or doubt in the present law, for this reason, that these laws confined the jurisdiction of the court within a certain amount, which certainly can afford no light in explaining a limitation as to mere locality. The jurisdiction is not claimed under these laws, which are, as it respects the parish court of New-Orleans, repealed by the law cited.

But there is no ambiguity in the law; it is couched in the most positive terms; its import cannot be mistaken or perverted.

"The court of the parish of New-Orleans shall consist of one judge, learned in the law, who shall have and exercise within the limits of the said parish a jurisdiction concurrent with that of the court of the first district in all civil cases originating in the said parish." *Law of March*, 1813.

The law organizing the district court provides that "there shall be a court in each parish to be held, except for the parishes composing the first district, at such times as shall be hereafter provided for the trial of all civil cases

which may arise in the said parish. *Section 2 of law of February* 10, 1813.

"The proceedings of the said district courts in civil as well as in criminal cases, shall be governed by the acts of the territorial legislature regulating the proceedings of the late superior court of the territory of Orleans; and that they shall have the same powers, when not inconsistent with this act, which were granted to the said superior court by the said act." *Sect.* 6.

The intention of the legislature was evidently to give the district court general and original jurisdiction of all cases, which could be brought before them. Out of the first district. the parish judges have only jurisdiction of cases to the amount of three hundred dollars; and if we adopt the rule of construction, which common sense and law requires, we shall find that no evil can possibly result from the principle for which we contend, and that the powers of the courts are defined with sufficient accuracy for us to ascertain their extent; that the jurisdiction of the parish court is limited, and that of the district general. The consideration of the circumstances under which these courts were established, leads to this opinion. On the formation of state government, the state was divided into districts, courts were organized, and were required

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to be held in each parish for the trial of all civil cases which should arise there; or, in other words, of all suits which should be brought there. Any other construction leads to this preposterous conclusion, that no remedy could be had in the courts of this state but in cases which originated within its limits. So local in its organization is this court, that the judge's salary is not paid from the public funds of the state, but from those of the parish: the judges of the other courts are paid from the public treasury. As this court was exclusively limited to cases originating in the parish, as it was created solely for the recovery of those debts, which should be contracted within its limits, and for the benefit of its inhabitants, the legislature could not in justice tax the people of the state with the charge of supporting it.

Parish judges had, by the law of February 10, 1813, their jurisdiction limited "in civil cases, to personal actions where the matter in dispute shall not exceed three hundred dollars, subject to an appeal to the district court above the sum of one hundred dollars, &c."

The jurisdiction of the parish court of New-Orleans was by a subsequent act extended, and concurrent jurisdiction with the district court given, in civil cases originating in said parish.

This was done for the accommodation of the French population of New-Orleans: a French gentleman was appointed as judge, and most of the cases originating among those who speak that language in New-Orleans have been brought there.

If we admit that the words of the statute are ambiguous or uncertain, we must endeavor to learn the intention of the legislature. The English text is the law: but as the statutes are written in both languages, what sounder rule of construction can be imagined, than that, when one text is ambiguous, it may be explained by the other? Perhaps half of the members of the legislature intended to give effect to the law as it was written in the French language; and it is conceived that nothing can be more just or politic, than the adoption of this mode of construing statutes, or furnish a better key to the intentions of the legislators.

The French text warrants the construction which we have attempted to establish; the district courts have cognizance in the parishes where they are held of all civil actions *qui pourront se presenter;* the parish court of the parish and city of New-Orleans of all civil cases *qui prendront naissance dans les limites de la dite paroisse*—in the one case the courts have a

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general original jurisdiction, in the other it is limited to cases originating within the limits of the parish.

We deem further comment on this head as entirely useless, as we have shewn, from the nature of the courts and from the strictest construction of the statutes, that the parish is a court of limited and the district court of general jurisdiction; and that the limitation relates exclusively to the place where the case originates. Much more might be urged in favor of the principle which we support, but under the present view of the subject, it would not be respectful to waste the time of the court in advancing these arguments to prove a point so simple, and which has already been decided.

III. To the objection, which the gentleman has made to the inconveniences which would result to his clients and the public, if our construction of the statute be adopted by this court, we answer: if any person after the decision of this court in the case of *Dunwoody* vs. *Johnson*, should commence a suit in the parish court on a foreign contract, he did it willingly, and cannot complain if this court maintains its former opinion; *caveat actor* is the rule for him.

The parish court resembles, in the extent of

its jurisdiction, some of the inferior courts in England: in which it is necessary that every part of that, which is the gist of the action, should appear to be within their jurisdiction; the consideration as well as the promise, must be laid in the declaration within the jurisdiction. 1 *Saunders*, 73. *notes by Williams.* Cases cited 1 *Levy*, 50. *Rumsy* vs. *Atkinson*, 69. *Littlebay* vs. *Wright, et mult. al.*

To the same point, 2 *Bacon's Abridgment. Tit. Courts, D. no.* 4.

There is but little danger of "the floodgates of litigation being opened" by the court giving in this case the same decision, which they have hitherto given in similar ones. The case of *Delisle* vs. *Gaines*, in which the question now under discussion first came before this court, was determined in March 1817. Three years have elapsed, since the bar and the judge of the court of the city and parish of New-Orleans were informed that the supreme court considered it as a court of limited jurisdiction: yet no judgment heretofore given was sought to be reversed. Those which were rendered before that case, or have been so for the year that followed it, are beyond the reach of an appeal. More than fifteen months have elapsed since the case of *Dunwoody* vs. *Johnson*, was determined:

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the judgment there put the opinion of this court out of the possibility of being mistaken: yet no anterior judgment of the parish court has been brought up to be reversed. The case of *Smith* vs. *Flower & al.* was pronounced a few days after. If, notwithstanding these repeated warnings, gentlemen have obstinately continued to institute suits before a court, which the supreme tribunal of the country had declared to to be without jurisdiction, and the defendants have obtained bail or security, to regain their property illegally attached, on the assurance which their counsel have given to their friends, that the supreme court would relieve, if the inferior one erred so far as to sustain cases illegally brought before it, will these friends be taught that the decision of the highest court of this country is not to be considered as a beacon, by the aid of which their course may be directed with safety, but as a decoy that will lead them into the snare? But, why do I use such an argument? Considering the case, as one *novæ impressionis*, the usual rules of construction, the expressions, the apparent meaning of the legislature, independently of the repeated decisions of this tribunal, forbid its members to adopt the interpretation for which the plaintiff's counsel contends.

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MARTIN, J. delivered the opinion of the court. The defendant's counsel urges that the principal question in this case has been settled by this court, in the cases of *Dunwoody* vs. *Johnson*, and *Smith* vs. *Flower & al.* while the plaintiffs' contends, that we have pronounced opinions impliedly in diametrical opposition with the decision in these cases, which, he believes, to have been decided hastily, and with little consideration.

The case of *Dunwoody* vs. *Johnson* received from this court all the attention which we are accustomed to bestow on those in which we have to pronounce without the aid of counsel. As in such cases we are more exposed to err, we are in the habit of submitting them to a more severe scrutiny. In that, however, the question to be determined had been agitated two years before, in the case of *Delisle* vs. *Gaines*, in which, neither any member of this court, nor any of the counsel engaged, appear to have entertained any doubt of the law being as it was finally settled in that of *Dunwoody* vs. *Johnson*. In this latter case, the counsel of the plaintiff did not apply for a reconsideration of the question, and in a subsequent case, *Smith* vs. *Flower & al.* no doubt occurred of the law being as it had been settled. The

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court, whose judgment was reversed in the case of *Dunwoody* vs. *Johnson*, informs us in its opinion in the present case, that it "thought and said repeatedly it had no jurisdiction, but the jury in spite thereof gave a verdict for one of the parties, and the court thought itself bound to give judgment."

The cases, which the plaintiffs' counsel cites, go but a very little way, indeed, to establish the position he contends for. Those of *Lus Cuyas* vs. *Larionda's syndics* & *Rion* vs. *Rion's syndics* are merely, what the Spanish law calls *incidentes* of the main cause, of these insolvents against their creditors: collateral suits, exclusively cognizable in the court seized of the principal ones, and which would have been cumulated thereto, had they been instituted in any other court, before the inception of these principal cases. Those of *Ralston* vs. *Pavar*, *Perry* vs. *Flower* & *al.* and *Harvey* vs. *Fitzgerald*, were cases in which the cause of action originated in this city: the goods, payment of which was asked in the first, for the preservation or conveyance of which compensation was claimed in the two next, and an account of which was demanded in the last, had been delivered to the respective defendants in New-Orleans. The case of *Smith* & *al.* vs. *Elliot*

came upon a bill of exceptions, and the attention of this court was necessarily confined to a review of the opinion excepted to. *Ferry* vs. *Legras*, and *Forsyth* vs. *Nash*, are cases in which the plaintiffs failed to establish their claims, and the defendants' counsel thought it more for the interests of their clients to have judgment on the merits, than to stir the question of jurisdiction. *Cooley* vs. *Lawrence* is the only one, among the cases presented to us, in which a plaintiff succeeded in an action brought up from the court of the parish and city of New-Orleans, on a contract made out of that parish. The question of jurisdiction not having been raised, nothing can be inferred from this court not having withdrawn its attention, from the points to which the parties called it, to arrest it on one, of which neither of them saw fit to avail himself of.

We have, however, examined the question, raised by the plaintiffs' counsel, without any prepossession from former opinions.

The legislature has given to the court, in which the present suit was instituted, jurisdiction of all civil cases originating in the parish. The plaintiffs' counsel contends that the word *cases* is here synonimous with the word *actions*,

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while the defendant urges that it is synonimous with the words *contracts* or *torts*.

If with the plaintiffs' counsel we read, *jurisdiction of all civil* ACTIONS *originating in the parish*, we will arrive at a senseless result: for the expressions will include any action which a suitor may see fit to originate in the court, and the object of a section, intended to describe the jurisdiction of a court, is badly answered by a declaration that it extends to all suits which may be brought in it.

We are told that the only restriction intended was to prevent the inhabitants of the parishes of St. John the Baptist, St. Charles and St. Bernard, which, with that of New-Orleans, constitute the first judicial district, being dragged out of their parishes before the new court. While it is admitted that these inhabitants may be dragged out of their respective parishes before the district court, which sits in the same city, and generally in the same building, it is not easy to conceive that the alledged restriction would be of any avail to them.

If we read with the defendant's counsel *jurisdiction of all* CONTRACTS, OR TORTS, originating in the parish, we arrive at a correct result. The exclusion of contracts or torts

originating out of the parish appears congruous with the provision, that the salary of the parish judge shall not be a state charge, but shall be paid out of the parish treasury, and we perceive the wisdom of the provision, that a court held at the expense of the inhabitants of a parish shall exclusively attend to the concerns of that parish.

But, it is said, that if we give the meaning supported by the defendant's counsel to the word cases in this act, we must give the same meaning to the same word in the fourth section of the act establishing the district court, and then, in the latter act, we will arrive at an incongruous result. It does not necessarily follow, that a word must invariably have the same meaning in every statute in which it is found. But the jurisdiction of the district court is not, as the counsel for the plaintiffs states, established by the 4th section of the act of 1813, but by the 15th and 16th, which provide that it shall have the same *powers* as the superior court of the late territory. The 4th section provides for the *place of trial*: we may, therefore, conclude, that the *cases*, spoken of, are such to which the word trial is applicable, viz. *actions*.

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That the word is to be understood in a different sense in the two acts is apparent from its being translated by different words in the French parts of these acts.

Another consideration is that the limitation, of the jurisdiction of the court of the parish and city of New-Orleans, is precisely the same, which is given to corporation courts, mayor's courts, &c. which is confined to cases in which the cause of action originates within the limits of the corporation.

After the most mature consideration the court is of opinion, that the view of the subject, taken by this court whenever it has come under their consideration, is not an erroneous one.

But it is contended, that, as the bill of exchange endorsed by the defendant was payable in New-Orleans, the cause of action accrued there. This suit arises on a contract of endorsement; the defendant entered in no other with the plaintiffs; they do not contend that this action is grounded on a tort.

An endorser undertakes that, if the drawee cannot be found at the place mentioned, or refuses to honor the bill, and the endorsee, after fulfilling all the formalities which the law requires, gives timely notice to the endorser, he

will pay the amount of the bill, with such costs and damages as the law allows. The endorsement is a conditional promise, which when the condition is performed, is to be kept in the same manner as an absolute promise, at the domicil of the promisor, or where he may be found. Now, in the present case, the endorsement was made at Nashville, and the notice of non-payment was sent there: on receiving it the defendant was bound to pay. He was suable instantly, and on the spot; and if Nashville has an incorporated court whose jurisdiction is limited to cases, in which the cause of action arises within the limits of the town, he was suable in it. So, if an insurance company in New-Orleans insured goods on board a steamboat, on a voyage from Natchez to Nashville, in case of a loss, the company could be sued in the court of the parish and city of New-Orleans: for the contract, which is the cause of action originated there; although no part of the contingency on which the payment depended was to happen there.

We conclude, that the parish court erred in overruling the plea in abatement.—It is, therefore, ordered, adjudged and decreed (DERBIGNY, J. dissenting) that the judgment of the parish

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court be annulled, avoided and reversed, and that the suit be abated at the plaintiffs' costs in both courts.

See *April* term, an application for a rehearing.

ABAT vs. *RION*.

In a suit against an endorser notice must be alledged and proven.

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

MATHEWS, J. delivered the opinion of the court. This is an action brought by the holder of a promissory note, against an endorser, who resists its payment on account of notice not having been given him of the maker's refusal to pay. Notice is not alledged in the petition, nor does it appear by the record, that any proof was given of it on the trial below. We are, therefore, of opinion that the judgment which was given for the plaintiff is erroneous.

It is, therefore, ordered, adjudged and decreed that it be annulled, avoided and reversed, and that there be judgment for the defendant as in case of a nonsuit, and that the plaintiff and appellee pay costs in both courts.

Denis for the plaintiff; *Ellery* for the defendant. *See post*, 567.

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If the judgment does not contain the reason on which it is grounded, and a material erasure be on the statement of facts without its being recognised and avowed by the parties, and one of them insists that it was made without his consent, the case will be remanded.

APPEAL from the court of the third district.

DERBIGNY, J. delivered the opinion of the court. The judgment complained of, in this case, does not contain the reasons on which it is founded; we must, therefore, as we have done in other similar cases, avoid and reverse it.

Proceeding to enquire whether the case is so presented as to enable us to adjudicate upon its merits, we find, that a diminution of the record has been suggested by the counsel for the appellee, who has stated on oath, that a certain part of the statement of facts, agreed upon by the parties, to wit, the second fact, said in the transcript of the record to have been struck out, was erased without his knowledge; and that upon this suggestion, and without any order from this court to that effect, the clerk of the third district court, has come forward and sent up the original statement of facts, certifying at the same time, that he knows not whether the erasures, which appear on the face of it, were made by consent, nor by whom they were made. In that situation of the case, however irregular this mode of proceeding may have been, the document, the transcript of which was complained of as incomplete, being now before us, no techni-

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cal difficulty ought to prevent us from ascertaining by its examination, whether it is such a statement of facts, as the parties may be bound by.

This statement contained four facts, distinctly and separately set forth under the numbers 1, 2, 3 & 4. It bears at the bottom the signatures of the respective attornies of the parties, and that of the judge. But of those facts, one is now found erased, and the clerk cannot tell whether those erasures were made by consent, nor by whom they were made. What is to be presumed? The signatures of the parties are affixed at the bottom of a writing as an acknowledgment, that they approve of that which is written. But when a paper is mutilated and defaced, is an approval of the alterations to be inferred? Ought not the clerk, who received it, to be able to certify, at least, that the parties did jointly deliver it to him in its present state? And, if he cannot certify even that, would there be any justice in making an instrument thus disfigured binding on them?

Parties are, no doubt, at liberty to blot and scratch their written agreements as much as they please; however objectionable the practice, there is nothing illegal in it. But when they do so alter what was written, they ought to take care, that the alterations shall appear to have

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been made by consent; for if the consent neither is expressed, nor can be ascertained, and is denied by one of the parties, it shall not be presumed to have been given.

This, then, not appearing to be the statement of facts agreed upon by the parties, the appeal stands as if it was not accompanied by any statement at all. We are, therefore, under the necessity of remanding the case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that this case be remanded with instructions to the judge, to render judgment therein, in the manner prescribed by the constitution; and it is further ordered, that the costs of this appeal be paid by the appellee.

HIPKINS vs. *SALKELD.*

APPEAL from the court of the first district.

If the petition charges that there is an error in a release, being a reference to a mortgage by a wrong date—it must be read, if proven, and the party left to establish the mistake by legal evidence.

MARTIN, J. delivered the opinion of the court. The petition charges that the defendant, as agent of the plaintiff, received a sum of money from a commercial house, the plaintiff's debtors, and released a mortgage which the latter had given therefor—that, in the release, the mortgage was erroneously referred to, as bearing

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date of June 2nd, 1811, while, in fact, its date is of May 24th, 1810.

The defendant pleaded the general issue.

At the trial, the plaintiff offered in evidence a release given by the defendant, which referred to a mortgage bearing date of June 2nd, 1811. The defendant objected to its being read, "on the ground, that it did not correspond with the allegations in the petition;" which objection was sustained by the court; and there being a judgment of nonsuit the plaintiff appealed.

It appears to us, that the district court erred; that the release corresponded with the allegations in the petition: it proved *rem ipsam*, viz. that the defendant acknowledged that a debt due to the plaintiff was paid, and released the mortgage, by which it was secured. After the reading of this release, the defendant might contend (with what success, we do not undertake to say) that the debt released and that claimed are not the same—that the alledged error ought to be proven, and could not be so by testimonial proof. We are not enabled to say, that written proof was impossible to be produced.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the

cause be remanded, with directions to the district judge to admit the release in evidence, if duly proven; and it is ordered that the costs in this court be paid by the defendant and appellee.

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

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The court may, in its discretion, when the plaintiff's claim is not established, give judgment as in case of a nonsuit.

MATHEWS, J. delivered the opinion of the court. In this case a rehearing has been granted, at the request of the defendant and appellant, the court having doubted the correctness of their decision, by which the plaintiff was nonsuited.

The action is brought on a promissory note, and brought against an endorser; the defendant, in his answer, prayed to have a jury, to whom facts were submitted, in pursuance of the act of the legislature, in such cases made and provided. After a verdict, which is affirmative of the facts submitted, the parish court gave a judgment for the plaintiff, which was reversed by this court, and judgment rendered as in case of a nonsuit.

It is now contended, on the part of the defendant, that the latter judgment cannot be sup-

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ported, on principles derived from either the Spanish or English law.

It is said, in some of the treatises on the former of these laws, that, after the *contestatio litis*, the plaintiff cannot withdraw his action nor change it. We are of opinion that the utmost extent to which this rule is to be carried, will only deny to a plaintiff the privilege of discontinuing his suit, as a matter of right, without the interference of the court, after the defendant has contested his claim. But it is within the legal discretion of tribunals of justice to allow such a discontinuance, after judgment or verdict.

Our trial by jury being borrowed from the common law of England, to it we must resort for a rule to govern that mode of proceeding. According to this system of laws, as it has been lately recognized, in the case of *Chedoteau's heirs* vs. *Dominguez*, *ante* 520, it is agreed that, after a general verdict, a judgment of nonsuit cannot be allowed by the court, the verdict being for the plaintiff. Passing in silence all that has been said by the counsel for the defendant, in regard to the technical definition of a nonsuit, as being only the recorded default of the plaintiff, &c. it only remains for us to examine whether, after a special verdict, the court

may grant, to a plaintiff, the benefit of a nonsuit or discontinuance.

Since the 2 *Hen.* 4, 7, which in relation to the situation of this country may be considered as forming a rule for trials by jury, under the common law terms, "after verdict passed against the plaintiff, he shall not be nonsuited." But this provision of the statute, it is believed, has been confined to general verdicts; for they alone can be said to have passed against the plaintiff or defendant, by finding both the law and facts of the case. A special verdict states the naked facts, as the jury finds them to be proven, and concludes conditionally, not absolutely, for either party. 3 *Bl. Com.* 377. The finding of the jury, on facts submitted under our statute, must be considered as a special verdict.

In the present case we view it so, and think that, after the answer of the jury, the parish court might have allowed to the plaintiff the benefit of a nonsuit, had the judge been of opinion that the allegations in the petition, and the facts found, were not sufficient to authorise a judgment in his favor. 5 *Mod.* 208. But that court gave judgment for the plaintiff, which, in our opinion, was erroneous, and accordingly we reversed it.

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The case was then placed before us precisely in the same state in which it was before judgment in the parish court, to be adjudged according to law, justice and equity, which, as we believe, required of us such a decision as might put the plaintiff out of court, with liberty to re-commence. Such has been given, and we see no reason to alter it. The circumstance of this judgment of nonsuit, not having been asked by the plaintiff, is no substantial objection to its correctness; when offered by the court and accepted by the party, it stood on as good a footing, as if granted on his motion.

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

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See the judgment *April* term.

APPEAL from the court of the first district.

Ellery, for the plaintiffs. It becoming important, soon after the cession of this country to the United States, to improve its inland navigation, left by the Spanish government in a state of reproachful neglect, and more particularly desirable, to open and enlarge the communication between Lake Ponchartrain and the city

of New-Orleans, on the 3d of July, 1805, an act for this purpose, was passed by the governor and legislative council, by virtue of which, a company was formed and incorporated by the name of the "Orleans Navigation Company," whose immediate objects and efforts were to remove the bar obstructing the mouth of the bayou St. John; to free the bayou itself, from its numerous obstructions; to dig out the canal Carondelet; and to excavate, at its termination in the city, a basin of sufficient capacity for the reception of all the vessels using this navigation. By the 9th section of this act, as a compensation for labors, thus usefully directed, the president and directors of the company are entitled (as soon as the company shall have improved the navigation of the Bayou, so as to admit, at low tides, vessels, drawing *three feet* of water, from Lake Ponchartrain to the bridge at the settlement at the bayou) to receive from any vessel, passing in or out of the said bayou, a sum, not exceeding one dollar, for every ton of her admeasured burthen; and so in proportion for every boat of a burthen less than one ton. And when further improvement shall permit vessels, drawing *three feet* of water, to pass from the bayou by the canal Carondelet to the basin, to receive in like manner, an additional toll, not

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exceeding one dollar per ton. 3 *Martin's Digest*, 186. And by the 11th section, the collectors of toll, appointed and authorised by the president and directors, may stop and detain all boats and vessels, using the canals and navigation, to which they respectively belong, until the owner or commander, or supercargo of the same, shall pay the toll so fixed as aforesaid, or may distrain part of the cargo therein, sufficient by the appraisement of two credible witnesses, to satisfy the same. 3 *Martin's Digest*, 190.

By virtue of the first quoted section, the president and directors, as the different parts of this rout became navigable, proceeded to fix the rate of toll, considerably short, however, of their chartered limits, viz: imposing but seventy-five cents per ton upon all vessels coming to the bayou bridge, and only fifty cents, additional toll, upon those using the basin.

The schooner Amelia, having made eight trips, seven of which were to the basin, and her master having refused to pay the prescribed toll, was, by virtue of the power granted by the 11th section of the charter, *stopped and detained*, by process issuing out of the court of the first district, for the purpose of compelling such payment. Soon after her detention, the A. D. Q. M. General, filed his claim to this vessel, excepting

in his answer to the jurisdiction of the court, and claiming her as a public transport, owned by, and in the service of, the United States; and pleading that, as such, she could not be stopped, nor made subject to the payment of toll. To this plea a demurrer was filed; and upon trial sustained, and judgment rendered in favor of plaintiffs for the amount of their demand; from which judgment the present appeal is brought.

The rate of toll, falling so considerably short of the chartered limits, is not contested; nor from the proceedings does it appear, that the charter of the company is intended to be put in issue. The course of argument seems indeed sufficiently marked out by the assignment of errors upon the face of the record. Four errors are thus assigned.

1. Because the United States are not amenable as defendants, to any judicial demand whatever (especially in a court of a particular state) neither by an action against them *in nomine*, nor by an action *in rem* against property, the title of which is in them.

2. Because, any act or acts, of the late territory of Orleans, or of the state of Louisiana, authorising the said company to levy a tax or toll on vessels passing along the bayou St. John, or the canal Carondelet, and any tax or toll, prescribed or ordained, by

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the said company, pursuant to the said act or acts, as far as the said toll or tax may operate, or is intended or endeavored to be levied on public transport vessels, attached to the army of the United States, purchased by them pursuant to the constitutional law of the congress of the United States, providing for the public defence, and employed exclusively in the transportation of troops and army supplies, and solely in the public service, are unconstitutional and void.

3. Because the matter is exclusively of admiralty jurisdiction.

4. Because, even if the United States were amenable to any judicial demand as aforesaid, or if the said act or acts, prescriptions, or ordinances were constitutional and valid, or if the matter were not exclusively of admiralty jurisdiction, yet the act of incorporation of the said company, gives them no lien upon the said vessel, and confers no right of seizure and sale, to enforce the payments of the said tax or toll.

I. If, by the first error assigned, is merely intended, that the United States are not suable, the position is readily admitted. It is not pretended that they can be made subject to the cognizance of our courts. We are well aware of their freedom from all forensic jurisdiction or

coercion ; and that the remedy against them is by petition and not by action ; and that relief is a matter of grace and not of compulsion. An exemption, however, which lays them, as well as those acting under their authority, under an honorable engagement, punctually to discharge all public dues, and not shelter themselves under the judicial inviolability of the United States.

But though, as sovereigns, they are thus exempt from an involuntary subjection to our tribunals, it by no means follows, that they cannot make themselves parties to a suit, by intervention. This power is incident to their sovereignty and necessary to their protection ; and we see it every day exercised. We find them constantly interpleading, wherever their rights or interests are concerned : and figuring in suits as claimants and respondents. The books are full of cases of libels and insolvencies, where they thus come voluntarily forward, to claim a forfeiture, or vindicate a privilege. Having thus a right to intervene in any suit, in which their interest may be involved, they of course come into that court wherein such is entertained ; and should they think proper to remove it to their own courts, the statute of the United States, prescribes the mode of such removal. But the exceptions taken in the answer to the jurisdic-

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tion, by the very terms of it, shews that it was not made for the purpose of transferring the cause, and *trying* it in the United States court, but to prevent it from being *tried* in any court; that the objection was not to this forum, but to all forums. By not pursuing, therefore, the mode designated by the act, for its transfer, and rejecting our offer to transfer it, the cause is fixed in the state court by their own consent and election. They are then voluntary parties, claimants and respondents in this suit; and by this intervention, have put at issue their title to this vessel, as well as to its exemption from toll. Having made themselves parties to this suit, what is to be the result of this voluntary intervention? Do they bring with them any peculiar privileges over common suitors? Are they to be exempt from the ordinary administration of justice in our courts? Are they not, and have they not put themselves, upon a footing with all other parties litigant; and can they claim any respect for their character, which is not due to their cause?

But it is objected, that though not *nominally*, yet *substantially*, we have sued the United States, by an action *in rem* against property, of which the title is in them.

We know nothing of the United States in

this suit, further than they have thought proper to make themselves known. The schooner Amelia, commanded by captain Swepler, uses this navigation; he refuses to pay the legal toll imposed, and we *stop and detain* his vessel, until it is paid. She might be his property, or that of any other individual, or of the United States: our officers are not bound to investigate her title, but to collect her dues. Had she indeed been a public armed vessel of the United States, belonging to the navy of the United States, and employed for national purposes, (though I am not prepared to say, that in that case, she would have had a right to use toll-free, the canal and basin of a private corporation) yet there would have been no mistake as to her character. But the schooner Amelia, employed as a transport in the Q. M. General's department, has no distinctive marks, no national character; she does not belong to the navy of the United States; is not commanded by an officer, nor manned by a crew of the United States, and is only known to us by her delinquency.

But it is said, that she is *actually*, if not *ostensibly* the property of the United States; and by *stopping* and *detaining* her for the payment of her navigation dues, we have obliged the

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United States, to come forward in her behalf. We have called for no process against the United States, nor against their property; if they are interested in this vessel, and therefore come forward, it is, on their part, a voluntary thing; their appearance is no more coerced in this suit, than in any case of libel, where a vessel is seized, in which they claim duties; or where property of an insolvent is sequestrated, upon which they claim a preference. If any one is coerced, it is the D. A. Q. M. General, in whose department and employment this vessel is said to be. Suppose, instead of stopping and detaining the vessel, we had sued this officer in his individual capacity, for the toll in arrears, could the United States, though ultimately responsible for the amount of the judgment, free him by their intervention, from the consequences of the suit, and take away the jurisdiction of the court? There is but little difference, whether the payment is made out of the officer, or out of the vessel.

A. attaches goods, the property of B., the duties on which are unpaid; the United States intervene for the protection of their debt; is the court, by this intervention, to lose at once its jurisdiction, and release the attached property; or does the cause go regularly on to trial?

Are not the United States bound, in this case, to make out their claim, and prove their preference? And has not the attaching creditor a right to contest it with them, step by step? Suppose, in our case, we had taken issue upon the title of the vessel, would not the United States, have been bound to produce and prove their title; claiming it as their property, would they not be held to prove it such? By our demurrer, we admit the fact, but does this admission, release them from the necessity of going on with the cause, and shewing also their title to their claimed exemption from toll? Intervening in a suit, they are to remain as parties, until its decision; they are not permitted to appear and disappear at pleasure. In the above supposed cases, of the libelled vessel; of attached goods, with the duties unpaid; of sequestrated insolvent property, is the mere intervening claim of the United States, sufficient for their release? Are they not bound respectively to prove, that a forfeiture has accrued; that the duties are due; that their priority over the other creditors, is legal? Are the words United States, so magical in court, that when pronounced, like the word *sesamy*, all doors are to fly open, and every process unclose. Suppose, in our case, instead of resorting to the process of the court, to

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stop and *detain* this vessel, we had ourselves closed upon her the toll-gates, until she had paid her toll; would they not, in that case, in order to effect her release, have been obliged to come into court, institute their claim, and prove their exemption: and should we not also have had a right to be heard? Is there any substantial difference, in this stoppage and detention, whether done by ourselves, or the court? Does the hand employed change the quality or character of the act? Or, is the coercion upon the United States, stronger in the *actual*, than in the *supposed* case? Again, instead of a canal, a basin, suppose it a turnpike road, and a horse or waggon, belonging to this department, stopped, upon a refusal to pay the customary toll; would the mere saying in court, it is our property, be enough? Would they not be held to shew, by some law, its exemption from toll? The contrary position is fraught with the most serious consequences; notwithstanding no title to exemption created either by the constitution or laws of the United States, or of this state is, or can be shewn, yet, by thus taking away the jurisdiction of the court and the means of enforcing the payments of toll, a perpetual exemption is produced. All inquiry is, in this way, fled; the pretended right of exemption is with-

drawn from the profane eye of a court, and secu ely and with impunity enjoyed. Every thing is made to yield not to the *character* of the property, but to that of the claimants. If the property of the United States be indeed seriously believed to be entitled to this exemption, it would better comport with their justice, character, and di nity judicially to test it, and fairly meet the inquiry, in that court, which they themselves have elected, and in a suit, to which they have made themselves voluntary parties.

A jealousy of the prerogatives and sovereignty of the United States seems unnecessarily excited in this cause, which is not even felt in governments of a more despotic cast. In England, until the time of Edward I, the king might be sued. Even now, the crown may be judicially reached by petitions *monstrant de droit* and process in the exchequer. The banker's case, in the time of Edward II, contains the principal features of a suit: it commences with a petition to the barons of the exchequer, the attorney general demurs, and upon judgment, takes it by writ of error to the exchequer chamber; whence, in like manner, it is carried to parliament, where the lords affirm the judgment of the exchequer in favor of the petitioners. In Spain, the son of Columbus successfully car-

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ried on a suit, before the council of the Indies, against Ferdinand, upon the contract made by that monarch with his father, in relation to his rights to this then newly discovered world. The different states of the union, all claiming sovereignty, were liable to be sued, until exempt, by an amended article of the constitution; and according to a variety of authors, the goods of a sovereign are liable to process to compel appearance. *Bynkershoek*, *Martens* and *Rutherford*. With these instances before us, we may surely support, without disrespect, our interests in a cause, in which the United States, uninvited by any citation, process or call to appear, thought proper voluntarily to intervene.

II. The second error assigned, claims for this vessel an exemption from toll, on the ground of her being a public transport attached to the armies of the United States.

To support this title to exemption, some provision, either in the constitution or laws of the United States, or of this state ought to be produced. We know of none. Even had she been a public armed vessel, constituting part of the military force of the United States, officered and manned as such, and exclusively employed on national purposes, though exempt from toll

by a resolution of the company, we know of no law enforcing such exemption. Much less then is exempt an unarmed vessel, employed in the Q. M. General's department, privately manned and commanded, and liable, when not employed in public transportation, to take freight and passengers.

By the constitution, congress has power to make *all laws* proper and necessary to carry into effect their constitutional powers. But we know of no law, by which, either literally or constructively, their public transports are exempt from the payment of toll, *rateably* and *equally* imposed by a *private* company, upon *all* vessels, using a bayou, canal, and basin made navigable, and dug at their expense; and we doubt much their authority to make any such law. We are even yet to learn that public transports are exempt from wharfage; or public property, from storage; or, if sold at public auction, from auction dues; or if transported through a turnpike road, from toll. In Pennsylvania, an old fort belonging to the United States, near Pittsburg, was sold at public auction, and the payment of the usual auction duty resisted on the ground, that none could be exacted from the United States. The court, however, decided otherwise. 4 *Wheat.* 342.

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To avoid some of these expenses incidental to the operation of government, they have appointed officers, purchased lands, made navy-yards and erected buildings; and, by a provision in the constitution, have exclusive legislation over all such places so purchased.

Had this navigation been originally a public highway, the right of exacting toll might more fairly, and upon better grounds, have been drawn in question. But it is altogether a *private* concern: this corporation is not a *public* but a *private* one, the stock of which is held altogether by *private* persons. The bayou, canal and basin, have been cleared out, deepened and cut by *individuals;* of the land, upon which the canal and basin are dug they are the owners, and the toll collected is their *private* property. By which law then, are they to be divested of property and rights thus acquired? The seventh amended article of the constitution of the United States, expressly provides, "that no *private property* shall be taken for public use, without *just compensation.*" The toll, we have fixed, is that *just compensation* to which we are entitled for the use of this navigation, and why is the payment of it thus unconstitutionally resisted?

To say broadly that public transports em-

ployed by government in the transportation of troops and stores, is one of the means used by congress in carrying into effect their constitutional powers and therefore to be exempt from the payment of toll is not only a gratuitous assertion, but most dangerous doctrine. If applied to this case, where shall we find a limit to this principle? All local taxation, private toll, and customary dues, so far as the United States are concerned, are at once suspended. Each in turn would be construed to come into contact with some of the means thus employed, or be seized upon as furnishing one of such means; and the blighting course of the numerous agents and officers of the various departments and establishments of the general government would be marked, through every state by the destruction of ordinary revenue and invasion of property.

III. The third error assigned is, that this matter is exclusively of admiralty jurisdiction. Having no possible idea, how this ground will be maintained, and why our canal and basin are to be crowned with admiralty honors, I shall wait, until I hear further on the subject from the opposite counsel.

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IV. By the 11th section, of the act of incorporation above quoted, is given in express terms the right of *stopping and detaining* all boats and vessels, until they shall pay the toll fixed by the company; and this chartered right, through the medium of the court, we have, in the present case, exercised. By the order of the judge, indorsed on the petition, it is ordered "that the schooner Amelia be seized and detained until the further order of the court;" and the judgment of the court is, "that the demurrer be sustained, and the plaintiffs have judgment for the amount of their demand." No order of *seizure and sale* therefore, were it worth while to take that ground, has ever issued; and the words of the charter have been strictly followed. But independently of this chartered right, the company, upon general principles of law, have a *lien* upon all vessels using this navigation, for the amount of their toll, and a right to detain them until paid.

The fact of her turning out a public transport no more divests the company of their *lien*, than the fact of its being public property divests the owner of the warehouse where it is stored of his *lien*, for the amount of storage.

Here indeed, lies the *gist* of the question. Though we may have no right directly to *attach*

the property of the United States, yet, having thus a *lien* upon all vessels using this navigation for the amount of toll and therefore a right to stop and detain them until paid, and knowing no exception in favor of public transports, we have exercised upon them the same right; and if it be thought proper to apply to the court for a release, they must shew our mistake, by proving their title to exemption. And this is precisely the situation of the Amelia; we have, through the medium of the court, merely stopped her, until she pays the toll due; to coerce this payment, we have obtained no order of attachment; nor of sequestration; nor of seizure and sale, but simply that of detention, by virtue of which she remains detained, "until further order of the court."

The hand employed does not change the character of the act; and our rights are not weakened by forms exercised through the intervention of the court. Would not the carpenters, who built or repaired her, have a lien upon her for the amount of their bills, and a right, in like manner, to stop her until paid? And would the mere fact, of her being public property, deprive them of possession, and dissever their lien? And is not our chartered right equally strong? Ought she to be permitted to go out

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of our hands, or leave the basin, until she pay the incurred toll, or shew a legal exemption from such payment?

Ripley, for the United States. The plaintiffs have made a supposed act of the governor and legislative council of the territory of Orleans, passed July 3, 1805, the foundation of their proceedings in the present case. Of consequence, as it is apparent on the record, it is competent to investigate its validity although it is not amongst the causes enumerated for error in the proceedings of the court below.

Under these circumstances, I propose to make three enquiries arising upon the face of the record of the cause.

1. Is the act, purporting to be an act of the governor and legislative council, passed July 3, 1805, creating the corporation of the Orleans Navigation Company, valid?

2. If it be valid, does the corporation possess power, to impose a tax or duty upon a public transport, owned and employed under the provision of the federal constitution which authorises the United States government "to raise and support armies," as a necessary mean of carrying this power into effect?

3. If the corporation possess a power to assess such a tax, have they a right to coerce the

payment of it by compulsory process *in rem* against a public transport, or other property of the United States.

1. A corporation is an ideal, invisible body, created by the law. The individuals, who compose it, possess immunities in their corporate capacity, which do not belong to a mere partnership or junction of interests between individuals. These immunities are not only important to those who possess, but they are of immense consequence to society itself. If we look at every portion of the civilized world, we shall perceive the influence of these chartered communities. In England, in France, in every country of Europe, since society became enlightened by christianity and commerce, the effect of the ecclesiastical, the literary and the commercial corporations, have been most powerfully felt, through every relation of society. Look at the order of Jesus, the East India Companies of England, France and Spain, and we perceive at once the imposing influence upon society of these communities: cheering and vivifying a nation if properly directed, but degrading and degenerating it, if the reverse.

If we turn our attention to the United States, we shall perceive that in borrowing from the

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ancient world, our literature and language, and jurisprudence, we have also introduced the same important character to our corporations. The multitude of our universities, colleges, scientific and literary societies; our numerous banks and insurance companies; the venerable order of our clergy, with their vestries, wardens and parishes, assume almost invariably the form and the character of so many corporations imparting their cheering and consecrated, and benign influences to public opinion, and controling, in that way, even society itself.

Under this view of the subject, the question occurs, what power in a state is competent to create a corporation? What authority can impart to a portion of the individuals, composing a community, a union of interests, and powers and rights and immunities, which are not common to all? The answer is obvious. No authority can confer these priviledges and grant these rights, but the power which is sovereign. No tribunal can create these powerful and important associations, powerful as the instruments of good or evil, and important as it regards their influence upon a nation, but the functionaries who, according to the peculiar form of each government exercise the supreme power of the state. It is not with subordinate

authorities ever to wield it, unless the power is expressly and specially and by name delegated to them. In proof of the correctness of these principles, I refer the court to the following authorities.

Domat, expressly enumerates the power to create a corporation amongst the powers of absolute sovereignty.

The police and order of a state require that, not only crimes, but every thing that may disturb or hazard public tranquillity, be repressed. For this purpose, the reunion of several persons in one body is illicit, on account of the danger that might result from an assembly, gathered for a purpose injurious to the state. Assemblages of men, who have none but proper objects in view, cannot be formed, without the express approbation of the sovereign, who grants it on the information of the proposed objects. This, renders his permission necessary, to the establishment of ecclesiastical and lay corporations, as colleges, universities, chapters, &c. in which, a number of individuals form one body, whatever may be their object. The sovereign alone can grant the necessary leave and authorise such a reunion. 2 *Domat*, 9, 12.

Blackstone, speaking of the sovereign power vested in the king, expressly enumerates the

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power of creating a corporation, as a prerogative of sovereignty. 2 *Comm.* 272. And in 4 *Wheaton*, 410, Judge Marshall says "the creation of a corporation, belongs to sovereignty." This is admitted.

The position then being established that the power of creating a corporation is a sovereign power, let me ask, had the governor and legislative council of the territory of Orleans attributes of sovereignty, sufficient to enable them to create a corporation?

The sovereign power is the supreme power of the state. It knows no superior; it is what Grotius denominates the "*puissance civile.*" It is that concentration of power from which all authority emanates: and in what particular public functionary or functionaries it resides, depends upon the theoretical or practical nature of the social compact. In an absolute monarchy, this power resides in the monarch without limitation; in a limited monarchy, it resides in the monarch, but circumscribed by powers delegated to other estates in society: as for instance, the parliament of England. In an aristocracy, this power rests with the oligarchy. In a democratic republic, sovereign power is originally in the whole body of the people; but when they form a social compact, it becomes delegated to

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be exercised by the public functionaries, according to the forms, provisions, and limitations of that compact. Hence, in the United States, where the form of government is complex, arising from the relation of the states to each other, each state is absolutely sovereign within itself, according to the principles of the state constitution, excepting, so far as a portion of this sovereignty is conferred upon the federal government, by an express, or a necessarily implied grant of powers. Within the sphere of all powers, exclusively delegated to the federal government, it is supreme; within the circle of all powers, reserved to the state, it is also supreme.

The question now recurs, were the governor and legislative council of the territory of Orleans, sovereign or supreme, in any sense? They acted under no original compact of the good people of Louisiana. They were organised by a law of congress, passed March 26, 1804, in pursuance of *sec.* 3, *act* 4, *cons. United States*, "the congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The governor and legislative council were appointed by the president; and can it be contended for a moment, that this body was sovereign and supreme?

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In every respect, they were subordinate to the federal government. Their local government could be modified, and was modified by congress. Under the appellation of territory, Louisiana was actually a province of the United States, as it had been before of France and Spain. Surely, there is no pretence to consider the governor and council as possessed of supreme power, under an original compact, either theoretically or practically derived from the community. They were no sovereignty; they were a dependent, subordinate power of the federal government, under an express provision of the constitution of the United States. They were, to use the language of the most enlightened jurist of the present age, Chief Justice Marshall, "a corporate body." 4 *Wheaton*, 122.

It may possibly be contended by the opposite counsel, that the federal government granted to the governor and legislative council, the power of creating a corporation: such a grant of power from the sovereign, must be express and *eo nomine*. It cannot be raised by implication: the 4th sec. of the law passed March 26, 1804, after making provision for the appointment of a governor and legislative council, proceeds to declare "that the governor, by and with the advice and consent of this council, or of a

majority of them, shall have power to alter, modify, or repeal the laws, which may be in force at the commencement of this act. Their legislative powers shall also extend to all the rightful subjects of legislation: but no law shall be valid, which is inconsistent with the constitution and laws of the United States;" and further, that "the governor shall publish throughout the said territory, all the laws which shall be made, and shall from time to time, report the same to the president of the United States, to be laid before congress. Which, if disapproved of by congress, shall thenceforth be of no force. Having settled the principle that it is inconsistent with the laws of the United States, and of Louisiana, as expounded and established, for any power short of sovereignty to create a corporation, I cannot discover in this section any delegation of that power, on the part of the federal government to the governor and legislative council of Orleans. The section merely gives them powers of legislation, within the sphere of their corporate capacity, but not a grant of powers repugnant to the principles of the constitution and laws of the country. If the United States, in their capacity, are the only supreme power in relation to their territories, it has already been shewn that they can only cre-

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ate a corporation. And a delegation of authority on some points to an inferior tribunal with a proviso, that they shall not pass laws repugnant to the laws of the country, surely does not give them a right to usurp authority, which exclusively belongs to the supreme power.

This species of subordinate legislation in affirmance of general laws, but not repugnant to them, is given to every corporation. With reference to their own interior concerns, they can pass laws, but no one ever could suppose that they could arrogate to themselves the powers of sovereignty. If the bank of the United States were to attempt to create subordinate corporations, by its general power to pass bye-laws, it would excite much more clamor against that corporation than it has yet experienced, and still, upon the principles of our government, our laws and jurisprudence, the bank possesses that power, as much as the other species of corporation, the legislative council of a Territory.

No one would pretend that a territorial government of this description had power to raise armies or create navies in time of war, and yet these powers, are no more sovereign powers than the power to create a corporation.

With reference to the other part of the section, which directs that the laws of the legislative

council of the Orleans Territory should be reported to the president of the United States, to be laid before congress, which if disapproved of by congress shall thenceforth be of no force, this section does not confer upon the legislative council additional powers, but gives to congress a *veto* upon laws passed in pursuance of their proper authority. It is not a grant of authority, but a restriction upon authority already delegated. It is similar to the *veto*, which the governor of the state of Louisiana possesses upon laws passed by the legislature of the state. If he approve an act or suffer the period for exercising his *veto* to expire without returning a bill, it becomes a law, if the legislature act within the limits of their authority: but if they transcend it, if they go beyond the limits of the constitution, it is not a law, nor binding even with the approval of the governor: for example, if the legislature passed a bill of attainder, which they are prohibited from doing by the constitution of the United States, and the governor were to approve of it, still it would be void as transcending their powers. In this case, the legislative council had powers of legislation for certain subordinate purposes: on the exercise of these powers congress possessed a *veto* or the power of disapproving. If a law was pass-

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ed which was within their authority, and congress did not disapprove of it, it became a law of the land. But if they passed a law beyond that authority, for example to create a religious establishment, even if congress did not disapprove of it, yet as the law was passed without authority it would be void. In the present instance the legislative council, without authority, passed a law to create a corporation, which was void *ab initio*, and it certainly requires no supererogating *veto* on the part of congress to declare that null which is null already.

Having thus settled, I hope satisfactorily, three positions: 1. That the power of creating a corporation is a prerogative of the supreme power of the state exclusively: 2. That the legislative council of New-Orleans were not this supreme power, but were in all respects subordinate to the federal government: and, 3. That no authority was imparted by the act of congress of 26th March, 1804, delegating to the legislative council this important arm of sovereignty, it remains to enquire whether any act has been done by the congress of the United States, or by the legislature of the sovereign state of Louisiana, since its admission into the union, which amounts to a confirmation of the privileges and immunities claimed by the plaintiffs.

The 31st of March, 1814, the legislature of Louisiana passed a law by which it is enacted that the operation of the Orleans navigation shall be confined to the improvement of the inland navigation of the island of Orleans: and on the 14th March, 1814, they passed a law exempting them from the operations of a certain tax.

The United States congress have passed a law granting land to this corporation.

How these statutes can operate as confirming the immunities and privileges claimed by the plaintiffs, I am wholly at a loss to discover.

It is a settled principle that an act done *coram non judice* is altogether void. A judgment rendered by a court without jurisdiction is to all purposes as though no judgment existed. Where a legislative body with limited powers pass a law, transcending those powers, it is *ipso facto* void; for example, if a state of the American republic were to declare war, the law enacting it would be absolutely void. To apply these principles to the present case, the legislative council of Orleans have passed an act creating the corporation of the Orleans Navigation Company; they being a limited tribunal had no power to create a corporation, and of consequence the act is *ipso facto* void. Now if the act be

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void, it is to be considered as though it never existed; and, if it be viewed in this light, what force or effect is there in these subsequent statutes? To my view none. There was no such corporation, as the Orleans Navigation Company, *in esse*; there was of consequence nobody for these laws to operate upon; there is, in a word, no basis to the superstructure, which is attempted to be set up. A number of individuals exist to be sure in their natural capacity, but they have no legal existence as a corporation.

Again, these subsequent acts contain nothing by way of confirmation; they contain only a recognition of a certain name, which has no legal existence. An act of incorporation is a compact between the individuals who compose it and the state. Admitting the original charter to be void, is any compact created by these mere words of recognition? What rights do they convey, what priviledges afford, what immunities do they grant? For all these great purposes, they are perfectly inoperative. They convey not a single right; the character of the supposed corporation, the objects for which it is created, and the individuals who compose it, are totally unknown. For aught that appears in these recognitions, the Navigation Company could arrogate

to themselves the right to navigate exclusively the Mississippi, the gulf of Mexico, or even the Ocean itself. To ascertain the limits, extent and character of the corporation, to breathe into it life, it is necessary to go back to the original charter. Against this we protest; it is a void act, a waste leaf in the statute book, passed without competent authority, and no rights whatever can be claimed under it.

It may be contended that the Orleans Navigation Company have appeared as parties in the judicial tribunals of the country, and that decisions have been made, where they thus appeared. The judicial decisions of the state are of binding authority, upon points expressly raised and decided in a cause; and records of courts are conclusive, upon all who are parties or privies to the suit. This is the first time the charter of the Navigation Company was ever put in issue in a judicial tribunal, and the first that the present parties ever appeared in controversy. Hence the respondent is not concluded by any judicial decision with reference to the former points, nor by any record with reference to the latter. If the amount of such argument should be, that as the Orleans Navigation Company have appeared frequently in court, without their charter being attacked, that hence, the

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silence of others is to conclude the present respondent, the argument is too feeble to need refutation.

After a long course of practice otherwise, the supreme court have confined the parish court to its proper jurisdiction; and I believe that, it never was made a point in the argument, that because they had acted without authority several years, the usurpation itself would give them a jurisdiction, which the laws do not allow.

I have foreborne in discussing these points, to advert to other circumstances, which render this charter extremely objectionable, than those I have stated.

By the act of the legislative council of the territory of Orleans, sec. 7, it is declared that, the said corporation, by their president, directors or agents, may enter into and upon all and singular the land or lands covered by water, where they shall deem it proper to carry the canals and navigation, herein before particularly assigned, (extending throughout the whole territory) with or without the consent of the owner or owners thereof, and to lay out such routes, as shall be most practicable, for effecting navigable canals as aforesaid. The concluding paragraph, makes provision in what manner damages shall be paid to the proprietor.

It will be perceived that, by this section, an unlimited control is imparted to this corporation over all the real property of the inhabitants of the territory of Orleans; nor is the charter limited as to duration. I should think it questionable, whether even a state possesses the power to create so sweeping a grant as this is. It is a settled principle of law that, the sovereignty in case of necessity, can take the property of individuals for a public purpose, which is definite, paying an equivalent; but I am yet to learn that a sovereignty can confer upon a corporation an unlimited power to enter and seize the property of individuals at their discretion, without its first appearing to be a matter of necessity, for the public good. By this charter, I admit, in some future cases, it would be necessary to have the approbation of the executive, but this does not change the nature of the argument. The legislature and not the executive, under our institutions, are to be the judges of the necessity which definitively exists, and within what limits it may be proper to seize the property of individuals for public purposes. I venture to say that, even in despotisms, there has not existed a charter conferring such an universal monopoly as this. And the idea that, fourteen executive officers, appointed by the

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president of the United States, possessed the power thus to virtually grant away the property of the people of Orleans, without any definitive necessity is, to my mind, absurd and preposterous. Again, the act of congress, passed April 8, 1812, for the admission of Louisiana into the union, has this provision: "that it shall be taken as a condition upon which the said state is incorporated into the union, that the river Mississippi, and the navigable rivers and waters, leading into the same, and into the gulf of Mexico, shall be common highways and forever free, as well to the inhabitants of the said state (of Louisiana) as to the inhabitants of other states and territories, without any tax, duty, impost or toll therefor, imposed by the said state. And that the above condition, and also, all other the terms and conditions contained in the third section of the act, the title of which is herein before recited, shall be considered, deemed and taken fundamental conditions and terms, upon which the said state is incorporated into the union." The bayou St. John is a navigable water, leading into the gulf of Mexico, where the tide ebbs and flows, and from time immemorial has been navigated by vessels of more than ten tons burthen. By the 9th sec. of the act of March 26, 1804, the navigation

company have a right to ask for, demand and receive at the rate of one dollar per ton for all vessels navigating said bayou.

Are not these laws at variance? And the former one is the fundamental condition, on which Louisiana is a member of the American republic. If she does not perform it with good faith, according to every principle of law, she certainly forfeits her right to such membership. The subject, in this point of view, is painful to me, and I will not press it further; the court will at once perceive the results of sanctioning the claim of the corporation to the waters of this bayou.

In another view this section is important, for it contains a direct disapprobation and *veto*, upon all laws passed by the original territorial government, which impose a tax upon the navigable waters leading into the gulf of Mexico.

II. If it be valid, does this corporation possess power to impose a tax or duty upon a public transport attached to the army, owned and employed under the provision of the federal constitution which authorises the United States government, "to raise and support armies," as necessary means of carrying this power into effect.

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With reference to this point, it is not necessary for me to go into an elaborate train of reasoning. The principle has been so fully settled in the case of *M'Culloch* against the *State of Maryland*, 4 *Wheaton*, by the highest judicial tribunal of the country, that this necessity is taken from me. It is there well observed that, the United States' sovereignty, although limited, is supreme within its powers or sphere of opération.

The present case is a much stronger one for the defendant, than the case which I have quoted. In that instance, the state of Maryland claimed a right to tax a corporation created by the federal government. In the present instance, the navigation company, deducing its rights under the territory of Orleans, claim to tax the property of the federal sovereignty, employed as a means to carry into effect the powers of that sovereignty.

Now, if in the exercise of those powers they are supreme, how can a state, much less a territorial government, control them or interfere with that supremacy? The very moment you authorise any tax by a state government, you destroy all idea of supremacy. You admit the existence of a power superior to it. The exercise of that authority which the states for their com-

mon defence and general welfare, have delegated to the national government, becomes liable to restrictions, embarrassments and taxation from the state governments; or, in other words, you make the state governments supreme in every instance, and the federal government subordinate to them.

Can a state tax the mail? Can it impose a direct tax upon the building used for the custom house? Can it levy a stamp duty from the papers and blanks which are used in the offices of the agents of the United States? Can it impose a tax upon public armed vessels, or upon timber cut within it for the navy? Can it tax public baggage waggons laden with military stores, which traverse its highways? I believe the answer will at once be in the negative; and for what reason? It is simply because certain powers are delegated to the federal government. In the exercise of these powers, they are supreme, both as it respects the execution of the power and the means employed to carry it into effect. Now, if the state governments can tax, or in any way interfere with these means, all supremacy is destroyed; the means themselves become subject to the authority of the state, and the sovereignty or absolute supremacy of the federal government is lost and

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destroyed. The present case is one of this description, and any attempt to impose a tax upon property of the government, used as a means to carry into effect a power granted to it, is unconstitutional and void. On this point, it is not necessary for me to say more. Indeed after the able and sound analysis of the complex principles of our government, in the case I have just quoted, the subject is exhausted, and no argument could illustrate it.

III. If the corporation possess a power to assess such a tax, has it a right by compulsory process *in rem* against a public transport, or other property of the United States, to coerce the payment of it?

In this case the plaintiffs admit, that the United States are not suable. Of course, it is not necessary for me to adduce authorities to support a proposition of this kind. As they have admitted they are not suable, it then follows, in the present case, if the process is a suit against the United States, all foundation for the action is at an end.

By the civil and admiralty course of proceeding, there are two modes of commencing a suit. One by process against the person, the other by a seizure of the thing.

In the proceeding, *in rem*, recognised by these laws, are all cases of lien or priviledge. The builder of a ship, the sail-maker who supplies it with sails, all have this species of priviledge. Mariners can have it sequestered for their wages; and persons, who lend money upon it as a specific pledge, possess this remedy. Landlords can proceed against the thing itself for rent; and innumerable examples of other proceedings of a similar kind might be given. Are not these suits; and are there not parties to them, in the manner in which there are to all suits at law? By admitting that the United States are not suable, the gentleman has in fact conceded away his cause; for to my view all these modes of proceeding are as much suits at law, as a proceeding against the person; and they are accordingly so recognised. A suit is a process at law for the purpose of coercing the payment of a debt, or obtaining remuneration for a wrong done; and it is of no consequence whether this be accomplished by the seizure of the thing, or by a remedy against the person. In both instances, it is compulsory in its character and consequences; and from this circumstance alone results the deduction, that a sovereignty is not suable; for it being supreme in

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society, it would be a contradiction in terms to render it liable to the compulsory process of any tribunal.

I do not think it necessary to adduce authorities to this point. The case is so clear, tha it appears to me it cannot be misunderstood. The very foundation of civil society is broken down, if you admit that the sovereignty is liable to coercion from inferior tribunals.

In the argument of the opposite counsel much is said about the United States intervening in suits with their claims, and an attempt is made to render this an analogous case. The sovereignty can sue, but not be sued. The sovereignty can appear voluntarily in court, but not be coerced. The sovereignty can intervene in suits, but not be compelled to answer. Now, in this case, the proceeding is coercive. The vessel of the United States is seized by the sheriff; and either it will be condemned by default, or the United States must suggest their claim. Is this a voluntary intervention? Is this simply making a claim, without being compelled to do it? Certainly, it is not necessary for me to reason on this point. To the common sense of the court, and to their legal capacity, I leave it.

I regret that this process has ever been com-

menced. I most sincerely lament that a sense of professional duty should impel me to attack the character of a company for the individuals of which I possess the highest respect. The proceeding has been far from voluntary on my part. But such strong ground has been taken in this cause with the United States, that the Navigation Company must take in the full measure of the consequences. There is manifested sometimes almost a spirit of frenzy, productive of no good and which often leads to disastrous results. I do not wish to speak in the language of prediction; but I am much mistaken, if we shall not perceive its unfortunate effects in the present example. The canal company, under their defective charter, were receiving immense profits. A spirit of discontent to be sure was manifested, but still their proceedings were not interrupted. By attacking the national sovereignty, it has led to an analysis of their rights, and I very much question, whether the still small voice of murmuring will not be forcibly heard, and its consequences seriously felt. I repeat, that we have been forced into this discussion, and we wash our hands of all its consequences.

Ellery, in reply. From the errors assigned,

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I was not given to expect, that among the means employed to resist the payment of toll, would be numbered an attack upon the constitutionality of the charter. After a lapse of fifteen years, since the incorporation of the company, and after the successful completion of extensive and hazardous works, and an expenditure of $230 000, from which, as yet, but scanty returns have been yielded, it seems rather late to call in question the constitutionality of that instrument, upon the faith of which these works have been performed, and this money hazarded. The acquiescence for so many years, in its constitutionality, and in the competency of the late territorial legislature to the grant, as well as the practice under the act granting it, seems to have fixed the proper construction upon this point; and the judicial and legislative authorities of the late and present governments, as well as that of the United States, having sanctioned such construction, the question ought now to be considered at rest. Such was the decision of the supreme court of the United States in relation to the constitutionality of the appointment of the circuit court judges; and such was also the decision of our own supreme court, when a like question arose, with regard to that of the

office of special administrator. 1 *Cranch*, 309, *Stuart* vs. *Laird*. 3 *Martin*, 169, *Rogers* vs. *Bellew*.

Safe reliance might, perhaps, be placed upon this principle, so fully recognised by the highest tribunal of this state, as well as that of the United States; but the importance of the present case to the stockholders of this company, and the large and various interests ultimately at stake, will excuse a more particular answer to objections thus unexpectedly and unseasonably raised. They all chiefly resolve themselves eventually into the denial of the competency of the late territorial legislature to the grant; and divested of extraneous matter, and put into syllogistic form, stand as follows: None but the sovereign power can create a corporation: the governor and legislative council of the late territory of Orleans were not the sovereign power; therefore, they could not create this corporation.

In the construction of this syllogism, the premises, from which this conclusion is drawn, are too broadly taken; inasmuch as they suppose absolute and unqualified sovereignty, or supreme power. It is admitted, that a law, creating a corporation, like any and every other law, is an exercise of sovereign power, the act

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of legislation itself implying sovereignty; but though *sovereign*, as it respects the act done, it by no means follows, that the enacting legislature may not, in other subjects, be dependent or subordinate. Within the scope of its legislative powers, it is necessarily absolute, and *quoad hoc, sovereign;* but it may be otherwise limited by national compact or fundamental law; as congress, for instance, by the constitution of the United States; and each state, in addition, by its respective constitution. Hence it was once doubted, whether congress (the power not being expressly given by the constitution) could create a corporation; the same doubt is now raised, as it respects the late territorial government; and might, with as much propriety, be extended to all the local governments. But congress, and the different states and territories, being all constitutionally invested with certain legislative powers, are, as to all objects within the scope of these powers, *respectively sovereign;* and all *means* necessary and proper to the accomplishment of these objects, if not specifically expressed, are constructively and impliedly given. Now corporations are such *means;* and being such, we do not look for any specific authority for their creation; we do not

ask, whether such a power be specially given, but whether it be specially prohibited.

Now, by turning to the acts of congress, providing for the government of the territory of Orleans, during the period when the charter was granted, we shall find:

First, that the governor and legislative council were invested with powers *adequate* to the creation of this corporation, which, if not expressed, fall necessarily within their sphere of legislative action; and

Secondly, that even if *inadequate*, this act of incorporation, in conjunction with all the other territorial laws, has received the sanction of congress.

1. This charter was granted by the governor and legislative council, at their second session, 3d July, 1805. 1 *vol. Orl. L.* 2 *p.* 1 *chap.* § 1.

Now, by the 4th section of the act of congress, of 20th March, 1804, "erecting Louisiana into two territories, and providing for the government thereof," the legislative powers are vested in the governor and thirteen of the most fit and discreet persons of the territory, to be called the legislative council, and to be appointed annually by the president of the United States: and by a subsequent clause of the same section,

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their legislative powers are made to "*extend to all the rightful subjects of legislation.*" 1 *Martin's Dig.* 142. I omit, as unnecessary to the argument, any notice of the act of congress, of 2d March, 1805, "further providing for the government of the territory of Orleans;" for, though of a date some months *prior* to that of the charter, the organization of the government under it, was subsequent. 1 *Martin's Digest*, 170, 183. 1 *Grayd. Digest*, 431. We must then look exclusively to the first mentioned act of congress, for the legislative powers of the territory of Orleans, under which this charter was granted; and which, by the 4th section above quoted, extended to *all the rightful subjects of legislation.*

The powers, conveyed by this clause, seem abundantly ample to the creation of a corporation; and if improving the inland navigation of the territory were a rightful subject of legislation, creating a corporation, as the means of such improvement, is assuredly not withheld. The legislature selected this as the fit means to produce an authorised end; and the same reasoning which would divest them of such power, would equally go to divest of it, the state and the United States. The territorial government, it is said, was not the sovereign power; nei

ther in the full import of the term, is the state government or the general government: inasmuch as the sovereign power resides in the people. But no specific authority for this purpose, it is added, is found in the act of congress providing for the government of Louisiana: neither is it to be found in the constitution of this state, or that of the United States.

2. But secondly, admitting the incompetency of the governor and legislative council to the grant of this charter, yet the act granting it has undergone the examination and received the approbation of congress; and therefore, even if invalid, as an act of the territorial legislature, it has all the force of a law of the United States.

By the 4th section of the act of 20th March, 1804, above quoted, the governor was bound to "report from time to time, to the president of the United States all laws which were made, that they might be laid before congress; and which, if disapproved by them, should thenceforth be of no force." 1 *Martin's Dig.* 144.

If disapproved by congress, the law was thenceforth of no force; it follows then, until disapproved by them, it was of force; by not disapproving it, when presented, they necessarily (under the provisions of this act) approve.

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Qui non prohibet, quum prohibere potest, jubet. Every territorial law was therefore of force, from the date of its passage, until the period of its disapproval. The approbation of congress was not previously necessary to their validity. Our distance from the seat of national government, would have produced the most serious inconveniences, if the operation of all our laws had been suspended, until the pleasure of congress was known.

Now, it is not suggested that the governor failed to report, from time to time, the laws which were made; or that he omitted to include, in such reports, the law containing this charter: or that the president neglected to lay them before congress; or that congress ever disapproved this law. It follows then, that it has met with the due approbation and sanction of congress. Even the statutes of a corporation, by our code, acquire the force of laws, if they have been approved by the legislature. *Civil Code*, 90, *art.* 20.

Indeed, the government of the then territory of Orleans may properly be considered as a delegated branch of that of the United States; and all their laws, not disapproved by congress, as having the force of a law of the United States. The governor and legislative council

were appointed by congress for the express purpose of making laws for this territory; and every act made by them, within the scope of their legislative agency, is, in effect, an act of congress. *Qui facit per alium, facit per se.*

3. To this it may further be added, that this company has also been distinctly recognised by various subsequent acts of congress, passed in their favor. By the act of March, 1807, confirming the claim of the corporation of the city of New-Orleans to the environs, done upon the special condition, of their gratuitous relinquishment of "so much thereof as shall be necessary to continue the canal Carondelet from the basin to the Mississippi; and leaving open as a public highway, 60 feet of the space thus reserved for the canal." By the act of 18th April, 1814, the United States grant to the president and directors of the Orleans Navigation Company, and to their successors for ever, a lot of ground, fronting the bayou St. John. And by the act of 16th March, 1816, they confirm to the company the use and possession, and vest in them another lot of ground, purchased by the company of the Charity Hospital.

After such general sanction by congress of the act of incorporation, as included in the late territorial laws submitted to their inspection, and

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such particular recognition of it, by subsequent act of favor and endowment, we were not prepared to expect, as one of the means selected for their defence in this suit, an attempt to dissolve the charter, by a denial of its constitutionality, and thus take back by revision, the lands with which they endowed us.

4. This charter has also been recognised by the succeeding legislature of the territory of Orleans, when put on a more advanced grade of government, as appears from a supplementary act of the 1st March, 1809, passed by the second session of the second legislature of the territory of Orleans, in relation to the improvements of the company. 3 *Martin's Digest.* 196.

5. It has been further recognised by the different judicial authorities of the territory and state, in various suits, in which it has appeared as party, plaintiff or defendant; many of which are reported; in one of which (against the city corporation) to which I particularly refer the court, many of the points, now made, were then raised, and decided in favor of the company. 2 *Martin*, 10, 214. 1 *Martin*, 23, 269. 2 *Martin*, 84. 5 *Martin*, 507.

6. And lastly, it has received at different times and in distinct forms, the sanction of the legislature of the state of Louisiana, witnessed

by a number of recognitive acts. By the act of 3d March, 1814. passed by the fifth legislature of the state of Louisiana, at the instance of the company, their chartered rights and powers are confined to the island of Orleans. By the act of 27th March, 1813, an annual tax, producing about 500 dollars a year, and which still continues, was imposed on the capital stock of the company; though by the act of 14th March, 1816, the company, on account of their losses, were exempted, during the years 1816 and 1817, from its payment.

Thus the charter of the Orleans Navigation Company appears to have been granted by a legislature fully competent, by the powers with which it was invested, to the grant; and the act granting it has been duly approved by the congress of the United States; by whom it has also been recognised by various subsequent acts in its favor; it has also been recognised by the succeeding legislature of the territory of Orleans, when under a more advanced grade of government; and also by the different judicial authorities of both the territorial and state governments; and lastly, it has been sanctioned by different recognitive acts of the legislature of the state, which still derives a revenue from the tax imposed upon its capital stock, and annual-

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ly, by a joint committee of both houses, visit the company, and inspect their books and proceedings.

This charter rests upon unshaken ground, supported by the concurring acts of the territorial, state and general governments.

To the above may be added, the consequences which would result from the adjudged unconstitutionality of the charter, upon the grounds taken in the argument. Without stopping to notice its ruinous effects upon the stockholders, in the loss of 200,000 dollars, amount of capital stock subscribed and paid, and the reversion of the lands with which they have been endowed, and the abandonment of works completed and projected; what would become of the various companies incorporated during the existence of the territorial government, and standing on the same obnoxious grounds? Besides roads, ferries, and toll bridges, the Fausse Riviere company, one insurance company, two churches and three banks, by this disfranchising principle, would fall at once to the ground: divested of lands, and deprived of the means of recovering a debt; embarrassment, confusion and distress, would spread through all classes, and in every direction.

I had forgotten, what perhaps it was hardly worth while to recollect, or material to answer, another objection, viz. that toll could not be *constitutionally* demanded by the company, because the 1st section of the act of congress of 8th April, 1812, for the admission of Louisiana into the union, makes it one of the *conditions of its incorporation*, "that the river Mississippi, and the *navigable* rivers and waters *leading into* the same, and into the gulf of Mexico, shall be common highways, and for ever free, without any tax, duty, impost, or toll therefor." 1 *Martin's Digest*, 222.

But this condition applies exclusively to *navigable rivers and waters leading into the gulf of Mexico;* now the bayou St. John, in the first place, is not connected with the gulf of Mexico, but with lake Pontchartrain; and in the next, does not *lead into* that lake, but on the contrary, *makes from* it. A river has its source in the interior, and flows into the sea; but a bayou is a creek from a lake, sea, or river, running into the land. And again this condition applies only to waters *originally or naturally navigable*, and not to those made so by the exertions of individuals. And lastly, the charter and privileges of the company existed, and were known to and approved of by congress, as has been shewn,

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long *prior* to this act; as well as *subsequently* recognised by the act of 18th April, 1814, and 16th March, 1816, already noticed.

Under these circumstances, I am inclined to believe, that the company may still continue to collect toll from the bayou, without endangering the union, or forfeiting to the state of Louisiana, as is apprehended, her membership.

While upon this return back, I crave also the excuse of the court in noticing an overlooked *intrinsic* ground of *unconstitutionality*, supposed to be found in the seventh section of the charter; which, in certain cases, grants power to the company in conducting their canals, to enter upon *lands covered with water*, belonging to individuals; prescribing however, the mode and extent, and providing the means of compensation. Though a similar clause may perhaps be found in every turnpike act, yet this is considered as imparting an unlimited control to this corporation, over *all* the real property of the inhabitants of the territory of Orleans, (which, by the way, supposes *it all covered with water*) and it is said, that even in despotisms, there has not existed a charter conferring such an unlimited monopoly; and that the late territorial legislature possessed the power thus to virtually grant away the property of the people of Or-

leans without any definitive necessity, is pronounced absurd and preposterous. And yet is this charter still permitted to live! *Senatus hæc intelligit, consul videt, hic tamen vivit!*

As the other grounds in this cause are lightly touched on in the reply, either from a reliance upon the strength of this, or from a belief, perhaps that some of them are mistaken, and that others are untenable, I shall add but little to what has been said in the opening.

I know of no principle in the constitution of the United States, by which public property generally is exempt from local taxation. This exemption is confined to real estate, ceded or sold to them by the state legislatures, for the erection of forts, &c. or to personal property employed by them in the proper and necessary exercise of their constitutional powers. The decision of chief justice Marshall in the suit of *M'Culloch* vs. *the State of Maryland*, is grounded on the constitutional right of congress to erect banks, as one of the fiscal means of carrying into effect such constitutional powers, and that the power to tax them, on the part of the states, involved the power to destroy; but it is expressly made not to extend "to a tax paid by the real property of the bank in common with other real property in the state." 4 *Wheat.*

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436. In this state, indeed, the real property of the United States, by the 3d section of the act of Congress of 16th Feb. 1811, "to enable the territory of Orleans to form a constitution," &c. and assented to by the territorial ordinance of the December following, enjoys this immunity. 1 *Mart. Dig.* 218, 132. *But I know of no law, exempting personal property in this state, from the payment of customary and ordinary dues and tolls claimed by individuals, or what is tantamount, a private corporation, for the use of their works. The principles of such a law would lay at their feet both personal rights and private property. Congress, by the constitution, have power "to raise and support armies;" but they have no more right gratuitously to use a private canal, water-course, navigation, ferry, bridge, or turnpike road as a matter of conveniency in the transportation of their troops, than they have, as a matter of economy, to quarter them in our houses. I speak not o time of war, when every thing is made to yield to necessity. But the question then recurs, how can you coerce the United States? How can you profit by the lien you have upon their property, or their vessels, or enforce against them the payment of your dues or toll? By stopping and detaining the subject matter, upon which

the lien subsists, or the toll is due. If goods, by turning the key of the store; if vessels, by closing upon them the toll-gates. If they are then claimed by the United States as their property, the court, upon payment of such dues, and not until such payment, will order their release. Can any law or principle be pointed out to the contrary, divesting parties of such right to detain? United States' property is saved at sea; the sailors bring it into port and libel it for salvage, admonishing all persons concerned to shew cause, why reasonable salvage should not be decreed therefrom; whereupon the United States come into court as owners, and claim the saved property. Is it to be at once released and restored, without inquiring into the rights of the salvors?

In the present case, we have a lien upon the Amelia for the amount of toll due; she is in our basin, excavated at our expense, out of our soil, and under charge of our officers; she proposes to leave it without payment; we want, by stopping her to preserve our lien; instead of resorting to forcible means, we seek the aid of the court to prevent her departure; the court, at our instance, does detain her; the United States then file their claim, and answer and deny our right of toll. Will not the court

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hear us upon this point, and decide upon our right, thus put at issue by the United States? Is the court prepared to say, that no lien can attach to public property? But the very existence of a lien depends upon possession; deprived of that, by the departure of the vessel, we are deprived of our lien; we call then upon the court to secure us in such possession; a denial throws us upon physical means of detention; and puts it upon the right of the strongest; where, indeed, we should stand but a poor chance.

See the judgment, *post*, 632.

YOUNG vs. *M'LAUGHLIN & AL.*

If A.B. and C. receive a note, payable in Tennessee, and promise to send the proceeds to N. York, and they transmit it to D in Tennessee, and being called upon by the owner give him an order for it on D. he cannot demand the proceeds from them.

APPEAL from the court of first district.

On the 3d of April, 1818, the plaintiff and appellee delivered into the hands of the appellants, a promissory note, subscribed by Samuel Vance & Co. in favor of Young and Urquhart, dated New-York, 5th July, 1817, and payable twelve months after date: in the receipt, which they gave to the appellee, they say, "that when collected, it is to be remitted to John Urquhart of New-York." It appears that the subscribers of the note, lived in the state of Tennessee,

and that it was understood between the parties that the appellants were to send it there, for collection. On the 22d of April, same month, they inclosed it to John P. Irwin in a letter, which makes part of the evidence produced by them. John P. Irwin is presumed to have obtained payment of the note; but the appellee, being without any account of it, called upon the appellants, and received from them an order on John P. Irwin for the same. A few days, however, after having received that order, he brought the present suit, demanding payment of the note directly of them.

There seems to be but one question in this case: Did the plaintiff authorise the defendants, to send the note to John P. Irwin to collect it in Tennessee, and remit the same from thence to Urquhart, in New-York? If so, he certainly cannot call upon them here, for the amount. Let us see how stands the proof with respect to that point: in the first place, it is admitted that the note was payable in Tennessee; so that without any recommendation to that effect, it was, of course, to be sent there. Two of the partners of the house of the defendants here, have another mercantile house in the country, where the note was to be paid; it is reasonable to suppose both parties to have understood, that it

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was to be sent to them. The amount, when collected, was to be remitted to New-York. Was it first to be sent here, and then from here to New-York? That is hardly to be presumed. The natural course of this transaction was certainly that the defendants were to despatch the note to the house of their associates in Tennessee, with instructions to remit the proceeds directly to New-York. This, if there was no positive testimony on that point, would offer itself as the probable understanding of the parties; but there is positive evidence that the plaintiff, on seeing that such had been the course pursued by the defendants, declared that it was conformable to the instructions which he had given them. To that must be added, as a confirmation of that testimony, his own acceptance of an order on Jno. P. Irwin, for the proceeds of the note, which, as it makes part of the evidence produced on his side, was, it must be supposed, in his hands. We are, upon the whole, satisfied that Jno. P. Irwin was made, by the direction of the plaintiff, his agent on the spot where the note was to be collected, and that the plaintiff must look to him for an account of it.

Enough having been found in the merits of the case to pronounce in favor of the appellants,

no notice has been taken of their bills of exceptions.

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, **reserving to the plaintiff his recourse against the house of J. P. Irwin, in Tennessee, as if no suit had been brought against Irwin, M'Laughlin & Co.*

Eustis for the plaintiff. *Preston* for the defendants.

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* This case was determined in January last, but was continued on a motion for a rehearing, till this term, when the judgment was amended by the addition of the words in italicks

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District
April, 1820.

EASTERN DISTRICT, APRIL TERM, 1820.

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ORLEANS NAV. CO. vs. *SCH. AMELIA, an e*, 6[illegible].

A vessel of the United States cannot be seized to compel payment of toll.

MARTIN, J. delivered the opinion of the court. The plaintiffs have seized, and pray for the sale of, a vessel of the United States, to obtain payment of three hundred and odd dollars, which they claim, for toll, which accrued on her passage up and down the canal Carondelet. The attorney of the United States, claims a restoration of her, on this, among other grounds, that the United States are not suable *in personam* nor *in rem*. The court of the first district has given judgment for the plaintiffs, and the United States have appealed.

That the plaintiffs have a right to a compensation, if the United States have made use of a

canal dug and kept in repair, at the exclusive expense of the former, can, perhaps, no more be doubted than that the sailors employed in the vessel are entitled to a compensation for their services. If she was the property of any other person, natural or politic, but the sovereign, the Amelia could be seized and sold, or her owner sued, for the payment of the claims of her sailors or those of the company through whose canal she has passed. Yet the sailors of a vessel of the United States cannot obtain their wages by a suit *in personam* or *in rem*, in the ordinary courts of justice. The reason is, that these tribunals are established to coerce private persons, whether citizens or aliens, but not to decide on demands against the sovereign, who has appointed other officers to adjust and discharge claims against him. If, therefore, the plaintiffs have any demand against the United States, they mistook their remedy.

After the seizure, the officers of the United States might come into court to demand the restoration of public property illegally seized, without thereby giving jurisdiction of the claim against the United States.

This view of the subject renders an examination of the other points useless.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the the schooner Amelia be restored to the officers of the United States, and that the plaintiffs pay costs in both courts.

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The payment of the whole dowry will not be presumed from the poverty of the husband: or the circumstance of the parties binding their respective estates, for the performance of the stipulations in the marriage contract, nor from a part of the dowry being ceded with other considerable property, by the husband to his creditors.

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

The plaintiff claimed twenty-three hundred dollars, as her dowry. Her husband had not acknowledged the receipt of any part of it, in the marriage contract; her mother had therein declared that it consisted in that sum, viz. $500 her share of her father's estate, $1000 in cash, a slave of the value of $600 and $100 in furniture and cattle.

The slave was proven to have been the property of the plaintiff, before her marriage, and was identified as part of Viales' estate, in the hands of the syndics. Witnesses deposed that she was entitled to 600 dollars, as her part of her father's estate; but there was no evidence of that sum having been paid: neither was there any as to the other articles of the dowry, except

what resulted from the admission of the husband in his *bilan*.

The parish court gave judgment in favor of the plaintiff as to the negro only, with costs. She appealed.

Moreau, for the plaintiff. The Spanish law recognised two kinds of dowry: that which is counted and delivered, in the presence of the notary and witnesses, and mentioned in the marriage contract, and hence called true or counted dowry, *verdadera o numerada*, and that which is proven only by the confession or acknowledgment of the husband, hence called confessed or putative dowry, *confesada o putativa &c.*

The first was a priviledged debt, in regard to creditors of the husband, whether their claim was posterior or anterior to the marriage, and the declaration in the contract, that it had been counted and delivered in presence of the notary and witnesses, was conclusive evidence against the husband, his heirs or creditors.

With regard to the privilege of the debt, says *Febrero*, we must distinguish two cases: the one when the dowry is true and counted, the other when it is only acknowledged, and there is no other proof of its delivery. In the first, when the wife concurs with a creditor of her husband,

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without fraud or simulation, she is to be preferred, for her tacit mortgage, to all creditors anterior to the marriage, with a general mortgage, and to posterior ones, with a special one, although hers be only a general mortgage. 7 *Febrero, adicionado*, 2, 3, 3, § 2, *n.* 132.

It is of this priviledge, that mention is made in the part of the *Curia Philipica*, invoked in the parish court by the defendants' counsel.

Likewise, the priviledge of the true dowry, which is that which is real, is not extended to the *putative*, or that which is held for such, without being really so, according to a text, Alexander & Acevedo. *Curia Phil. p.* 427, *n.* 37.

It follows that the priviledges, granted by the law to the dowry, attend only that, the counting and delivery of which appears to have taken place before the notary and witnesses, by the marriage contract, or when the counting and delivery is established by a contradictory judgment. It is otherwise, when the receipt of the dowry is simply acknowledged by the husband: and this acknowledgment, even when made under oath, does not preclude the claims of his creditors anterior and even posterior, thereto; and it is presumed to have been made in fraud, according to Baldo Novelo, Antonio Gomez, Covarrubias and Alvaro Baez. *Id.* 38.

The defendants' counsel relied on these two passages, in order to repel the plaintiff's claim to a preference, because it does not appear from her marriage contract, that her dowry was counted and delivered to Viales, in the presence of the notary and witnesses.

The counsel has thus confounded two kinds of priviledges, which are perfectly distinct.

The effect of the first is to give the wife a preference, even over creditors anterior to the marriage, who have no special mortgage. This kind of priviledge attends only the true and counted dowry, and it is of it that mention is made, in the passages just cited from the *Curia Philipica*.

The effect of the second was to give to the wife a tacit mortgage, which the laws of this state have expressly given her. *Code Civ.* 333, *art.* 53. It extends to both kinds of dowry,—the true and counted, and the confessed or putative.

The wife has a tacit mortgage for her dowry on the estate of her husband, from the day on which he received it, according to *Partida* 5, 13, 23, as well as for her paraphernal property, which he received from her, according to *Partida* 4, 11, 17. *Cur. Ph.* 363, *n.* 26.

Febrero, speaking of the proof of the delivery

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of the dowry by the acknowledgment of the husband, distinguishes two cases: that in which this acknowledgment results from an authentic instrument, anterior to the marriage, and that in which it is contained in an instrument posterior thereto.

After noticing the priviledge of the counted and true dowry he adds: "Having treated of the first point proposed, in *n.* 132, it is proper to treat of the second, viz. of the dowry, acknowledged by the husband in a contract or in a will executed before or since the marriage, of which I have said something in *l.* 1, *ch.* 3, *n.* 36 & 38, to which I refer the reader. On the last point, I observed that in order well to understand it, two cases are to be distinguished: that in which the wife or her heirs claim the restitution of her dowry from the husband's heirs. In this case, according to a learned jurist, a rigorous proof of the payment of the dowry is not required: light proof will suffice.

The second is when the wife acts in opposition to his creditors, seeking a preference over them: in this, conclusive evidence is required.

"In the first case, the acknowledgment of the husband in a contract anterior to the marriage, is conclusive against him and his heirs. They have no greater priviledge than he; and, as his

representatives and successors, in his actions active or passive, they ought to be bound and abide by his contracts." 7 *Febrero adicionado*, 2, 3, 3, § 2, *n.* 136 & 137.

The author next examines the effect of the husband's acknowledgment, in regard to his creditors.

"If the husband acknowledges to have received the dowry, by an instrument anterior to the marriage, his acknowledgment will bind his creditors; because marriages are not ordinarily done without a dowry, unless when the contracting parties are poor; and it is probable that the dowry was counted and delivered according to the acknowledgment of the husband, which is not suspected of fraud; the case is much stronger, when the exception *non numeratæ pecuniæ* is renounced.

"If the acknowledgment was preceded by a promise of the dowry, made in an authentic instrument, distinct from the one which contains the acknowledgment, it will prove the delivery of the dowry, whether made before or since the marriage, and conclude not only the heirs, but the creditors, of the husband.

"When the acknowledgment is made during the marriage, without there being any previous promise, the wife will exclude mere chirographa-

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ry creditors, even anterior ones: because every thing else being equal, the wife has a privilege for the restitution of her dowry, as well on account of her hypothecary action, as the personal one; and she will be preferred to creditors, who have only the latter.

But if anterior, acknowledged creditors ground their claims on the acknowledgment of the husband, as in the case of a deposit, sale or other convention, neither a loan, nor made during the marriage, they will be preferred to the wife, because their claims are equal to that of the dowry, as long as the exception *non numeratæ pecuniæ*, cannot be opposed to them: according to the rule *qui potior est in tempore, potior est in jure*, their claims ought to pass before that of the acknowledged dowry; because, in such a case, the common and general right ought to prevail over the special. For the same reason, if the acknowledgment of the receipt of the dowry, which has preceded the marriage, be anterior to the claim of the creditor, the right of the wife will prevail. Not so, if the acknowledgment be posterior to the marriage; because, then the husband is presumed to have intended to favor her, to the injury of his anterior chirographary creditors.

"The acknowledgment of the receipt of the dowry, during the marriage, without a previous

promise, does not preclude anterior hypothecary creditors; being presumed to have been made in fraud of them. Posterior ones had the benefit of the exception *non numeratæ pecuniæ*. When the period, during which this exception avails, is passed, this right is viewed in different ways by the authors: but, as this is not the case in the present instance, the question will not be examined." 7 *Febrero adicionado*, 3, 3, § 2. *n.* 153 158.

It appears evident from the above quotations, that the acknowledgment of the receipt of the dowry, in an instrument anterior to the marriage, without any counting or delivery of it, in the presence of the notary and witnesses, may affect hypothecary creditors.

We have only to inquire, then, whether the marriage contract of the plaintiff contains the acknowledgment of her husband, that he received the property, which she brought in marriage. If it does, whether the property be dotal or paraphernal, she must be preferred to her husband's creditors, hypothecary or chirographary, who are all presumed to be posterior to the marriage; since none of them has shewn that he was anterior.

The contract does not, it is true, contain a receipt for the property of the wife, but a close

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attention to the expressions made use of, will convince, that this is to be attributed to a want of attention in the person who drafted it. It is impossible to presume that Viales did not receive the property at the execution of the instrument, or immediately after. He begins by a declaration, that he possesses no property : his wife's mother, on the contrary, declares that the young lady possesses 2300 dollars, and declares in what objects. Is it possible to suppose, that the husband did not receive the property in 1814, when he had not any thing to subsist upon ; and when, the slave brought by the wife in marriage, was found among the property in his possession at the time of his failure? a period at which, he was possessed of considerable property. Besides, if the property was not then delivered to him, why did he give the mortgage mentioned in the marriage contract? If he received nothing, why give security? It is therefore clear, that the mortgage can only be intended to secure the property brought in marriage by the wife, since the contract contains no other obligation on his part, than that which might result from the delivery of that property.

This is not an indifferent circumstance, in a case like the present.

"When the acknowledgment of the husband"

says Febrero, "is supported by adminicules of proof, it proves completely the delivery of the dowry, and enables the wife to claim its restitution from the creditors of her husband, and it will be reputed a true dowry, *verdadera dote.* Therefore, they will not have the exception *non numeratæ pecuniæ* against her. We understand by the expression, confession supported by adminicules of proof, that which is attended with circumstances which cause it to be presumed. These adminicules result from the consideration of the quality and situation of the parties, and other circumstances which induced a belief of the truth of what is contained in the acknowledgment of the husband. In matters like these, conjectures drawn from facts and persons are very powerful. These conjectures, are generally drawn from a promise of the dowry, before the acknowledgment, from the payment of some of the objects constituting the dowry, although not precisely made as part of it, for *when a part of the dowry appears to have been actually paid, payment of the whole is presumed.* 7 *Febrero adicionado* 2, 3, 3, § 2. *n.* 159.

It may perhaps be contended here, as in the parish court, that the property brought by the plaintiff, was not constituted in dowry, and so

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the restitution of them cannot be claimed with the priviledges of dotal property. Whenever the marriage is contracted, as in the present case *in verbis de futuro*, property brought in marriage is reputed dotal. *Id. n.* 132. *Curia Philipica*, 420. *n.* 36.

Carleton, for the defendants. The plaintiff, aware of the necessity of proving that she had *actually* brought into marriage and delivered to her husband the sum claimed by her, and that her marriage contract would not, of itself, make proof of that fact, sent a commission to Pointe Coupee, to take the testimony of witnesses residing there. Two persons were examined, both nephews of the plaintiff, who declare that they have known her "*as long as they can remember*," that they do not know that she ever possessed any other property than the negro *Joseph*, mentioned in the marriage contract; and that there was a sum of six hundred dollars, due her, from the estate of her father; but cannot tell whether she ever received it. There is no evidence, that she ever possessed any other property; or, if she did, that it was ever delivered to the husband.

The husband does not declare in any part of it, that he ever received any property into his

possession, nor does any one declare it for him; neither the subscribing witnesses, or the notary, know of its delivery to him. The mother, then is the only person from whom we learn that the daughter possessed any other property, than the slave; and even she does not say, that any of it ever came into the possession of the husband. The declaration of the mother can be of no avail, as she could not have been heard in court in behalf of her daughter, had she appeared at the trial; much less then, can the court listen to her *ex parte* declaration, not delivered under oath. But the plaintiff's counsel having erroneously assumed it, as a fact, that the husband confesses, in the marriage contract, he had received the sum, claimed by his wife, then labours to shew that such confession makes proof against the creditors, where the contract is made anterior to the marriage. But he says in his petition, that, the plaintiff was married to L. Vialez on the 13th May, 1804, the very day on which the marriage contract was executed and dated: this reasoning then cannot apply, even if the husband had made such confession, as the marriage and contract were entered into on the same day. It is however acknowledged by the plaintiff's counsel himself, that no such con-

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fession is contained in the contract, which, he says was executed before marriage.

Hitherto, the property said to have been brought by the wife in marriage has, for argument's sake, been called a dowry. Yet that word does not appear in the contract; and the Spanish laws then in force, quoted by the plaintiff's counsel, declare:

"Likewise, in order that the dowry may be priviledged, it must be constituted in express terms when the marriage is contracted—*in presenti*, by saying, 'it is given and received as a dowry;' for if it is not so expressed it will not be a dowry, nor can it enjoy any preference notwithstanding the wife had brought her estate into marriage, and delivered it to her husband; because the wife by contracting by words *de presenti*, is not considered as giving her estate in dowry, unless it be expressly said so," &c.

As we learn from the plaintiff herself, in her petition, that the marriage was celebrated on the very day on which the contract was executed, this law entirely defeats her claim, unless what she brought into marriage had been expressly declared to be a dowry.

But the plaintiff's counsel says, the marriage was contracted *in verbis de futuro*, and there-

fore *les biens apportes*, the property brought in is to be held dotal, and cites *Cur. Phil.* 420, *n.* 36.

That this law might fit the case, it was at least necessary to shew that the wife did actually bring into marriage what she claims.

Let us suppose however, if we can, that a marriage celebrated, on the same day as the marriage contract, is a marriage contracted *in verbis de futuro*. The law cited declares, that

"When the marriage is to be contracted *in futuro*, or where there is a promise of marriage, if the wife be rich, she is presumed to have tacitly promised her estate in dowry, and will, in that case, enjoy a priviledge, according to Baldo, unless the husband himself be rich, and had sufficient for his support; for there the wife is not presumed to have promised her effects in dowry, nor consequently will she enjoy a priviledge for the same, according to Covarrubias."

There is not a syllable of testimony on record, to shew that the wife was rich at the time of the marriage, or that she possessed any other property than the slave Joseph. The law cannot apply but by assuming, for proved, the very fact in dispute, viz. that the wife possess-

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ed and delivered to the husband the property mentioned in the marriage contract.

Having, as I conceive, entirely overthrown every position taken by the plaintiff's counsel, I proceed to cite some authorities which, I presume, will fully satisfy the court that the plaintiff cannot recover unless she had proved the actual delivery to her husband of the amount by her claimed.

Likewise, the priviledge enjoyed by the dowry that has a true and real existence, is not extended to the putative dowry, which is that which is called a dowry, but which is not so in reality, according to a text and Alexandro and Gomez. *Cur. Phil.* 120, *n.* 3.

From which it follows, that the priviledge conceded by law in favor of the dowry, takes place only where the money is counted and delivered before the notary and witnesses to the instrument in which it is mentioned, or by proof of the same contradictorily in court, and not by the sole confession of the husband; for his confession that he had received it, though made under oath, cannot prejudice those who are there, or who become his creditors thereafter, nor their heirs; for it is presumed to be made in fraud according to a glossary, the opinions of

Baldo Novelo, Antonio Gomez Covarrubias and Baez. *Id. n.* 38.

The estate being formed into a mass, in, the manner above explained, proportional deductions must be made from it: and first must be deducted the legitimate and real dowry, which has been counted down, and which the wife legally proves she brought into marriage, and delivered to her husband. 4 *Febrero*, 1, 3· § 1. *n.* 4.

Having explained in what manner the legitimate dowry, which had been counted down, ought to be deducted, I proceed to speak of the dowry that is confessed: and I say that, if the delivery of the dowry appears from the mere confession only of the husband, made by testament or last will, since marriage and after he had taken his wife to his house, such is not, nor can be esteemed as a dowry; for the confession, whether it be for a certain sum, or other property, makes no proof, but, on the contrary, is presumed to have been made with the intention to give the amount as a legacy, to be confirmed at his death, and though the confession be under oath, it can prejudice neither his creditors, nor his legitimate heirs. *Id. n.* 36.

Finally I ask, if the confession of the husband that he had received the dowry, proved its re-

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ception, and whether such dowry would enjoy the same priviledge with that, which had been really and truly received and counted. On this point, I briefly and decidedly say, no: for after the dissolution of the marriage, either the husband or wife may oppose the exception of *non numeratæ dotis,* and the wife or her heirs, would be bound to prove its actual counting and delivery; otherwise, the husband's confession would avail nothing, whether it were made before witness, or private or by public act.

And the reason why such confession cannot prejudice the husband, and why he may make the foregoing exception, is two fold: the first, because not having the wife in his power he is presumed to make the confession, that he may the more quickly obtain her: and secondly, that he may thereby appear more liberal to her relations; and this holds good even when the confession was made under oath.

To this the commentator might have added another and still more powerful reason: that of securing a living to himself and family, in case of future misfortune. It is a common practice in Louisiana, for men to acknowledge by their marriage contracts, that their wives brought to them immense sums, which they never possessed. This is done under the belief that, the wife

becomes thereby a priviledged creditor, who may in time of need, provide for herself and husband, out of any property that may pass through his hands. But I trust that the law above cited has fully shewn the failing of this opinion, and that it has been most clearly shewn that the confession of the husband, whether made before or after marriage, cannot prejudice even himself, or his heirs, and for a stronger reason cannot affect third persons.

I beg leave once more to remind the court, that even this confession of the husband is no where to be found; and that therefore no proof whatever has been produced by the plaintiff, shewing that she brought into marriage any other property than the slave Joseph, and agreeably to the decision of this court in the case of *Nadaud* vs. *Mitchel*, 6 *Martin*, 688 the wife cannot recover more than what she proves she brought in as her dowry.

MARTIN, J delivered the opinion of the court. The plaintiff demands the restitution of a dowry of twenty-three hundred dollars, which she alledges to have been received by her husband. The defendants deny that he received it. She produces her marriage contract, in which her mother declares that the property of the future

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wife, her daughter, consists for the present in a sum of 2300 dollars, viz. 600 dollars her share of her father's estate, 1000 dollars in cash, 600 dollars in a slave, and 100 dollars in furniture and cattle. The future husband declares he has no property. The future husband and wife make a reciprocal donation of the usufruct of the property of the one who may die first to the survivor, and for the performance of the contract, bind their respective estates present and to come. The plaintiff shewed that the slave made part of the property surrendered by her husband to his creditors. She had judgment in the parish court for the slave and costs, and appealed.

Her counsel contends that the payment of the dowry ought to be presumed, from the circumstance that the husband had no estate to support the family, from that of his having bound his property present and to come, and from a part of the dowry, viz. the slave, being proven to have been received by him, since he is part of the property surrendered.

We cannot say that the parish court erred. It is clear that no part of the property was in the possession of the insolvent, at the execution of the contract. The first item was a sum due the wife; the 1000 dollars are stated to be in

the possession of the wife, as well as the rest of the property enumerated. It is true, he bound his property for the due execution of the contract; so did the wife, yet it cannot be pretended, that she received any thing. The presumption which rises from the need in which the husband appears to have been of receiving his wife's dowry for the support of the family, is not sufficient to produce the conviction of his having been successful in obtaining it, even where coupled with the circumstance of his having been in possession of considerable property, at the time of the surrender. Whatever may be the amount of the property so ceded, it is not pretended to be more than that of his debts, and he owed only what he had received. Where there is an acknowledgment of the husband that the dowry was received, proof that a part of it came to his hands, may raise such a presumption that the whole did, as will repel the exception *non numeratæ pecuniæ;* but in the present case, the parish court acted correctly in allowing to the plaintiff the slave, as the only part of the property of the wife that came to the hands of the insolvent.

It is, therefore, ordered, adjudged and decreed that the judgment be affirmed, at the costs of the plaintiff and appellant.

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APPEAL from the court of the third district.

Fraud, in a deed, cannot be alledged by one who claims no right tho' the persons to the injury of whom, the fraud was intend d. If a copy of a deed comes up with the record, it will be presumed that the deed was duly proven below

MATTHEWS J. delivered the opinion of the court. This is a petitory action commenced to recover a tract of land described in the petition, both parties claim under James Jackson, and the *locus in quo* is not disputed. The plaintiff and appellant obtained a verdict and judgment and the defendant appealed.

There is an agreement of counsel that the record contains all the evidence given in the district court, and in it is found a bill of exceptions taken to the opinion of the judge, in rejecting certain documents and witnesses, offered by the defendant to prove fraud in one of the plaintiff's title papers. The evidence thus offered and rejected is an affidavit of the grantee of the land, and the testimony of a witness establishing that no consideration was paid by B. Jackson, under whom the plaintiff immediately claims, as expressed in the deed of sale executed to him by James Jackson, his father, and that the sale was made to defraud one of his sons, from part of his property.

Without inquiry into the competency of a vendor, in any case, as a vendor to defeat his own act of sale, it is sufficient, in the present

to observe that the district court was correct in rejecting the affidavit of Jackson, sen. on the ground of its being *ex parte* evidence.

Neither do we believe that the court erred in the rejection of the witness. It is agreed that, on suggestion of fraud, testimonial proof may be received against an instrument: but this can only be regularly done, in cases in which one of the parties to a suit may be subject to injury, by such fraud, in rights and claims which existed at the time of its perpetration. In the case now under consideration, the defendant claims no right derived from the person who was intended to be injured by the alledged fraud and falsehood, in the deed and sale from Jackson to his son. As to him every thing is fair, in his second purchase from the grantor, with legal notice; the first act of sale having been recorded in the office of the parish judge nearly two years previous to his purchase: and he does not in any manner, represent the person against whom the alledged fraud is supposed to have been intended.

During the hearing in this court an objection was made to the admissibility of the deed from J. Jackson to D. Jackson, as being an act *sous seing prive*, and not authenticated by testimony: a copy of the deed comes up with the record, as a part of the evidence received in the court

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a quo, and we must presume it to have been correctly admitted, as no bill of exception suggests the contrary.

On examination of the whole case, as it is presented to us, we are of an opinion that the plaintiff ought to have judgment; and having obtained it in the district court, we would have no hesitation in affirming it if it had contained the reasons on which it is grounded, as the constitution and law require.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed: and proceeding to give such a judgment as, in our opinion, the district court ought to have given, it is further ordered, adjudged and decreed that the plaintiff and appellee do recover, from the defendant and appellant, for the reasons above stated, one hundred acres of land claimed in the petition, with costs, and that the plaintiff and appellee pay cosis in this court.

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

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Whether the plaintiff may recover on a note alledged, and by him sworn to be lost, proven to have been returned by a broker, when there were many persons around him, with evidence that the defendant had given it for a valuable consideration, and had promised to pay it?

APPEAL from the court of the first district.

This suit was brought for the amount of the defendant's promissory note, which was alledged to be lost. He pleaded the general issue, nonage and the absence of a legal consideration. There was judgment against him, and he appealed.

The evidence consisted in depositions which came up with the record. There was no evidence of the defendant's nonage, and a legal consideration was proven. All the difficulty in the case arose as to the proof, authorising the admission of witnesses, to establish the contents of the note.

Melas deposed he had knowledge of the note, having received it in collection from the plaintiff. The defendant gave only evasive answers, viz. that all was well; that the plaintiff would not lose any thing; that the note not being to order, he could pay it to him only. The witness returned the note to the plaintiff, at a time when there were many persons, *beaucoup de monde*, in the shop. A few days after, believing, from some late information, that he could obtain some money from the defendant, he ap-

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plied for the note to the plaintiff, who, after a search, could not find it, and informed him it was lost.

Low deposes he never saw the note: at the plaintiff's request, he called on the defendant, who admitted he had given the note, but not to order, he still owed the money, could not pay it, and would see the plaintiff. This witness does not recollect the precise amount of the note, but believes it to be upwards of $1000.

Barnett came down from Baton Rouge with the defendant, and deposed he was informed by the latter, he had an expired note, in the plaintiff's hands, and came down to make arrangements.

The plaintiff made affidavit that the note was returned to him by Melas, at a moment when there were many people in the shop, that Melas laid it on the counter, and when the plaintiff searched for it, two or three days after, he could not find it.

A bill of exceptions was taken to the reading of this affidavit.

Livingston, for the defendant. The decision of this cause depends solely on the construction of the *Civ. Code*, 312, *art.* 247, which admits parol proof to supply the contents of a written

instrument, "when the creditor (according to the English text) has lost it through a fortuitous event, an unforeseen accident or overpowering force :" (in the French) *Lorsqu'il a perdu le titre, par suite d'un cas fortuit, imprévu et résultant d'une force majeure.* Here it will be perceived that the English text, by using the word *or*, makes either of the events enumerated a sufficient reason, to let in the proof; while the French, by connecting them by the copulative *et*, seems to require that all should concur. That is, that the loss must be proved to be the result of a *cas fortuit*, that this must be *imprévu*, and that it must result from *a force majeure*. This is of some importance to shew, that in the language best understood by the makers of the code, they restricted the cases, in which parol evidence should be admitted to supply the alledged loss of a deed. As both texts must be taken together, the greatest extent of enactment in either must prevail, so as to reconcile both in the present instance. The French reading may be adopted and it includes the English, but the English does not include the French.

I will therefore take the English, as the text most favorable to the adverse party.

He must prove then, before any parol proof of

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the contents could be introduced. 1st. that the instrument is lost; 2d, that it was lost by a fortuitous event, an unforeseen accident, or an overpowering force.

First. The loss: this is the foundation on which the introduction of the parol proof must rest. He must prove the loss; for the next member of the article enforces the first, by declaring that it is not sufficient, if he merely alledges that he has lost them: he must prove the loss. How? I answer, in the same manner that any other fact is proved, by satisfactory evidence, either positive or circumstantial, but by evidence. Excluding expressly his own allegation, that by the words of the law is to have no weight; it is not sufficient if he merely alledges: there must then, of this substantial fact, be some evidence. On the record, the only circumstance related proves directly the reverse, viz. the note was given to the plaintiff by the witness; not laid on the counter, where other persons might have taken it up, but given to him; not abroad, where he might have lost it before he came home, but in his own house, in his own scene of business, his own shop. It is true, he adds, there were several persons at the time in the shop, but no evidence of any bustle, any hurry, any confusion, nothing out of the ordina-

ry course. Now, this fact, of itself, creates not the slightest presumption of loss: but the law does not admit a slight presumption, even if it existed, of the loss to be sufficient. It must be proved, and so extremely solicitous have the legislature been, that they three times, in one short article, enforce the necessity of proof. I do not, I repeat, insist that this proof should in all cases be direct: but it must be such as will induce a presumption of the loss, unconnected with any declaration of the party, which is excluded. Now, because a broker returns a note to the owner in his shop, when there are several persons in it, can any presumption whatever arise that it is lost? The legal presumption is, that since it was given to him, he has it still. Yet, this is the only testimony, either direct or circumstantial, positive or presumptive, that appears of the loss. It must, therefore, be by connecting this circumstance with the declaration of the plaintiff (expressly, as we have seen, forbidden by the law) or with the proof afterwards introduced, that we can arrive at a belief even that the note, if it existed, was lost. But no inference ought to be drawn from the other proof, to aid that which was to authorise its introduction; because evidently, if the first evidence was not sufficient alone, the second ought not to

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have been introduced. But that evidence throws no light whatever on the proof of loss. It only shews the prior existence of the instrument, but this the law declares is not sufficient; it is the loss that must be proved, not inferred from the previous existence of the paper and the declaration of the holder, that he had lost it. If that were the case, they would have dispensed with any other proof, and the present provisions would have been useless. As little stress, it appears to me, ought to have been laid on the defendant's plea, as containing an implied admission of the existence of the note. Our mode of pleading, where we are required to set out every defence in succession in one answer, obliges practitioners to set up frequently different defences, that would be deemed inconsistent pleas in the common law; such as pleas to the jurisdiction, in abatement, and in chief, a general denial and payment, &c. in the same answer. It is therefore, every day's practice for the attorney to insert in an answer, every species of defence, that he thinks may serve his client, without fearing that any of them can be used as admissions against him, provided he deny generally the allegations of the plaintiff. A general denial and payment are every day joined, yet strictly, the last is an admission that the debt

had once existed. But no one has yet thought that such a plea, dispensed with the necessity of proving the debt on the part of the plaintiff. It is true, that in all suits of this nature, much is of necessity to be left to the discretion of the court of justice. But this discretion must be limited, 1st. by the words of the law, where that is clear; 2d. where the words of the law give room for doubt, by general principles, as established by jurists, and other decisions.

But here the words of the law are unambiguous; and they are enforced by repetition in different forms.

There must be a *loss*, by *fortuitous event*, or *overbearing force*; that loss and that event must be *previously proved*, by other testimony than the declaration of the party; those are the provisions of the law. Can it be possible that they can be said to be complied with, merely by showing that the note was given to the party at his house, when there were several persons in the room? For this is strictly, literally the whole of the testimony on the point; every case to be sure stands upon its own circumstances, but every case is more or less a precedent, or why are they reported; this case then will hereafter be successfully quoted to show that the proof of delivery of a paper to the party in the presence

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of a number of persons, is evidence of its loss; and I ask if this does not change very materially the letter and the spirit of the law.

It was made to relax the wise rule that prohibits parol proof of the contents of written instruments; but to dispense with it, only in cases where loss by accident, or force, could be clearly proved; to dispense with it, when this proof was not clearly made, would be in effect to repeal it, and to introduce the perjury and fraud which that sage provision was intended to exclude. If such slight circumstances, as appear in this case, are sufficient to prove a loss, in what case can they not be procured? A man may have a note, which has defects that will prevent his recovery on it; the defects might be such as would not strike a person, not much interested to examine them. It may have a discharge on the back, it may be negotiable, it may be for 1000 livres, and a person who has seen it cursorily may think it is for so many dollars.

In all these cases, the incorrect memory of a witness is more advantageous to the holder, than the production of the note. He is then invited by this decision to withhold the note; to keep it in his pocket; to prove that it was handed to him in the coffee-house, when he was engaged in other affairs, and then he will be per-

mitted to prove the contents by testimony, inferior in its nature to the written : if he fail in this, he may always find his note again and (except the costs of his experiment) be exactly in the situation he was before. But this the law forbids ; and therefore insists as a preliminary, that the loss be proved : because secondary proof can only be admitted, where the primary no longer exists, and is lost by accident or force ; to guard against careless or wilful destruction of the written, in order for fraudulent purposes to let in the verbal, proof.

This is a point of so much importance to the the jurisprudence of the country, that I know I shall be excused if I enlarge on it, and add the authority of jurists to shew—Secondly

That, even if the words of the law should admit of a doubt, neither principles of law nor precedents can be found, for admitting the proof, under such circumstances, as are disclosed by the present case.

First. Let us take the very high authority, *Pothier, Obligations, no. 815, quarto edit.* He puts the case where one has lost his papers, by the pillage or burning of a house. *parmi les quels étoient les billets de ses débiteurs.* This, he says, is a *cas fortuit*, which admits the introduction of parol proof. But he expressly adds,

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that this fact of the burning, or the pillage of the house must first be admitted or proved. Why will this admit the proof? Because when a house is burned with its contents, or pillaged of what was in it, and there is proof that he used to keep his papers there, there is a strong presumption that the papers were lost or consumed. But the burning or pillaging of the house alone would not be sufficient, if it were proved that he saved his papers, or that he kept his papers in another place. The burning of a kitchen would be no proof or presumption of the loss of papers; because they are not usually kept there. There must be a probability resulting from the circumstance stated; not a mere possibility. It is possible I may have kept my papers in an outhouse; yet the burning of an outhouse would raise no probability of my having lost them, even if I should myself declare they were lost there. It is possible, that after the plaintiff had received the note from the broker, he may have laid it on the counter and that it was swept in the fire. But it is also possible, nay it is most probable, that he put it in his pocket. After the delivery to him, there is no evidence whatever, of any species, except his own declaration and his own act in bringing the suit, which is expressly ex-

cluded as proof, both by the words of our code and the reasoning of Pothier, in the latter part of the same article: "if he (says that learned jurist) who wishes to introduce parol proof, only alledges that he has lost his deed, without proving any fact of inevitable necessity *(force majeure)* by which he lost them, he cannot be admitted to prove, by parol testimony, that this deed has existed; otherwise, the ordinance which prohibits parol proof, to prevent the subornation of witnesses, would become illusory: for, if one wished to substantiate a payment or a loan, which had never been made, by parol testimony, it would not be more difficult to suborn witnesses to swear that they had seen the obligation or the receipt, than to swear that they had seen the money paid." I quote this opinion, not only as the opinion of a learned jurist, but as the source from which the text of the law itself was taken. The Napoleon code is word for word the same with the first part of the corresponding article in our civil code, above referred to. *Au cas que la créancier aie perdu le titre qui lui servoit de preuve litterale, par suite d'un cas fortuit, imprevu et résultant d'une force majeure.*" Thus far the Napoleon code. In the 10*th Pandectes Francoises*, 360, the ordinance of 1667 is quoted, as being in

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conformity to it, and Pothier is referred to for the origin and exposition of the law. Our code enacts into a positive law the commentary of Pothier, and strengthens the doctrine by adding, "but, in this last case, in order that the judge may admit the deposition either of two, or of a single witness, to supply the loss of the title, the fortuitous event which occasioned the loss of the title, which formed the literal proof, must be established." This, one would think, would be sufficient to exclude the testimonial proof, until the loss of the deed is established. But the legislature, anxious to leave no doubt, no possible pretence for misunderstanding its provisions, repeats and enforces the idea by adding, "for, if he, who requires to be admitted to produce testimonial proof, merely alledges that he has lost his titles, without any fact appearing, or overpowering force, by which he has lost them, he cannot be admitted to give testimonial proof that those titles existed." In looking into the *Pandectes Francoises* for an exposition of the article in the Napoleon code, I find nothing but these emphatic words, "for the exposition of this section, see Pothier's Treatise on Obligations;" and, on referring to Pothier, I find that our legislature have enacted his explanation into a law, and that both re-

quire that the loss of the deed should be established, that is fully proved, before the proof of its contents can be admitted. Again then, I ask, is the loss established? Is there, in the language of the text of the law, any fact or overpowering force made to appear, by which he has lost them. The court surely cannot think, that the expression in the French text of the code *par lequel il auroit pu les perdre*, is to be construed in its most extensive grammatical meaning, without any regard to the antecedent member of the sentence. If any thing, by which the title might have been lost, be a sufficient reason for the introduction of verbal proof, there is no possible disposition of the writing, that would not allow it. It might have been lost out of my pocket, out of my house, out of my hand. But the text is not thus loose: the sentence must be taken together. *Il faut que le cas fortuit, qui a donné lieu a la perte du titre qui formait la preuve litterale, soit constant; car si celui qui demande a être reçu a la preuve testimoniale, allegue seulement qu'il a perdu ses titres, sans qu'il a y ait aucun fait de force majeure, par le quel il auroit pu les perdu il ne peut pas être admis, &c.* What then, by this text taken together, must be proved? Not only an event, by which the title might have

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been lost, but the *cas fortuit:* the *fait de force majeure*, by which the paper might have been lost. I return, therefore, armed with this positive, clear, unequivocal text, to the position that a loss by a *cas fortuit*, a *fait de force majeure*, an unforeseen accident and overpowering force must be proved unconnected with, expressly exclusive of, the party's allegation, before testimonial proof of the existence of the contents of the written proof can be legally admitted. And I invoke the important provision of our *Civil Code* 4, *art.* 13, "Where a law is clear, and free from all ambiguity, the letter of it is not to be disregarded under pretext of pursuing its spirit." And I ask, what is more clear and unambiguous than the words of this law, requiring proof of the loss; and no loss but by accident or force will avail. The law is wise in this restriction; but wise or not, it is the law. And if a court can say that the delivery of a note to the owner, under such circumstances as in the present case, is a sufficient proof of loss by unforeseen accident or overpowering force, I know of no law whose provisions, under such a latitude of construction, can be carried into effect.

The Napoleon code is, as we have seen, the same with ours in the first part of the article,

but wants the second and third repetition of the enacting clause, which is contained in ours. The decisions under it, therefore, might reasonably be supposed to be not quite so favourable to the side of the argument I espouse, as they would be were their law as full as ours. Yet these decisions go to the full extent of my argument, and in a case, containing much greater probability of loss, they refused relief, because it was not proved to be by *force majeure* or *cas fortuit*, as the law requires. In 3*d Sirey*, 227, we have this question stated under the title *preuve testimoniale*. *La perte d'un acte non occasionée par un accident de force majeure, peut elle être prouvée par témoins?* The negative, he says, has been decided in the following case:

Meyroux sold a farm *(metairie)* under a *pacte a remeré* to Gaube, redeemable in twenty years. The vendor's heir, within twenty years, cites Gaube, the purchaser, to receive the price and reconvey. Gaube appears and offers to prove by witnesses that the vendor had renounced the right of redemption. This proof, rejected in the inferior court, is permitted on an appeal, and a preparatory judgment is given which permits the plaintiff to prove by witnesses:

1. That, after the sale a writing had been

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executed under private signature, by which the right of redemption was renounced.

2. That it was addressed to the purchaser, or to some other person, to be delivered to him.

3. That it was seen and read by several persons, who knew it to be written and signed in the handwriting of the vendor, and that it contained the said renunciation.

4. That the renunciation was sent to the lord of Roquefort *pour l'investir*, who kept it some time, and who said it was mislaid or lost.

These facts seem to have been fully made out in proof. The cause was fully debated: the court of cassation declared that the proof was inadmissible, in language that applies much more strongly to this case than to the one before them.

"Considering (they say) that the law has excepted from the rigor of its prohibitions the cases of forced deposits, fires, tumult or shipwreck, and that the jurisprudence, which added the case of the loss of a writing, is conformable to the spirit of the ordinance, and to the disposition of the Roman laws, in forbidding testimonial proof of the contents of an act in writing unless there should be added to it that of the accident of *force majeure*, that caused the loss of the act, whereas here testimonial proof

of the pretended renunciation has been admitted without even an allegation of an inevitable accident, *(cas fortuit)* &c."

As far as this is applicable can any thing better suit the case before us? Nagel does not even alledge, as much as the plaintiff did in the French case: "which note is lost," is every thing that he takes the trouble to tell the court, on the subject. The plaintiff, in the French case, goes further, and alledges and proves that he put it into a third person's hands, who cannot find it. Nagel, on the contrary, proves that it came to his own hands, but of what has become of it, the court is perfectly ignorant. A number of witnesses had seen, read, and remembered the contents of the renunciation. Yet, because the accident *de force majeure* was not alledged, they pay no attention to this proof. They go on, "Considering that, if this opinion was sanctioned, the disposition of the ordinance would be continually eluded; the most important and authentic contract might be easily annulled by means of two witnesses, who should depose that they had seen a pretended act, the handwriting of which it would be impossible to verify. They, therefore, reverse the judgment," &c.

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Moreau, for the plaintiff. As the civil code does not determine in what manner the fortuitous event, occasioning the loss of the title, which formed the literal proof, must be established, it is proper to recur to the laws, from which this part of our statute is derived, and the authors who have treated of the matter.

"If one, who procured a receipt for a payment, has lost it in consequence of a fortuitous event, as a conflagration, shipwreck or the like, we order that he be permitted, if he prove this fortuitous event, to produce witnesses, who may testify as to the payment; that he may avoid the consequences of the loss of the receipt, which he had procured. *C.* 4, 20, 14; 2 *Hulot.*

Conflagration and shipwreck are not the only cases, in which the party is relieved, but all like cases; it suffices that the event be a fortuitous one.

In some decisions it is indistinctly stated that when it is not declared that the loss was occasioned by a fortuitous event, as a ruin, conflagration or shipwreck, testimonial proof cannot be received. But it would be to stick too closely to the letter of the law, in an equitable case, to adhere strictly to them: it is true that the *sicut infra est*, speaks only of a conflagration, but the principle has been extended to all fortui-

tous cases, which may happen, according to the law *de fortuitis, C. de pignoratitia actione Danty, preuve par temoins*, 438.

The law cited by Danty from the code says: the accidents which fortuitously happen and cannot be foreseen, as an irruption of thieves, do not give rise to the warranty in *bonæ fidei actiones*: therefore, the creditor is not responsible for things pawned which are thus lost, nor deprived from his action to recover the loan, unless the parties agreed that the loss of the pawn should liberate the debtor. *C.* 4, 24, 5. 2 *Hulot*, 66.

A comparison of these Roman laws with our own, shews they all agree that it suffices that the fortuitous event should be proved, without saying in what manner the fact is to be established; and Danty clearly shows that any fact or fortuitous event, which may occasion the loss of a paper, suffices to allow the production of testimonial proof: as, the circumstance that the defendant's note was handed to the plaintiff, in a moment when he was busily engaged with a number of persons, may be considered as one which authorises the reception of testimonial proof.

As to the mode, in which the event is to be established, but little is to be found in the Ro-

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man and Spanish laws. The Napoleon code, *art.* 1348; has a disposition similar to that in ours; *i. e.* that there is an exception to the rule which requires that all obligations above the sum of 150 livres shall be proven by a witness, in cases in which the creditor has lost the title, which was his literal proof, in consequence of a fortuitous and unforeseen event, &c. by *force majeure, vi majore.*

Before the promulgation of the Napoleon code, the same exception had been established, by the construction given to the third article of the twentieth title of the ordinance of 1667, which speaks of testimonial proof, and the admission, in case of a necessary deposit, on a conflagration, ruin, tumult, shipwreck or other unforeseen accidents.

Danty, treating of testimonial proof, when the loss of the title is alledged, makes the following observations. The deposition of witnesses is to be received with great caution, and ought only to have weight when they prove the loss of the title. For, if the witness declares only that he was present, at the execution of the contract, and details all the clauses and conditions of it, without saying any thing of the fact through which the loss ensued, or speaks of it in vague and loose terms, there can be no doubt

that his deposition is of no avail, on account of the prohibition in the ordinance. Therefore, those who alledge the loss of a title, fraudulently, in order to prove its contents by witnesses, ought not to be heard. It is then necessary that the loss of the title and its contents be proven, so that it may be evident that there was a written title, what it contained, and that it was lost. *Preuve par temoins*, 423, 424.

But the proof of the loss cannot be expected to be made with all the rigor, with which other facts must be established. A direct and positive proof is not required, which in most cases cannot be had; but indirect and conjectural proof suffices.

Danty, in the part of his work cited, expresses himself thus: But it is asked, how is the proof of the loss of the title to be made? Must the witnesses expressly declare they were present when it was taken, burnt or torn: or will it suffice that they speak, in general terms, of the loss? The manner of making this proof is well shown by Cynus, Bartolus and other doctors, who say that it is not required that the witness should depose precisely, as to the manner in which the loss happened: but that it does suffice that the witness depose he hitherto saw the title spoken of, that he read or

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heard it read; that he knew the place in which the party used to keep his papers, and has since seen the building burnt, pillaged, or that the press, in which the papers were, was broken open, and its contents taken, dispersed, burnt, so that it is presumable that the title in question was destroyed, with the rest of the papers; thus is this proof to be made; it consists of two parts: that the witness knew the place in which the title was kept, and saw it pillaged, burnt, &c. *Preuve par temoins*, 426.

Desquiron, who treats of the same matters, according to the principles of the code Napoleon, has literally copied this passage from Danty's treatise.

The defendant's counsel speaks not with his wonted correctness, when he advances that positive and decided proof of the loss must precede the introduction of testimonial proof. Direct and positive proof is indeed required of the fortuitous event, which occasioned the loss, but not of the loss itself; for this can only be made out by conjectures.

Desquiron, speaking of the Roman law which we have cited, *C.* 4, 20, 14, observes that it follows from the text that testimonial proof is not to be received from him, who alledges the loss of his title, without proving the event which

occasioned it. A decree of the court of cassation of the seventh Ventose, in the eleventh year, reversed two judgments of the court of the department of Gironde, in which testimonial proof was admitted of the loss, without proof of the event which was alledged to have occasioned it: besides the Napoleon code settles the question. *Preuve par temoins*, 368. *n.* 473.

This is the decree of which the defendant's counsel seeks to avail himself, to show that the plaintiff has not made the requisite proof of the fortuitous event, which occasioned the loss of the note. They referred us to *Sirey's Collection*, in which the decree is preserved. In *Merlin's questions de droit, verbo Preuve* 126, § 7, we have the whole details of the case, the conclusions of this celebrated jurist, which were the basis of the decree.

In addressing the court of cassation, Merlin, then the imperial attorney near it, spoke thus: "The question which is presented for your solution is, whether testimonial proof be admissible to shew that after the execution of a contract of sale, before a notary, in which a right of redemption was reserved, the vendor renounced this right by a private act, which has been held, seen and read by several persons, and that a man, who had been entrusted there-

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with, after keeping it for a while, declared he had mislaid it." After having thus established the facts, Merlin developes the principles of law respecting it, and concludes, "Let us well notice the condition, on which the Roman law allows testimonial proof of a fact, which the law requires to be proven by a writing: it is that it be previously proven that the writing perished by accident. *Casu qui probatur, causa n peremptionis probantibus*, say the Roman laws, which are, in this respect, the model of our legislation. Before all these, the loss of the instrument is to be proven, and, in order that any evidence of this may be received, the loss must be alledged to have been the consequence of an act of violence, *vis major*, a fortuitous event. This act of violence, *vis major*, fortuitous event, must be first established."

This reasoning of Merlin shews that the defendant's counsel, in this case, vainly seeks to avail himself of the circumstance, that in the French text of our code, similar to the corresponding part of the Napoleon code, it is said that the loss of the title ought to be the consequence of an event, fortuitous, unforeseen, and resulting from an overpowering force, to contend that the event ought to have these three characteristics. Merlin, under the empire of a law

precisely worded as our code, speaks in such a manner as to convey the idea, that it suffices that, the event should have either of the characters spoken of.

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"What an idea can we then conceive of the judgment brought before this court by Cecile Sioceys? Neither allegation nor proof was made of any act of violence, overpowering force, fortuitous event, or any accident whatever, that might have occasioned the loss of the pretended deed of renunciation of Meyroux. It was only alledged that a ci-devant lord had said, he had mislaid the deed, while the mislaying, *i. e.* the essential fact, was not proven."

All that results from the decree of the court of cassation, which reversed the judgment, is that proof of the contents of an instrument is not to be allowed till the event which occasioned its loss be made out.

Can it be said that the present plaintiff stands in the same predicament as the plaintiff was in the French case? Did not Nagel alledge and establish the fortuitous event which occasioned the loss of Mignot's note? In a moment of hurry and bustle, surrounded by many persons, eagerly engaged in another affair, the note was handed to Nagel, and he accidentally

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mislaid it. Is it incorrect to say that these circumstances may give rise to a presumption that the note was dropped and lost? An answer in the affirmative to this question is in conformity with the principles which regulate cases like the present. According to these principles direct and positive proof of the loss is not to be expected, but only of a fact from which the loss may fairly be presumed. If it were otherwise, testimonial proof could hardly ever be introduced; for direct and positive proof of a loss is very rarely indeed to be made.

The court will attend to the nature of the paper, and the circumstances that attended the loss of it. In questions like the present, circumstances are not unimportant.

Merlin, in the case cited, observed that in discussing the point, he did not forget that he was before a court of cassation, not a court of appeals: hence, he laid aside particular circumstances which, in a court of the latter kind, would suffice to reject the testimonial proof: he would not, therefore, mention the improbability of a vendor renouncing, without reason and without consideration, his right of redemption; that he would do so, unsolicited, in the absence of the vendee; lastly, that the paper, after having been sent to the latter, should have re-

turned into the hands of the former, and that it should be transmitted to the lord by the vendor. 1 *Questions de droit*, 127.

It seems clear that if Merlin had been, as we are, before a court of appeals, he would have availed himself of the circumstances, which shewed the improbability of the alledged loss.

In the present case, what interest could the plaintiff have in feigning the loss of the note? Will it be suggested that he might transfer it to a third person, and thus obtain its amount twice? The note was not payable to order, and could not be negociated without a formal act of transfer, notified to the debtor. *Civ. Code*, 369, *art.* 121. The defendant does not alledge that he received any notice, and the payment to the plaintiff will not expose him to pay twice *Id.* 123.

Another striking circumstance is the manner in which the defence is made in the case. The existence of the note, in the hands of the plaintiff, a short time before the institution of the present suit, is beyond a doubt. The defendant did not plead that the note existed once, and that he had paid and torn it. Had this been the case, the court would perhaps feel great reluctance in admitting testimonial proof; for it often happens, indeed it is so pretty generally,

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that the maker of a note tears it, after paying it, without having taken a receipt therefor. It is said the general issue, in practice, admits the proof of any fact by which the plaintiff's claim may have been destroyed, as payment, set-off or release, &c. Admitting this, which is not perhaps clear, is it possible that, shocked at the plaintiff's temerity in demanding a second payment of the same note, the defendant would not have shewn his indignation, and been induced to expose the turpitude of his adversary?

The defendant could not plead payment. The particularity of the details of Melas' testimony left him without any hopes of success on that head. He, therefore, thought it safest to deny the debt, or the existence of the note which is the evidence of it.

The nature of the title, which is the ground of this action, ought to be considered as making a favorable exception in favor of the plaintiff. It would not be proper to be as difficult to admit testimonial proof, in the case of the loss of a promissory note, or bill of exchange, as in that of the title deeds of an estate, which are preserved with greater care, and are seldom exposed to a removal, while notes of hand and bills of exchange are kept in incessant circulation, constantly passing from one hand to an-

other, often transmitted, by mail or other conveyance, to distant parts of the world. If a bill or note be transmitted, enclosed in a letter which miscarries, will not evidence that the letter was put in the post office, with the declaration of the person to whom it was directed, that it never came to his hands, authorize testimonial proof of the contents of the note or bill, notwithstanding no fortuitous event, no overpowering force, no accident is proven to have befallen, which may have occasioned the loss? Will the holder of the bill or note, in such a case, lose his right of action? Will it not suffice that a plaintiff in such a predicament prove the inclosure of the bill or note in the letter, and the delivery of it into the post office, if the person, to whom it was directed, be incapacitated, by interest, from testifying? Losses by mail, though they sometimes happen, are not so frequent as to allow us to say they are probable.

In France, literal proof is required by law to establish even very trifling obligations, and the courts are extremely rigorous and admit, with the utmost circumspection, testimonial proof in the case of the alledged loss of a paper. The judge is authorized to order the payment of a

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mislaid bill of exchange, *adhire*, on a tender of security for the indemnification of the payor.

We are, therefore, to understand the principles which so strictly demand proof of a fortuitous event, or overpowering force, conflagration, shipwreck, tumult, &c. by which a title is lost, to relate to the title deeds of an estate, or like papers, usually kept still and secure in a box or chest, and which from the undisturbed situation to which from their nature they are doomed, are hardly liable to be lost or destroyed, unless the house in which they are kept be burnt, broken open or pillaged. Papers of this kind, from the unfrequency of their removal, can hardly be thought liable to being blown off, misplaced in the hurry of business, or otherwise mislaid.

The object of the legislator, in excluding testimony on the suggestion of the loss of the literal proof, is to prevent parties, by the production of suborned witnesses, establishing facts or obligations which it forbids to establish by any but literal proof.

In order that the judge may admit this proof (that of the loss of the title) it is necessary that the fortuitous event, which has occasioned the loss of the titles be proven, *constant*. For if he, who asks to be admitted to testimonial

proof, alledges only that he lost his titles, without there be any instance of overpowering force, through which he may have lost them, established, he shall not be allowed to shew by witnesses, that these titles did exist. Otherwise the ordinance of 1667, which forbids testimonial proof, in order to prevent the subornation of witnesses, would be illusory. For, it would not be more difficult to him, who would wish to prove, by witnesses, a loan or payment which he should not have made, to suborn witnesses deposing they saw obligations or receipts, than others deposing they saw the money counted out. 2 *Pothier, Obligations, n.* 781.

There cannot be any doubt that, in France, proof of the fortuitous event, which occasioned the loss of a title, is rigorously insisted on, in all cases of contracts or obligations which the law has required to be reduced to writing, in order to guard against the subornation of witnesses : but would not courts of justice be more liberal, in the case of an obligation which the law permits to be entered into by parol? The case oft he alledged loss of the title deeds of an estate, the sale of which, by parol, would be void, is unlike that of the alledged loss of the receipt of a taylor's bill, which might be proven by parol, to have been paid. A me-

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chanic claims payment of an account, which I paid: I may by witnesses prove the payment, and the law apprehends not that I suborn a witness therefor. Why then should it apprehend, if I took his receipt, the subornation of a witness who deposes that he saw and read this receipt, that he well knows it to be in the mechanic's handwriting.

Danty has very satisfactorily treated this question in his *Preuve par temoins, ch.* 15, *n.* 8, 12. He says, Cujas on the *t.* 21, *c de fid, instr.* makes a distinction, as to the admission of testimonial proof, in the following case. If in the affair there was not any necessity of having a written act, there is no necessity of proving that the act is lost, if there be other sufficient proof of the fact, according to the fifth law of this title: for this law does not say, that proof is to be made of the loss of the title; but, that the creditor must lament his loss and prove the fact. But, in a case in which no writing was necessary, yet if a written act was made, and it be lost, although the loss be proven, it will not avail, unless there be proof of every thing contained in the act; which is confirmed, says he, by the third law of this title, which expressly provides that, although it be proven that the title is lost, the proof is of no use, if those who

make it, do not depose as to the contents of the writing. Cujas adds, that it suffices to prove what was done, although there be no proof that the title is lost. But, he speaks only of cases in which writing was not necessary to the proof of the fact disputed; for a little after he adds that, when writing is necessary, if the instrument be lost, there must be proof of its loss and contents.

It is then clear, on the united authorities of Cujas and Danty, that proof of the loss of the title, in cases of obligations, which the law does not require to be reduced to writing, is not necessary, when there are witnesses who may prove the obligation: and it follows that, under the empire of the ordinance of 1667, the second article of the twentieth title of which required a writing, in every case when the value of the object exceeded one hundred livres, and under that of the code Napoleon, the 1341st article of which requires it only in cases where the sum or value exceeds one hundred and fifty livres, proof of the loss of the writing is not necessary, if the party has witnesses who may prove either, that the instrument was executed or the obligation contracted.

The plaintiff then, in the present case, is not absolutely bound to prove the event which has

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occasioned the loss of the defendant's note, since the obligation, of which the note was evidence, was one which was susceptible of parol proof; two witnesses depose to the existence of the obligation, and one of them shows its character to be commercial.

Livingston, in reply. It is difficult to answer the first part of the plaintiff's counsel's argument, because almost every sentence of it contains some proof or some authority to strengthen the principle, for which I contend.

The court will understand this the better by again referring to the allegation of the plaintiff, in his petition, and to the proof; the allegation is that the defendant made a promissory note for the sum of one thousand four hundred eighty nine dollars; that the plaintiff has lost it, and that the defendant refuses to pay.

There is no exposition of the manner in which the loss happened. Yet, if I understand the authority quoted, this is absolutely necessary, before any proof whatever of the loss can be admitted. *It faut donc qu'avant tout la perte de l'acte soit prouvée, et pour que l'on soit admis a en faire la preuve, il faut qu'elle soit articulée, comme l'effet d'un acte de violence, de force majeure, d'un evenement fortuit.* If I compre-

hend right the meaning or the word *articuler* it imports a charge or statement of the fact, previous to the production of the proof to support it, and is equivalent to a statement in the petition, under our practice; the authority then relied on proves that it must not only be proved that there was a loss, and that it happened either by violence, inevitable necessity, or a fortuitous event, but the fact of loss must be stated in the petition, together with a designation of the particular event, and its circumstances, by which the loss happened. Therefore, in this the plaintiff's authority strengthens the defendant's case.

In the plaintiff's argument, the last member of the sentence, part of which I have already quoted, tells us: *Il faut enfin que cet acte de violence, que cette force majeure, que cet évenement fortuit soient constates.* The plaintiff's counsel is good enough to employ Merlin to plead the defendant's cause. "What then shall we think, says he, of the judgment, &c. in a case where the party did not prove, nor even alledge, either act of violence, or inevitable necessity, or fortuitous event, by which the paper was lost. They content themselves with alledging that a ci-devant seigneur had said that he had lost it, but the fact of this loss, that is to say, the essen-

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tial fact, was not alledged, and still less proved; this then was a case, if ever one existed, to reject the proof," &c. Change the names of the parties, and the court might imagine Merlin had argued for Mignot; the plaintiff neither alledges nor proves any act of violence, any inevitable necessity, any fortuitous event, any loss by any other means. Merlin's case was stronger; for there the ci-devant nobleman was proved to have said that *he* had lost the paper: in the case before the court, it is only the *plaintiff himself* who says he had lost it: he has not even the *dixit* of a witness to rely on; we may then be justified in adopting Merlin's words, "this then is a case, if ever one existed, to reject the proof."

Therefore, in this also the plaintiff's authority strengthens the defendant's case.

Departing from the written and precise and unbending rule, which our code presents, the plaintiff's advocate thinks he can have some advantage by recurring to the French ordinances anterior to the code, and to the commentator upon them. Let us see how he succeeds; Danty, on whom he relies, says "we must receive the deposition of witnesses on this subject with great caution, and they are not proof unless they state the loss of the paper in question."

"It is necessary that the witness should depose particularly to the loss of the paper, and at the same time, declare what was contained in it." The remainder of this authority contains the same doctrine, and the only difference I find in it, from the law which must be our guide, is that our courts are bound to make the proof of the loss a preliminary to the introduction of the proof of the contents of the deed; whereas, Danty, under the ordinance, seems to think they are to be admitted simultaneously. But this is rather a dispute about words, because even according to him the proof of the contents cannot be made without proving the loss. Therefore, even the legislation of the ordinances and the decrees under them is in our favor, and the learned counsel must excuse me if once more I repeat my formula, that the plaintiff's authorities strengthen the defendant's case.

Leaving his authorities, I return to the admission of the plaintiff's counsel. He frankly acknowledges, what indeed the clear expressions of the law forced him to acknowledge; that the single allegation, made by the plaintiff, of the loss of the paper, was not sufficient. But he is very far from acknowledging (he tells us) that the proof of this fact, must be rigorously made, in the same manner as proofs of other

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facts, alledged in support of actions on obligation. He supports this position first, by the reflection that in many cases, positive proof of the actual destruction of the paper would be absolutely impossible: to this, I answer that, the learned counsel departs from the provision of the law, and of course, from his usual accuracy in this reasoning. The law does not require this impossibility, nor have I been so unreasonable as to contend that it does. The law does not require the positive proof of the loss; but, it requires that the fortuitous event, which occasioned the loss of the title, should be established. And immediately after, "if he merely alledges that he has lost them, he cannot be admitted, &c.;" or, more extensively in the French text, *par lequel il auroit pu les perdre.* But, this relative in the French *par lequel*, refers to the antecedent *fait de force majeure.* So that the plaintiff is not obliged to prove the actual loss, but a fortuitous event, an unforeseen accident, or an inevitable necessity, by which it was probably lost. Now, in complying with this disposition of the law, there is neither impossibility nor even hardship. I am willing to admit, and have admitted, that all the cases, quoted by the plaintiff, came within the spirit of this law. Thus the case from Danty, where

the proof was, that the witness knew the place where the plaintiff kept his papers, that it was in his dwelling house, that the house was consumed by fire, or was pillaged by an enemy, and the papers dispersed and torn, &c. : so that it is probable the paper in question, which was with the others in that place, was also dispersed and torn, &c. Here is positive direct proof of the event, and circumstantial but strong presumptive proof of the loss by that accident. This is all I have required in the present case, and it is not quite candid for the plaintiff's counsel to say as he does, that I have not been correct, when I maintained that direct and positive proof was required of the loss. This is the less excusable, as I have endeavored to maintain the reverse, as my position. The court will there find that, speaking on this subject, I say, he must prove the loss. How? I answer: in the same manner, that any other fact is proved; by evidence, either positive or circumstantial : and again, I do not, I repeat, insist that this proof should in all cases be direct, but it must be such as will induce a presumption of the loss, unconnected with any declaration of the party, which is expressly excluded.

Instead, therefore, of combating what I have not advanced, it would have served the plain-

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tiff's cause more effectually, had he directed his whole force to shew that he has done that which, we all agree to be necessary in like cases, viz. produced proof of the fortuitous event, the unforeseen accident, or the inevitable necessity which renders the loss a presumable event.

What is this event? It is contained in the testimony of Frederick Melas; the note was delivered to the plaintiff, at a time when there were a great many persons in his shop. This is all! this is the whole proof on the subject! and, in this miserable penury of proof, we find the true reason why the plaintiff's counsel has found it more convenient to entertain the court with complaints of the hardship, and even impossibility of proving an actual loss by direct proof, than to meet the true question of the cause, and shew that he had proved a fortuitous event, or an accident, or an inevitable necessity which rendered it presumable. Now, unfortunately, the proof here, independent of the plaintiff's allegation (which the law expressly excludes) renders directly the reverse presumable. The witness gave him the note; the presumption therefore is, that he still has it. He gave it to him at his own house, in his own shop, where it would probably be neither lost or mislaid: in the presence of many persons, the fact

therefore is not doubtful. By what process of reasoning is it, that all these circumstances concurring to prove that he has it, should be made proofs that he has lost it?

Suppose the note to have belonged to another, who should have sued Nagel for it, and on the trial, precisely this evidence should have been introduced, would it not have been amply sufficient to charge him? By what process of perverted reasoning then, I repeat, can the same circumstances be considered as evidence in one case, that he has the note, and in the other, that he has not got it? Feeling the absurdity of this attempt, the plaintiff has been obliged to create, in his argument, a bustle, a confusion and tumult, in the quiet shop of Nagel, which does not exist in the proof, in order to introduce the inference that, in this hurry and confusion, the note was lost.

It is attempted also, by the plaintiff, to lead the court into a consideration of the improbability (as it is called) that he should conceal the note, if he really had not lost it. To this I answer first; that these considerations can only arise from the examination of evidence improperly introduced. For, if the proof of the fortuitous event, or inevitable accident, by which the paper was lost be wanting, the court are

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imperatively forbidden to consider any thing else. Whether the note was payable to order; whether the defendant acknowledged it, or did not acknowledge its existence; what motives the plaintiff may have for alledging the loss, are circumstances, only to be enquired into after that is done, which is the passport, and the only passport of such testimony. To exemplify this: the plaintiff can have no motive to alledge the loss, says his counsel, because, the note was not to order; therefore, he cannot have passed it to another. The amount is ascertained; therefore, he can recover no more than he would have done on the note. But how do we know these facts? Oh, they are proved! But, if the proof ought not to have been introduced, how then? Why then, we have nothing. Secondly, I say a plaintiff may have strong motives to conceal his note, and trust to the imperfect memory or corrupted testimony of witnesses to supply its loss. Things may appear on its face, which he would wish to conceal; it may be for an illegal consideration apparent on its face; it may be cancelled. But, I do not enlarge on this point, because, it would be repeating what I have said, and I close my reply on this head, by again calling the attention of the court from the consideration of the

several matters to which the plaintiff wishes to direct it, to the only material question in the cause,—has a loss been proved either by a fortuitous event, or inevitable necessity?

A new point is raised in which the counsel seems to place much reliance, and which for that reason only, I shall examine with some attention. Every thing seriously urged, from so respectable a quarter, requires examination. otherwise, I should consider it as introduced only to endeavour to make up by number for the want of weight in the array of argument.

The prohibition to receive parol proof of the contents of a deed, which it is alledged is lost, before the loss be proved, was intended (says the plaintiff) to prevent perjury and fraud, and to preclude an evasion of the laws which forbid debts of a certain nature to be proved but by writing. But if the debt claimed, be such a one as might have been proved without writing, then the reason ceases, and without danger of the evils which the law intended to avoid, you may be allowed to introduce testimonial proof. These positions it is said, are supported by Danty, and the passages he quotes from Cujas.

It is always dangerous, if we would come to a true decision on a text of written law, which is clearly expressed, to pursue reason-

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ings on other laws in *pari materia*, which differ from it, although the difference at first may not seem material. But, where the difference is very great, it is truly bewildering ourselves very much, to pursue all the reasonings that may have been had on the subject. In the present case, the law commented upon by Cujas and Danty in the *C.* 4, 21, 1, "if you can prove in any manner," says that text, "that the defendant is indebted to you, on being called before the president of the province, he will be compelled to pay; nor can the loss of the instrument be objected to, if you prove by clear testimony, that he is your debtor." This law, as will be perceived, is the very reverse of ours, and permits what ours expressly forbids. And it is in commenting on this law that, the distinction set up by the plaintiff is made by Danty; for Cujas, according to the quotation given from him (for I have not his work) contents himself with enforcing the text of the law, for he says, *qu'il suffit de prouver que la chose a ètè faite quoiqu'on n'áit pas prouvè que l'ácte en ait ètè pendu.*

On this, Danty is of opinion, that this law relates only to cases where the transaction of which the writing is a proof was of necessity to be proved by writing. But, we are constru-

ing our own, not the Roman nor the French law, as it stood before the Napoleon code. *Civil Code*, 312, (247). "There is, lastly, an exception to the rules laid down in the foregoing 241*st*, and 242*d art.* whether the creditor has lost the title which served him as a literal proof," &c. What are the rules of the two articles referred to?

First. That no parol proof shall be admitted to prove a sale of slaves or real property.

Secondly. That no such evidence shall be admitted against or beyond what is contained in the acts, or what may have been said before, since, or at the time of making them.

By the 247*th art.* then, parol proof may be introduced to prove a sale of real estate or slaves, or to prove what may have been said and agreed on at the time of the act, or before or since, provided the loss be proved in the manner directed by the article. No other case is provided for, no other relaxation of the law contemplated by our law, in the case of lost deeds.

The plaintiff, under this head of his argument, seems to admit that were the deed alledged to be lost of the sale of a house, or a slave, or any other transaction required to be reduced originally to writing, that the loss may be pre-

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viously proved; but when the agreement is of such a nature as might have been proved by parol if no writing had been made, then the loss need not be proved at all.

But, we are construing a written law bearing generally on all cases of lost deeds, and containing no such distinction, as is contended for: therefore a court that would make such distinction must legislate, which is not only forbidden by the nature of judicial functions, but expressly by statute, where it is expressly forbidden to forsake the letter of the law where it is unambiguous, under pretence of pursuing its spirit. But, if there were any equivocal expressions in this law which would justify us in examining into its spirit, it would be no difficult task to shew that by admitting the distinction contended for, the principal objects of enacting the law would totally fail; these objects need not again be repeated.

To exemplify this, I will state too cases: A. makes a sale to B. of a plantation and slaves; but in reducing it to writing some material stipulation in favour of the vendee, which had been verbally made at the time of concluding the bargain, has been omitted in the act; if the vendee produce the sale, he cannot give evidence of this stipulation, because it is not contained in the

act; therefore, he pretends that it is lost, and calls witnesses to prove the bargain; there it is conceded, by the plaintiff's distinction, that the testimonial proof cannot be admitted without proving the loss of the act; but A. makes another contract with B. relative to any other object which might be proved by two witnesses, without writing, for instance, for the building of a ship, but for greater certainty the parties reduce all their covenants to writing, the same circumstance takes place as in the preceding supposed case; a stipulation relative to the payment, or some article relative to the execution of the work which was agreed on verbally, was not reduced to writing; the party wanting to supply this omission by verbal proof, cannot do it, if he produces the act; he, therefore, alledges it is lost, and without any proof of the fact, according to the distinction, taken by the plaintiff, he may do so. He may give evidence beyond the contents of the act. He may state what passed at the time of making it or before or since. He may even contradict it; for the act not being produced, its contents, as well as every other fact attending it, must depend on the weight of parol proof. Now, I ask what possible difference is there between the two cases? Is not the danger of perjury the same?

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Is not the temptation to concealment, as great in the one case, as in the other? And can we conceive that the legislature intended any distinction, more especially as they have expressed none?

The true rule is this, that although parties may, in certain cases, trust the proof of their conventions to the memory of witnesses only, yet for greater certainty they may (though not obliged so to do) reduce them to writing; but the moment they are so reduced to writing, they become subject to all the rules for the proof of written agreements, and their constructions: and it appears to me, that it would be a strange argument to say, that none of those rules applied in cases, where it would have been lawful for the parties to have contracted without writing.

Suppose, in the case before put, of an agreement for building a ship, the plaintiff alledges in his petition, that an agreement was made for the work to be done in a certain manner and by a certain time, and on the trial, when the plaintiff opens his case, his first witness should declare that the agreement had been reduced to writing, and that the writing had been delivered to the plaintiff: and even should add, that it had been given to him in his counting house

where there were many persons present, would not his adversary immediately have a right to stop the witness and call for the instrument as better evidence than the verbal proof; and would it be a sufficient excuse to say, with the plaintiff in this case, "the contract would have been good, although it had not been reduced to writing, therefore, although it was, I am not obliged to produce the act. It is my interest to conceal this writing because, I know the witness has forgotten a part that operates against me; there is a receipt for part of the money on the back of it, of which my adversary has no other testimony. In short, I lose my cause, if I produce the paper; I gain it by the want of recollection, the prejudices, or the perjury of the witnesses, if I do not: therefore, I will keep it safe in my pocket-book, and prove my case by parol testimony?" The court would I imagine, say we must have the best evidence that the case can afford. Here the parties have created higher evidence than the law would have required, if they had not chosen to do so; but since there is a written contract, we will hear no evidence of a verbal one. Unless you produce proof that the higher degree of evidence has been lost, we really cannot think that, because it was delivered to you in your own shop

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where a number of persons were present, we ought to give credit to your allegation of its being lost.

Such it seems to me, would be the decision of a court in the case of a suit brought on the original contract, without mentioning the written one. But, here let it be remembered, the suit is brought on the written contract, on a note without even any allusion to the consideration for which it was given: nor is that uncertainty supplied by proof. The court knows no more of the debt, than that the defendant is alledged to have made his note; whether he owed the money for a tailor's bill, for money lent, or for any other cause is neither alledged nor proved: the note, then, is the cause of action. The note must be produced, or proved to be lost in the manner prescribed by law, or the plaintiff cannot recover.

Therefore, even if the plaintiff's new formed distinction could be established, it could never apply to a case where the suit was brought on the instrument itself, which is alledged to be lost, not on the contract which it witnessed.

☞No judgment was given during this term.

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APPEAL from the court of the first district.

A ship sold in Philadelphia, while she is in the port of N. Orleans may be attached by a citizen of Louisiana, for a debt of the vendor, before the vendee takes possession.

MARTIN, J. delivered the opinion of the court. The plaintiff complained of the illegal seizure of his ship, the Tennessee, by the defendant, under process of attachments, issued against the property of the plaintiff's vendor, in two suits. There was judgment for the defendant, and the plaintiff appealed.

The statement of facts shows that the ship arrived in the port of New-Orleans, from Philadelphia, consigned to J. K. Week of the former port, who advertised her for Philadelphia, on the 19th November 1819. On the eighteenth of December she was purchased in that city, by the plaintiff, from her then owner, John Meary. On the 23d, she was attached, at the suit of J. K. Week against the vendor. On the 18th of February, 1819, J. K. Week failed and called a meeting of his creditors, and obtained a respite. On the 8th of April, the present plaintiff intervened in the suit.

On the 18th of February the Tennessee was also attached at the suit of W. & J. Montgome-

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against the present plaintiff's vendor, and on the 10th of March he had judgment.

On the 13th of April the plaintiff instituted the present suit.

It is agreed that the common law of Great Britain prevails in the state of Pennsylvania, except when controlled by the statutes of the state or the U. S.

The institution of the present suit and the intervention of the plaintiff in West's case, were the first notice of the plaintiff's claim received in New-Orleans, and his first effort to obtain possession of the ship, which remained in New-Orleans till sold by the sheriff, under a consent rule, and her register and other documents remained in J. Meary's name, till after the sale. W. & J. Montgomery are citizens of Louisiana residing in New-Orleans.

The plaintiff's counsel contends, that the sale transferred the property of the ship, according to the law *loci contractus*, without any actual tradition: that of the deed of sale being there a sufficient symbolical delivery. That the case is to be distinguished from that of *Norris* vs. *Mumford*, 4 *Martin*, 30, in this particular, that the thing sold was a ship, a kind of chattel, which from its nature is often abroad, and sometimes at a very great distance from the place of sale: that for this reason an

actual tradition is not essentially necessary for the transfer of the property.

The defendant's counsel urges that the ship, having been seized by a citizen of this state, within her jurisdiction, his lien cannot be affected by the laws of another state, to which this court cannot give effect to the injury of our own people. But, that even under the laws of Pennsylvania, the plaintiff could not be entitled to recover, as he was guilty of very great latches in keeping his right concealed for the space of about four months : while, if ordinary diligence had been used, he might have made it known in as many weeks.

The principles laid down in *Norris* vs. *Mumford*, and *Thuret & al.* vs. *Jenkins & al.* *ante* 318, bear so pointedly on this case, that it suffices to refer to these cases. If the ship had been sold by J. Meary, within this state, on the day on which she was first attached, and the vendee had taken immediate possession of her, the sale made in Philadelphia to the present plaintiff would not have affected the second; the vendee being without notice of the first. If the ship was sold by Meary, according to our law, so that he might effectually transmit her to a vendee, she must be considered as liable to the

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seizure of his creditors here, who might seize all he could sell.

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

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

GUILLOT vs. *ARMITAGE.*

If a hired horse & g g be drove farther than was agreed upon so that the horse die, in consequence of it, the owner may recover the value of the horse, and interest may be allowed, on the score of damages for the delay.

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

MATHEWS, J. delivered the opinion of the court. This is an action, in which the plaintiff and appellee claims damages to the value of a horse, belonging to him as well as its hire, on account of its death, occasioned by the neglect of the defendant and appellant.

It appears from the testimony, in the case, that a horse and gig were hired to the defendant, to go from the city to its upper suburb and no farther; but that, instead of returning from thence, he proceeded some distance up the river, and, on his return, the animal shewed symptoms of excessive fatigue and soon after died.

The whole of the evidence, taken together, raises a violent presumption of the want of ordinary care and attention, on the part of the defendant, to the property of the plaintiff, and of his use of it in a manner different from the stipulations of their contract of hiring. He must, therefore, be considered as a trespasser, and responsible for all the damages resulting from his misconduct, which we believe to be the value of the horse, and ought to have been paid at the time of the loss.

For this amount, judgment has been rendered by the parish court, with interest from the judicial demand; and although it is not usual, and is perhaps incorrect, to allow interest, in cases originating in torts, yet it may be viewed as a reparation in damages for the injury done to the plaintiff.

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

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

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BREEDLOVE & AL. vs. FLETCHER.

BREEDLOVE & AL. vs. *FLETCHER*, *ante* 524.

In this case there was judgment, for the defendant, at last term: the plaintiff's counsel made an application for a rehearing, which was not acted upon, during this. *See the case in the next volume.**

* The cases of this term are continued in the next volume.

The following late and important decision, in the court of the United States for the Louisiana District, is inserted in this volume at the request of several gentlemen of the bar.

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U STATES vs. THE FRANCIS & ELIZA.

FEBRUARY 20, 1820.

UNITED STATES vs. *THE FRANCIS & ELIZA.*

A British vessel, sailing from Margarita, to Jamaica, the captain landing there bringing out passengers, and coming to an American port, is forfeited, under our navigation laws, although she did not enter any port in Jamaica, but stood off and on, while the captain was on shore.

HALL, D. J. The libel, in this case, alledges that this ship, owned by British subjects, and having then come from a port or place, in a colony or territory of his Britannic Majesty, (to wit, Falmouth in Jamaica) which, by the ordinary laws of navigation, is closed against vessels owned by citizens of the United States, did attempt to enter the port of New-Orleans, contrary to the act of congress, entitled "an act concerning navigation."

It appears that this vessel sailed from London in January, 1819, bound to South America, and to return to any port in England, or for any port she might have a cargo for. She sailed and arrived at Margarita, having on board a considerable number of men, intended to be employed in the service of the revolutionary government in Venezuela. She remained there some months, and on the 8th of November last, sailed; it is alledged on the part of the United States, that she sailed for Jamaica, and by the

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claimant that, her intended port was New-Orleans; but that want of provisions compelled the master, captain Coats, nine days after leaving Margarita, to stop a few days off Falmouth, in Jamaica, which port he visited, in his boat; that the vessel never entered the port, but sailed off and on, waiting the return of the master, and that, while at Falmouth, he purchased some provisions and then sailed for New-Orleans.

In support of the libel, the log book is referred to. The entry made on the 9th November is in these words, "Francis and Eliza, captain Coats, from island of Margarita to Jamaica." The next is "Francis and Eliza *towards* Jamaica." On Tuesday, the 16th of November, the following entry is made, "capt. Coats determined to send the boat ashore for provision; at 10 hove too with head to the westward; at day light made all possible sail; at 11, pilot came on board and shewed us the harbour of Falmouth; bore up, and at noon captain Coats went ashore with the passenger." On the 18th the next entry is "captain Coats came on board and made all possible sail: at 12, captain Coats went ashore, and passenger left the ship. On the 20th, captain Coats sent the skiff aboard with four bolts of canvass, and two *small* casks pork, and boat to return. On the 24th, the

boat came aboard with captain and one passenger." On the 25th, the log book is headed, "Francis and Eliza, captain Coats, towards New-Orleans".

In further support of the libel, is a pass from admiral Biron, dated at Juan Griago, November 8, 1819, granting permission to capt. Coats, in the English ship Francis and Eliza, to proceed to the *colonies* friendly to the republic; requiring those under his jurisdiction not to interrupt him, and requesting others to aid and respect him.

It appears also from a document in evidence, that while ashore on the 16th November, 1819, captain Coats made application to the officers of the customs at Falmouth, to have his register endorsed, which was refused him, unless the vessel came into port; and the notary certifies, that captain Coats considers it best (considering the great expense and detention that should arise) to proceed to New-Orleans, and there report his case to the British consul in order to get his name endorsed on the register. Martin Thomas, a witness, says that he sailed with Coats from Margarita, bound to Falmouth in Jamaica; heard they were bound to Falmouth from the people on board: heard nothing about New-Orleans, till they came here:

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lay about four miles from Falmouth, but did not anchor. This witness has had a quarrel with captain Coats.

Captain Loomis, of the revenue cutter, in passing down the river, hailed the Francis and Eliza, and asked where she was from; the answer was, Jamaica; asked captain Coats, what he was doing off Jamaica. He said he went in to get his name endorsed on the register, and to get a freight to England, but the crops not coming in, he did not get one; he then determined to make for New-Orleans for freight. Captain Loomis told him, he would be under the necessity of seizing the vessel under the navigation law; the captain then said he went in for provisions. Falmouth is a port closed to American commerce. On his cross examination, he says he does not know that it was the captain who answered his hail, though, he thinks it was, as it is a matter of course for the captain to answer, and it was not afterwards contradicted. He asked captain Coats if he would not have taken a freight at Jamaica, who said he would have done the best for his owners. Captain Loomis further says, that in nautical language touching at a place is, standing in close to the land, and sending a boat ashore, and a vessel is said to be where her papers are;

and when her papers are in the custom house, she is considered as in port.

Lieutenant Taylor says (he was an officer on board of the revenue cutter) captain Loomis hailed the Francis & Eliza, she answered from Jamaica. Witness understood from the captain that he had put in at Falmouth for a freight; he heard nothing of distress, but understood from the captain, that not being able to get a freight at Jamaica he had come here for it. Mr. Chew, the collector of this port, was on board the revenue cutter on the 6th of December last when the Francis & Eliza was hailed by captain Loomis and answered from Jamaica and repeated it: heard no other answer.

On the part of the claimants, Peter Heinds, first mate of the ship, was examined and says they first arrived in Margarita with about 170 or 180 passengers; continued at Margarita and along that coast till November, when they sailed for New-Orleans; that provisions were very scarce there, and could not procure enough for a voyage to New-Orleans; got a barrel of beef off St. Domingo from an American vessel; had a crew of 25; the beef went little way to support the wants of the crew, they *were without bread;* nothing aboard fit to eat but the barrel of beef;

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between St. Domingo and the east end of Jamaica, fell in with a brig solicited supplies, but could not obtain any: proceeded on the voyage for New-Orleans, arrived off Falmouth which was in the course of the voyage; the captain went ashore to get provisions; procured two barrels of pork, one of flour and some yams, and returned next day; went ashore again for more provisions; remained three or four days; he brought fowls, pigs, &c. and a small quantity of spirits, four or five gallons; and sailed immediately for New-Orleans. The island of Jamaica was the first land they could make with convenience and safety to get provisions; they could get nothing at Margarita, and lived on fishing, &c. about three weeks; he says there was no communication between Falmouth and the ship; did not cast anchor, but stood off and on. The provisions procured at Falmouth *were barely sufficient to reach New-Orleans.* When pilot came on board had scarcely any. The first captain from London, was Stone, who died on the passage; he was succeeded by the first mate, who died at Margarita; he does not know the ultimate object of the voyage; he signed articles for South America; *did not go to Jamaica for any other purpose but to procure provisions to his knowledge;* they did not go

into Falmouth, because they were not bound there; that they could not go in if they wished, being to leeward and having no pilot.

Mr. Hanson says he wrote the log under *the direction of the chief mate*, the entries were made every morning: it would *have been dangerous to enter Falmouth*; it could not have been done in the then state of the weather; the accounts (see evidence) show the amount of provisions gotten at Falmouth: were greatly distressed for provisions at Margarita. *they eat ship's bread at Jamaica:* sometimes pork and beef, which were difficult to be procured: could not get provisions at the island.

George Glover says, the agent gave him a passage to New-Orleans, where he intended to come; he is an Englishman, and did not intend to go to Jamaica; his intention was *to go from New-Orleans to London;* he came in this vessel from London, and if he could not have got another vessel, he would have worked his passage back to London.

John Drixon was a seaman on board. On the 8th November last, sailed for this port; had nothing but salt herrings to eat at *Margarita:* Took *two passengers at Jamaica*, and landed a doctor of some sort. When they arrived off Falmouth, were in great distress for provisions,

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could not with safety have made New-Orleans with their stock; *they made St. Domingo* after *leaving Margarita.*

John Kein says they continued a long time at Margarita; had but little provisions the latter part of the time; *they were not on allowance at all on the voyage:* made St. Domingo: got a barrel of beef off St. Domingo or Cuba. He believes the captain went ashore for provisions, and they were as near in, as they could get when the boat went ashore: they had always something to eat, but the provisions were *bad.*

Charles Jones Salmond was in Falmouth when the ship hove in sight; pilot boat returned and reported that she was bound to New-Orleans. Captain Coats came ashore and went to a tavern kept by a relation, a Mr. Preston. He heard from the land waiter and searchers of the customs, that she was from Margarita, was an armed vessel and bound to New-Orleans.

The same day, the captain purchased some provisions, which he saw taken to the wharf; captain went aboard with Preston, and returned to Falmouth next day; that the captain and witness attempted to go aboard, but could not. Next morning about 10, he descried the vessel from the upper part of a house, and supposed

her to be off Montego bay, about twenty five miles; they got a boat and boarded about 2, of the same day, and immediately made sail for New-Orleans. The ship never entered Falmouth, nor was nearer than about four or five miles. He was on the quarter deck of the ship when hailed by captain Loomis; the pilot answered the hail that she was from Margarita and Jamaica; captain Coats was below. The revenue cutter sent her boat aboard with the lieutenant, who asked witness where she was from; witness answered from Margarita, but the boat went ashore at Jamaica. The only part of the conversation he heard was, captain Loomis asked Coats, if he would not have taken freight at Jamaica. The captain laughed and replied "Yes."

Charles Emlin, embarked at Margarita to work his passage to New-Orleans, as he was told; did not hear that she was destined for any other port; that they were short of provisions; he heard captain Coats say on the voyage, that he would put in at any port to get provisions, there being no provisions to be got at Margarita, but *bad flour*.

Captain Thomas Coats, says the ship in which he came from England, was sold; that the owners of that vessel, were interested in

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the house of Hanning & Richardson, to whom the Francis & Eliza belonged; that they were both under the control of Gold, the agent, who desired witness to take command of the Francis & Eliza, which he did on the 1st October, at Margarita; that the agent gave him orders to proceed to New-Orleans. The agent died and she was obliged to remain to arrange his affairs: he did not sail from Margarita, till 8th November. Prior to that, if he had been loaded with money, he could not have got provisions from the shore. Every morning the boat went a fishing; and in fine weather, went ashore with muskets to procure provisions. Left Margarita with 15 pieces of beef; gave the people part of his own stores. Got one cask beef from an American vessel, and gave an order on R. D. Shepherd, of New-Orleans. When off Jamaica, had not more than would last three days; hove too off Falmouth, refused a pilot, saying he only wanted provisions: went ashore and returned with a relation to see the ship; was not able to make arrangements for ship's provisions on account of the smallness of the bill on London; returned to Falmouth: ship was blown off and did not see her for two days: when he saw her, she was to the leeward of Montego bay, where he joined her, and came

here. He was ordered by Gold to take freight at New-Orleans for England or the continent. At Margarita, he obtained a letter for R. D. Shepherd & co. which he delivered here. When hailed by the cutter, the pilot answered from Margarita and Jamaica. Does not know the original destination of the ship; his object in coming here was provisions and freight.

Did not enquire for freight at Jamaica; if he had taken freight, he would have violated his orders; if freight had been offered thinks he would have done the best for his owners; he had *no written instructions* from Gold, but was *verbally directed to proceed to New-Orleans.* (see evidence) He took a passenger from Margarita and landed him at Falmouth; the passage was intended for New-Orleans. He took a nephew at Falmouth, at the request of his cousin, and another young man who was out of employ. He says that by the navigation laws of Great Britain, the captain is obliged to have his register endorsed on change of master *at the first port the ship arrives;* it can't be done at a foreign port; the certificate exhibited contains all the declaration he made at Falmouth.

Before we proceed to the examination of the merits of this case, it is proper to observe that

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the law upon which the libel is founded is a retaliatory law. It is intended to produce a great political effect; one of much importance to the trade and navigation of the United States. It is calculated so to operate upon *Great Britain*, as to induce her to relax from her strict and rigid exclusion of American commerce and navigation from her ports on this continent, and in the West Indies. In the construing of this law, Great Britain cannot take it amiss, if we apply in this case her own principles and rules of decision on similar subjects. In the case of the Beaver, (28th April, 1812, *Dodson* 155) Sir W Scott observes, "one cannot help feeling that in cases of this kind, innocent parties may be exposed to great hazard and inconvenience; at the same time it must be recollected that, the navigation laws are of great importance, and very inflexible in their nature. The national benefit must take precedence of the profit of individuals. The law presumes too, that the party damnified has a remedy against him whose fault has caused the loss, and although it may sometimes happen that the person, from whom the remedy is to be sought, is not in point of solvency able to make satisfaction, still that circumstance can make no difference in the legal principle, which remains unshaken."

On a subsequent day Sir William observes, "there are circumstances in this case, that would induce the court to regard it in the most favorable light, and to stretch as far as possible to give relief to the owners of this cargo; the parties have, I think, made out a *case of perfect innocence of intention*. Under these circumstances, it is impossible not to feel a desire to relieve from the penalties affixed by law upon illegal importation; but at the same time, no door must be left open for the violation of the high interests which the navigation act was intended to protect." He further observes, "it was considered I presume, that the object of the statute could not otherwise be attained than by imposing these penalties. The sacred rights of British navigation could not be upheld if these penalties could be avoided under the plea of ignorance. I am therefore, clearly of opinion, if the *strongest possible case of innocence were made out*, it could not avail to protect the parties from the penalties imposed by this statute." We here plainly discover that, the policy of Great Britain is, to secure to herself the monopoly of trade and navigation of her colonies. The policy of the United States in passing this law, is no less obvious; it is to cut off and prevent all communication between

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the colonies of Great Britain and the United States, until *she* shall consent to a mutual intercourse. It was not merely to prohibit the introduction of her produce from the islands and her other colonies, that this measure was adopted, but to affect her navigation and trade. The law makes no difference whether the vessel be loaded or not, "all British vessels coming or arriving from any port or place in a colony or territory of Great Britain that is, or shall be by the ordinary laws of navigation, closed against vessels of the United States, such vessel shall be forfeited."

This being the evident intention of the law, let us examine the evidence that has been given.

That the Francis & Eliza sailed from Margarita for Jamaica, I think, is pretty clearly shewn.

The first entry in the log book after leaving Margarita, is "Francis & Eliza, captain Coats, from Margarita to Jamaica;" the next, "from Margarita, towards Jamaica." Now, it appears from the testimony of William Hanson, who kept the log book, that it was kept under the direction of the chief mate; indeed, this is always the case. This entry then, could not have been made without the direction of the chief

mate, and he must have received his directions from captain Coats. Notwithstanding this, Mr. Heinds, the chief mate, swears that they sailed from Margarita to New-Orleans: so much for Mr. Heinds. The next circumstance which goes to prove that the intention in the first place, was to try some of the West India ports, is the pass received from admiral Brion. It is an order and request of Brion, to all the revolutionary cruisers, to respect the Francis & Eliza, going to the "colonies friendly to the republic." Now, if the real intention of captain Coats was, to come to New-Orleans immediately, the pass would not have been to the friendly colonies, but to the United States alone.

Martin Thomas, who was a seaman on board, says he sailed with captain Coats from Margarita; were bound to Falmouth in Jamaica. He heard they were bound to Falmouth, from the people on board. He says on his cross examination, that he never heard the captain say, they were bound for Falmouth. It is to be observed, that a quarrel has taken place between the captain and this man, and perhaps his single unsupported testimony, would not establish the fact of intention; but taken in connexion

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with other circumstances, it may have some weight.

The next circumstance to shew the destination of the vessel for Falmouth is, the directness of the course for that port. The log book on the 9th November, first announces the intention to proceed for Jamaica. Their course is N. E. E. E. N E. &c.; on the 12th, St. Domingo was in sight; on the 15th, east end of Jamaica, S. W. by W. distance 6 leagues; people employed unbending small bower cable. On Tuesday 16th, took in all small sails, captain Coats determined to send the boat ashore for provisions. At 2, hove to, with her head to the north. At day light, made all possible sail. At 11, pilot came aboard and showed us the harbor of Falmouth; bore up, and at noon captain Coats went ashore with the passenger. On the 17th, captain was on shore. At 7 on the 18th, captain came aboard, and made all sail. At 11, captain went ashore, and the passenger left the ship. On 20th, captain Coats came on board with 4 bolts of canvass, and two small casks of pork; boat to return. On 21th, captain Coats came on board with a passenger. It was then, that captain Coats determined to proceed to New-Orleans, for on the day after, the log

book begins, Francis & Eliza, captain Coats, towards New-Orleans.

Another circumstance to show that it was the object of captain Coats, to proceed from Margarita to Jamaica, is the conversation between him and captain Loomis and lieutenant Taylor.

Captain Loomis says when he hailed, the answer was from Jamaica: when on board he asked the captain what he was doing off Jamaica; he said he went in to have his register endorsed and for a freight. Crops not being in, he determined to proceed to New-Orleans. After he was informed that the vessel must be seized he endeavoured to explain. He thinks the captain answered the hail; there seems to be some doubt as to this fact. Mr. Salmon says he is sure the pilot answered, and that the answer was Margarita and Jamaica. Mr. Salmon states also, that when captain Loomis asked captain Coats if he would not have taken freight from Jamaica, he answered laughing "Yes."

Lieutenant Taylor says the answer to the hail was, "from Jamaica;" witness understood the master of the Francis & Eliza that he had put into Falmouth for a freight. The captain said nothing of distress; understood from the

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captain that not finding a freight at Jamaica, he came here.

The collector says he was on board the revenue cutter and heard the answer to the hail, it was "from Jamaica," and was repeated; he heard no other. John Keen says they were as close in shore as they could get when the boat went ashore. That distress did not compel captain Coats to proceed to Falmouth can, I think, be easily shown: from the testimony and circumstances that I have detailed, it appears that he had views and motives to visit Falmouth: there is another circumstance which is a link in the chain: he had relatives in Falmouth, he lodged at his cousin's, and brought from Falmouth a nephew, with an intention to carry him to England.

I find no entry in the log book as to want of provisions on the voyage to Falmouth; it is only observed on the 14th of November, captain Coats saw an American schooner, went on board and purchased one cask of beef. To establish the fact of distress Mr. Heinds is examined; he says provisions were scarce and could not get enough to proceed to New-Orleans: says they were without bread; had nothing aboard fit to eat; that between east end of Jamaica and St. Domingo, fell in with a brig

and solicited supplies, which were refused. No mention of the latter circumstance is in the log book.

It is stated in the log book of Monday, 15th of November, "at noon boarded the brig Mary & Jane from Jamaica bound to London, several more vessels in sight:" now it is to be recollected that this happened the day after they procured a cask of beef from the American schooner: no mention is made of the object of going on board, or that it was for provision; but the ingenious Mr. Heinds has positively sworn that they boarded for provisions, and that they were refused. If provisions had been their object, why did they not try some of the other vessels which were in sight? Some of their captains might not have been so uncharitable as the captain of the Mary & Jane. The true object of the visit was to make inquiry as to Jamaica, the east end of which was only six leagues off at day light.

John Keen says, in contradiction of Mr. Heinds' statement, that although they had very little provision, during the latter part of the time at Margarita, yet they were not at all allowanced on the voyage.

Mr. Heinds is again contradicted by one of the seamen, Wm. B. Hanson. Heinds says

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they had no bread on board, and nothing fit to eat, but the cask of beef they got from the American schooner. Keen says they eat ship's bread at Jamaica, sometimes salt pork and beef; he says they could not get provisions at the island.

The witnesses do not agree: one says they had nothing but salt herrings. Charles Emlin says there were no other provisions at Margarita than bad flour. Heinds says they had no bread: Hanson says they eat ship's bread; he too says that about a week before they left Margarita they were on half allowance. No mention is made of this in the log, or by the other witnesses. Now in opposition to this, it appears that captain Coats, with a large crew, takes on board from mere motives of benevolence a Doctor Blair, to come to New-Orleans; but arriving at Jamaica, the doctor was put ashore, got employment there, and two more passengers were brought for New-Orleans.

But, if the necessity was so great, why did he not enter any of the friendly islands, for which he had a permission from admiral Brion? Many of them were much nearer Margarita than Jamaica, which was the most distant in his rout to New-Orleans except Cuba; St. Domingo was in sight, three days after leaving

Margarita, two days before they met the American ship. No—it was not distress that drove him there. Was it to have his register endorsed; to endeavour to procure freight; at the same time to visit his connexions?—I need not say that this plea of distress by mariners is always examined with a most scrutinizing eye; no instructions in writing are produced. The distress which will excuse is well defined by Sir Wm. Scott in the case of *the Eleanor* in *Edward's*. "It must be urgent distress; it must be something of grave necessity; when the party justifies the act upon plea of distress; it must not be a distress created by himself, by putting on board an insufficient quantity of water or provisions for such a voyage; for there the distress is only part of the mechanism of the fraud, and cannot be set up in excuse for it. The same doctrine is held by the supreme court of the United States in the case of the *New-York*, 3 *Wheaton*.

Distress being out of the question in the present case, let us enquire whether, or not this voyage being intended by captain Coats from Margarita to Jamaica; his going in as close as he could get; his entering into the harbour with his boat; his landing a passenger there; his remaining there six days; his application to

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have the register endorsed there, and his actually bringing two passengers from there to this place, do not bring this vessel within the meaning of the law, which declares that any vessel owned by British subjects coming or arriving from any port or place in a colony of his Britannic Majesty closed against the United States, shall be subject to forfeiture. The captain must have considered the voyages as two distinct voyages. The log book stating the first from Margarita to Jamaica, and after leaving there for New-Orleans. Jamaica then was the point of departure; so he answered when hailed. I have already stated that the policy of this law is, to induce Great Britain to allow the United States to trade with her colonies: to effect this we say, your colonies shall have no communication with us, until you change your system: you shall not import any produce to us, you shall bring no passengers to us in your ships.

In this case, it appears that captain Coats brought two passengers from Jamaica. Suppose these passengers were asked, from whence came you, or from where did you arrive? Their answer would be, from Jamaica. In what ship did you come? In the Francis & Eliza; but she did not come from Jamaica. How so! you came in her from Jamaica, and she has not

come from Jamaica? No! she was laying off, and we went aboard in the boat. Shall this be an excuse to evade our navigation laws? Suppose they had brought from thence a cargo of sugar, which had been put aboard from lighters and small vessels three leagues from the shore, would this have excused her? Does not the navigation of a country derive sometimes, as much advantage from the carrying of a passenger, as from carrying a cargo? Suppose captain Coats had heard that there were 200 more patriots at Jamaica anxious to join their compatriots at New-Orleans, and he had brought them to this place, together with his nephew Charles Alexander, & Jones Salmond, who were both landed here, would this be no violation of our navigation law? If the British had permitted American vessels to visit their colonial ports, our navigation might have shared perhaps the honour and profit too of conveying half of this patriotic band.

Upon the whole it is ordered, adjudged and decreed that said vessel, her tackle, furniture, &c. be forfeited to the United States.

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