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.

Imperator Severus rescripsit, in ambiguitatibus quæ ex legibus proficiscuntur, consuetudinem, aut rerum perpetuo similiter judicatarum auctoritatem, vim legis obtinere debere. ff. 1, 3, 38.

VOL. VI.

BEING VOL. VIII. OF THIS REPORTER.

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1820.

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

On the 12th of July 1820, THOMAS B. ROBERTSON resigned the office of Attorney-General, having had the greatest number of votes, for the office of Governor, and

ETIENNE MAZUREAU was appointed in his stead.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, APRIL TERM, 1820.*

East'n District. *April*, 1820.

WATERS vs. BACKUS.

WATERS vs. *BACKUS.*

When the natural meaning of the words of an act presents no ambiguity, there is no room for interpretation.

APPEAL from the court of the first district.

The petition stated that the plaintiff purchased, from the executor of Boisclair, a lot of ground of sixteen feet in front, with a depth of forty-five, having a right of passage and entry of four feet, in width from the front, along the whole depth, over the next lot, which belongs to the defendant, whose house covers, in its whole depth, twenty-one inches of the passage to which the plaintiff is entitled: that the defendant refuses to clear the said passage, so that the plaintiff cannot have the benefit of it.

* The cases of this term are continued from the preceding volume.

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The defendant pleaded the general issue, and farther, that the passage was, at the time it was granted, of its present width, and that whatever may have been said in the deed, under which it is claimed, it was the intention of the parties it should remain as it then was.

The district court was of opinion that, "the parties to the deed intended to reserve the passage, as it then existed, and although it calls for a passage of four feet, the absurdity in supposing that it was contemplated to cut down two feet of the house, justified the court in departing from the words of the deed, in order to give it such an interpretation as the parties evidently intended; as a contrary one would be absurd, unreasonable and manifestly unjust;" whereupon judgment was given for the defendant: the plaintiff appealed.

The evidence on which the case was heard below was all written, and consisted of a deed of partition, between J. B. Boisclair, and the defendant, of a lot of ground of sixteen feet in front and ninety in depth, holden in common between them; the certificate of the register of wills that the portion of said lot, which belonged to Boisclair, was adjudicated to the plaintiff, and a deed of sale, executed, in consequence of such adjudication, by Boisclair's executor

The deed of partition states that Boisclair and the present defendant, being desirous to put an end to the joint ownership which they had in a lot sixteen feet in front and ninety in depth, have effected their intention in the following manner, viz. "Louisa Lacombe, widow of N. Backus shall have, in full property the sixteen feet of front, on Bienville-street, to the depth of forty-five feet, burdened, by her consent, with a passage of four feet in width, on the whole extent of the part of the lot abandoned to her by Boisclair, who shall have and possess in full and absolute property the remainder of the lot, after and beyond the forty-five feet abandoned to the widow—which remainder contains an equal quantity of ground, viz. sixteen feet in width and forty-five in depth, and is bounded by the limit of the whole lot,—Boisclair and his heirs or assigns to have and enjoy for ever a right of passage, of the above-mentioned width, which the widow is to allow on the sixteen feet of ground set off to her, along the whole depth of the forty-five feet."

The executor's deed and the certificate of the register shewed that the whole estate of Boisclair, in his portion, with the right of way expressly mentioned, was acquired by the plaintiff.

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By a survey which was made, under a rule of court, it appeared that, at the date of the deed of partition, a building, of 13 feet 9 inches in width, which existed on the part of the ground allotted to the defendant, covered 21 inches of the portion of it over which the right of way reserved to Boisclair was to be enjoyed; and that the passage then existed so obstructed by the building.

Hennen, for the plaintiff. It is contended, on the part of the defendant, that, as at the time of the partition, there was a passage of two feet and three inches only, it must have been the intention of the parties to give a passage of that extent only, though, in the deed of partition, it is expressly said that the extent thereof shall be four feet. In other words, the defendant contends that a passage of two feet three inches was intended, when one of four feet was stipulated for in the deed. On a case so very plain, as plain as words can make it, I think it necessary only to refer the court to the rule, laid down by Vattel, for the interpretation of treaties, which equally apply to the interpretation of contracts.

"The first general maxim, in regard to interpretation, is that one is not to be allowed to

interpret that which needs no interpretation. When an act is written in clear and precise words, when the meaning of the parties is evident, and one arrives at no absurd conclusion, there cannot be any reason to reject the sense naturally presented by the act. To resort to conjectures to extend the sense is to seek to elude it. If this dangerous practice be once admitted, there is no act which may not become useless. Let light shine on every disposition of it, let it be couched in the clearest and most precise words, this will be of no avail if reasons are permitted to be looked for out of it, to shew that it is not to be understood in the sense which it naturally presents.

When chicane attacks the sense of a clear and precise disposition, it seeks to render it unavailable by a recurrence to the intention, the views of the party. It would be often dangerous to enter into the discussion of an intention which the act itself does not present. Here is a case which defeats chicane. If he, who could and ought to have spoken clearly and precisely, has not done so, he must suffer therefor, and ought not to be permitted to speak of intentions which he did not mention. *ff.* 2, 14 *de pactis*, 39; 18, 1. *de contract. empt.* 21. *Pactionem*

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obscuram iis nocere, in quorum potestate fuit legem apertius dicere."

This short authority contains a full answer to every argument drawn from the probable intention of the parties. The act of partition is clear and destitute of all ambiguity; and any attempt to resort to such an interpretation of it, as that which the defendant's counsel has given it, would render every written act totally useless.

Unless words have no meaning, and unless four feet means two feet three inches, the plaintiff must obtain the judgment of this honorable court in his favour, for the free enjoyment and use of the passage of four feet, which the defendant contracted to give him over her lot, and likewise some compensation in damages for the frustration of his right thus far.

Cuvillier, for the defendant. It cannot be imagined that the parties intended that the widow should demolish her house, in order to widen the passage which existed at the date of the deed of partition, to the width which is there mentioned. If such had been the intention of Boisclair, his view was to deviate from the maxim that the covenant ought to be executed in good faith. *Civ. Code*, 267, *art.* 34.

If such were his views, the defendant has justice on her side, and may confidently seek relief, in the courts of her country. It is, however, due to the memory of the person, with whom she contracted the obligation of furnishing the passage, that, as long as he lived, he did not consider the demolition of the defendant's house, as something due to, or desired by him. This co-temporaneous view of the parties, may aid us in ascertaining their intention, which is to be the guide of the court, called upon to compel the execution of their agreement. *Civ. Code*, 271, *art.* 56. The interpretation of every convention is to be made according to certain rules, which enable us to determine what was the intention of the parties, when the instrument was drafted and executed, *Vattel*, 2, 17, § 268.

These principles once admitted, we are to inquire whether the intention of the parties was that the defendant should not enjoy the piece of ground, having sixteen feet in front, with a building thirteen feet nine inches wide, leaving a passage between the house and the ground of Boisclair, of two feet three inches; whether it is not to be presumed that during the existence of the house, that portion which narrowed the passage in the length of the house, should remain as

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it was: rather than to conclude that the whole side of the house should be pulled down, the cross timbers cut off, and the side rebuilt at an expence to one party, which bore no possible proportion to the benefit resulting to the other.

That the intention of Boisclair was not to compel the defendant to pull down her house, or part of it, to leave a four foot passage, is apparent from the conduct of the former. He lived six years after the partition, and never complained that the passage he enjoyed was not the one he had stipulated for.

An error of fact is discernible in the deed of partition. When the defendant accepting, as her share, the house and sixteen feet of ground on which it stands, contracted to leave a four foot passage for the advantage of the owner of the piece of ground of the same extent, to which she abandoned her right, in order to enjoy the other part as absolute owner, it is impossible to believe that she understood that she covenanted to pull down the house, in order to give to the existing passage a width of four feet: it is clear that she intended only to leave the passage as it existed, and if there be an error of fact the agreement ought to be rescinded. *Code Civ.* 207, *art.* 250.

The parties were two old negroes, the de-

fendant and a decrepit woman, unable to discover or avoid the error in which she has fallen.

MARTIN, J. delivered the opinion of the court. The defendant's counsel contends that the intention of the parties manifestly was that a passage of two feet three inches was to be given, and the district court so determined it.

That a passage of four feet in width was stipulated, and contracted for, the words of the partition deed do not allow us to doubt. The only question, which might have arisen, in this case, is whether equity would not, had the case appeared a proper one, have compelled the plaintiff to accept a commutation, to be satisfied with a reasonable compensation, during the existence of the building which obstructs his passage. If it had been shown that the building is a very valuable one, and that its reduction, to the size it was intended to have by the parties, would be attended with such an inconvenience and expense, as bore no possible proportion to the benefit he could reap from a specific performance of the defendant's obligation, we are not ready to say that he might not be compelled to accept a pecuniary retribution, during the reasonable existence of the building.

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But the building, the property of an old negro woman, thirteen feet nine inches wide, not alledged to be built of brick or new, may most likely be reduced, at a much less expense than would attend the remanding this case, in order that the proper costs of the reduction might be ascertained. This is the only remedy of which the defendant's case is susceptible, and we are not by the record enabled to apply it; it was not asked in the pleadings.

Left, therefore, to ascertain the intention of the parties from their words, the conclusion is irresistible that a passage four feet wide was intended and is due.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and proceeding to give such a judgment, as in our opinion ought to have been given in the district court, it is ordered, adjudged and decreed that the defendant do leave a passage of four feet in width in the whole length of her lot for the use of the plaintiff, and that she pay costs in both courts.

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BRICKLE.

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VIENS vs. *BRICKLE*,

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

If a man & a woman contract to carry on business together, their subsequent cohabitation does not lessen her right.

MARTIN, J. delivered the opinion of the court. The plaintiff alledges that she kept a boarding house in this city, well supplied with the necessary furniture, had a great deal of custom and was thriving in her business, when the defendant took charge of said house and furniture, managing its concern, and receiving the profits : that she faithfully attended to the management of the house and they continued engaged in the conduct of it for six years ; the plaintiff in the meanwhile receiving no wages and no part of the profits was ever allowed her; that she is fairly entitled to some compensation for her labour, and the wear and tear of her furniture.

The defendant pleaded the general issue and prescription : further, that in the month of April, 1810, the plaintiff and he agreed to live and cohabit together and did so, till the year 1819 ; that during the most of that time, the parties lived in a house hired by the defendant, and the plaintiff superintended his household

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affairs: he paid the rent and supplied the house with groceries, money, &c. He supported the plaintiff, during the whole time of their cohabitation, finding her food, raiment and every thing necessary, and indulged her with money whenever she required it. He paid her at sundry times, different sums of money, amounting together to $7000, which she never accounted for. He paid for supplying her with food, raiment, &c. about $16,00. She received several sums of money from boarders, amounting together to several thousand dollars, which she never accounted for. The defendant never promised her any pay or reward, except for cohabitation, on which promise she is without any action.

The plaintiff had a verdict and judgment for 1200 dollars and costs, and the defendant appealed.

The testimony, which is voluminous, establishes the fact that the plaintiff kept a decent boarding house for mechanics, well supplied with furniture, when the defendant came to board with her; that soon after he took the management of the house, as master of it, and the plaintiff continued her attention to its indoor concerns with great care. Her own witnesses

depose that they lived in greater intimacy than morality allowed. This, however, does not seem to have been the motive of their coming together, but rather the consequence of the familiarity, which a close union of interest is apt to create between persons of different sexes. We, therefore, cannot view this circumstance, as preventing or destroying any right which she may have on the defendant for a remuneration, and perhaps it increases his obligation, in a moral point of view, of doing her justice, instead of lessening it in a legal.

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For the faithful and incessant services, in attending to the management of an humble boarding house, which fall to the lot of a female; for the wear and tear of her furniture, the jury have believed that she is entitled to a sum which does not exceed what a common black servant would be allowed, at the ordinary rate, about ten dollars per month. Against this verdict, no principle of law militates, and we cannot say that it is incorrect. There is no evidence of any specific sum of money coming into her hands. The continuity of her services till within a short time, previous to the suit, repels the plea of prescription.

It is, therefore, ordered, adjudged and de-

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creed, that the judgment of the parish court be affirmed with costs.

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

OLD & AL. vs. FEE.

The assumption of the debt of another must be strictly proven.

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

MARTIN, J. delivered the opinion of the court. The defendant is sued on an alledged assumption of his to pay a debt of the estate of the late husband of his step daughter. He pleaded the general issue, and the judgment of the parish court is that it has not been satisfactorily proven that the defendant assumed the payment of the plaintiffs' claim. They appealed.

A close examination of the testimony does not enable us to say that the plaintiffs' case is clearly supported. The plaintiff's demand must be fully proven or he cannot recover. It is not enough for him, that he render his case probable. When a defendant is alledged to have undertaken to pay the debt of another, this ought to be more particularly required. In the present case, although the testimony, on

the part of the plaintiffs, establishes the claim, that, on the part of the defendant, places it in a very dubious point of view. The parish court, who heard the evidence from the very lips of the witnesses, has concluded that the claim is not satisfactorily proven, and we are not able to say that it erred. In such cases, we cannot reverse its judgment.

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

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

ROBINSON vs. *JONES & AL.*

The vendor, who has not delivered the goods, cannot maintain an action for the price.

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

DERBIGNY, J. delivered the opinion of the court. The plaintiff sent to the house of Christy and Basdeu, of this place, four pipes of brandy to be sold by them for his account; they sold it to the defendant H. Jones ; and although an entry was made in their books, from which doubts have arisen whether they undertook to sell it as theirs, we believe that it had not ceased to be the property of the plaintiff, before they sold it to the defendant. After the sale, the

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brandy was shipped on board the steam boat Franklin bound to St. Louis, and was consigned to W. Christy on board, who was directed by his house, to place it in the hands of some responsible firm at St. Louis, with orders to hold the proceeds at the disposal of Christy & Basden, or remit them to that house in this city. The brandy was, in no case, to be delivered to Jones until he should pay for it. After that extraordinary agreement, we look in vain for any evidence that Jones ever received either the brandy or the proceeds of it: so that we are at loss to conceive upon what ground the purchase money is demanded of him. The judgment, by which the parish court absolved him of this demand, is therefore correct.

The syndics of the creditors of Christy & Basden, who are now bankrupts, have also been made parties defendant in this case. The prayer against them is, that they may shew why they interfere to prevent the defendant Jones from paying the plaintiff; and that they may be decreed to pay the costs and damages, which have accrued to the plaintiff by that interference. Upon that prayer, judgment by default was rendered against them for the amount of the debt. We find that judgment erroneous in two points of view: 1st. it is inconsistent with the nature of the demand: 2dly, no responsibility

of any kind can have been incurred by these parties, had they, as it is alledged, interfered to prevent payment of that which was not due.

It is, therefore, ordered and decreed, that the judgment given in favour of the defendant Jones, be affirmed with costs: that the judgment rendered against the syndics of Christy & Basden be reversed, and that judgment be entered for them with costs.

Turner for the plaintiff, *Eustis* for the defendants.

RION & AL. vs. *SEGHERS' SYNDICS.*

A creditor who procures a writ of sequestration which is followed by the failure of the debtor, has no action for the costs of it, against the mass, when the measure does not appear to have been advantageous to them.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs being creditors of Dominique Seghers, conceived some apprehensions of his insolvency, and suspecting that he intended to defraud them, applied for a general sequestration of his property. In doing so, they employed counsel, to whom remuneration is due; but they say that, in as much as this step was taken for the benefit of all the creditors, that expense ought to be charged to the common stock.

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This application, though perhaps unprecedented, is supported on the authority of the case of *Morel* vs. *Misotiere's syndics*, and on general principles of equity. If the allegation of the plaintiffs that the course, by them pursued, turned to the advantage of the creditors generally, was well founded on fact, it would indeed seem reasonable that they should recover their expenses; but they were bound to shew that clearly and satisfactorily. Have they done so?

At the time of suing out the sequestration, Dominique Seghers, for aught that appears, might have gone on with the management of his business. His schedule shows sufficient substantial property to pay his debts. The assertion that he was endeavouring to remove it out of the reach of his creditors is not supported by proof; the principal fact, on which it rests, is the shipping of eighteen bales of cotton to Europe; but he had to pay, for the boarding and schooling of some of his children, a sum nearly equal to the value of that cotton.

By compelling D. Seghers to fail, it is by no means clear that the plaintiffs have benefitted his creditors generally; but it is very certain, that they have done no good to those, at least, whose debts were secured by mortgage,

and who are entitled to a considerable part of the common stock. There is no reason then why that common stock should be charged with these expenses.

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

Grymes for the plaintiffs, *Seghers* for the defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District. *May*, 1820.

LEE & AL. *vs.* BRADLEE.

EASTERN DISTRICT, MAY TERM, 1820.

LEE & AL. vs. *BRADLEE.*

APPEAL from the court of the first district.

Delivery is not a consequence, but of the very essence of the contract of pledge.

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Hoffman, for the plaintiffs. The plaintiffs and attaching creditors in this case contend that their attachment must be sustained—

1. Because the intervening claimant, Jos. P. Bradlee, has not made out his claim by testimony.

2. Because no delivery of the property attached having been made to the claimant, no sale or assignment thereof could transfer it to the prejudice of the attaching creditors.

I. The only evidence in support of the claim in this case is an order, drawn by the

defendant on C. B. Sweetzer, who was at the time in Boston, requiring him to deliver to the claimant all goods, or proceeds of goods, that he may have belonging to him, to the defendant. This order is dated Boston, Nov. 9th, 1818, and is accepted by Sweetser the same day. The circumstances, under which this order was given, must lead to a conviction that it was intended as a collusion between the parties. It is drawn by the defendant, in favor of his brother, on the very eve of bankruptcy. It is not expressed to be for value received, and, what is still more extraordinary, was not brought to this place by Sweetser, but sent here by the claimant, when this cause was nearly ready for trial, and many months after the property was attached.

But it is difficult to perceive what there is in this order, which can make it apply to the goods in question, for the evidence of Hyde shews clearly, that Sweetser had delivered them into the possession of the Messrs. Hydes of this city, many months previous, in pursuance of instructions from the defendant.

But let us suppose for a moment that Sweetser, though in Boston, had the possession of the goods claimed and then in this city (which we think is carrying the doctrine of constructive

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LEE & AL. *vs.* BRADFORD.

possession beyond all bounds) there is not the least testimony to show that this order was given in pursuance of a sale from the defendant to his brother, the claimant, or even intended as a *dation en payement*, for that supposes a debt due, which is not made out by the testimony.

Had the goods in question been delivered, in pursuance of the order, it would not have made them the property of the claimant; he would have been nothing more than what Sweetser had been, that is, the agent of the defendant; for if the defendant intended, by the order drawn on Sweetser, to transfer the property of the goods in question to the claimant, why, it may be asked, was not the order drawn on Messrs. Hydes, who, the defendant knew, had the actual possession of the goods? To constitute a sale a price must be given; a *dation en payement* can be made only by a debtor to his creditor, and a delivery is of the very essence of such a contract. In this case, there is no evidence to support either. The notes and checks filed by the claimant are, no doubt, intended to shew that the defendant is his debtor to that amount, as being the holder thereof, and it will, perhaps, be contended that his possession of them is sufficient proof of the fact. Such a circumstance, it is true, might be testimony in an ac-

tion by the claimant against the defendant, but certainly inadmissible in the present case. There is no evidence that the claimant was in possession of the notes and checks previous to the failure of the defendant, which took place about the 24th Nov. 1818. In an action by the assignees of the defendant against the present claimant, he would not be permitted to set off a check issued by the defendant, payable to bearer, and dated before the bankruptcy, unless he proved that the check came to his hands prior to the bankruptcy. *Ogden* vs. *Cowley*, 2 *Johns. Rep.* 274. The reason of the decision in that case applies, with equal force, to the present.

It is deemed unnecessary to examine the question whether Sweetser, when in Boston, could, in contemplation of law, have possession of goods in the city of New-Orleans; as it clearly appears from the testimony that, on leaving, he renounced all control over, them. By the letters of the defendant to the Messrs. Hydes, received prior to the departure of Sweetser for Boston, they are repeatedly informed that, in the event of Sweetser leaving New-Orleans, all the goods of the defendant would be left with them; they are likewise authorised to sell them lower than their neighbours, in order to put themselves in funds to

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meet the defendant's drafts. Sweetser, on the eve of his departure, conformed to the expectations raised by the letters of the defendant, by leaving with the Messrs. Hydes the key of the store in which the goods were deposited, with a memorandum naming some of the items. In the case of *Durnford* vs. *the syndics of Brooks* this court say, that the delivery of the keys of the building, in which moveable property is kept, is a delivery of the property therein contained. *Civil Code*, 350, *art* 27. The claimant has failed to establish his claim to the goods in question.

II. Taking it for granted, that the claimant has proved a sale or assignment of the property in question from the defendant to him, in such a manner that, according to the *lex loci contractus*, the property, if there, would pass without delivery; yet it is contended that the laws of this state must govern in the present case. This point has been so often decided in this court that a reference to these decisions is all that is deemed necessary. In *Norris* vs. *Mumford*, 4 *Martin*, 20, the goods attached were in New-Orleans, and all the parties were citizens of New-York. In *Ramsay* vs. *Stevenson*, 5 *Martin*, 23, and *Fiske* vs. *Chandler*,

7 *Martin*, 24, the circumstances were the same, and in all those cases it was determined, that, as no actual delivery took place before the attachment was laid, the attaching creditor should hold the goods. In the case of *Thuret & al.* vs. *Jenkins & al.* 7 *Martin*, 318, the court say that "If the ship had been within the state, at the time of the sale, the rule in *Norris* vs. *Mumford* would have regulated the decisions of the court." Nothing more is asked in the present case.

Pierce, for the claimant. To substantiate our claim, and to show that the order, accepted by the agent of the defendant, was in part payment, or as security, for a *bona fide* debt due to us by the defendant, we produced upon the trial notes and checks of different dates, all due long before said transfer. Their genuineness and the reality of their dates never were contested in the court below; nor, either there or in this court, any testimony shown that could cast a suspicion upon them: and of the notes many bear the certificate of the cashier, that they have been taken up by us.

But the plaintiffs, now, for the first time, suggest that suspicion arises from our retaining these notes and checks in our possession,

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though we call them the consideration of the transfer; we did retain them, and if this had been a transaction of the nature which the plaintiffs are desirous of establishing, we should no doubt have been sufficiently cautious, and have surrendered them to the defendant and taken from him a long and verbose bill of sale: but we were then acting with all the fearless openness, incident to a fair and honourable transaction, and as we knew that many expenses had been incurred and were chargeable upon these goods, and that such could not be ascertained until Sweetzer, a common agent, should be in New-Orleans, and should be able to render an exact account of the same, we accepted these goods or whatever proceeds might be in Sweetzer's hands, rather as security for our debt, than as full satisfaction.

Defeated in this, another objection is started, that the order does not bear upon the face of it the being given in payment or as security for any debt, and that it merely establishes an agency. Let the circumstances of the case alone refute this; they are sufficient. What would Samuel S. Bradlee want with an agent in Boston, the place where he himself was residing? Of what goods of his could Sweetzer there be in possession? He a stranger, and but

lately arrived in that city. Again, is there any proof that J. P. Bradlee, intended coming to New-Orleans, and as agent of S. S. Bradlee? Is it probable that he would agree to be but his factor, when he was so largely his creditor, and S. S. Bradlee was on the eve of bankruptcy? And finally, though it is scarcely necessary to mention it, S. S. Bradlees letter is conclusive: a witness, whom the plaintiffs have laboured to introduce, and whose testimony, if at all admissible, must be more pure after his surrendering his property to his creditors, than, when still struggling to keep himself upon the surface.

We trust, therefore, that in a few words, we have made out the justice of our claim, and established the plain meaning of the order on Sweetzer.

We are next to enquire if this assignment be legal.

The law of Massachusetts is here the sole rule by which we are to judge this transaction; all the parties, plaintiffs, claimant, and defendant, are citizens of the state of Massachusetts. The law of Massachusetts is the law *loci contractus*, and when no inconvenience or injury results to our own citizens, although the subject matter of the contract is to be determined

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according to the *lex loci contractus*, the remedy is to be pursued according to our judicial forms. 2 *Johns. Rep.* 198; 3 *Dal. note* 370, 3, 5, 6; 7 *Martin*, 373.

By the laws of Massachusetts such assignments are legal, and particular creditors may be justly favoured, at any time before act of bankruptcy committed. *Vigilantibus non dormientibus lex adjuvabit;* 8 *Mass. Rep.* 287, 12 *Mass. R.* 143.

If legal, how far binding, 1st. as to the contracting parties, and 2d. as to third persons.

1st. As between the contracting parties. The common law is the law of Massachusetts. By agreement, at common law, the property is transferred. *Shep. Touchst.* 225; 1 *Gal.* 422; 4 *Bl. Com.* 448. And should the property be in Louisiana, and even the delivery there to take place, the contract will be construed by the common law, and be here enforced, 7 *Mart.* 213, as between J. P. Bradlee and S. S. Bradlee: therefore, the contract may be complete and binding, wherever enforcement should be demanded.

2d. As to third persons. In assignments of this nature, to bind third persons there must be an actual delivery, or delivery and possession

as much as the nature of the case will practically admit. 1 *Gal.* 423; 8 *Mass. Rep.* 290.

II. There was a sufficient delivery from S. S. Bradlee, and sufficient possession on the part of J. P. Bradlee. Sweetzer, while in Boston, was the agent of S. S. Bradlee for those goods, then being in New-Orleans, which we now claim. The Hydes were but sub-agents and their possession his. Upon accepting the order of S. S. Bradlee, he became the agent of the latter, and possessed of the property for him, and if he should not be considered as being sufficiently in possession of these goods in his new character while in Boston, he certainly was on his return to this city, and before this attachment of Lee & Francis was laid.

Let it be recollected by the court that both Sweetzer and the Hydes were agents for S. S. Bradlee; Sweetzer for the property which we now claim, and the Hydes for other goods. This will explain many of the directions of the defendant, in his letters to the latter; this the plaintiffs allow, but they alledge, that when Sweetzer departed from Boston, he ceased being the agent of S. S. Bradlee, and that this property was delivered over to the Hydes, as the defendant's sole agents, agreeably to his

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express directions. For the proof of this they examine Mr. Hyde, who appeared to be in some way connected with the house of J. & W. M. Hyde. From his confused and contradictory testimony, we can only draw this information, that a considerable intimacy existed between Sweetzer and the Hydes; that they acted in some measure as his bankers, paying for the rent of his store, charging it to him to be sure occasionally, as the witness proves, and when not doing so "charging it to charges and charging it back again," a method something unintelligible, unless he means that they were paid; further, that Sweetzer upon his leaving New-Orleans, delivered the key of his store and invoice books to the Hydes, and that he considered them as Bradlee's sole agents, from certain letters received from him by the former. These letters, upon which his knowledge is based, are produced, and the counsel for the plaintiff are all anxiety to have them admitted and placed on file. They are so: let us examine their contents. The first letter, marked (C) gives them permission, if Sweetzer wishes it, to assist him in the sale of his goods, and tells them that in case he goes away they may calculate upon receiving all the goods. What does this mean? That he will

revoke Sweetzer's power of attorney and invest them with it; or that, if Sweetzer should go, all goods that he might hereafter send would be received by them:—the third letter marked (E) explains it satisfactorily: he there says, that he consigns them goods because "he hears Charles is about to leave New-Orleans," and because of his promise to them:" his fourth letter marked (F) gives this, "I understand Mr. Sweetser will leave and put all his property in your hands:" the fifth letter, dated July 10th, adds, "you no doubt have received before this all the property that Mr. Sweetser left:" his reasons for stating this are expressed in his next letter of July 22d. "Mr. Sweetser wrote me he should leave all the goods in your hands." Which is the conclusion to be drawn from all this? Surely, not that S. S. Bradlee revoked the power of attorney of Sweetzer and named the Hydes his agents for the goods claimed; but rather, that he knew the intimacy existing between the latter and Sweetser, and supposed therefore he would depute them to act in his stead, in case he left New-Orleans, and indeed was finally so informed by Sweetser himself: no where does he even hint at causing the responsibility of Sweetser to cease.

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Suppose the Hydes had been in bad credit, on the brink of failure, would Sweetser have been justified in turning over these goods to the Hydes; would he not have been accountable to the defendant, and could he have said that the defendant had ordered it? Certainly not. Sweetser is then the agent of the defendant, while in Boston, and the goods are still in his store in New-Orleans. They there remain to the time of this attachment, unopened and untouched. What delivery could he make when he assumes the character of agent of the claimant? They are in his store, and he himself is the agent; he departs for New-Orleans directly after his change of character, and finds the goods still in his store and as he left them; and immediately after his arrival, he is garnisheed by the plaintiffs and declares that he has no goods of the defendant, and that these goods in his store were the property of the claimant, and we confidently trust the court will determine that he was correct in his answer and his subsequent claim.

There was therefore as real delivery and as full possession, as the nature of the case could admit of. The civil law asks no more. 3 *Marin*. 222.

Hawkins, on the same side. It has been urged by the counsel for the attaching creditors, that the laws of Massachusetts, where this contract was made, can avail the claimant nothing because the supreme court of Louisiana have settled the question, by deciding that the property, being within the jurisdiction of this state, at the time of the attachment, would invalidate the rights of the claimant, though good, had the property been elsewhere than in Louisiana.

By a close examination of the decisions of this court, it will be found that no case, heretofore under consideration, presents the same features with the present.

The only case of the five referred to from *Martin's Reports*, which can at all sanction the doctrine, that, the property being within our own state, would alter or affect the rights of the parties, is the case of *Ramsey* vs. *Stevenson*. 5 *Martin* 23. And in this case, the court seem influenced by other considerations, as well as the situation of the property.

If the contract between S. S. Bradlee, and the claimant J. P. Bradlee, was good in Massachusetts, and would have passed good right to the property, notwithstanding the property, at the time of sale, was in Louisiana, why should

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the courts of Louisiana step in and vacate this right.

The parties litigant are old residents of Massachusetts, or foreigners, in the case immediately before the court; all residents of that state.

Is there any thing in reason or justice, which requires that the courts of Louisiana should lend their aid in furnishing facilities to citizens of sister states, not furnished by the laws of the state where the parties reside and where the contract was made?

Or rather, would it not be fraught with the highest injustice, that in the present case, the court should destroy the claim of J. P. Bradlee, by giving an ascendency to the attaching creditors, which they could not obtain in Massachusetts where both parties reside?

Wherever the rights of our own citizens were affected, then and then only, would our courts interfere. If the decision in *Ramsey* vs. *Stevenson*, goes further, it was because of the difference between this case and that: and the case of *Lynch* vs. *Postlethwaite*, and other cases of this court, sanction the position that if the contract was good by the laws where made, it was binding though the property was here, or elsewhere, at the time of sale; and this court would alone interfere with the subject matter of the contract,

where necessary to protect the rights of our own citizens.

Was the order and its acceptance, relied on by the claimant in this case, good in Massachusetts ?

Delivery of the article sold there is only necessary, when in the power of the parties. It was at first attempted by some of the courts of sister states, to confine the principle to ships at sea ; but subsequent decisions show the absurdity of the position, and extend the principle alike to all cases where the property at the time of sale was without the controul of the parties ; requiring however, of the party purchasing, to take possession of the purchased property as soon as practicable, after it shall come within his reach.

No laches or neglect can be imputed to the claimant for not taking possession as early as practicable. The agent Sweetzer was deemed (as he was in fact) in possession of the property for the use of the seller, and his acceptance of the order, converted his possession to the use of the purchaser, taking as he did the character of agent also, for the purchaser, and as soon after his arrival in New-Orleans as practicable, he not only did all as an agent he could do in regard to the safety of the property, but you find

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him on the record, as the agent of J. P. Bradlee, the claimant, filing and urging the claim against the attaching creditors.

No solid argument has or can be urged to repel the reason of the rule here prescribed by the courts.

Nor is there any essential difference between the common and civil law authorities on this subject. Although no final decision was had in the case from *Dallas*, the reporter inserts the translation of a note from *Huberus*, as furnishing the best illustration of the principles which should govern.

Gallison and *Peters* resort to the same source, and this court, in the case of *Lynch* vs. *Postlethwaite*, expressly sanctions the rule from *Gallison* where it is declared, in general terms and without exception, that the law of the country where the contract is made is to govern throughout.

It is attempted to weaken the claim of J. P. Bradlee by urging that the order and its acceptance gave no right to the property in contest; the order not being in the nature of a bill of sale.

It was not necessary that any writing should have been executed to vest good title in this property; because it passed by virtual sale;

and the order is used, coupled with other evidence in support of this sale.

The early death of Sweetser the agent, after this controversy commenced, precluded the benefit of his services, as well as deprived the claimant of the benefit of his testimony, which would have been more full and satisfactory; he, Sweetser, having been privy to the sale and could, therefore, have furnished all that pressed on the subject.

But in support of the claim of J. P. Bradlee, we find a large debt due by his brother of the most sacred character, the greater part being for monies paid in bank as his endorser, and so certified by the bank officer. The justice and amount of the debt no where repelled or denied, nor even questioned, save in argument and for the first time now urged before this court.

But as another reason why the parties did not conceive it necessary to express any sale of the articles of property, in the hands of Sweetzer it will be recollected that Sweetzer had, during his absence from New-Orleans, confided the goods to the Hydes; that the Hydes as well as Sweetzer, had been directed to sell even at lower prices than others, with the view to effect early sales; and at the time of giving the order it was uncertain whether Sweetzer would have

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in his hands money or goods to deliver over to Bradlee, the claimant. And hence you find the order worded in the alternative of "deliver J. P. Bradlee all goods, or proceeds of goods, that you may have belonging to me."

Had the goods been sold and the money either in bank or in the hands of the Hydes to the credit of Sweetzer, or even held as the funds of S. S. Bradlee, would not the order and its acceptance have been good and passed the right to these funds, the proceeds of sale?

If good for the proceeds of sale, why not good for the articles not sold?

But we contend that even if our claim be not so clearly made out as we might desire, still the attaching creditors are not to recover upon the feebleness of our proof, but upon the strength of their own attachment.

The only rights derivable to the attaching creditors, grow out of special laws, enacted by our legislature.

The remedy is, in its nature, an extraordinary one, given only in the cases especially recited, and can apply to none other. And this brings us to the assignment of errors filed in the cause.

1st. The plaintiffs and defendants, being all non-residents, no attachment can be maintained

under the statutes of our legislature, and on which the plaintiffs alone rely for support of their attachment.

2dly. No sufficient answer is given by the garnishees, on which the attachment could be maintained.

3dly. No sufficient levy of attachment, or any goods of the defendant is found on the record, by which the court below could award judgment for the plaintiffs in attachment.

4thly. It does not appear that the account, on which the plaintiffs rely, was a liquidated account, or that the balance due was ascertained and specific, which is required by law.

We will not enter into a detail of the arguments used in support of these grounds.

As to the first, the words of the statute do not embrace cases wholly between non-residents; nor does the comity or courtesy due to other states or powers require that Louisiana should interfere with rights of citizens of other states, and give the one or the other benefits not extended by the laws of their own respective states.

To adopt or pursue such a system would be to covert ourselves into an instrument of oppression, rather than protection.

The growing commerce of our city, being

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as we are also the great depot for several of our sister states, all of whom are governed perhaps by different measures, if not different systems of legislature forbid that we should unnecessarily interfere with controversies and contracts wholly between citizens of other states.

Several of the states have from policy, whether wise or unwise is unnecessary to examine, passed laws calculated to relieve their citizens, from immediate coercion for debt. Shall the citizens of these states, pursuing their only legitimate trade, on their arrival in Louisiana, find a system of coercion and sacrifice enforced by a creditor who has protection at home to his property there, and increased advantages over his fellow citizens here, from not having had sufficient enterprize to embark himself in trade. Louisiana was destined for higher and better purposes, than to be made the mere theatre of judicial controversy between citizens of other states; when we have amply protected our own citizens, nothing more is due to ourselves; and when we furnish the citizens of other states with all the facilities secured to our own in reaching the property of an absent or absconding debtor, nothing more is due to them. Transcend this rule and where shall we stop?

Suppose the courts of justice of all the states with whom we have intercourse were suspended in their judicial process, as is now the case in some four or five, would Louisiana be acting, with becoming dignity to herself and a due regard to what is due to other states, by suffering the citizens of those states to harrass our commerce and crowd our dockets with judicial controversies denied them at home?

By adverting to the different enactments on this subject, although the words are general, in sections treating of attachments, in cases where debts are due, still in an after section, speaking of attachments for debts not due, the legislature have clearly confined the remedy, to cases in which our own citizens are concerned; and it is but a fair interpertation, to say that this was evidently the object of law makers in treating of debts due.

For why not let non-residents attach the property of each other, as well for debts not due, as actually due? The same justice, which sanctions the one section of the law, sanctions the other.

In regard to the second error assigned, it is clear beyond controversy, that where redress is sought by attachment on garnishees, it is the answer of the garnishee alone that gives juris-

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diction, or proof that he has property, or effects. Without the one or the other, the plaintiff in attachment must fail.

In the case before the court, both Hyde and Sweetser are garnisheed; it being clearly established that both had received different parcels of goods by different shipments.

Hyde answers as garnishee, and after accounting for the goods actually shipped him, proceeds to declare, not that he then had, or had at any previous period held, other property or effects of the defendant; but that Sweetser had placed in his charge other goods as per invoice. No proof in the cause contradicts the answer of Hyde; on the contrary supports him.

It is equally clear from testimony, that the goods were only placed in charge of Hyde, during the absence of Sweetser.

When the attachment was sued out, both Hyde and Sweetser were here, and the plaintiffs, conscious themselves that Sweetser was regularly and legally vested with possession of the goods, temporarily committed to the charge of Hyde, made Sweetser also garnishee.

And Sweetser denies having any goods the property of the defendant, J. P. Bradlee, and, as was his duty as agent, files the claim of J.

P. Bradlee, which he had by an accepted order bound himself to deliver.

There is, therefore, nothing in the answer of either of the garnishees, or in the proof in the cause, which would justify the court below in awarding judgment for the attaching creditors.

As to the 3d error; it is not pretended that the sheriff actually attached, or had in his possession, any property or other effects of the defendant; the sole ground relied on being the response and proof as regarded the garnishees. So that no levy of attachment and possession of the groods were had by the sheriff, to justify the court below in entertaining jurisdiction or awarding judgment for the plaintiffs.

As to the fourth ground of error, it is deemed equally clear that the account sued on is neither liquidated between the parties, nor is the amount thereof ascertained and specified, which is required by the statute of our state.

See, 1 *Martin's digest, tit. Attachment. Durnford* vs. *Syndics* of *Brooks*. 3 *Martin*, 222. *Norris*. vs. *Mumford*, 4 *Martin*, 20. *Ramsey* vs. *Stevens*, 5 *Martin*, 23. *Lynch* vs. *Postlethwaite*, 7 *Martin*, 213, *Thuret & al.* vs. *Jenkins & al.*, 7 *Martin*, 352. 3 *Dallas' Rep.* 370, *and notes*. 1 *Gallison*, 371. 1 *Peter's Rep.* 74, 5. 8 *Mass.* 299. 12 *Mass.* 143.

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Ellery, in reply. I. The order, on which the claimant relies, is not for value received ; it expresses no consideration, and acknowledges no debt; it shews neither a sale, payment, security, nor assignment ; and the party, claiming under it, appears neither as purchaser, trustee, nor creditor. Being the only title in support of his claim, we are not to look out of it for his character, or construe it to mean what it does not express. In it, he figures as a mere agent; and if as such, he had already obtained possession of these goods, it would not have changed his character nor that of the property; nor would he thereby have acquired any right whatever, to have held it against attaching creditors. He would have received them, under this order, not as a creditor in payment or on pledge, or as security, but as an agent on commission ; his possession would have been that of the defendant, and we should have had a right to attach them in his hands.

It is by no means clear, that he ever was a creditor. The order does not make nor acknowledge him as such ; nor is it permitted to travel out of it in quest of such proof; and if it were the checks and notes of an insolvent debtor, without any evidence of how or when procured, would go but little way towards it. But

admit him for a moment, to be a creditor, and even in possession; would this, under the circumstances of this case, give him a preference over attaching creditors? As creditor, he could not convert this into his own property, but through the medium of an attachment laid upon it in his own hands; *Sergeant* 72, and his attachment would be productive only according to its priority. His lien upon it derived from possession would not be measured by the amount of his whole debt, but by that of the expenses incurred by him as agent, and his agency would be limited to this single transaction.

But suppose that this order was actually followed by a delivery, and the goods delivered, were taken, as is contended, in pledge, or as security for a debt; would it not in that case, both by our own laws, as well as those of the state of Massachusetts, where the order was drawn, be set aside as void against the other creditors? Of our laws upon this point, there can be no doubt; nor are those of Massachusetts, less explicit. The insolvent laws of that state are analagous to those in England; and cases arising under them, are governed by the same principles and authorities. According to these, all payments made, or securities given by a debtor contemplating

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insolvency, and with a view of preferring a favorite creditor, are void. In the case of *Locke* vs. *Winning*, C. J. Parsons says, "no case has been found, where a payment has been made, or security given by the bankrupt, in contemplation of an act of bankruptcy, which has been holden good against creditors. 3 *Massach. Reports*, 329.

Was not this order evidently given in such contemplation, and for the purpose of preferring a favorite creditor, and that creditor a brother? It is dated 9th November, 1818, on the 24th day of which month, the defendant becomes a bankrupt. It is voluntarily and gratuitously given, without suit or pressure; without even a shew of diligence on the partof the claimant, or an acknowledgement of debt on that of the defendant. When to these invalidating circumstances is added, that it is loosely and indefinitely worded, without specifying these goods, or indeed any goods; or designating any place where they were to be found; that it is made by one brother in favour of another; was not brought here by Sweetser, nor apparently thought of, or sent for, until after the institution of this suit, and did not arrive until some months posterior -I think there can be no mistake

as to its character and object. According, therefore, to the laws of Massachusetts, this order (going with the counsel the improbable length of supposing it intended as a pledge or security, and followed by delivery) would be set aside as made in fraud of creditors; nor is its chance much improved by being brought to this quarter, and tested by our laws.

II. Whatever be its original character, it was never executed. The transfer was not perfected by the delivery of the goods transferred. At the date of this order, and long previously, they were in the possession of the Hydes, in this city and before its arrival, were placed by sundry attachments into the hands of the sheriff. In what manner is this order to deliver, attempted to be turned into a delivery? By first making the drawee, (Sweetser) at Boston, the agent of the defendant for these goods, at New-Orleans; then converting him into a like agent of the claimant; and lastly, transforming the Hydes into his sub agents; and by this process of triple transformation, the work is done.

But how stand the facts in this case, are they favorable to any part of this legal metamorphosis? It is true, that Sweetser, while at New-Orleans had been the agent of the defendant,

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and in possession of these goods; but prior to his leaving this city, on the 5th August, 1818, he gave up the agency, and handed them over to the Hydes, with instruction, to sell and remit the proceeds to the defendant. The Hydes take them with the invoice-books, &c. into their possession, as well as the store in which they were kept, of which they received the key, and paid the rent. This change of agency is also made at the particular instance of the defendant himself; who, in his letters to Sweetser, requests him to deliver, and in those to the Hydes requests them to receive, these goods. This correspondence between the defendant and the Hydes continues for many months; he uniformly addressing them as his agents, giving them instructions as such, in respect to sales and remittances, and drawing upon them, upon the credit of these goods thus placed in their hands. One of the witnesses, a clerk of the Hydes, and well acquainted with their affairs, expressly negatives every idea of a joint agency, or a sub-agency; and makes them sole and exclusive agents of the defendant.

In the lower court, an exception was taken to the introduction of these letters; but where can a plaintiff look for better proof, than in the written acknowledgments of the defendant?

made too at a period prior to the date of this order, when his mind must have been free from all bias? If warped by any subsequent bias, it is hardly necessary to ask, whether it be in our favor, or that of his brother, the claimant. The gentlemen might with as much reason, had we sued upon a promissory note, have objected to its admission: but their intervention in our suit, surely does not change the character of the parties plaintiff and defendant, or lose to the former the benefit he might derive from the confessions of the latter.

To return: Sweetzer then, at the time he accepted this order at Boston, 9th of Nov. 1818, was neither in actual nor constructive possession of these goods. Did he afterwards, as agent or otherwise, obtain such possession? By the testimony, he does not arrive in this city, until the 23d of Dec. 1818; two or three days prior to the issue of the attachment in this case, but subsequent to those issued in some of the others: by which time, the goods had already been placed in the custody of the sheriff, and after his return, we have it expressly stated in evidence, that "he had no access to the store," which contained them, and that he never was suffered to enter it unaccompanied by the Hydes (left by the sheriff as keepers of these

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goods) and that he never took, nor attempted to take possession of them; his own testimony indeed upon this point is conclusive; garnished this suit, he swears, that he has no property of the defendant in his hands.

There is, therefore, no pretence whatever of delivery or possession either corporal, or constructive; in default of which, (even admitting this to be a sale or transfer) the whole course of decisions runs in favour of the attaching creditors, 1 *Martin*, 222. *Durnford* vs. *Syndics of Brooks*. 2 *Martin*, 26. *Norris* vs. *Mumford*, 3 *Martin*, 77, *Ramsay* vs. *Stephenson*, 5 *Martin*, 30, *Fisk* vs. *Chandler*, 5 *Martin*, 319, *Thuret & al.* vs. *Jenkins & al.*

Thus then it appears, that if (against all fact and probability) we change the nature of this order, and admit it to be intended to operate as a pledge or security; and admit also the *lex loci contractus* to prevail; by that law it would be declared void, as made in fraud of creditors. But the subject matter, being, at the date of this order, within the limits of this state, and the order calling for its execution in this city, the *lex fori* will govern, and the transaction be tested, as well as the rights of the attaching creditors enforced, by our own laws. 5 *Martin*, 337, *Thuret & al.* vs. *Jenkins & al.*

But it is further contended by the claimant, that the attachment itself is null, because the remedy by attachment is a domestic one, and not communicated to strangers; because the account upon which the suit is brought, is not liquidated; because no sufficient answer is given by the garnishees; and because no sufficient levy is made of the attachment.

1. The first ground of nullity is supposed to be found in the spirit and phraseology of our different attachment-laws; from which it is inferred, that none but native suitors are entitled to this remedy. But a review of these acts hardly warrant this inference; they neither breathe this spirit nor express this distinction. They are all remedial acts, and therefore to be liberally construed; and nothing is shewn to narrow such construction. The expressions are sufficiently comprehensive to include suitors of every lineage and country; they mention in general terms, plaintiffs, petitioners and creditors, without drawing any line of geographical exclusion. And singular would it be, if one of our most important legal remedies was wholly confined to ourselves; and every attaching creditor was to enter our courts of justice through a domestic door, only to be opened to citizens, and obliged to become a citizen, in order to re

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cover a debt. But we trust that there is more hospitality in the justice of our country.

Tros Tyriusve mihi nullo discrimine agetur.

The stranger while remaining in this state, becomes, *quoad hoc* an inhabitant. 1 *Dall.* 480 *Syle* vs. *Foreman.* During his term of residence here, he is in effect a citizen, owing allegiance and entitled to protection; and to deprive him of a legal remedy in a personal suit, would be unreasonably to abridge that protection, and violate national comity. 3 *Martin*, 371, *Smith & al.* vs *Elliot & al.*

2. But it is next contended, that the account, upon which this suit is brought, is not a liquidated one, which is required by law; but we say, that it is sufficiently liquidated, and the debt sufficiently ascertained by the oath of the plaintiff. In the case of *Hunt* vs. *Norris*, while a similar question arose, it was decided in this court, "that all obligations arising from contracts either express or implied, either for the payment of money or delivery of goods, create a debt on the part of the obligor, for which an attachment may issue, whenever the amount may be fairly ascertained by the oath of the obligor. 2 *Martin*, 532. *Vid. also Sergeant, Law of Att.* 43, *and opinion of J. Washington*, 47.

3. In the third place it is objected, that no sufficient answer is given by the garnishees on which judgment could be awarded. The best answer to the objection is a reference to the record, where John W. Hyde, one of the garnishees, expressly swears, "that about the 6th August, Sweetser placed in their charge for sale several invoices of merchandize belonging to Samuel S. Bradlee, (the defendant) amounting per said invoices to $12,476, 44."

4. The last ground of nullity is said to be found in the execution of the writ of attachment; it being alleged, that the sheriff did not actually attach and take these goods into his own possession.

By looking however at his return, we find that he not only left copies of the petition, citation, attachment and interrogatories with the garnishees, but also "attached in each of their hands" all the property of the defendant.

The sheriff is not bound to remove the attached goods from the store, in which they may have been attached. There is no particular place provided or assigned by law for the safe keeping of attached property. It is as much in his custody in one store as another; and he may appoint such guardians of it, as he thinks proper; and their possession is constructively

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his possession. His return is made in the usual form, (*Sargeant*, 227) and when he tells us in it he has attached these goods, we are not permitted to travel out of it. The garnishees (the Hydes) by their appearance, also acknowledge the attachment.

In the state of Pennsylvania, where the attachment law is similar to our own, we find the like practice, and the like return on the part of the sheriff. The usual practice there is to serve a copy of the writ of attachment on the garnishee, with notice annexed by the sheriff, that by virtue of the writ, of which that is a copy, he attaches all and singular the goods and chattels of the defendant in his hands or possession, and summons him as a garnishee; (*Sargeant*, 15) and from that time the garnishee is restrained from paying over the debt or property of the defendant, and must await the legal issue of the proceeding. *Id.* 108.

DERBIGNY, J. delivered the opinion of the court. The ingenuity of counsel has raised in this case a variety of questions, from which it has assumed more importance than it deserves. If we disembarrass it from the matters which do not properly belong to it, we will find it simple and of easy decision.

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The plaintiffs, citizens of Boston, have attached property here, which they say belongs to the defendant their debtor, also a resident of that place; the defendant pleaded the general issue, and the debt was proved; so that between plaintiff and defendant it only remained for the court to pronounce judgment accordingly. But a third person has stepped in, averring the goods attached to be his property, and demanding restoration of them. The claimant has not only attempted to prove the property to be his, but he has been acting the part of the defendant, by undertaking to show that the attachment ought not to have issued, and that, after it had issued, it was imperfectly executed. The only thing, which we conceive a claimant may be permitted to do, is to show that the property attached is verily his. As soon as he succeeds in that, his part is at an end. But a claimant has surely no right, to show any irregularity in the suit, in which he intervenes for the sole purpose of rescuing the property. Whether the plaintiff, the court and the sheriff, have been acting legally or not, is none of his business: for whether the proceedings are regular or not, the property must be shewn to be his, before it can be returned to him; and whether they are regular, or not, it shall not

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be returned, unless he proves that it belongs to him.

Is the claimant owner of the goods attached, or is he not? Such is the only question between the attaching creditor and the claimant. There might perhaps be cases, in the nature of a possessory action, in which a claimant might rescue the property without proving it to be his own; and this, we conceive, would take place, where goods, in the actual possession of a person, would be seized in an illegal manner, as the property of another. The person thus dispossessed, might plead his possession, and perhaps obtain to be reinstated in it, without alleging property in himself. But whether such a claim could be maintained, is not here in question; the present claim is one of the petitory kind: the claimant alleges his ownership, and prays that the goods may be restored to him as owner. Is he, or is he not, the owner of them, is the only point in controversy. That the goods in dispute were once the property of the defendant, is acknowledged; for the title of the claimant rests upon a written order whereby the defendant directs a person said to be his agent, to deliver them or their proceeds, to the claimant. The order is in these words: "Boston, Nov. 9, 1818, Mr.

Charles B. Sweetser. Sir, please deliver Mr. Josiah P. Bradlee, or his order, all goods or proceeds of goods, that you may have belonging to me.—Your humble servant, signed Samuel S. Bradlee." Across that order is written: "Boston, 9 Nov. 1818, accepted, signed, Charles B. Sweetser." Is this a transfer, a pledge or a simple mandate? Nothing on the face of the order shows what the contract is. But, that which is wanting shows what it is not. It is not a transfer, for there is no consideration. That we suppose to be the law at Boston, as well as here. It must be either meant for a pledge, or intended to take the property from the hands of one agent, and place it into those of another. This last interpretation, of course, does not suit the claimaint. He must, therefore, be reduced to call this a contract of pledge, and to this consideration the case must be confined.

A contract of pledge, in all countries in the world, is a contract *in rem*, where the delivery of the thing is not a consequence of the contract, but is of the very essence of it. Was there a delivery in this case? No real corporeal delivery could be made, for the parties were then at Boston, and the goods in New-Orleans. Has a constructive delivery taken place? This is the gist of the action. The claimant has for-

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tured the circumstances of this case to extort from them the conclusion that such constructive delivery was made. This is the manner in which he endeavours to establish it: Sweetzer, as agent of S. S. Bradlee at New-Orleans, had those goods in his possession; when he left New-Orleans, he placed them in the care of W. M. and J. W. Hyde, merchants there, who possessed them as his sub-agents. He came to Boston, where his principal ordered him to deliver those goods to Josiah P. Bradlee, and he delivered them, by accepting the order. If asked to whom the delivery was made, the answer is to himself, as agent for the creditor as well as for the debtor.

To inquire seriously into the nature of such pretended delivery, is really more than we are willing to undertake. The position presents such a confusion of principles, that any demonstration of its fallacy, would be more troublesome than useful. One remark, however, may be proper, and that is, its incorrectness in point of fact. It is not true that the Hydes received the goods into their custody, as Sweetzer's agents; they received them as the substituted agents of S. S. Bradlee, in conformity to his written instructions, and after this delivery to the substituted agents, at the desire of the principal, the

possession of the goods was as much out of the hands of the first agent, as if he had returned them to the principal himself. The attempt to show that Sweetzer, on his return here, took possession of the goods in the name of J. P. Bradlee, previous to the attachment levied in this particular case, needs hardly be adverted to: the goods were then in the custody of the law.

We will forbear making any remarks, on the suspicious circumstances under which this claim is brought forward; enough being found in the substantial objections to which it is liable.

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

DURNFORD vs. *JACKSON & AL.*

APPEAL from the court of the first district.

The vendee of real property, though liable to an action of mortgage, is personally liable on his promise.

MATHEWS J. delivered the opinion of the court. This suit was brought on a mortgage, which was transferred by the mortgagee to the plaintiff. The mortgagor having failed, his syndics sold the mortgaged property to the de-

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fendant Jackson; they themselves, have also, become defendants to the present suit. Judgment was given for the plaintiff, in the court below, from which all the defendants appealed.

In the sale to Jackson, he stipulates to pay the price to Durnford, and another person mentioned in the act of sale, or to the sellers, as might be decreed in a suit then pending before the city court. No judgment was ever rendered in said suit. The present action is prosecuted to recover 5000 dollars, a part of a larger sum, secured by said mortgage. The appellee, being subrogated to the rights of the mortgagee, has a lien or right of preference over other creditors of the insolvent on the mortgaged premises, and could pursue the property in the hands of a third possessor; as regulated by our laws. But, as the purchaser has stipulated to pay him the price, he is also personally liable according to the terms of his contract. It is true, they are conditional, and the contingency, on which he was to pay to the plaintiff, has not yet happened. viz. a decree of the late city court to that effect. This circumstance might have caused difficulty, in deciding on the rights of the present parties, was it not, that they are all now fairly before the court in this suit; and we are of opinion, that the district court has correctly decided their

case. The mortgage refers to notes of hand, and those given in evidence on the trial (it is insisted by the counsel for the appellants) are not shewn to be those referred to. It is believed, in opposition to this exception, that the answer of Mitchel, in the former suit before the city court, which it is agreed shall be evidence in the present case, proves the identity of the notes beyond a doubt.

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

Hennen for the plaintiff, *Livermore* for the defendants.

J. CAVELIER vs. *TURNULL'S HEIRS.*
CAVELIER, Jr. vs. *THE SAME.*
DAVENPORT vs. *THE SAME.*

APPEAL from the court of the third district.

If a sheriff levies an execution on property of a third person, the sale may be enjoined, by the judge of the district in which the seizure was made, although the execution came from another district.

MATHEWS, J. delivered the opinion of the court. These cases having been consolidated by order of the court below, and judgments rendered for the plaintiffs; the defendants, who were intervening parties, appealed.

It appears by the record that an execution, which issued on a judgment obtained in the dis-

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trict court of the first judicial district, by the appellants against the heirs of one Fletcher, was transmitted to a sheriff of the third district, and that, under color of authority given by said execution, he seized and advertised for sale, land, which is claimed by the appellees, as belonging to them.

They instituted suits in the court of the latter district, and obtained injunctions against the sheriff, by which he was interdicted from proceeding to sell the property thus seized. The plaintiffs in execution intervened, and pleaded the general issue to the actions, & also demurred to the evidence adduced by the plaintiffs in support of their declarations. It is not shown that any plea to the jurisdiction of the court *a quo* was made, denying its authority to interfere and stay the progress of an execution, which had issued from another district; which, in pursuance of that pleading might preclude the necessity of inquiring into that subject; but as the counsel, for the appellants has here insisted on the want of such jurisdiction, as error apparent on the face of the record (although not regularly assigned in writing, in conformity with the rule in such cases ordained) and as there is a statement of facts sufficient to sustain the jurisdiction of this court, it is considered proper to in-

quire into the authority and jurisdiction of the inferior court. We regret that no explicit mode of proceding, in cases like the present, has been pointed out by any act of our legislature. The difference, which exists in the organization and powers of our courts of justice, from the Spanish tribunals, and the alterations, which have been introduced in the manner of proceeding in suits, frequently create difficulty, in applying the principles of the ancient laws of the country, to our present situation, and we are often compelled, in the investigation of questions of law, rather to reason by analogy, than to make regular inductions from clear and well established premises. According to the regulations of the Spanish laws, on the subject of execution, where the judgment of one court was to be executed within the jurisdictional limits of another, the execution proceeded under the orders and directions of the judge of the latter place, and where opposition was made to its proceeding, on grounds wholly incidental to the original cause, the claims and rights of the opposer were to be decided upon by the judge, who held cognizance of the principal suit, in the first instance; but if the claimant, or *tercero opositor*, claimed the property taken in execution as his own, his rights were finally decided upon by the

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judge who conducted the execution without resorting in any manner to him who judged the original case. It would seem from this mode of proceeding, that claims of the latter description, were considered so far original suits, as not of necessity to be incidental to, and solely cognizable by the tribunal, from whence the execution issued. Viewing the cases now under consideration as original actions, and the defendants, being domiciliated in the parish in which they were commenced, no doubt can exist of a proper exercise of jurisdiction, by the district court of the 3d judicial district. But it is said that to allow one court of the state, to enjoin the process of another, may create an improper conflict of authority, and subject a ministerial officer to the absurd situation of owing obedience to the orders of two distinct powers, at the same time: the one commanding him to proceed, and the other prohibiting him from acting. In answer to this objection to the mode of proceeding by the appellants in the present suits, it may be observed, that the writ of execution (a fieri facias) requires the sheriff to seize the property of the defendant, and if he seizes that of another person, of which the latter has the possession, and it be claimed, on affidavit the officer might perhaps raise the levy and pro-

ceed against other property. Should he proceed to sell after a claim supported by affidavit, great injustice might be done to the claimant, and such as can only be remedied, or rather prevented, by a prompt interference of some court of justice, which could probably be most speedily obtained in the place where the property is seized. Legal remedies ought, in all cases, to be adequate to relieve from the injuries which they are intended to redress. This maxim might not prove to be true in the effect, if a just claimant in Ouachita were obliged to resort to the judge of the 1st judicial district, to prevent himself and family from being turned out of house and home, by an improper execution of a fieri facias, issuing from the latter place. When property is claimed by a *tercero opositor*, as his own, which has been seized in execution as belonging to a person, against whom judgment may have been obtained, it ought not to be sold until such claim be decided on, and the sooner such decision can be obtained, the better for all parties; which would probably be in the parish, where the seizure may have been made. As to the unpleasant situation in which it is supposed the officer might be placed, in consequence of being required to proceed by one judge, and restrained by another, it ought not,

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and could not take place, on the principle that petitions for injunctions, in cases like these, are so far original suits, as to authorise the court of the district, where the property is seized, though not the same from which the execution issued, to hold cognizance of them.

In relation to the demurrer to the evidence, offered by the plaintiffs in support of the petitions, we will briefly observe, that although they have not shown a title, derived from the sovereign of the country, yet having proved their possession of the property in dispute, under such deeds as are exhibited in the record, they ought to be maintained in it, as the plaintiffs in execution have shown no title in Fletcher's heirs.

It is, therefore, ordered adjudged and decreed that the judgment of the district court be affirmed, and that the appellants pay costs in both courts. MARTIN, J. dissented.

Duncan for the plaintiff. *Turner* for the defendants.

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DESBOIS
vs.
SEGHERS' SYNDICS.

A creditor, opposing the homologation of the proceedings, must state specially, the grounds of his opposition and is not allowed generally to allodge irregularities.

DESBOIS vs. *SEGHERS' SYNDICS.*

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. At a meeting of the creditors of Dominick Seghers, an insolvent debtor, syndics were appointed, against the nomination of whom, the present appellant filed his grounds of opposition, conformably to the 18th section of the "act, relative to the voluntary surrender of property and to the mode of proceeding, as well for the direction, as for the disposal of debtors' estates, and for other purposes." Those grounds were, or rather that ground was "that through an error of calculation, it was said that Messrs. Sainet and Labatut, were appointed syndics, as having the majority of votes in amount, while in reality Messrs. Sainet and Desbois had such majority, &c."

Upon that issue the case was tried, and upon that issue this defendant was cast in the district court. It seems now that he has abandoned that plea, and rests his case upon entirely different grounds. Can he be listened to? We think not. A particular creditor, who is dissatisfied with the proceedings had for the purpose of appointing syndics, and wishes to be relieved

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against them, is directed by law to state specially the grounds of his opposition, or, as the law expresses it, "the several facts of nullity of the said appointment." He is not permitted to complain generally that the proceedings are irregular; he must state the facts on which he intends to rely. This statement is the foundation of this sort of judicial contention, in which he holds the place of a plaintiff: upon that statement his case rests, in the same manner as any action does on the allegations contained in a petition. To pretend that he may afterwards travel out of this issue, and alledge any thing, against the legality of the proceedings, is to contend, in other words, that parties are not bound by their pleadings.

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

Grymes for the plaintiff, *Seghers* for the defendants.

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BREEDLOVE & AL. vs. *FLETCHER. Vol.* 7, 524, 712.

BREEDLOVE & AL. *vs.* FLETCHER.

Turner, on an application for a rehearing.

Rehearing denied.

1. The court misconstrued the powers and jurisdiction of the parish court, in supposing it to be a court of inferior and limited jurisdiction, in comparison with the district courts in civil matters.

2. The court erred in the interpretation of the contract, on which the suit was grounded, in supposing it to be local, at Nashville, and there to be performed: and also, in supposing it to be a condition on which the payment, or non payment depends, that the notice of protest and demand of the money at Nashville, was necessary to be made, previous to the right of action accruing to the plaintiffs, as holders of the bill.

3. They misconstrued the law of attachment of the state, which makes the property of the debtor, in this parish, to represent the debtor, when he permanently resides abroad.

For by the contract, the debt became due at New-Orleans, and not elsewhere, and on the non-payment of it by the principal debtors, the acceptors of the bill, the obligation of the indorser, to pay it, became *eo instanti* absolute, and had he been present, there could have been

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no doubt he might instantly have been sued either in the district or parish court, at the option of the plaintiffs. But being absent, he was represented by his property, under our laws of attachment, and in this manner suable in either court.

I. By the constitution of this state, the judiciary power is vested in a supreme court, and inferior courts. By law, the parish court of New-Orleans is placed in the same grade of inferior courts, as the district courts in civil matters. There is, I conceive, no sort of difference in the cases, nor in the amount, cognizable by the one and by the other. But, in cases of doubt, it is consonant with the soundest rules of law and equity, and becomes the duty of a good judge rather to enlarge his jurisdiction in favour of justice, than to restrict it, and in all such cases to entertain the cause; the maxim in equity is, *Boni judicis est ampliare justitiam,* so it is in law, *ampliare jurisdictionem.* It surely does not form any part of the duty of a court, in the construction of statutes, to listen and give ear to far fetched and high strained niceties, which tend to defeat the justice of the case; and besides, when the practice under the law, for a succession of years, has established a

certain course of proceeding, although a different practice may in strictness be more correct, that course will not be overthrown, unless some important good will be promoted by the change; it is better to let the law remain as it has been practised, than by a decision of the court, to undo what has been settled and fixed; and leave the matter to legislative wisdom.

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I must be excused, for again urging the opinion, that there is no difference in fact, nor in principle between the powers of the parish court and those of the district court; and surely it ill suits the gravity of the supreme court of the state, to offer, as a reason for their opinion, that the powers intended by the legislature, to be given to the one court, are different from those given to the other, because, the translation of the English text into French, is different in words. The English is the law; it is by constitutional order; the translation of that law is, at most, but the opinion of some clerk of the house, that it should be expressed in French, in such and such words. Will the court adopt the words of a clerk of the house, against the justice of the cause, rather than follow the plain and necessary meaning of the legislature, in the only part that, by the constitution, can be received as law? Certainly this would be to offer

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an excuse, rather than to give a just reason for the opinion; but if the translation of the law into another language is to govern, then let us take the authority of the dictionary for the meaning of the word "originating," and by it we shall find, the translator has made a figurative expression, instead of the literal sense: *prendront naissance*, is no translation of the English participle "originating." But I dismiss this part of the subject, with this single remark, that the French is not the law, but only a translation, which may or may not be correct.

I think on a review of that part of the opinion of the court, which relates to the powers of the district courts, it will be deemed erroneous. The opinion asserts that the 4th section only gives power to try the cases arising in the parish, but does not confer the jurisdiction; but that the jurisdiction is confered by the § 16. This section directs the mode of proceeding; and surely there is a distinction between the mode of proceeding, to enforce a right cognizable before a court, and the right to take cognizance and to entertain jurisdiction of the cause, or subject matter of the court. But the law is misquoted, or rather it is quoted only in part; and if quoted in the whole, the sense is not

such as that set forth in the opinion. The § 16th. declares "that 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 New-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 acts."

Now, if this section confers a general jurisdiction to the district courts, over all cases wherever they may have arisen, or wherever they may have originated, or whether they are of a civil or criminal nature, and is to controul the plain and necessary meaning of words of the § 4th. which declares in *totidem verbis*, "that there shall be a court in each parish, (except in the first district) to be held for the trial of all civil cases, which may arise in said parish;" and for those parishes composing the first district, the court shall be held at New-Orleans; for the like purpose, then this provision was necessary; and so was that contained in the 15th section, couched in these words: "the district courts shall have criminal jurisdiction in all cases whatsoever."

It seems to me a clear and undeniable rule of

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construction, that the particular provisions of a law are not to be controuled by general words to the contrary; and in the different parts of this law, we find the legislature giving special powers and confering special jurisdiction to the district courts, to wit, in the § 4, they have power given to try all civil cases arising in the parish, or if we speak of the first district, we should say "to try all civil cases arising in the district;" § 15, they have conferred "criminal jurisdiction in all cases whatsoever."

But, I look in vain into the acts of the territorial legislature, regulating the proceedings of the late superior court, for any grant of jurisdiction; I can find only some regulations for the proceedings of causes therein; unless indeed we are to understand the § 22, of the act of 1805, as conferring jurisdiction; but I fancy no lawyer would consider that section as having any other intent, than to say that the courts should have power to issue certain writs known to the common law, such as *quo warranto*, *procedendo*, *mandamus* and *prohibition*, and to declare that when issued, they shall be in the form, and that the modes of proceeding thereon, shall be according to the common law.

But what have these writs to do with cases originally cognizable before that court, such as

actions of debt, damages for injuries to persons or property, for real actions, &c. &c?

The truth is, there is not in any of the territorial laws regulating the proceedings of the superior courts, any grant of jurisdiction in such cases; they are as they purport to be only laws, regulating the mode of proceedings therein. Their powers were derived from the acts of congress.

With what propriety, therefore, does the opinion rest on those laws, as the basis on which the district courts found their jurisdiction of civil cases which neither originate, nor arise in the parish or district, and when none of the parties reside there? This is a question which I am unable to solve, and must, therefore, beg leave to ask of the court a solution. I ask it, because upon it depends this important principle, that unless there are some powers implied, or hidden, which the district courts derive from the territorial laws, which enable them to have and take jurisdiction of civil cases arising abroad, to wit, out of the parish and district, they must either not have those powers, or they must derive them from the general principles of jurisprudence, which declare certain personal actions to be transitory, and suable upon, wherever the defendant or his property may be found.

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If this general principle is admitted as necessary, to enable the district courts to take cognizance of cases arising abroad, then I contend the principle is regularly applicable to cases suable in the parish court; no difference, in principle or in reason, is perceived to exist. If one court may take cognizance of the case, so may the other, and if the one cannot, so likewise cannot the other. This is a consequence inevitable, and upon it, have the courts ever acted since they were organised.

But if it is fair to couple the 4th and 16th sections of the district court law, to understand why they have jurisdiction of cases arising out of the district, so I think upon a parity of reason, is it fair to couple the 1st and 2d sections of the parish court law, for by the first section, this court has concurrent jurisdiction in civil cases, and by the second section, the mode of proceedings, before it, shall be in all respects similar to that prescribed for the district courts, and by the fourth section, the judge is empowered to fulfil the same functions in every other respect, as were assigned to the judge of the city court, under the territorial government.

The jurisdiction of the county courts extended to all causes of the value of 50 dollars, and upwards, which shall arise on contract, where

the debtor resides, or is found in the county, and the city court had the same jurisdiction, as the county courts; no one, I think, can reasonably doubt, that the city court had a general jurisdiction of civil causes, arising on contracts; notwithstanding the judge's salary was to be paid out of the like fund, as that of the present parish judge. But indeed, it is the first time I have ever heard, that the extent of jurisdiction was to be measured by the amount of salary, or limited by the fund, out of which it was payable. Surely there was a mistake in the mode of proceeding, when the salary of the judge was resorted to, as affording a reason for considering, that his jurisdiction extended only to contracts made in the parish. But, if there is any force in that argument, as relative to the parish court, it must apply with a great force to the district courts, and restrict them, if not to contracts made in their district, to those made within the state. But the truth is, there is nothing in the argument; for citizens of other states resort to our courts for attachments, against foreigners, as well as our own citizens. But, we have seen that the parish judge is to fulfil all the functions of the city judge, under the old system. Now, in the seventh section of the county court law, we find, *inter alia*, this duty pre-

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scribed, "that whenever a petition shall be presented for the recovery of a debt due from a person residing out of the territory, and such residence abroad, together with the existence of the debt, shall be proved to the satisfaction of the judge, he shall direct the clerk to issue an attachment, &c."

This was one of the functions of the city judge, prescribed by the territorial law, which, by the parish court law, is assigned to the parish judge, and fits our case, as expressly as if made on purpose for it.

We have likewise seen, that by the second section of the parish court law, the mode of proceeding, before that court, shall be in all respects, similar to that prescribed to the district courts.

In the district court law, and in that very sixteenth section, which the supreme court think gives a general jurisdiction, we are referred to the territorial laws regulating "proceedings in civil causes."

By the eleventh section of that law (1805) we have the identical same words of the county court law just quoted, viz. "That whenever a petition shall be presented for the recovery of a debt due from a person residing out of the territory, and such residence out of the territory,

together with the existence of the debt demanded, in such petition, shall be proved to the court, if in session, or to some judge thereof, in vacation, then such court or judge, shall order the clerk to issue an attachment, &c." Here is the mode of proceeding, and the duty of the court as well as its power, all coupled together: and whether we take the functions of the judge of the city court, or the rules of proceeding as prescribed for district courts, for our guide in this case, we shall come to the same conclusion, to wit, that the judge was not only authorised, but bound, to order the attachment prayed for in this. And, with every submission to the superior intelligence of the supreme court, I must be permitted to say, that in my opinion, this mode of reasoning, brings no "absurd conclusion."

But if all this reasoning is of no avail, and the court should still be of opinion that no case is cognizable in the parish court, but such as depend on contracts made in the parish, it would be useless to consider farther, what may be urged under the other heads. But as it is by no means clear, that the court is restricted to such cases, I proceed to examine the second point

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II. The law of bills of exchange has grown out of commercial usage, for there are no statutes on the subject, but such as are made to give them greater credit, and to extend the rights, as well as the more effectually to secure the holders of them.

We must, therefore, consult the writers on this particular branch of the law, for an accurate understanding of the true principles on which the rights of the holder depends, as well as the obligations of the drawer, acceptor and endorsers, towards him.

It is laid down in *Baller's Nisi Prius*, 269, that if a bill is presented for acceptance, and it is refused, that an action may be immediately commenced against the drawer, without waiting for the expiration of the days of sight. The same law is laid down in *Douglas*, 55.

In 2 *Strange*, 949, it was contended that no cause of action existed against the drawer, until after non-acceptance and protest; but the court decided that the drawing of the bill was the time of contracting the obligation. This decision was made in favour of a bankrupt, and he was discharged on that principle.

In 3 *Wilson*, 17, the court held the obligation of the drawer to be *debitum in presenti, solvendum in futuro*, and that a protest is nothing

but a notice that the drawee will not pay it, and creates no new obligation on the drawer.

The same law is laid down in *Evans' Essay on bills*, 38, 9.

In *Chitty's Law of Bills*, a work in which all the modern decisions are collected, and the principles, by which the rights and obligations of all the parties are governed, are considered, and clearly laid down, we find in p. 121, 122, this doctrine further enforced; he says, upon the delivery of the bill to the payee, the liability of the drawer, immediately becomes complete. The act of drawing the bill implies an undertaking to the payee, and to every subsequent holder, that the bill will be duly honored. On failure of this engagement, the drawer of the bill will be immediately liable to an action.

I have brought this part of the law, relating to the drawer, as fully before the court, for the purpose of showing that the obligation to pay, does not depend on the contingency of notice and demand; but is complete, the instant the bill is dishonored. But he may be discharged from that obligation, by the neglect of the holder, as I shall presently show.

But although the obligation of the drawer is contracted, when he delivers the bill, it does

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not follow, that he is not answerable, on that contract, at any other place than that were he made the bill; for it is well known that he may make the performance of it to be at any other place; and the contract shall be governed by the law of the country, where it is intended to be performed. *Dallas' Rep. Bay's Rep.* and many others.

But, as our case is that of an endorsee, on the endorser, in consequence of the dishonor of the bill, by the drawer, it is incumbent on me to show that the obligations of the endorser, to the endorsee, are precisely the same, as those of the drawer of the bill.

Chitty, 154, 5, treating of the effect of the endorsement, and transfer of bills, says the nature of a transfer of a bill, the right which it verts in the assignee, and the obligation which it imposes on the person making it, will appear from what he had already said of the time, person, and mode of tranfer. He then adds "a transfer of a bill of exchange, by endorsement, it is said, is equivalent in its effect to the drawing of a bill; the endorser being considered as a new drawer, on the original drawer. And if the drawee refuses to accept, the endorser is immediately liable to be sued."

In 3 *East, Ld. Ellenborough* says "there

is no distinguishing the case of an endorser, from that of the drawer: it having been long ago decided, that every endorser is in the nature of a new drawer, every endorsement as a new bill, and that the endorser stands, as to his endorsee, in the law merchant, the same as the drawer. And in a late case tried before him at Guildhall, it appeared to be the universally received law merchant on the continent, that an endorser was liable immediately on the non-acceptance of the drawee.

That the law of bills is as I have laid down, I am confident, the court will find on an re-examination of the subject.

What, therefore, must have been my surprise, at finding the law laid down by the court in these terms, "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, &c."?

Is it possible the court could seriously be of opinion, that the endorser is not liable, until after the endorsee gives him timely notice of the dishonor of the bill? I cannot be mitaken in the plain meaning of the words, such is their meaning; and that idea is made more manifest,

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by the next two or three sentences, wherein it is said "the endorsement is a conditional promise." Very true, it is as much conditional, as the contract of guaranty, or surety. But on what contingency does that condition depend? The opinion informs us it depended on "the notice of non-payment being sent to Nashville, the place where the endorsement was made, and on the receipt of that notice, by the defendant;" "he is (says the opinion) then bound to pay, and was suable instantly, and on the spot," and that too, "in the corporation court of Nashville, if there be such a one with a limited jurisdiction;" for the cause of action, it is said, did arise in that town.

This part of the opinion is so contrary to the principles of the law of bills of exchange, as known and practized in the United States, that unless there is some other law to govern the case, and more is quoted by the court, I am bound to believe the court will find on a review, that the principles, on which it is founded, are mistaken, and the assumption of these erroneous principles has necessarily led the court into an erroneous decision.

So far from the right of action depending, on the circumstance of the defendant's having received, at Nashville, a notice of the dishonor of

the bill; I am warranted in saying he was liable to the action of the plaintiff, although, he never did receive notice of the dishonor; this I shall show by repeated decisions on that very point.

The holder may lose his right by his own neglect; the obligations of the endorser may be discharged by the misconduct, or neglect of the holder; as if he does not apply to the drawee at the proper place, or in proper time, for acceptance, or payment after acceptance; or if he neglect to send notice of the dishonor, within a reasonable time, and a loss is thereby occasioned to the endorser, or drawer. *Chitty on Bills.* 213.

But there are many cases where notice will be dispensed with, and yet the obligation of the drawer and endorser be continued; some of these cases being mentioned, will show that the action of the holder existed before, and that it does not accrue to him, after the receipt of notice, but upon the dishonor of the bill. If his rights did not then exist, he could not lose them by neglect; a creditor on a bond may lose his action by delay.

The bankruptcy of the drawee will dispense with notice to the drawer. No funds of the drawer, in the hands of the draw-

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ee, will dispense with notice. Bankruptcy of the drawer will dispense with notice to an endorser. *Chitty on Bills*, 225, 6, 7, and the cases there cited.

But there are other causes, which will excuse the want of notice. As the absconding of the drawer, or endorser. The sudden illness of the holder, or of his agent, or other accidents. *Chitty, id.*

I now proceed to shew, that the obligation of the drawer and indorser may continue, and the action of the holder may exist, although notice of the dishonor of the bill was not received by them, or either of them.

The holder is only held to the use of due diligence, to obtain payment of the drawee; and in case of non-acceptance or payment, to give notice thereof in reasonable time.

The sending of a letter by the ordinary mode of conveyance although it miscarry, or does not arrive until a long time after, is sufficient. Sending a letter by a ship from India, to London; or by a ship from America, to Europe; or by the ordinary post, although it miscarry will be deemed diligence. The holder is not bound to deliver the notice, he is only requested to send it by the ordinary mode of conveyance.

Chitty, 235, and 236, and the cases cited. *Lanusse* vs. *Massicot, & al.* 3 *Martin*, 267, 8.

By what has been shown, I think it plainly appears the plaintiffs' right of action accrued to them, the instant the bill was protested for non-payment, at New-Orleans, that their right of action was neither suspended, nor postponed, until after notice was received by the defendant: and for the first time, it was then brought to life. It had existence at the city of New-Orleans, the enstant of protest: the contingency, on which the conditional promise of the endorser became absolute, was then accomplished, and their rights to sue then originated, then it had legal birth in this city.

Will it be contended, that because the bill bears date at Nashville, that the contract was there to be performed? I think it cannot, even, be so pretended. Was there any thing local in the transaction at Nashville? I think not.

The bill is payable at New-Orleans, the acceptors have contracted to pay here, the endorser contracted with us, that we should here receive our payment, he guaranteed that payment here, he failed in his contract. And where did the right to sue him first accrue to the plaintiffs? Why, most assuredly at New-Orleans. Their action originated there.

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This interpretation of the case, is particularly necessary where the drawer and indorsers are out of this state; for if it were otherwise, the holder of a bill of exchange would be in a worse condition, than other creditors. A single example will shew this to be the case.

Suppose A, a resident in London, draw a bill in favour of B, a citizen of New-Orleans, on C, likewise a citizen of New Orleans, and when this bill is dishonored, the drawer has in New-Orleans property sufficient to pay this bill, if attached; shall the holder be told he has no action in this bill, until after he has given a notice to the drawer in London, and demanded the payment there? If this was the case, the defendant's property in the mean time, might be removed; and the holder, though a citizen of New-Orleans, would be compelled to resort to the court of England for a remedy.

Such a construction I believe was never given to a case so circumstanced. And indeed it would prove of mischievous consequence, and defeat in a great measure the remedy by attachment.

III. On this point, I shall find it unnecessary to dwell, nor to be prolix. Most of what I had to offer on it, has been embraced in considering

the matter which fell under consideration in the two former heads of the subject.

It will be remembered that, by the second section of the parish court law, the proceedings before that court, shall be in all respects similar to those prescribed for the district court.

The power to issue attachments against the property of a debtor, who resides out of the state, and mode of proceedings thereon, is found as well in the old county court law, as in the superior court law.

This attachment law is in reality nothing more than a law, prescribing the mode of proceeding against absent debtors; and is not only borrowed from the like law of the other states in the union, who borrowed it from the customary law of London; but like that customary law is general, and has no reference to the place where the contract was made, nor where the action originated, but has reference only to the place where the debtor's property is found. Three things only are requisite to authorize the court to pursue that mode of proceeding in favor of the plaintiff: 1st. the existence of the debt; 2d, the absence of the debtor, and 3d, the property of the debtor, in the jurisdiction of the court.

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The words of our act of assembly have no kind of limitation, they are, "that whenever a petition shall be presented for the recovery of a debt due, from a person residing out of the territory, &c." No matter where the debt was created, the attachment is the mode of proceeding prescribed; such too was the effect given to the mode of proceeding in London.

The court of Hustings in London had jurisdiction of all pleas real, personal and mixed within the city.

But although, the jurisdiction of that court was limited, to cases arising within the city, yet in foreign attachments, no attention was paid to the domicile of the defendant, nor to the place of contracting the debt; let the debt arise where it will, it is attachable. *Sargent, Law of att.* 7, 8.

REHEARING NOT GRANTED.

ERWIN & AL. vs. *TORREY.*
ROGERS & AL. vs. *THE SAME.*

If cotton be sold, payable in two days, and the vendee instantly procures advances thereon, delivering it to the lender, who

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiffs Erwin, M'Laughlin & co. sold to the defendant, ninety-one bales of cot-

ton for cash, and delivered them on his promise to pay in two days. Immediately on receipt of the cotton, Cliff, an agent of the house of H. Dawson & co. of Liverpool, made an advance to the defendant, of seventeen cents per pound. Whereupon, the cotton was shipped for Liverpool, for the account and risk of the defendant; but before the ship sailed, the defendant failed, and the plaintiffs sequestered the cotton, claiming a lien on it, as vendors. Cliff intervened as claimant, obtained a delivery of the cotton, on giving bond and surety, and sent it to Liverpool, where it was sold, and the net proceeds fell considerably short from the sum advanced. The plaintiffs' demand for the price of the cotton was admitted to be, having been reduced by partial payments, $2805 44.

ships it, in his own name, the vendor cannot claim it, without refunding the sum loaned and charges.

The plaintiffs Rogers and Cully had sold to the defendant twenty-six bales of cotton. Their situation was admitted to be perfectly the same, except as to the quantum of their demand, as that of Erwin, M'Laughlin & co. the balance due them was $1646 08.

The district court was of opinion, that "the seller has a right to reclaim the property sold, so long as it remains in the power of the buyer, and the seller has not been paid. At the time of the sequestration, the condition of the buyer's title had not been changed. The cotton was

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shipped on his account. The advances made by the claimant, on the cotton, did not alter the buyer's title. The former cannot look to the cotton or its proceeds, to be reimbursed. He must look to the person, and not to the thing." Accordingly, judgment was given in favour of the plaintiffs for their respective balances, and the claimants appealed.

The above statement, which was made before trial, in the district court, comes up with the record, and is accompanied by the bill of lading, and account of sales. The bill of lading (for there is but one for the two parcels of cotton) shows that the shipment was made by, and in the name of Cliff, the agent of H. D. & co. to his principals, the name, of neither of the plaintiffs, appearing thereon.

Although the cotton is stated to have been sold for cash, yet as it is also stated to have been afterwards delivered on a promise to pay in two days, the sale must be considered as on a credit. The buyer then well might, as he did, instantly pledge the cotton, for an advance made thereon, or sell it. The claimants having undertaken to be the factors of the defendants, in the shipment and sale of the cotton, and hav-

ing made advances thereon, and acquired a lien on it for such advances, and consequent disbursements on the cotton, which is in their possession, are accountable only for the balance that may appear due to the defendant. And it is admitted that the net proceeds, does not cover the claimants' advances.

The claimants having, as factors, a lien on the cotton for their advances, it cannot be considered in the power and possession of the defendant, who could not have demanded a surrender of it, without reimbursing the sum received, and incidental charges. And although it was at his risk, and he was entitled to the profits, if any there had been; yet the receipt of the advances created a lien which affected his right. The district court, therefore, erred in considering the situation of the defendant as unchanged.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that there be judgment for the claimants, with costs in both courts.

Grymes for the plaintiffs, *Livermore* for the claimant.

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FOX vs. DAWSON'S CURATOR.

FOX vs. DAWSON'S CURATOR.

APPEAL from the court of the first district.

A woman has a right to sue the estate of a man, who married her, his first wife being still alive, for her services in his house, the use of her furniture, hire of her negroes, monies of her received by him, and debts of his paid by her, since his death

MARTIN, J. delivered the opinion of the court. Dawson married the plaintiff, although the former was at the time already married to another woman still living, and she brought the present suit against his estate to recover, compensation for her services, the use of her furniture, the hire of her negroes, monies of hers received by him, and several sums paid by her to his creditors since his death, while she was curatrix to his estate, till her letters of curatrixship were revoked on the appearance of the first wife. There was judgment for her, and the curator appealed.

It is contended that she is only to be considered in the light of a partner, and it does not appear that there was any profit; the evidence proves that the plaintiff kept a decent boarding house, well furnished, and was thriving in her business, when Dawson presented himself, as a single man, and married her, that Dawson was a tailor by trade, had much custom, managed the affairs of the parties, as a master, while she attended to the in door concerns of the house.

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The marriage contract, upon which she surrendered her person, property and affairs, being illegal and void, she has a right to be indemnified against the consequences of the deceit, and she appears to have confined her claims, to items to which she is doubtless entitled, and the district court has rendered the amount of each particular claim to what appears to be correct.

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

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

WHISTON & AL. vs. STODDER & AL. SYNDICS

In a sale completed in a country, in which the vendor has no privilege on the thing sold, he acquires none on its being brought here

Sm. 95
10 502
8m. 95
47 523
Sm. 95
52 [illegible]

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

Workman, for the plaintiff. Stodder and Hewitt, merchants of this city, having become insolvent, the judge whom, they petitioned for the benefit of our laws of insolvency, thought fit to appoint me to defend the rights and interests of the absent creditors. On examining the schedule and investigating the accounts of

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the insolvents, I found that they had in their possession some goods which they had purchased from the plantiffs, merchants of Great Britain, and of which the greater part of the price still remained unpaid. I, therefore, thought it my duty to bring this suit, claiming for the plaintiffs, as if they had been citizens and inhabitants of this state, their privilege in those goods for the price due upon them. A sequestration issued in the usual form, and the court below gave judgment in our favour: from which judgment, the defendants have appealed.

The facts, stated in the petition, are fully proved by the testimony on the record: and these facts bring the case completely within the provisions of the seventy fourth article of the *Civil Code*, 469. In one of the clauses, there is a special reservation that nothing herein shall alter or affect, the established laws and usage of commerce, as to the thing sold. The vendor's privilege, given by this article, is substantially the same as is secured by the ordinance of *Bilbao*, in cases of bankruptcy; and which has been recognized and acted upon here, as the law of the land, since its cession to the United States. Nothing then can prevent us from maintaining this claim, unless it can be shewn, that this case

must be decided according to the law of England, and not by the laws of Louisiana.

It has been often determined in this court, in conformity with the opinion and judgments of all other high and repectable tribunals, that the law of the place, where a contract is made, is to govern as to the nature, validity and construction of such contract; and that it is to be enforced every where, except in cases in which the contract is immoral, or unjust, or in which the enforcing it in a state, would be injurious to the rights, the interest, or the convenience of such state or its citizens. 1 *Gallison*, 375. 3 *Martin's Rep.* 66, &c. But as to the form of the action, or the remedy by which a contract is to be enforced, a different rule prevails; to wit, that the recovery must be sought, and the remedy pursued, not according to the *lex loci contractus*, but according to the *lex fori*.

In the present case, there is no question concerning the nature or validity of the contract. We do not seek by a redhibitory action to recind, or annul the sale. We do not claim the goods themselves, but a privilege or mortgage in or upon them, for so much of the price of them as remains due. If these goods were now worth twice or ten times more than they were

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sold for to Messrs. Stodder and Hewit, we should be entitled only to that part of the price which is unpaid. The defendants would have a right to all the rest; which would not be the case, if our action, affecting the nature or force of the contract, sought to set the sale aside, and recover back the goods in kind. Sometimes indeed in these actions, the plaintiff is allowed by consent of the other party, to take back the remaining goods, at the invoice prices; but this is done only to prevent the sacrifice of the goods at auction.

The proceeding, in this suit, belongs to the mode of recovery, and the remedy, as much as the ordinary proceeding by way of attachment; in the first case a particular property is laid hold of; in the other, the whole of the defendant's property may be seized. In both cases, the object is the same; to secure the debt for which the plaintiff sues. But the law of attachment does not prevail generally through England, nor in all of these United States. Yet who ever denied whether our English or other creditor might attach his debtor's property in this state? The long continued, undisputed practice of our courts puts that matter at rest.

If this doctrine of the *lex loci contractus*, contended for on this side, be admitted, then it

would follow, if goods were sold in Louisiana to a merchant in England, or in any of our states, where the English law prevails, that the vendor might, in the event of the purchaser's bankruptcy, claim a privilege upon these goods, for the price due on them, if they were found in the bankrupt's possession. But would the courts of England, or of these states admit the claim? Has any such claim ever been heard of? Would not the creditor in suing for his debt be restricted to the forms of action, and kinds of remedy allowed by the laws of the country, where the suit was brought? Would any new writ be manufactured? Would any process, unknown to those laws, be resorted to for this suitor's benefit, or convenience?

There is another and a strong reason why the *lex loci contractus* ought not to govern, in this case. The parties themselves must have contemplated Louisiana as the country whose laws and tribunals were to be resorted to, for enforceing the debtor's part of the contract, if he should fail in his engagements. The goods were sold, it is true in England, and payment for them was to be made by remittances to England. But if the purchaser neglected to make this payment, where was it to be enforced? At the debtor's domicil, in the city of New-Orleans.

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Neglect or inability to make payment in these cases, is not so extraordinary as to render it at all improbable, that a suit in this country for enforcing payment for these goods, was contemplated by the vendors, at the time when they made the sale. They are, therefore, entitled to all the remedies which our laws afford.

Livermore, for the defendants. The question, for the decision of the court, lies within a very narrow compass. Stodder & Hewitt were merchants in New-Orleans, and became insolvent in the year 1818. At that time, they made a cession of their property to their creditors, which was accepted, and the defendants were appointed syndics of their estate. After this time, the gentleman, who had been appointed to represent the absent creditors of the insolvents, sued out a writ of sequestration to obtain the remnant of an invoice of goods, which had been consigned to the insolvents by the plaintiffs, who are merchants in England, and which had not been paid for. This proceeding was confirmed by the plaintiffs; and upon this sequestration, the cause was tried in the parish court. The goods were identified by a clerk of the insolvents, and the same witness proved that these goods were not consigned to the insol-

vents as factors, but under an order as vendees. The course of dealing, between the insolvents and the plaintiffs, had been for the former to order goods, and for the latter to purchase them of the manufacturers, and ship them to the insolvents, on account of the insolvents, and for which the plaintiffs were to be reimbursed by bills remitted, or produce shipped to England. These bills, or produce, when sold or paid, to be applied in payment for the goods.

Upon this statement, the question for the consideration of the court is this :—Are the plaintiffs entitled to take these goods to the prejudice of the other creditors of Stodder & Hewitt, or must they come in, as general creditors, for a contribution ?

The cession of property, made by an insolvent debtor to his creditors, vests in his creditors all his estate : not indeed an absolute indefeasible estate, but a right to sell the property for their benefit. If, before the sale, the debtor finds himself able to discharge his debts, he may take back his property, upon satisfying his creditors. *D.* 42, 2, *l.* 3, *et* 5. The interest of the creditors is not strictly in the goods themselves, but in the right of selling them. They cannot divide the goods, but must divide the proceeds. *C.* 7, 71, 4, *qui bon. ced. poss.*

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This interest, or right of selling, is however effectual against all persons, except the insolvent in the cases specified in the law. But this right of the creditors, extends only to the goods of the insolvent, and not to the goods of other persons in his possession. These must be delivered to the owners. Nor will the cession deprive any creditor of a right, which he derives from a mortgage or privilege upon any portion of the debtor's property. These mortgages and privileges, which constitute a special property in the thing mortgaged or subject to the privilege, follow the thing *ut lepra leprosum.*

When, therefore, a person, claiming goods found in the insolvent's possession at the time of his failure, can prove, that the goods did not belong to the insolvent, but to the claimant, the real owner is entitled to the possession, and the creditors have no right. So also, where a person has a mortgage or privilege upon the goods, he will be entitled to the benefit of his mortgage or privilege; for this is not to be destroyed by the failure of his debtor. But, these claims, either of property or privilege, must be clearly established; the presumption being in favour of the general creditors, that all the goods in the debtor's possession belonged to him.

Is any right of property, mortgage, or privilege, supported by the plaintiffs in this case? They claim as vendors, and rely upon the *Civil Code*, 469, *art.* 71. If this will not support them, they contend that the reservation, concerning "the established laws and usages of commerce, as to the claim of the thing sold," must be construed for their benefit, and that this reservation was intended to have the effect of giving a further extension to the privilege of a vendor, by introducing the provisions or the ordinance of *Bilboa*. I believe it has been determined, that the ordinance of *Bilboa*, is not law in this state, the rules established by that ordinance being entirely inapplicable to our situation, and indeed as a body of laws having but a local and partial operation in Spain, and not extending to the colonies. I have also heard, that, at an early period after the promulgation of the *Civil Code*, it was declared from the bench, that the exceptions, introduced in that code in favour of the laws of trade and commerce, were intended to introduce the general principles of commercial law prevailing in the other states of the union. There is certainly great reason in this construction, as uniformity in the principles of maritime and commercial law between the several states is highly desi-

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rable. But by what course of reasoning can it be pretended, that this reservation, respecting the laws and usages of commerce, was intended to give to the vendor any greater right than is given to him by the article in the code? This article gives him a privilege for the price. Will it be said, that he can have a greater privilege than for the price? The article postpones him to the landlord. But the landlord's right extends to all moveables found on the premises, even to those deposited or lent. The vendor is, by the article, postponed to the pawnee. But the pawnee, stands in the same situation to the original vendor, to the extent of the sum loaned upon the pledge, as a subsequent purchaser would have stood. The vendor is also postponed to the person who has laid out money in preserving the thing. But the money so laid out is for the benefit of the thing, and of any person who may be entitled to claim it. Can it be pretended, that any laws or usages of commerce would give to the vendor a right above these creditors? If any effect is to be given to this reservation in the code upon the vendor's privilege, it must be a restrictive, and not an enlarging effect.

But it is by no means clear, that this reservation has any particular reference to the extent of

the vendor's privilege, or to the ordinance of *Bilboa*. The words in the French text are, *Il n'est rien innové aux lois et usages du commerce sur la revendication*. The word *revendication* is a term of jurisprudence, signifying a real action by which a person claims a property in the thing, as belonging to him. *Rem suam judicio repetere, sibi aliquid vindicare.* Such is the definition we find given in the *Dictionnaire de Trevoux*. *La revendication, appellee chez les Romains* vindicatio, *ou* revindicatio, *étoit une actión réelle que l'on exerçoit ou pour réclamer la propriété de sa chose, ou pour réclamer une servitude sur la chose d'autrui, ou pour réclamer la chose d'autruí à titre de gage.* This is, therefore, an action by which the thing itself is claimed to be delivered in specie to the claimant. This will give a meaning to the reservation in the code, and the true meaning. The chapter is upon the preference and order of privileges and mortgages, which are to be enforced, by a sale of the thing and an application of the proceeds in the order named. But as the vendor had a right, upon the failure of the debtor and the price unpaid, or upon the price being unpaid where no specified credit was given, to take back the thing itself, instead of having it sold to pay the price, the framers of

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the code considered it advisable that this right should be expressly declared to be reserved. By the framers of the code, I mean the authors of the French *Code Civil*, from which the whole of this article, with the reservation, is literally borrowed. *Code Civil de France*, *n.* 2102. The reservation was, therefore, intended to save the right, given to the vendor by the laws and usages in France, of rescinding the contract, in certain cases upon non-payment, and of reclaiming the thing sold.

Let us consider this article in the code as a statute, and see what effect is to be given to it. Was it intended to create new privileges, or merely to declare the existing ones? Was it intended to operate upon contracts made abroad, and to invest parties with rights for which they had not stipulated, and which were not given to them by the laws of the country where they contracted? Or was it not rather intended as a legislative declaration of the rights growing out of contracts made within the territory?

In construing statutes, or contracts, it is a general rule, that the most large words are to be taken with reference to the subject matter. It is another general rule, that statutes are intended to affect only such contracts, as are made in the country subject to the statute. *Statutus*

intelligit semper disponere de contractibus factis intra, et non extrà territorium sum, Casaregis, disc. 130, *n.* 15. Therefore, although this statute speaks of vendors generally, it must be understood with reference to contracts of sale made within the territory. The effect given to contracts, made in other countries, depends upon a different principle. But in enacting laws for the government of the people, and for determining the rights of the parties arising upon contracts, the legislature are supposed to have in view the rights of their own subjects merely, and not the rights or advantages of other people.

It is true that personal contracts follow the person of the debtor, and may be enforced against him, in a different country from that in which the contract was made. This is by the comity of civilized nations. But when the courts of a nation are appealed to, for the purpose of compelling performance of a contract entered into abroad, the rights of the parties are not to be determined according to the statute, or laws of the place of trial; because the application of these laws might either restrict, or enlarge the terms of their agreement, and substitute a new contract, in place of that to which they had assented; on the contrary, the court will

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consider the statutes, laws, and customs of the place of contracting, as having been within the contemplation of the parties at the time, and making part of their agreement. *Lynch* vs. *Postlethwaite*, 7 *Martin*, 84, and the authorities there cited.

Foreign contracts are not within the purview of the laws, are not considered as being within the contemplation of the legislature, and, consequently, are not included in the most general expressions; although it would be an absurdity, for the legislature to go out of its way, and legislate for the benefit of foreigners, yet there is no doubt this may be done. But it is not to be presumed; and when it is done, it will be done in express terms. If, therefore, it had been intended to give the right claimed to foreign vendors, there would have been an express provision in the code to this effect, that the article should extend as well to contracts of sale made in foreign countries, as to sales made in the territory. If such an extension of the law had been proposed, what would have been the answer to it? That foreign governments, and the contracting parties, were competent to fix the rights arising out of contracts made within their limits, and that it would be a violation of every principle of legislation to interfere with

this subject, either to diminish or to enlarge the terms of such contracts. It would have been said with justice, that the laws of nature determine those things, which are of the essence of a contract, but that, as to every thing which is of the nature of a contract, or accidental to it, the will of the contracting parties, and the laws of the place where the contract was made, must govern.

The nature of this action of sequestration is real. According to the division of actions in the Roman law, it is a real, and not a personal action. It is a *revendication*, the object of which is to annul the contract of sale for the portion of the goods remaining, and to reinvest the plaintiffs in their original property. It is not a personal action, founded upon a personal contract, and instituted to enforce a contract. But it supposes a right in one party to rescind the contract, upon the failure of the other party to perform the conditions of it. The essence of a contract of sale is in the transfer of property in the thing sold from the seller to the purchaser, and in the transfer of the price from the purchaser to the seller. An action against the purchaser for the price, is an action to enforce the contract; but an action to recover the thing in specie, is in effect an action to dissolve the contract. Now it is evident, that a right to annul a contract, upon any certain contingency,

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must exist at the time of making the contract, and cannot be given afterwards. The event, which is to give occasion to the exercise of the right, may happen at a future period, but the right must exist at the time. Upon a sale at a credit of one month, either by express agreement, or by law, the vendor may have the right, at the expiration of the credit, to dissolve the contract; but if, at the time of making the contract, the property passed irrevocably to the vendor, no change of time or place can afterwards give the right to the vendor, to reinvest himself in the property. When, therefore, the sale is made in a country, by the laws of which the entire and indefeasible property is passed to the vendee, and nothing is left to the vendor but a personal action for the price, the subsequent removal of the thing, to another country, where different laws prevail, cannot give to the vendor a greater right, nor vest in him an interest, which the contract did not give him.

The plaintiffs contend, that a sequestration is founded on privilege, and not upon property. It is not very material to the defendants, whether this action be founded on privilege or property; for if upon privilege, then it must be shewn that the privilege exists. A privilege is not a form of action, but a right, which is to be ex-

ercised according to certain forms prescribed by law. This action of *revendication*, the object of which is the restoration of the goods in specie, is founded on property. Privileges are enforced by process against the goods to have them sold, and the privileged debt is to be paid out of the proceeds. *L'action de revendication est une action qui nait du domaine de propriété que chacun a des choses particulières, par laquelle le propriètaire, qui a perdu la possession, la rèclame et la revendique contre celui qui s'en trouve en possession, et le fait condamner à la lui restituer. Pothier, du domaine, n.* 281. The plaintiff, in this action must have the right of property. *In rem actio competit ei qui aut jure gentium aut jure civili dominium acquisivit. D.* 6, 1, 23.

It is upon this principle, that a vendor is allowed by our laws to reclaim his property. By the Roman law, the delivery to the buyer of the thing sold did not transfer the property, unless the price was paid, or the seller was satisfied to accept a surety or pledge, or the engagement of another person, or unless the seller gave a credit to the buyer. *Quod vendidi non aliter fit accipientis, quàm si aut pretium nobis solutum sit, aut satis eo nomine factum, vel etiam fidem habuerimus emptori sine ulla satisfac-*

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tione. *D.* 18, 1, 19. Where an express credit, however, was given to the purchaser, the property passed, and the sale could not be afterwards dissolved, on account of non payment. Express conditions were, however, frequently annexed to the contract of sale, that if the price was not paid by a certain day, the sale should be annulled. *Si intrà certum tempus pretium solutum non sit, res inempta sit.* These conditions are treated of in the third title of the eighteenth book of the *Pandects. De lege commissoria.* But when a credit had been given, and the vendor did not reserve a right to rescind the sale upon non-payment, he could not reclaim the goods. These principles were formerly followed in the French practice. But a change insensibly took place, and the vendor was allowed the benefit of the *pacte commissoire,* although it had not been reserved. The only difference was, that when the contract contained a *pacte commissoire*, and the credit had expired, the judge would, upon the judicial demand, award a dissolution of the sale; but that when there was no such agreement, and the property was immoveable, he would, by an interlocutory sentence, fix a day within which the purchaser might pay the price; but if the price was not paid by that day, the sale would be an-

nulled. In sales of moveables, this delay was not granted. *Pothier, de vente, n.* 475. These principles of the French law have been adopted in the *Code Civil de France, n.* 1654, 5, 6, 7, and from that code, have been copied in ours, 360 and 362, *art.* 86, 87, 88, 89.

These articles in the code apply to cases where the price is not paid on the day limited in the contract; but, upon the purchaser's insolvency, the vendor may demand a dissolution of the contract, and reclaim his property, although the credit has not expired. The reason is, that the insolvency establishes the purchaser's inability to pay, and all his debts become due, according to our laws. The goods in his possession, not paid for, revert to the vendors upon this event happening, and they have a right to reclaim them as their own property.

The authorities, which I have cited, appear fully to establish these principles; that this action of the plaintiffs is a real action, that the effect of it is to dissolve the contract, and not to enforce it, that it is founded upon property, and cannot be supported, if it appear that the whole property had passed from the plaintiffs and vested indefeasibly in the insolvents.

The question then reverts; whether the plaintiffs have a right of property in the goods se-

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questered sufficient to support this action? To determine this question, I apprehend, the court must inquire into their rights, as regulated by the common law of England. The general principle, that the rights of parties founded upon contracts must be determined *secundum legem loci contractus*, does not appear to be controverted. But the plaintiffs contend, 1st. that this contract was not made in England, but in New-Orleans; and 2dly. that a right to a sequestration respects the remedy, and not the substance of the contract.

The goods were ordered by the insolvents; the plaintiffs accepted the order, purchased the goods, and shipped them, to the address, and upon the account and risque of the insolvents; and payment was to be made in England, by bills or produce. It is well known that a bill remitted is not payment, unless paid or agreed to be received as payment; and produce is not payment until sold, when the proceeds are applied to the extinguishment of the debt. In every part of this business, therefore, it was an English transaction. The order from the insolvents gave to the plaintiffs no right, until that order was accepted and executed in England. Their rights then became perfect. The reception of the goods in New-Orleans, was not ne-

cessary to entitle them to demand payment; for when goods are consigned under an order, the delivery to the carrier is a delivery to the consignee; the property immediately vests in him, and the goods are at his risk. In purchasing the goods from the manufacturers, the plaintiffs acted in the capacity of mandataries, and in that capacity they acted in England, and the payment was also to be made in England.

If any thing more than a simple statement of the facts be necessary, in order to refute the doctrine relied upon by the plaintiffs, as to the locality of this contract, I will refer the court to the authority of one of the ablest writers upon commercial law, to an author who has furnished the grounds of some of the best decisions in England upon maritime contracts, who has been often quoted with great respect by judge *Story*, and of whom *Valin* says. that he is without contradiction the best of all the writers on maritime law. I mean *Casaregis.* This author, in his 179th. discourse, discusses very fully the question, in what place a contract entered into between absent members shall be said to be celebrated? He premises that it is a general rule, that contracts, entered into between persons residing in different places, shall be considered as made in that place where the

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ultimate consent was given. *Præmittenda est regula ab omnibus recepta, quod contractus, vel negotium inter absentes gestum dicatur eo loci, quo ultimus in contrahendo assentitur, sive acceptat, quia tunc tantum uniuntur ambo consensus. Disc.* 179, *n.* 1. Therefore, a contract of agency is said to be entered into in that place, to which a letter has been written containing the order, if the person to whom the letter was directed has received and accepted the order. *Et sic mandati contractus dicitur initus in loco, quo diriguntur literæ, missivae alicujus mercatoris, si alter ad quem diriguntur, eas recipit, et acceptat mandatum. n.* 2. Among a great number of cases, which the author states in illustration of this general principle, is the precise case before the court. *Quando mercator alteri suo corresponsori mandat, ut aliquas merces pro se emat, easque sibi transmittat, quo casu si corresponsor acceptet mandatum, et in illius executionem ab aliqua tertia persona merces commissas emat. duo perficiuntur contractus: primus mandati inter mandantem et mandatarium, et alter emptionis et respectivè venditionis inter eundem mandatarium uti emptorem nomine mandantis et ambo perficiuntur in loco mandatarii, n.* 10. According to strict principles, the contract in

this case was rather a contract of agency than of sale; but as, by the decisions in England, the merchants, who accept and execute an order from a foreign correspondent to purchase and ship goods, are considered as vendors with reference to the right of stoppage *in transitu*, it is proper we should consider them in the same character here. The case, where the merchant, to whom the order is sent, ships his own goods, is stated by *Casaregis in n.* 12, 13, 14.; and in this case he determines also, that the contract is made in the country where the order is executed. In *n.* 16, 17, 18, 19, 20, he treats of the case, where the merchant having exceeded his authority by shipping goods which were not ordered, his correspondent afterwards ratifies the act by accepting the goods. In this case also the author decides, that the contract is made in the country of the shipper, because the ratification has relation back, and is equivalent to an original authority. *Quia ille ratificationis consensus, licet emittatur in loco ratificantis, et ibi videatur, se unire cum altero precedenti gerentis consensu, qui venit à loco gerentis ad locum ratificantis, retrotrahitur ad tempus, et ad locum, in quo fuit per gestorem initus contractus emptionis, vel aliud negotium pro absente. n.* 20. The learned counsel for

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the plaintiffs will not, I am certain, contend against these authorities.

But it is said that this question respects the remedy, and not the substance of the contract. There can be no doubt, that when an action is brought upon a foreign contract, the form of proceeding must be such as is prescribed by the laws of the country to which the plaintiff has recourse. The jurisdiction of the court, the form of action, and the course of pleading is prescribed by those laws. The nature of the process also, either by citation, bail, or attachment, must be according to the *lex fori*. But when it is said, that the remedy must be pursued according to the laws of the place where the action is brought, it is not meant, that any remedy can be demanded, which is inconsistent with the rights of the parties, as regulated by the contract. Suppose that, by an express article in the contract, the parties agreed that the entire property should pass to the vendee, notwithstanding the credit given for the price, and that the vendor renounced all right to dissolve the sale and reclaim the goods upon non-payment or insolvency, and consented to look wholly to the personal security of the purchaser; would it be contended, that the vendor could afterwards sequester the goods, and claim to

have them delivered to him as his property, and say that this was merely a form of proceeding to enforce his rights according to the contract? If this could not be done against an express stipulation, it cannot be done in this case: because the laws of the country where the contract is made make a part of the contract, and are considered as being within the contemplation and intention of the parties, when not controlled by express conditions. *Et sive per pactum, sive per statutum dicta juris communis dispositio correcta sit, seu moderata, cum à pacto ad statutum valeat argumentum. Casaregis, disc* 179. *n.* 53. *Quod valide fieri potest per pactum, possit etiam fieri per statutum, et illud idem, quod operatur pactum, multo fortius operetur statutum. n.* 55.

The process of bail, and of attachment, are in no respect similar to this action. An attachment is not founded upon any right in the plaintiff to the goods attached. It is merely a mode of obtaining security, for the performance of the final decree to be rendered in the suit. But the action will be supported, or it will fail, according as the rights of the parties shall appear. An attachment is not, as the plaintiffs seem to think, a remedy against the goods. The action is personal, and the goods are mere-

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ly taken as security. An action *in rem* is either founded upon property, as in the case of a *revendication*, or upon a lien, as in the case of privileges and mortgages. The property, privilege, or mortgage, is a right; and the action of *revendication*, sequestration, or order of seizure and sale, is the remedy which the law gives to enforce the right.

The same observations will apply to the process against the person of the debtor, by which he is arrested and held to bail. The right to this process must be determined *secundum legem fori*. A case has been supposed of a contract made in England, and that, by the laws of England, the creditor would have a right to hold the debtor to bail, and that by the laws of Louisiana he would not have this right, upon a similar contract made here. Upon this case, it has been asked, whether in the case of a suit brought here, upon such a contract made in England, the defendant could be arrested and held to bail? I answer, no. The right of arrest made no part of the contract. It is a matter proper for the regulation of every government. Imprisonment for debt may be allowed, or not allowed, according to the discretion of the legislature; and to deprive creditors of this remedy, would not be an act to impair the obli-

gation of contracts. This has been so decided by the supreme court of the United States, in the case of *Sturges* vs. *Crowninshield*, 4 *Wheat.* 122, the decision upon this point extends, as well to contracts made before the act, as to contracts made after it. But suppose, that the legislature of Louisiana were to pass an act to deprive the vendor of his claim upon the thing sold, would not the supreme court of the United States say, that such an act, so far as it pretends to affect the rights of vendors upon contracts of sale existing before the act, was unconstitutional and void, as an act impairing the obligations of contracts?

To illustrate my distinction, between the rights growing out of a contract, and the remedy given to enforce a contract, we will suppose that the laws of Mississippi gave to the vendor the same right of property, privilege, or hypothecation, as our laws, but that, instead of allowing a sequestration or order of seizure in the first instance, the laws of that state required the vendor first to establish his right, by a personal action against the vendee, and permitted him to resort to the property, only after his claim had been established in such action. If the same laws prohibited the alienation of the property, after the action brought, to the prejudice of the vendor's claim, he would be equally

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secure. Then, if the sale were made in either of these two states, the vendor's right would be the same; but the form of proceeding, to enforce that right would be different, and the laws of the state, where the goods are found, and the action brought, would prescribe the form of proceeding.

By the laws of this state, persons furnishing materials for the use of a ship, and the builder also, are privileged creditors, and may enforce their claims by a proceeding against the ship. The right is given by the laws of the state, and may be prosecuted in a court having admiralty jurisdiction. But neither the carpenter, nor any material men have a privilege by the laws of England, nor by the laws of those states, which follow the common law of England. A vessel is built, or repaired, in Baltimore; the creditors have no privilege there; she sails to New-Orleans, and is here seized upon a claim of privilege, for debts contracted there, can this be permitted? Surely not; unless the court will overrule the decision of the supreme court of the United States, in the case of the *General Smith*, 4 *Wheaton*, 438. In that case the supreme court decided, that the right of lien must be tested by the laws of the state, where the work was done, or the materials found. A contrary

decision would lead to the most manifest injustice. A steam boat is built at Pittsburgh, and the persons, employed in building her, rely upon the personal credit of their employer. By the laws of Pennsylvania, they cannot seize the boat, but may have a personal action against the owner. This does not suit their views; they remain silent; and the owner, supposing them to be satisfied with his personal security, sends the boat to New-Orleans; when she arrives here, she is seized by them as privileged creditors; other creditors, who had an equal right in Pennsylvania, attach the boat before such seizure. Shall these be prejudiced by a claim of privilege from persons who had no privilege by their contract?

It is asked whether, upon a sale made in Louisiana, the English courts would respect the right of the vendor as established by our laws. The plaintiffs' counsel seems to take it for granted that they would not. I know not upon what the gentleman grounds his belief. I know no principle of the common law, nor of any decided case, from which it can be presumed, that the courts of Westminster Hall would not give to the vendor, upon a contract made here, the advantage of our laws respecting his rights under such contract. It is not to be presumed

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that those courts would violate established principles for the purpose of taking away his right. It is true that a court of common law could not give to the vendor the relief, to which his contract would entitle him; but this would be owing merely to the limited nature of the jurisdiction of these courts. But, in the court of chancery there can be no doubt, that upon a bill setting forth the sale in Louisiana, and that by the laws of that state, the plaintiff had a right, under the circumstances, to have the sale annulled, and to reclaim the property in the thing sold, there would be a decree in conformity with the laws of the place of contract. The case of a vendor, having a privilege according to the laws of the place of contracting, and bringing an action, in a place where the privilege did not exist, is the precise case which makes the subject of the greater part of the 179th discourse of *Casaregis*. The case was this, Cayrel a merchant in Leghorn sent an order for merchandize to Astruch & co. merchants in Nismes. The order was executed, the goods were purchased by Astruch & co., consigned to Cayrel, and by him received; soon afterwards Cayrel failed, and the question was, whether the vendors Astruch & co. were entitled to reclaim the goods, or must come in for a

contribution as general creditors. By the laws of France, a special hypothecation was reserved to the vendor upon the goods sold, until payment for the price; whereas in Tuscany the Roman law was strictly followed, and it was held, upon the authority of *Ulpian, in l. procuratoris, § planè, ff. de tribut. act. D.* 14, 4, 5, 17, and upon the general rule that where credit was given, the property was transferred, that the vendor of merchandize, sold on a credit, must enter into contribution as a general creditor. The general creditors of Cayrel contended, that the question ought to be determined according to the laws of Tuscany, where the action was depending, and not according to the custom of Thoulouse, or the *lex loci contractus.* The governor of Leghorn decided, in favour of the general creditors, as did also the consular court at Pisa upon an appeal; but upon an appeal from this last decision to the Grand Duke of Tuscany, the cause was referred to the Rota of Florence, who examined the subject in all its bearings, and in a most elaborate and conclusive argument established the right of the vendor and reversed the judgment of the consular court. I will merely refer to the numbers 55 and 56, to show that the same points were there made by the creditors, that are made by the plaintiffs

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in this case, and that the same answer was then given by the Rota, which I have attempted to give in this case. *Nihil refragrante objecto allato pro creditoribus, quod judicium hujus causæ pro executione contractus, et pro solutione pretii intentatum fuerit coram domino gubernatore Liburni, ubi pendet judicium concursus creditorum super bonis David Cayrelli communis debitoris, ideoque non esse attendendas leges et consuetudines regni Tholosæ, sed leges et statuta Etruriæ, aut jus commune, à quibus nullum privilegium praelationis, vel potioritatis impartitum est venditori, qui habuit fidem de pretio. Quia hoc non obstante, recedendum non esse à dispositione particulari dictarum legum in civitate Nemausi receptarum nos arbitrati sumus, ea ratione, quod dictum privilegium pro securitate et cautione venditoris respicit merita causae, et desumatur originaliter ab eodem contractu celebrato Nemausi, et sic observandae sint leges loci, in quo initus fuit contractus, quia contrahentes ad leges loci contractus respexisse censeantur. n. 55, 56.*

By the law of England, the property in the thing sold is changed as soon as the parties have assented to the contract; but so long as the thing remains in the vendor's possession, he has a lien upon it for the price, and may retain it

until payment; and this lien will be a good defence to an action of trover, although by the bargain the property is in the buyer. *Hob.* 41, *Noy's Maxims*, 88. This is the case where no credit is given. But where goods are sold, to be paid for at a future day, the vendor cannot retain them until payment; for to do so, would be inconsistent with the terms of the contract, and the conditions of sale shew that the vendor relied solely upon the personal credit of the vendee. In the case of a sale upon credit, therefore, the principles of the common law of England, and of the Roman law, are the same. The property is completely changed and vested in the purchaser by the contract. But where no credit is to be given, the principles of the two systems of law are different. In this case, by the Roman law, the property is not transferred, although a delivery has followed the sale. By the common law, the property is transferred, although there has been no delivery, and the vendor has merely a lien for the price. This lien is preserved to him only, so long as he retains possession; for by parting with the possession he loses his lien, and cannot recover it, by taking the goods out of the vendor's possession. *Godfrey* vs. *Furzo*, 3 *P. Wms.* 185. *Slubey* vs. *Hayward*, 2 *H. Bl.* 504.

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Ex parte Gwinn, 12 *Vez. Jr.* 379. *Hammonds* vs. *Anderson*, 5 *Bos. & Pul.* 69 When goods have been consigned by one merchant to another, under an order from the latter, the sale is considered as being completed, when the order is accepted and executed. The delivery of the goods, in this case, to the carrier is a delivery to the consignee, in whom the whole property is vested. 5 *Bos. & Pul.* 119. *Brown* vs. *Hodgson*, 2 *Campb. N. P. C.* 36. *Evans* vs. *Martlet*, *Ld. Raymond*, 271. If the consignee became insolvent, while the goods are on their passage, the courts of equity have allowed the vendor to stop them *in transitu*; and this right has been recognized by courts of law. The principle upon which this right has been established is, that, when the vendor has been able to obtain possession of the goods sold and not paid for, before they come to the hands of the vendor, it would be hard and against equity, to compel him to deliver them up, and come in for a contribution. But, when the goods have been actually delivered to the vendee, or his agent, this right does not exist, the transit is determined, and the vendor has only the right of a general creditor. That such is the law of England, is well known, it is not denied on the part of the plaintiffs, and it seems hardly ne-

cessary to refer to authorities upon this point. Where the bankrupt has goods in his possession as agent or factor, and these goods can be identified, they will be delivered up to the owner. But the bankrupt is himself the owner of such goods as have been sold to him, although not paid for, and these must be applied to the general benefit of his creditors. All the cases upon this subject are collected in a treatise upon the law of principal and agent, vol. 1, from page 261 to 307,—see particularly *Tooke* vs. *Hollingworth*, 5 *T. R.* 215. *Bent* vs. *Puller*, 5 *T. R.* 494.

Such then is the situation of the plaintiffs. They are vendors claiming property, which has fully vested in the insolvents, and upon which they have no privilege or mortgage. They can complain of no hardship, in being obliged to enter into contribution with the other creditors of Stodder & Hewitt; for they have the full benefit of their contract according to the laws of their own country, in which it was made.

Workman, in reply. Much of the learned gentleman's argument seems founded on the opinion that the Roman law is applicable to the present question. That it is not so, I think is evident, from all the provisions of that section

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of our code which has been quoted, and by which this suit must be decided. The court knows well that the Roman law is of very limited authority in this state, upon any subject. That it is referred to so often, arises from its general conformity to the Spanish and French codes, by which in civil causes we are for the most part governed; and from the light which it throws on these of our laws which have been founded on its principles.

Our law, which gives the vendor the privilege we now claim, is not founded on the Roman law, which gives the vendor a right to reclaim or revendicate his goods, when the price is not paid. The reason assigned by the Roman jurisconsults is, that the thing sold does not belong to the purchaser, unless the price be paid, or secured to the seller. Neither this reason, nor this provision, can have been contemplated by our legislators. They consider the thing sold to belong to the purchaser whether the price be paid or not.

They declare that the vendor's privilege shall be exercised only after that of the owner of the house or farm: and there are various other privileges which take precedence of both. This court has decided that law charges are privileged in preference to the vendor's claim for

the unpaid price. But nothing of this kind could take place, if the vendor had the right of rescinding the sale, and revendicating the goods as belonging to him, and not to the purchaser. If the goods still belong to the vendor, they cannot be made subject to the funeral charges, nor the law charges, nor the charges for medical attendance, due by the purchaser of those goods: to all of which charges, they are made subject by our code, before the vendor can recover any part of their price. The word *revendiquer* has been inadvertently used in the 5th clause of the 74th article; as all the other clauses and articles of the section most clearly shew.

The object of the clause, in favour of the established laws and usages of commerce, was probably neither to restrict or extend the vendor's privilege in mercantile cases; but to leave it exactly as it stood before. Much of the ordinance of *Bilbao*, it is true, is inapplicable to our situation, but most of its provisions in cases of bankruptcy and failures, are considered as in force throughout Spain and her colonies, and have been recognized in this state. The clause could never have been intended to introduce the commercial laws prevailing in the other states. They are subject to be altered

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and modified, and have in fact been often altered and modified by the state legislatures.

The arguments used in the case, cited from *Casaregis*, being founded on the Roman law (which I have shewn to be in this matter essentially different from ours) neither those arguments nor the final decision of that case, can have any weight with the court in the cause now before them.

In the case of the General Smith (cited from 4 *Wheaton*) the suit was brought in the same state (Maryland) in which the cause of action arose. The *lex loci contractus*, and the *lex fori*, were the same.

In the supposed case of goods sold in Louisiana to a person residing in England, I have, as the gentleman observes, taken it for granted that the English courts would not maintain the vendor's privilege according to the provisions of our laws. I found my belief on the ground that no case can be shewn in which such a privilege has been admitted. It cannot, in the nature of things, be required of me to prove that no such case exists; but I can aver that I have not found any such case, though I have diligently examined the books for that purpose. If English law, or English equity were as the gentleman supposes, many such cases must

have occurred in England since the establishment of her bankrupt laws. Her constant commercial intercourse with the states of the continent of Europe, where the Roman civil law prevails, must have given occasion, in cases of bankruptcy, to frequent claims of the vendor's privilege on the part of the merchants of these states, who had sold goods there, to the merchants of Britain. And the same thing must have often occurred in the United States. But if no such cases can be produced, we are bound to presume that it is universally known that no such claim of privilege could be supported.

On the whole, there appears to me no good reason why the judgment of the parish court, in this cause, should not be confirmed.

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 privilege as vendors on certain goods described in their petition.

It appears, by the evidence contained in the record, that the insolvents were in the habit of ordering goods and merchandize to be sent to them in New-Orleans, by their correspondents, the appellees, merchants of the city of London,

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in the kingdom of Great-Britain, who executed such orders and received payment by remittances in the usual course of trade between said places; and that, at the time of the failure of the appellees, certain parcels of the goods transmitted to them as above stated, were found unaltered in their possession and passed into the hands of the syndics, on which the plaintiffs claim a privilege.

On this statement of the case, two questions may be made: 1st. under the laws of which country was the contract made? 2d. Is the privilege of vendors of the nature of the concontract of sale, or does it belong to the remedy for enforcing such contracts?

In cases of contracts made between persons who are absent from each other, by means of letters or authorised agents, we are of opinion that the doctrine, as established by *Casaregis*, in his 179th discourse on commerce, is correct, viz. that they are made in the country and subjected to its laws, where the final assent may have been given, which is that of a merchant who receives and executes the order of his correspondent. In this view of the subject, the present sale must be considered as one made in England, and to be governed by the laws of that country, so far as relates to its effects;

and it is agreed that those laws provide no privilege for vendors in cases like the present.

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Our laws do grant the privilege contended for by the plaintiffs; and if it be one appertaining rather to the remedy than the contract itself, they ought to be maintained in their claim. We have not been able to find a decision directly in point, made by any other tribunal of justice; and the question is new to our own courts.

In the case cited in favour of the appellants, from the author abovementioned, same discourse *n.* 53, 55, it was determined that a privilege secured to sellers by the laws of a country where the contract was made, followed the property into one where by law, no such privilege existed. This decision goes far to shew that the privilege was considered as belonging to the contract itself, and not to the remedy for enforcing its execution. When men enter into agreements, they generally do so with reference to the laws of the place where they contract, and ought not to calculate on having their rights and claims, enlarged or diminished by the laws of any other.

We are of opinion that the judgment of the court below is erroneous. It is, therefore, or-

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dered, that the property claimed and sequestered by the appellees, be restored to the syndics of the insolvents, as belonging to their estate, and that the appellees pay costs in both courts.

SEGHERS vs. *HIS CREDITORS.*

An insolvent cannot contest the legality of the choice which his creditors make of syndics.

Seghers made oath, that proceedings were had, in this case, before a notary, by which Labatut and Sainet appeared to have been appointed syndics of his creditors, and the proceedings being brought for homologation, in the district court, an opposition was made by Desbois, one of the creditors, and the proceedings being perceived by the deponent to be irregular and null and void, he filed likewise his exceptions thereto, in writing, stating the several grounds of nullity on which he relied, and prayed that another meeting might be had, with directions to the notary to proceed thereon according to law.

That afterwards, on the 21st of August, 1819, a final judgment, was rendered by the district court, overruling the deponent's application, as well as Desbois, and approving the appointment of the syndics.

That Desbois having appealed from the decision of the district court, it was affirmed by the supreme court, and the deponent firmly believing that, as a party to the judgment of the district court, he was likewise entitled to an appeal, he presented his petition therefore to the district judge, who rejected his application. Whereupon, he moved for a writ of *mandamus*.

Seghers, in support of the motion. An insolvent has a right to resist an illegal appointment of syndics, and is not bound by a decision, even of this court, confirming the appointment of persons illegally chosen as such, when he was not a party in the suit, in which this decision was given.

I will endeavour to shew what syndics are, and in what relation they stand to the insolvent.

Syndics are the mandataries of the creditors of an insolvent. Theirs differ from other mandates, in not being susceptible of substitution.

As the assent of all the creditors cannot conveniently be procured in the appointment of syndics, the law has established certain formalities, on the fulfilment of which, the assent of a majority suffices; but these formalities must be strictly fulfilled, as the minority are bound

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by the choice, in their absence, and even notwithstanding their opposition.

Syndics, as mandataries of the creditors, possess themselves of the goods ceded by the insolvent, administer them, sell them without his concurrence; although he is at last the victim of an ill administration, since the property, which he may afterwards acquire, is bound for any deficiency. He has, therefore, a strong interest that intruders should not possess themselves of the property which he has ceded, in other words, to contest the legality of the mandate.

In ordinary cases, those who have to deal with a person, who causes himself to be represented by a mandatary, may inquire into the validity of the mandate. The curator of a vacant estate, where an account is asked by the heirs, through the intervention of a mandatary, is not bound to render it till the legality of the mandate be established. Is the unfortunate debtor in a different situation? Is he bound to surrender his goods to the first that come, to allow them to administer and dispose of them, without being permitted to inquire into the legality of a mandate, which is so powerfully to affect his interests? This cannot be supposed. The law has made no such excep-

tion, to the injury and detriment of the insolvent. It is true that the act of 1817, which regulates the manner in which creditors may oppose the appointment of syndics, does not speak of the insolvent. But are we not to conclude that the legislator did not make any innovation on his rights? This act, which is *stricti juris*, imposes reciprocal duties on the creditors and debtors, and prescribes certain formalities. These are strictly to be observed, and though the statute does not declare any omission therein fatal, if the insolvent was to fail in one single iota, the least of his creditors might prevent his obtaining relief. Ought he not then to be permitted to inquire whether his creditors proceed legally? Can it be supposed that the legislature, subjecting the insolvent to surrender any property he may hereafter acquire, to make up any deficiency that may happen, intended to leave him a passive victim, not allowed to raise his voice to avert his destruction, and leave him only a tardy and precarious remedy, in an action for damages, for an injury which a timely application might guard against.

The applicant was compelled last year, notwithstanding his utmost efforts to call his creditors together and surrender his property to

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them. Three or four of them, on false or spurious allegations had obtained a writ of sequestration. He sought for a respite and had sufficient property to meet every demand, had he been allowed a short time to dispose of it. A very small majority compelled him to a surrender. He has rigorously done every thing which the law requires from unfortunate persons, in his situation. Has he not the right to demand that his creditors should in their turn do what it requires of them?

The proceedings of the meeting of the creditors were so conducted, as to exclude the certainty of the appointment of syndics, being the act of the majority. Nothing, in the conduct of the person appointed, tends to compensate the insolvent or his creditors for the irregularity of the choice. Precautions the most puerile and expensive, inattention and carelessness, have occasioned considerable disbursements and losses. Sales of property repeatedly advertised and postponed; forced ones made by the sheriff, which might have been prevented, and which have been attended with direful sacrifices; meetings of creditors frequently held; the departure of one of the syndics for Europe; the useless detention of many slaves surrendered, while they might be advantageously hired, are

considerations which impel the applicant to insist on his right to the protection of this court, so far as to be permitted to shew that the appointment of the syndics of his creditors is as illegal as their administration is destructive of the interest of the creditors and debtor.

Nothing was taken by the motion. *Ante*, 67.

UNITED STATES BANK vs. *FLECKNER.*

Banks have no summary relief against the maker of a note, not given for the purpose of being discounted.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The act entitled "an act, to determine the form and effects of the election of domicil, with regard to promissory notes made in favour of the banks of this state, and for other purposes," approved in March 1818, has provided in favour of the banks, a summary remedy in certain cases. The present defendant, being sued in that summary way, pleads that his debt is not one of those against which this particular mode of compulsion has been established.

The suit is brought upon a note which the defendant subscribed in May, 1818, to one John Nelder: the note was payable in March,

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1820, and after having passed through several hands, was discounted at the office of discount and deposit of the Bank of the United States, in September 1819. On its becoming due, it was protested for non-payment, and the bank now pray for a judgment, and an order of seizure and sale of the property of the maker, under the following words of the abovementioned act. "Be it enacted, that when banks shall lend money on a note, or on a special mortgage, they may obtain, to wit, with regard to a note, on motion being made before any court of competent jurisdiction, a judgment and an order of seizure and sequestration," &c.

This departure from the ordinary rules of proceeding, in favour of banks, is said to be intended not merely for cases where application is made to a bank for a loan, but for all cases where banks chose to discount notes at the request of the holder; in other words, this remedy is said to be given not merely against the borrower and his co-obligors, but against any person who may have subscribed and endorsed a note of hand, no matter for what cause. Can this be a sound construction of this law? Can the legislature have intended to subject the subscriber or the endorser, of no matter what note, to the contingency of being sued in this man-

ner, should his note find its way into one of the banks?

We think that the legislative act, here alluded to, has done no such thing. It has established particular rules for the case where banks lend money. The contract spoken of is one of loan: the parties to it are the bank, on one side, and the borrower and his co-obligors, on the other. To compel the reimbursement of the money borrowed, it provides a summary and prompt remedy in favour of one of the parties against the other. Where the money is lent on the credit of the borrower and his co-obligors, there is no difficulty in applying the law. But where he, who asks money from a bank, presents the note of another person to be discounted, a very material difference takes place in the nature of the contract. It is partly, as the defendant contends, a transfer or sale of his claim against the maker and the previous endorsers, and partly an obligation on his part to reimburse the money, if the maker does not pay. As applicant for money, under this promise of reimbursement, he perhaps might be considered so far in the light of borrower as to be liable himself to the mode of prosecution established against those who borrow from the banks, though we do not pretend to decide this

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question; but the maker, and the antecedent endorsers of the note, who are with respect to this application perfect strangers, surely ought not to be treated as borrowers. The violation of principles to which this mode of proceeding would lead, is too obvious; and the injustice, hardship and vexation, with which it would be attended, are too glaring to require any comcomment.

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

Livermore for the plaintiff, *Livingston* for the defendants.

CAMFRANCQ vs. *DUFOURS HEIRS & AL.*

In an action on a lost note, the plaintiff is held to very strict proof.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff is the representative of the commercial house of Camfrancq, Thezan & co., formerly residing at Port au Prince, in the island of Hispaniola, and is entrusted with the

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* MARTIN, J. did not join in this opinion, having some interest in the question.

settlement of its concerns. In that capacity, he has brought this suit on a promissory note subscribed in the year 1771, by one Langouran to John & Francis Depas, brothers, in part payment of a plantation bought by the maker from the payees; which note, it is said, was transferred by the Depas, to one Lockwood, and by Lockwood to the plaintiff's said commercial house. To recover the amount of that promissory note, he has called upon the present defendants, as heirs of Louis V. Dufour and John Laroque Turgeau, who, he alledges, assumed the payment of that debt.

The plaintiff does not produce the note. He has endeavoured to show that it was lost amidst the troubles of the revolution of Hispaniola. In that, however, he has not succeeded; for the note is traced up for the last time, into the hands of one Hugon, the plaintiff's agent, who, it appears, came away from Hispaniola with all his papers. The objection, therefore, to the claim, as founded on a title which is not produced, would probably, on examination, be deemed fatal to the plaintiff. But laying aside the consideration of it, we find this action unsupported by any proof that the note, on which it is brought, ever became the property of the plaintiff's commercial house.

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It is indeed shown that Dufour and Laroque Turgeau bought from Langouran the same plantation, for part of the price of which Langouran had formerly subscribed the note in question, and that they assumed the payment of that note, which, it appears, was then the property of Lockwood. But there is no positive evidence that the note was ever transferred to the plaintiff's firm. There are presumptions, to be sure, that it was once in their hands. Laroque Turgeau once wrote to the plaintiff, that he and Dufour were disposed to make some arrangements to pay him an old claim against Langouran, of which he (the plaintiff) was the bearer. Edward Cauchois, one of the witnesses, "had once in his hands, for collection, several claims due to the plaintiff's firm, and among the papers belonging to that firm there were some titles, such as judgments and others, from which it appeared that Depas, debtor of one Lockwood of a sum of 14000 livres, had sold his estate to Langouran, and this last to Dufour and Laroque Turgeau, with delegation of that sum." Now, such information would do very well to help in the research of a title, but it surely will not suffice to prove one. After having given such evidence its due weight, it still will remain a matter of doubt, whether

the note sued upon was the identical debt mentioned by Laroque Turgeau, whether it was part of the documents mentioned by Cauchois, whether that note was actually transferred by Lockwood to the plaintiff's firm; or whether the plaintiff had undertaken to collect it for Lockwood's account: for the note being due years before it is pretended to have come into the plaintiff's hands, the mere holding of it would be no proof of transfer.

Upon the whole, we are satisfied that the plaintiff has failed to support his claim by sufficient evidence.

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

Seghers for the plaintiff, *Livingston* for the defendants.

HENNEN vs. *DESBOIS & AL.*

APPEAL from the court of the first district.

The demand must be made at the dwelling of the maker of the note

If an endorser' ignorant that no demand was made of the maker.

DERBIGNY, J. delivered the opinion of the court. This suit is brought against the maker and endorsers of a promissory note which was protested for non-payment. The signature of

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the maker being proved, judgment was of course rendered against her. But the endorsers resist this claim on the ground that no demand was made of the maker. The evidence shows that some demand was attempted to be made at a place where the maker was not, and where she did not reside. This being the same thing as no demand at all, the endorsers must be discharged.

promises to pay, he will be relieved.

One of the endorsers, it seems, made proposals for the renewal of the note, after it had been protested, and is pretended to be particularly liable on that ground. But, as nothing shows him to have known at that time, that no demand had been made of the maker, he cannot be considered as having waived his right to be exonerated on that account.

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

The plaintiff *in propriâ personâ*, *Cuvillier* for the defendants.

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vs.
ROSE & CHILD

BAZZI vs. *ROSE & HER CHILD.*

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

MARTIN, J. delivered the opinion of the court. The petition states that these defendants are the plaintiff's slaves, and obtained a writ of *Habeas corpus* from the president of the criminal court, on which they were discharged, that the proceedings therein are erroneous in law and in fact.

The answer avers the freedom of the defendants and there is a plea of presumption.

There was judgment for the defendants and the plaintiff appealed.

There comes up with the record, a number of depositions and several bills of exceptions, no part of which it appears necessary to examine. The defendants claim their freedom, under a deed of emancipation from the plaintiff. *Liberæ vel non*, is the only issue which can exist between the parties. If they be slaves, they cannot contest the plaintiff's title to them. They have no capacity to stand in judgment for any other purpose than to establish or defend their claim to freedom. *Trudeau's ex'tor* vs. *Robinette*. 4 *Martin*, 580.

The laws of Spain require the presence of five witneses to the emancipation of a slave, by parol.

If an informal emancipation takes place, the master promising to comply with the legal formalities, his rights are not thereby affected before the formalities be observed:

A record of such an emancipation, in this state, does not affect these rights.

If a slave procures his discharge by *habeas corpus*, the master is not thereby precluded from establishing his right.

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The act of emancipation introduced by the defendants is dated St. Jago de Cuba, May 24, 1805, and purports that the plaintiff "desirous of acknowledging the signal services of Gertrude, a Congo negro woman, aged 14 years, on several occasions, gives freedom to her and her child Rose, aged 16 1-2 years, to be fully enjoyed without any trouble: promising in due time and place, to comply with the formalities, which the law requires."

The parish court "considering that the plaintiff, by sending the act of freedom, which he had directed to be passed in the island of Cuba, in behalf of the defendants, in order that it might be deposited here with a notary public, to make it valid, as well by his long silence thereon afterwards, as by his subsequent conduct with regard to the defendant Rose, and her free baptized children, until lately, when he thought he had good reason to complain of her, had thereby completed and confirmed his act of freedom (which, in the opinion of the parish court, on the circumstances of this case, the favorable application of the law must protect,") gave judgment for the defendants.

In the correct decision of this case, it is all important to decide whether the defendant Rose, acquired her freedom in St. Jago de

Cuba, by the execution of the deed which the plaintiff has caused to be recorded here. It is not pretended that she had any claim to freedom when she left the island of Cuba, exclusively of the contents of this deed. For, if she arrived here a slave, she must still be considered as such, unless she has been emancipated according to the laws of this state, and this is neither alleged nor proven.

The *Partida* 4, 22, 1, requires that, where emancipation takes place in writing, it be done before five witnesses. *Es menester que quando lo affrase per carta, o ante sus amigos, que lo faga ante cinco testigos. Gregorio Lopez*, in his commentary on this law, says this solemnity has been held unnecessary; but the writer does not quote or allege any law in support of the assertion, and *Lopez* concludes that it is: *non allegat legem quæ suum dictum probet, unde servanda est ista lex quæ vult hoc esse necessarium.* The grantor, in executing this deed, knew his right was not thereby destroyed; since he promised to fulfil the formalities, the *sine quæ non*, which the law required. It therefore results, that the execution of this writing or deed did not render the defendants free. Nothing shows that any thing did happen in Cuba, by which the defect of the deed was cured.

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If these defendants were slaves on their leaving Cuba, they were so at their landing in this state. Here, the law requires certain formalities for the acquisition of freedom, none of which are pretended to have been fulfilled. Is the record of the deed, in the office of a notary, an act under which the defendants may claim their freedom? We think not. It is contended that the admission of the plaintiff, that he executed the deed makes full proof against him, and that the Spanish law requires the presence of witnesses to protect the grantor against the perjury of a single witness. The laws of most countries require formalities or ceremonies to attend the execution of certain contracts: and although these formalities and ceremonies generally, perhaps universally, tend to secure a stronger evidence of the contract, this is not perhaps the only object. In the case of an emancipation *delante sus amigos*, in the presence of friends and before five witnesses without writing, spoken of in the *partida* cited, the required presence of five witnesses might not always protect against the perjury of a single witness. For the emancipation would be proven, if he deposed it took place before him and four witnesses, dead since. The presence of a magistrate, the attendance of an unusual num-

ber of witnesses, the affixing of a seal, are all circumstances which, besides securing more evidence, are attended with this particular advantage; they make a strong impression on the mind of the party, excite reflection in him upon the subject he is engaged in; they ordinarily require time and, consequently, afford an interval for thought and awake apprehension, and are no contemptible guards against circumvention, fraud and surprise. 1 *Haywood*, 203. Farther, the deed itself shews that the grantor did not intend to destroy, *ipso facto*, his right on the defendant Rose: he knew what he then did, had no such effect: for he agreed, at a future time, to comply with the formalities which the law required. What he did must then be considered, notwithstanding the words in the first part of the deed, as a manifestation of his intention to free the defendant Rose and her child, at a future day. His subsequent conduct, till the record of the deed in the notary's office, shews that such was his apprehension.

Is the case altered by this record? We think not. If the plaintiff held legally the defendants as his slaves, when they landed in Louisiana, they must have remained so, unless

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emancipated according to our laws; and this is not pretended to have been done.

It is urged that the emancipation of the defendants is *res judicata*, having been pronounced by a judge, on the return of an *habeas corpus*, contradictorily with the present plaintiff. The judge, who issued the writ, was without jurisdiction in a civil case. He could not, finally decide the question of property, though he might accidentally consider it. It would be strange, if without a jury, without a right of appeal, a citizen of this state could be deprived of all his slaves by the parish judge, or by a justice of the peace, who might give judgment against him, on an action for work and labour done.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the defendant Rose and her child, be decreed to be the slaves of the plaintiff.

De la Chaise for the plaintiff, *Carleton* for the defendants.

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ULZERE & AL. *vs.* POEYFARRE.

ULZERE & AL. vs. *POEYFARRE.*

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

Questions of law cannot be specially submitted to the jury.

The record of a suit cannot be read against one, who was not a party or privy thereto.

Parol evidence is not admissible of the contents of decrees of the French or Spanish governors of Louisiana.

MARTIN, J. delivered the opinion of the court. The petition charges that Mary Ann, a Chickasaw squaw, was by various means entrapped and conveyed to M. Songy, a planter, of the parish of St. James, then under the dominion of Spain—that, shortly after she had two children, Ulzere and Frances, two of the plaintiffs, who were duly baptised, and whose certificates of baptism will be produced at the trial; that afterwards Frances bore Marie Therese and Casimir, the two other plaintiffs, who were also duly baptised and whose certificates of baptism will also be produced at the trial; that Mary Ann, during her life was considered as an Indian woman; whom it was unlawful and unjust, to hold in slavery. That an attempt having been mode to restrain her, she left M. Songy's plantation and came to New-Orleans, where she made application to the baron de Carondelet, then governor of the province, who gave her a letter to the commandant of the parish of St. James, which produced her liberation from all restraint, and she died a free

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pauper, in the hospital of New-Orleans. That when she last came away from the parish of St. James, she left the plaintiffs Ulzere and Frances, under the care and protection of M. Songy, on whose death the defendant, as heir of the said M. Songy, possessed himself of the persons of the plaintiffs, as part of the estate, and keeps and detains them in slavery.

The defendant pleaded the slavery of the plaintiffs, his property in them and the general issue.

The plaintiffs submitted the following issues to the jury, who found them to be true.

1. The plaintiffs are descended from an Indian woman of the Chickasaw tribe.

2. The Chickasaws now are, and ever have been, a free and independent nation.

3. Their independence has been recognized by the nations, who have successively possessed and governed Louisiana.

4. Reducing Indians to slavery has been prohibited by the French, as well as the Spanish government.

5. The color of the plaintiffs shews them to be of Indian origin.

6. The defendant has shewn no title, by which he can hold the plaintiffs as his slaves.

There was judgment for the plaintiffs and the defendant appealed.

The record contains several bills of exceptions, the depositions of a number of witnesses, and some documents.

1. The first bill is to the opinion in overruling the defendant's objections to the facts thus offered to be submitted to the jury, on the score of some not being pertinent, and all of them illegal.

2. The next is to the opinion of the court in overruling the objection of the defendant's counsel to the reading of a paper, purporting to be a judgment in favour of an Indian woman of the Natchez tribe.

3. Another is to the examination of Francis Dreux, upon the fact of the baron de Carondelet, liberating by a decree all Indians in slavery.

4. Another to the examination of the same witness, Guinault and others, to the contents of decrees of governors O'Reilly and Carondelet.

5. The next is to the examination of witnesses to prove certain ordinances of the king of France.

6. The last is to the admission of an amendment to the petition towards the end of the trial, after the testimony was closed.

1. The first and fifth issues appear to us pertinent and were properly admitted.

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The second is an historical fact, the pertinency of which is not very apparent. The independence of the Chickasaw nation, goes but a little way to establish the freedom of an individual of it. Many negro tribes, individuals of which are held in slavery, are independent. Inhabitants of a colony are individually as free as those of the metropolis.

If the independence of the nation be immaterial, the recognition of that independence cannot be material.

The abstract proposition, that the French and Spanish governments prohibited the reduction of Indians to slavery, is considered by this court as a question of law ; and the parish court, in our opinion, erred, in submitting it to the jury as one of fact.

The principal issue, in this case, was *liberi vel non* ; the title, therefore, of the defendant to the plaintiffs as his slaves was erroneously submitted to the jury. They were free or not. If free, it is clear they were not the subject of property and no title to them could exist in any body. It they were slaves, they had no right to contest, no faculty to stand in judgment on the question of the defendant's title. *Robinette* vs. *Trudeau's ex'rs.* 1. *Martin*, 580.

II. Nothing shewing that any of the parties in the present suit were so to the judgment in favour of an Indian woman of the Natchez tribe, the record of the suit, in which she was liberated, was improperly read. The suit was *res inter alios acta* and the parish judge erred in overruling the defendant's objection. *Morgan* vs. *Livingston & al.* 6 *Martin*, 227.

III. Decrees of the governors of Louisiana, and ordinances of the kings of France, are matters of record, not susceptible of being proved by witnesses, until the loss or destruction of the originals, and the absence of copies be established. The parish judge, therefore, erred in overruling the objections of the defendant's counsel, recorded in the third, fourth and fifth bills of exceptions.

IV. The last bill of exceptions is to the opinion of the court, in allowing an amendment to the petition, after the testimony was closed. This amendment is the addition of the following paragraph: "And your petitioners further shew, that from and in consequence of the facts and circumstances alleged in their petition, they are and each of them, is entitled to freedom in virtue of the third article of the

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treaty between the United States and the French republic, by which the colony or province of Louisiana, was ceded to the United States." The application for leave to add this clause or paragraph was made on the authority of 1 *Binney*, 368. 2 *id.* 291. 2 *Strange*, 1151. 1 *Douglas*, 151.

We cannot well see the object of this amendment. The constitution and treaty, to which the plaintiffs refer, being the supreme law of the land, the court was bound to take notice of them, without their being pleaded. We are, however, unconscious of any disadvantage that may result to the defendant, from the admission of the amendment, and we cannot say that the court erred in permitting it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and the case is remanded for trial, with directions to the judge to strike out the fourth and sixth facts. We permit the rest to remain, because, although the pertinency of some of them be not obvious, we wish not to deprive the plaintiffs from any advantage which their counsel may contemplate from the finding of the jury. We further direct the parish judge not to admit the record

of the suit in favour of the Indian woman of the Natchez tribe, in evidence, nor allow any parol evidence of the contents of any decree or ordinance of the governors of Louisiana, or French king, unless the destruction of the original be proven.

Davesac for the plaintiffs, *De la Chaise* for the defendant.

LIVAUDAIS' HEIRS vs. *FON & AL.*

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

A master may sue for what is due to his slave.

MATHEWS, J. delivered the opinion of the court. This is a suit brought by the appellees (plaintiffs in the court below) to recover the amount of a note, given by the defendants to Frosina, a slave of the plaintiffs, by which they promised to pay to her four hundred dollars.

Payment is resisted on the ground of the promise having been made in error, and consequently having created no obligation, it being a contract without cause or consideration. The execution of the note raises a presumption of a just consideration, which must be defeated by proof to the contrary, on the part of the defendants. This they have attempted by the production of a testament made by one Durand, in

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which he instituted Pedro, his bastard child by Frosina, the slave above mentioned, his heir, and appointed Fon, one of the appellants, his testamentary executor; and by the introduction of testimonial proof, shewing that the child died in 1812, &c.

Admitting that all this evidence was properly received, in the present suit against Fon and an other person, on their joint note, which is by no means clear; we are of opinion that it is not sufficient to support the defendants' objections to payment. For any thing, which appears to the contrary, the boy Pedro, the instituted heir of Durand, was the slave of the plaintiffs or their ancestor, and took the instrument under the will for their benefit, in conformity with the laws then in force. The right to the succession being thus vested in them, they might have instituted an action for its recovery against the executor. This they have not done, but now sue upon a note given by him and another to their slave Frosina; being, as the appellants insist, a liquidation of Pedro's succession, to his mother, which she could not take in consequence of her state of slavery.

The former having died since the promulgation of the *Civil Code*, that statute, 40, *art.* 17, & 158, *art.* 31, is relied on to establish the error, and

consequent nullity of the defendants' promise to pay the sum to Frosina, as stipulated in their note. According to the first of those provisions, being a slave, she was incapable to contract any kind of engagement. It is true, that she could not bind herself in any respect, because she was without will; nor could she have entered into any contract, which would be binding on her owner, unless under special authorisation by him. But it does not appear to us, to follow, as a necessary consequence, that the master cannot claim the benefit of a lawful and voluntary engagement made in favour of his slave, on an equitable consideration, by a person capable of contracting.

By the last article cited, slaves are declared to be incapable of transmitting their estates, as intestate, or of inheriting from others. They certainly can transmit nothing, for they do not possess any thing in their own right; neither can they inherit, clearly not for themselves; and perhaps not for the benefit of their masters. The same incapacity is attached to them, of giving and receiving by donation *inter vivos* or *causa mortis*, they therefore cannot take by will for themselves.

In pursuance of these rules, Frosina could not succeed to the estate of her son; but the

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owners had a right to claim it from the testamentary executor of Durand; and having this right, it cannot properly be said that no cause or consideration exists for the note by which he promised to pay that amount, when it is seen that such promise inures to the benefit of those who have a just and legal claim to the succession of Pedro. Considering the note, as a liquidation of this succession, there is sufficient cause for the contract thus made by the executor, and he has been rightfully condemned to pay the sum therein stipulated; but ought to be exonerated from any other or farther claim against him, on account of the estate, willed by Durand, to his bastard child.

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

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

DUSSUAU & AL. vs. *DUSSUAU & AL.*

Damages allowed, when the appellant does not procure a statement of facts nor assign any errors.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs claim to be reimbursed a sum of five hundred dollars, which they paid

to the defendants in advance, for work that has never been done, judgment being given against the defendants, they have brought up their appeal, without any statement of the facts on which it was rendered, and assign no error for which it ought to be reversed. The appeal is evidently taken for the sake of delay.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs and five per cent. damages. *Clark* vs. *Parham*, 3 *Martin*, 405. *Shannon* vs. *Barnwell & al.* 4, *id.* 35.

Hoffman for the plaintiffs, *Davesac* for the defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District. *June*, 1820.

COIT *vs.* JENNINGS.

EASTERN DISTRICT, JUNE TERM, 1820.

COIT vs. *JENNINGS.*

In an action for a tortious conversion, the court of the parish and city of New-Orleans has jurisdiction if the conversion be within the parish, tho' the property came to the defendant's hands, out of it.

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

MARTIN, J. delivered the opinion of the court. The petition states that the plaintiff's testator was drowned in the bayou Teche, in the parish of St. Martin, and the defendant took a large sum of money, from the corpse, which he brought to New-Orleans and deposited in a bank, in his own name, that the plaintiff made a demand of it, and the defendant refused to pay the same, whereby he became indebted to him, in the sum of $6150, the amount taken from the corpse, with damages.

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The defendant pleaded in abatement, that the court of the parish and city of New-Orleans, in which he is sued, has no jurisdiction of the case, because the cause of action originated out of the parish.

There was judgment for the defendant on this plea, and the plaintiff appealed.

The defendant urges that his plea did properly prevail, if the facts stated in the petition be true: the money sued for came to the defendant's hands in the parish of St. Martin, and it is the taking of the money which is the origin of the claim.

The plaintiff contends that he has brought his action for a debt, and has stated that the defendant is indebted to him, to the amount of the money taken from the corpse. Now the taking of the money did not create a debt, for the defendant might well and honestly take a sum of money from the corpse, for the purpose of preserving it from destruction or stealth, without thereby creating a debt, for had he been robbed, or otherwise lost the money without any fault or neglect on his part, he would not have been liable to pay. The depositing the money in bank, even in the defendant's own name, would not have created a debt; for it was a measure of safety. Had the bank

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failed, no claim could have existed against the defendant for he was not indebted. But he afterwards refused to pay or deliver this money to the executor of the deceased; and this refusal is evidence of a conversion of the money to his own use, a tortious act, which made him liable for the money, even if the bank, with whom it was deposited, afterwards failed. This circumstance is presented as the origin and ground of the claim. A claim not for an account, but for the payment of an existing debt resulting from the wrongful conversion of the money of the estate to the use of the defendant.

We are of opinion, that the case in the petition might justify the plaintiff in supporting an action, on an implied contract, similar to the action of the common law for money had and received to his use, and which would have been supported by the evidence of the money being taken out, in St. Martin's parish; but he has chosen to state the tort or conversion in New-Orleans, proved by the defendant depositing the money in his own name and refusing to pay. Although the depositing of the money would not be an evidence of a conversion, the refusal to pay it is certainly. The case is, therefore, to be fairly and strictly supportable,

on a cause of action, accruing in New-Orleans, viz. the application of the money to the defendant's use.

Pleas in abatement are not to be favoured, and unless the defendant shews a clear case, must be overruled. The parish court erred in sustaining the plea.

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 judge to proceed, as if the plea had been overruled in his court, and it is ordered that the costs of the appeal be paid by the appellee.

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

HATCH vs. *GILLET.*

Appeal from a refusal to grant a new trial, sustained.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. After a verdict, found in favour of the plaintiff in this case, a motion was made in the court below to obtain a new trial, founded on several affidavits as stated in the record; which having been overruled and judgment given ac-

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cording to the verdict, the defendant appealed.

The correctness of the decision by which the motion for a new trial was overruled is not now questioned; and the verdict and judgment are supported by law and the evidence of the case. It is, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Morse for the plaintiff, *Eustis* for the defendant.

LAWES & AL. vs. *WINTER & AL*

A case will be sent back for a new trial, if justice appears to require, that a fact of which there is presumptive evidence only, be fully proven.

APPEAL from the court of the second district.

MATHEWS, J. delivered the opinion of the court. There is one fact, in this case, which, although the record contains presumptive evidence of its truth, does not appear sufficiently clear, to authorise the court to proceed to judgment.

It is this: that the plaintiffs are heirs to the succession of C. Conway, who guaranteed the title of the property in dispute, to the defendants; but as, from the present state of the evidence contained in the record, it is doubtful

and being of the utmost importance in the decision of the cause, we are of opinion that justice requires that it should be remanded to the court below to have this fact ascertained.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be reversed, avoided and annulled, and that the cause be sent back to the district court to be again tried, with instructions to admit all legal and proper evidence, which may be offered on the part of the defendants, to establish the heirship of the plaintiffs to C. Conway and, that the appellees pay the costs of this appeal.

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

ASTOR vs. *WINTER.*

APPEAL from the court of the first district.

If the petition concludes with a prayer for the attachment of a specific debt, the sheriff cannot attach any thing else.

Samuel Winter, a native of New-York, having migrated to this state, amassed by his own industry a considerable fortune. In the year 1812 he returned to the state of New-York, *where he made a will* according to the laws of that state, *instituting as his exclusive heirs*, and by an universal title, *his brothers and sis-*

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ters. His father is not named in the will: his mother, Mary Winter, is named as a legatee by a particular title, and she, with three of his brothers, are named guardians of such of his brothers and sisters, as may not be of age at his death. He appointed Thomas L. Harman, Thomas Callender, Nicholas Girod and his brothers Elisha, Gabriel and Joseph, his executors with seisin of the succesion.

Afterwards he returned to New-Orleans, where, in October 1813, he died without lawful issue and without having revoked or altered his will.

The instituted heirs having been, both before and since his death, inhabitants of New-York.

His father and mother were also, then and before and have ever since been, inhabitants of New-York, as was also at the date of the will, and before and ever since the plaintiff, (John Jacob Astor) and where also the debt on which the suit is brought was contracted.

The petition alleged that the defendant is the plaintiff's debtor, is father and forced heir of Samuel Winter, the testator, that he is insolvent and refuses to accept his share of the succession, in fraud of the plaintiff and his other creditors.

The petition prayed that the defendant might

be cited to shew cause, why he should not accept the succession within a time to be limited by the judge, or, that the defendant might be authorised to accept in his stead: the citation issued, but was not served on the defendant.

The plaintiff prayed an injunction, injoining the executors from paying over to the defendant, the said third part of the inheritance. The plaintiff also prayed an attachment of a certain debt of E. Livingston, to the defendant; which attachment was laid on the said fund in the hands of the debtor, and further was laid by the sheriff on the alleged share of the defendant of the succession, in the hands of the executors.

The attorney, appointed by the court for the defendant as an absentee, pleaded 1st. specially to the jurisdiction of the court, and 2d, to the merits. The assignee of the debt attached intervened, pleading specially assignment and possession prior to the attachment. The instituted heirs also intervened, averring the leading facts, the validity of the will and possession under it, and protesting against the jurisdiction of the court, &c.

The district court dismissed the suit, being of opinion that there was not any property of the defendant attached, so as to give it jurisdiction. The plaintiff appealed.

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Livingston, for the plaintiff. The defendant, being a forced heir, was seized *ipso facto* of the estate of his son: and of course the succession is a property, on which an attachment will lie.

Filiifam., says the Digest, *sunt, ipso jure et immediate hæredes, ut quasi pro ipsis defunctis habeantur, dominiumque rerum patèrnarum, magis continuari in illos, quam transferri videatur. L.* 11, *ff. de lib. et posth.* The ascendants, being forced heirs as well as descendants, the same principle must apply to them.

Forced heirs are seized in full right by the death of the ancestor. *Civil Code*, 234, *art.* 122, Nay, such an heir transmits the inheritance of his own ancestor to his heir, without having accepted it. *Id.* 162, *art.* 84. The heir can only be deprived of the estate in cases provided by law. *Id.* 171, *art.* 126. 6 *Pand. Franc.* 369. *Napoleon Code*, 781. When there are no forced heirs, the instituted heir has the seizure. *Civil Code*, 234, *art.* 124.

This seizure lasts till there be a renunciation or refusal to accept, and this renunciation shall not be presumed; but must be proven to have been made, according to the forms provided by law. Every man is presumed to be solvent, his succession is supposed worth accepting,

and in renouncing it, the legal heir abandons a right and *nemo facile presumitur donare.* 9 *Pand. Franc.* 85. 2 *Jurisp. de la cour de cassation.* 2 *part,* 420. *Civil Code,* 161, *art.* 89.

Before the renunciation, therefore, the property is in the legal heir, and must be subject to the payment of his debts. We have seen that, if he die before any act of acceptance, without having renounced, the estate of his ancestor is in law so far considered as vested, that it constitutes a part of his own, and passes to his heir: if it pass to his heir, it must be in the hands of the latter, subject to the debts of the immediate ancestor. It would be strange that property not liable to the debts of a man, during his life, should become so by his death.

Admitting that the estate of the ancestor does not vest in the heir till after an acceptance, the creditors of the latter have over it the same power, which their debtor has. When an insolvent debtor refuses to accept a rich inheritance in fraud of his creditors, and with a view to prevent them from being paid out of the property, which such inheritance would give him, his creditors shall be admitted to accept it for him. *Civil Code,* 162, *art.* 83. The creditors of the heir, who refuses an inheritance to the preju-

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dice of their rights, can be authorised by the judge to accept it in the name of their debtor, and in his stead. *Id.* 164, *art.* 92.

It is objected that the debtor must be insolvent and have taken the benefit of some act for the relief of debtors of this description. This is not the common meaning of the word. *Civil Code*, 4, *art.* 14. Many persons are said to have died insolvent, who never took advantage of any such relief, and in the 92d article, the code speaks of a debtor, in general terms, without restraining its provision to insolvent ones.

It is objected that no single creditor may be admitted to accept, on the refusal of the heir. True it is; but the petition expressly prays that all creditors who choose to do so, may be permitted to accept.

The *Napoleon Code*, *art.* 798, has the same provision, and under it a single creditor has been permitted to accept. 6 *Pand. Franc.* 394. 4 *Sirey*, 2 *part* 167. 7 *Id. part* 2, 719. *Code Civil annote*, 275.

The defendant either refused to accept or he did not; if he have our attachment holds the property; if not, we have a right to accept for him.

Lastly, it is said the defendant cannot be compelled to appear. If the estate vested in

him, *ipso facto*, by the death of the ancestor, then he has been cited, and had notice of the suit, by the attachment of his property. If it did not, then he comes within the provision of the statute. When an absentee, not possessed of an estate within this territory, susceptible of being administered by a curator, shall be, either directly or indirectly, interested in any suit, it shall be the duty of the judge, before whom the suit shall be pending, to appoint a proper person to defend the rights of the absentee, if he be not otherwise represented within this territory, and if he has not himself appointed an attorney. *Civil Code*, 14, *art.* 8. But his appearance and answer cures all defects of citation, if there were any.

Smith, for the defendant. The question that obviously first presents itself in this cause is, has the court jurisdiction of the matter?

Certainly not by consent; by what sufficient process then can the defendant be made amenable here to the plaintiff's demand? By the record it appears, that the citation (prayed for and issued) has not been in any manner signified to the defendant; it equally appears, that he could not be competently cited, that he is a stranger, a native and inhabitant of New-York,

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and then, before and since, resident out of our jurisdiction.

Does the injunction on the executors inhibiting the delivering over, to the defendant, of one third of the inheritance, supply the place of the abortive citation, or, at all contribute to make parties to the suit? They were not called upon to answer; and they were obviously not competent, in the name of the defendant, as a forced heir to resist this demand on the one hand to compel his acceptance of one third of the inheritance, and on the other, to sue themselves and the instituted heirs for a reduction of bequests, and a partition of the succession, in violation of that very instrument, which the law makes it their duty to defend and execute.

If then the defendant be before the court, it must be by virtue only of the attachment. A suit by attachment is a proceeding in derogation of the civil and common law, and of the first principle of the law of nature. For it is an axiom of eternal justice, that no man can be condemned without having been heard. And on this firm basis rests the general rule of universal practice, requiring, in order to the jurisdiction of a court over a party, some personal notification, apprising him of the nature and extent of the demand against him. (*Curia Fe-*

lipica, tit. citation. fo. 65. ch. 42. no. 2.) The extraordinary process of attachment has been introduced for the encouragement of commerce, by facilitating the recovery of debts, and thereby enlarging the sphere of credit. Being an exception to the general rule, and a very rigorous proceeding, it must be construed strictly. Shall the plaintiff, then, in the first place, have the benefit of an attachment more than co-extensive with the prayer of his petition? He has prayed for the attachment of a particular fund, in the hands of Edward Livingston, Esquire, as garnishee: but not for the attachment of any other fund, nor, has he asked in general terms for the attachment of all the property of the defendant, within this jurisdiction.

So far, therefore, as the process has pursued the prayer, the evidence in the cause shews the attachment to be void: since the fund of Mr. Livingston's debt had been regularly assigned by the defendant and received and accepted by the agents of the persons to whom it was assigned, long before the date, even of the judgment alleged as the plaintiff's title (see assignment and Harman's deposition.) Process, being the immediate offspring of the prayer of the petition, must be in strict conformity to it. A petition without a prayer for process, at

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all, would hardly justify the issuing of any particular form of it: it would not be the duty of the court *ex officio* to issue a process not asked for by the parties interested. And, certainly, in a petition wholly silent on that subject, if a prayer, for some process, could be justly implied at all, merely from the exhibition of the demand of a debt, it must be merely the natural and universal process of citation.

But though the attachment was not subject to this fatal objection, and be deemed not the less regular for being extended, beyond the prayer, to the alleged share of Joseph Winter in this succession, it is nevertheless without foundation. The nature of the process of attachment, its very name and prescribed form, all import taking and holding possession. The order of a compulsory and exclusive possession seems to be essential to this process. As in ordinary cases, a judicial demand is signified by a personal citation; in attachment, it is effected by depriving of that possession of property which every man is presumed to have of his own. Privation of possession being deemed perhaps an equivalent notification to personal summons.

If this be a true account of it, then no man can be, by this process, drawn into court as a defendant; but by the attachment of that of which he has the right of possession.

Now, any right of Joseph Winter, whatever it might be, being unaccompanied by possession, and resisted by the adverse possession and right of the instituted heirs is, at best, but litigious, and not to be established without a suit. An action of reduction at least, would be necessary, in which not only his right to any thing, but also his relative proportion of the different parts of the estate would have to be established by a complicated suit. Now, is this, a point to be settled by a mere attachment of his supposed but unpossessed and resisted right? Does the mere fact of the attachment convert the plaintiff into his agent for so extensive a purpose, and enable him in one and the same suit, not only to establish his debt against the defendant; but, to go on and assert the defendant's supposed rights as an heir, against the instituted heirs who (as will be shewn) hold full possession under the will? Who would be the defendants in such a suit? What kind of judgment could be rendered? Could judgment of debt be rendered for the plaintiff against the defendant, collectively with judgment in the action of reduction, in favour of the defendant, as legal heir against the heirs by will? But, independently of these shocking incongruities; if the plaintiff could, for the

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purpose of supporting the jurisdiction of the court, validly assert for the defendant his rights in the action of reduction, the judgment would be conclusive, as well, if in favour of the instituted heirs, as, if against them. And, is it possible that the interests of a defendant in attachment, as an heir of a succession (which might be an hundred fold more valuable than the asserted debt) could be made dependant on the prudence, or knowledge, or care perhaps of a trivial interest of the attaching creditor! But suppose, on the one hand, the action of reduction to be so prosecuted to a successful result, what would become of the surplus, that might be due to the defendant, as one of the heirs? Assuredly the attachment creditor, after satisfaction of his debt, could no longer be constructive agent of the defendant, so as to have a right to retain fiduciary possession of this surplus. To whom could he deliver it? None of the other parties, to the suit in reduction, could take his place as agent. But, suppose on the other hand (a very possible event) that the plaintiff should fail in his principal suit, not being able to prove his debt, or, being nonsuited for some defect of form or proof; what then would become of the action of reduction, that would have been moved by him, as

constructive agent of the defendant, and in which sales, perhaps sacrifices of real, or personal estate might have been made? The plaintiff, in reduction, would certainly then turn out to have been a fictitious party. The whole proceeding in attachment would prove to have been radically defective, and the sales, made in such an action, though under an order of the court, would be void to all intents and purposes; and this, probably to the serious inconvenience of heirs and innocent purchasers.

If then, as is deemed manifest, a suit could not be maintained (by the plaintiff in attachment) to establish the supposed rights of the defendant as heir, in order to lay a foundation for the attachment, how else could it be supported? That is, how could it appear that there was an attachment of property belonging to the defendant, so as to enable the plaintiff to prove his debt, and take judgment against him, when the very existence of the defendant's supposed right of property must depend on the successful result of a suit which the plaintiff has no power to institute?

The remedy by attachment not only calls for an affidavit of debt, and of the absence, or approaching departure of the debtor; but this process having no foundation on natural equity,

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must be, in every respect, strictly pursuant to the act. The statute authorises the attachment of the property, that is, the undisputed property of the defendant. It authorises interrogatories to a garnishee as to the fact of his being indebted to, or holding property for the defendant, and even the exhibition of proof otherwise of that naked fact; but, if the defendant's title be denied, the act provides no mode by which the plaintiff can interfere to establish that title by suit against the party in possession. But, independently of the silence of the statute of attachment on the subject, since the judgment must (in justice to the adverse party) be conclusive, whichsoever way the balance might incline, there would be manifest injustice in thus exposing the defendant to the possibility of the greatest losses on account of, perhaps, an insignificant debt. And, however, the violation of natural equity evident in the proceeding of attachment may in general be softened in its practical effects, by the presumption, that every man's distant property would be under the controul of an agent who would, in such event, apprize the owner of its jeopardy, no such reasonable presumption can arise, in regard to a defendant's unpossessed, resisted rights, to alleviate the natural injustice of the proceeding, and all the evils obviously flowing from it.

Power to sue, in the name of another person, may arise either from the appointment of law, or from express authority to that effect, emanating from the party concerned, or perhaps, an authority implied from the nature of the employment of an agent, or his relations with his constituent, raising an undeniable presumption, that such authority had been conferred. Does the situation of the plaintiff, in an attachment, come under either of these descriptions? He is obviously not authorised by the expressed will of the defendant, nor from the appointment of law; still less can such authority, in the last place, be implied from the relation between them, which is a relation only of hostility.

But how is it with regard to the fact of possession? Is there any reasonable ground for maintaining that the testamentary heirs are not, as they pretend, in the actual and exclusive possession under the will? In the very face of the fact, it is contended that they are not, on the authority of what shall be presently endeavoured to be shewn to be an erroneous construction and application of an article, under the head of the testamentary institution of heirs. It is as follows:—"Whether the forced heirs have or "have not been instituted by the testator, they "are by his death, of full right, seized of all the

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"property of the succession, and the heir instituted universally is bound to demand of "them the property contained in the testament." &c. *Civ. Code*, 234, *art.* 122.

Would it not be enough to answer, that, in point of fact, the will, after having been duly proven in the court of probates, was ordered to be executed, and that it was actually, and not fictitiously, carried into execution on behalf of the instituted heirs? And that actual and not fictitious possession was taken of the succession in the same behalf. And does not the single fact of the effectual sale of the real estate by and on behalf of the substituted heirs, import the rightful delivery of possession to the vendee? How could the possession be delivered to the purchaser, unless first held by the vendors? And was not that possession peaceable, uninterrupted, and *bona fide*, as of owners, from the day of the testator's death? (*See Civil Code. T. Possession*, 466, *art.* 16. *Ibm.* 478, *art.* 23.)

Before examining the context of this article, (*art.* 122, *p.* 234, *head Institution of heir*) and the particular connexion in which it stands, let us look a moment at the other and preceding provisions of the code on the same subject, which are explicit, simple, unconnected with

other matter, and bearing directly on the question, how, or by what steps one person becomes heir, or, successor of another?

It is admitted that the several articles of the code, relative to the state of property, or ownership of succession, immediately on the death of the last proprietor, are to be so construed, so that all, if possible, may stand. It is but the application of a familiar rule of construction. Now, by recurring to the head "of acceptance" of the inheritance, the only source, one would suppose, from which light could be expected to be shed on this point of inquiry, we find it expressly enacted, that, no person can be compelled to accept an inheritance, in whatever manner it may have descended to him *(art. 71, p. 160)*. But, if (on the idea of the plaintiff's counsel) already, immediately on the death of the ancestor, and *ipso facto* merely, a man be, of necessity, actually seized as heir; to say, that he is not compelled to accept the inheritance, or, at least, to take it without acceptance is abuse of language. If so, then, by the plaintiff's construction of *art. 122, p. 234*, on which alone, he relies to shew the actual possession of the defendant, it is manifestly made to abrogate the article already referred to, which, unequivocally gives him an option on the subject, *art. 71, p. 160*.

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But, in addition to the article affording him this option, it is further expressly enacted (*art.* 72, 73, *p.* 150, 2) that the acceptance has the effect of giving him seizin of the succession entitling him to all the rights, and subjecting him to all the obligations of the ancestor. If such be the effect of the acceptance, then, without and until acceptance, that effect cannot have begun to exist, as wanting its efficient cause. Unless it can be shewn to be true in jurisprudence, though false in philosophy, that an effect can exist without a cause; and that in law, cause and effect are co-relative terms. This article, therefore, also, must fall before the plaintiff's sweeping construction of the *art.* 122, *p.* 234.

But is it true, that we are obliged to see in that article an intended repeal, or a contradiction of the preceding articles in question? though all were enacted and promulgated as law at one and the same time? If from the context, such intention or contradiction be not evident, it must receive another construction.

Let us examine it. "Whether the forced heirs have, or have not been instituted by the testator, they are by his death, (that is, not in virtue of any declaration of his will and dependently on it) of full right seized of all the

property of the succession, and the heir instituted universally (far from being entitled merely on account of his institution, to deprive them of the right allowed by law, to accept, if they choose) is bound to demand of them the property contained in the testament, &c.

This provision, both from its context and from the head under which it stands, seems to be declaratory of the rights of forced heirs, merely as they may be opposed by those of an heir instituted universally: exhibiting them rather in that relative light, than in an absolute manner, defining and analysing the particular features of their hereditary character: and intended to protect such legal heirs against the effects of a testament in favor of another person, tending to give him possession of the estate. If such be the real object, then there is no necessity of converting it against them, into a privation of a privilege (already secured to them by precise texts of law concurring with the law of nature) to wit: an option to become heirs, to be expressed by an acceptance of the inheritance. The legal rights of the one seem to be viewed merely, in a general manner, as opposed by the testamentary rights of the other. With reference, therefore, to the rights of the instituted heir, the forced heirs may well

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be said to be, by the death of the testator, seized of full right of all the property of the succession. For the death of the testator gives the forced heir a full right to accept the succession, and he may maugre any bequest or institution, subsequently exert that right, which does then by its retroactive effect (but still, only fictitiously) give him seizin from the death of the testator; but how? By causing him to be considered as if he had then taken possession of the estate. But with reference to his own right to an option on the subject, there is nothing in the phraseology of the article to oblige us to conclude that it was intended to trench upon the freedom of his consent, more especially since such a construction would be revolting to natural justice, and draw after it a virtual repeal of the preceding articles, 71, 72, 73, 74, *p.* 160, 2, of the code. The ancestor at his death, by a presumption of law, is supposed to consent to the transmission of his estate to his legal successor, which, like every other case of the alienation of property remains without effect and void, unless followed by the consent of him to whom the law would consign it. The effect of the acceptance, in giving this new seizin of the succession, may perhaps, not inaptly be said by its magnitude, to cast into shade and oblite-

rate to the eye the interval of time between it and the death of the ancestor. Further, this fictitious antedated seizin ensuring the acceptance, must like every other fiction of law, be adopted in so far as it is favorable to the party for whom it was created; but never be tolerated to his injury.

To conclude then on this branch of the subject, this seizin of the forced heir spoken of *(a. 122)* as derived from the death of the testator, when taken in the connexion in which it stands, is to be viewed rather as an avoidable benefit than as a fact: and, that, in the train of events, beginning with the death of the ancestor, the heir may be said to be seized in fact, in the following order of time and manner, and to the following effects: 1. By acceptance, the heir becomes in fact seized, as the true effect of it, according to the 73*d* and 74*th articles, p.* 162, under the head of acceptance of the succession.

2. Which acceptance, by operation of law, has a retro-active effect reaching back to the death of the ancestor "causing him to be considered, as if he had taken possession of the estate" at that time, according to the 72*d articles, p.* 160.

3. And thus (that is by virtue of the accep-

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tance) he becomes not actually, but through this legal fiction, seized by the death of the ancester according to *article* 122. *p.* 234. under the head of institution of heir. But still fiction can be nothing more than the resemblance of truth: and until what is the true effect of acceptance come to be produced by its efficient cause, the very archetype has not yet been formed from which to shadow out that fictitious seizin which is referred back to the antecedent period of the ancestor's death.

But it is next contended, that though the attachment be not sustainable on account of any seizin of the defendant, still the plaintiff, as his creditor, has a right to accept the succession in his stead: and for this position, the following provisions are relied on.

1. "When an insolvent debtor refuses to accept a rich succession in fraud of his creditors, and with a view to prevent them from being paid out of the property, which such inheritance would give him, his creditors shall be admitted to accept for him," *Civ. Code*, 162, *art.* 83.

2. "The creditors of the heir who refuses an inheritance, to the prejudice of their rights, can be authorised by the judge to accept in the name of their debtor and in his stead." *Civil Code*, 164, *art.* 92.

Now, the idea that would seem most obviously to arise from a perusal of these articles, without reference to any particular case, is this: Since the right of the supposed creditors is made contingent on the fraudulent refusal to accept, they import in the first place, on the part of the debtor an election; and that his right to an election must be concluded (or if exerted adversely to them, must be defeated) by some judicial proceeding against him; resulting (according to the first provision) in the creditors being "admitted to accept for him": or, according to the second in their being "authorised by the judge to accept in the name of their debtor, or in his stead." If so, then the first step in the proceeding (and without which, the court could not take jurisdiction of the cause) is, that the debtor must be cited to shew cause. For without that reasonable notice, there could be no party defendant; no competent judicial proceeding, in which to establish against him, the very material facts required to be made out by the creditors. In this case then, there being no citation, the plaintiff has not entered on the threshold of the proceeding.

But has the plaintiff even, so established his character of creditor as to entitle him to chal-

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lenge this single privilege against the will of the testator, and against the rights of the instituted heirs, and against the general rule of law, protecting the freedom of heirs in the acceptance of successions?

Creditors, of whatever description, may, with reference to their debtors, be divided into two classes. Creditors of solvent, and of insolvent debtors.

With regard to solvent debtors, suppose a holder of a bill, or note, or bond, for instance, should come into court, alleging that his supposed debtor is heir of an inheritance which he refuses to accept in order to defraud or injure him.

Would he not be told "first, prove your debt;" your debtor has a right to be heard, and to this end, he has a previous right to legal notice; after he shall have been heard, until (by your recovery of judgment against him) he can be allowed no longer to deny your debt, it will still be incumbent on you, to shew, as a matter of distinct inquiry, two very material facts. 1. "That an inheritance has accrued to him, which he has refused." 2. "That the refusal is intended to defraud, or actually injures you. For you are urging in your favor an exception to the general rule protecting the

freedom of heirs; and against these strong allegations also, he will have a right to defend himself, and to insist on personal citation."

But, how could the fraud or injury proceeding from a solvent debtor be completely proved? Not by the vague and negative opinions of witnesses as to the non existence or inaccessible situation of any other property, but by the experimental proof of an execution, the stated test appointed by law to ascertain how far payment of a judgment can be effectuated. And until search by the sheriff, an officer sworn to do that duty, has been made in vain, and duly certified into court the highest proof, the case could afford of that fact, would not have been produced. The necessity of it, in such case, may be likened to the required proof, the subpœna of an absent witness, on a motion for a continuance; or, the sheriff's return of *non est inomtus*, in order to fix the responsibility of bail. So long as a debtor is liable to be sued by an individual creditor, so long is he liable to suffer execution, and his case to afford that practical proof of his fraudulent, or injurious refusal of a succession.

This then must be the course of proceeding of every creditor so situated, against every heritable debtor, except only, in the case of declar-

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ed insolvency, in which the estate of an insolvent becomes vested in the mass of his creditors, which in common with the estate and the insolvent himself, are represented by syndics, or assignees.

This construction of the *articles* 83, *p.* 162, and 92, *p.* 164, is the more confidently urged, since it seems best to reconcile them with another provision which prescribes the mode of recovering for a forced heir, his share of a succession bequeathed to others, and which strictly limits the right to sue for the reduction of the bequests to the forced heir himself "his heirs or assigns." *See art.* 28, *p.* 214.

For, in the case of an avowed insolvent, the represented mass of his creditors would be "his assigns" and in that of a debtor on execution, a continuance in prison, or a concealment or withdrawal of his person from the reach of process (constituting under all bankrupt and insolvent systems, acts of bankruptcy or insolvency) and affording the proper proof of a fraudulent, or injurious refusal to accept. would justify a decree in like manner, appointing the execution creditor "his assignee" for that purpose.

But, has the plaintiff here, a right to issue execution? He has never issued an execution

even in New York (where judgment for part of his demand was obtained) to test the practicability of recovering payment there? He could not at the commencement of this suit, have issued execution there, without a revival of his judgment of two years old by *scire facias*. 9 *Johns.* 79, *Vanderheyder* vs. *Gardinier*.

But, independently of this reasoning, the defendant is a stranger, and as such, neither entitled to the benefit, nor subject to the operation of our laws, unless he first voluntarily submit to our jurisdiction.

Though the character of a stranger, and that merely of an absentee, coincide in this one particular of not being personally present, still there is an intrinsic difference between them. The character of an absentee is known to our laws, by a precise description, and which therefore admits of no other. He is defined to be a person who has departed his accustomed domicil, or usual place of residence within the state. To him belong a series of rights, commencing with the commencement of his absence, and gradually diminishing, passing from the presumption of absence to the declaration of absence, until at length, they become evanescent and lost in the rights of his presumptive heirs, which rise in a corresponding series, gradually

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augmenting from the provisional possession under security, to full possession, without security or accountability for their administration, until it terminate in the acquisition of the absolute property of the estate. Can this idea, be identified with that of a mere stranger to our laws and jurisdiction? Where is his accustomed domicil, from which he must have departed in order to become an absentee? He resides in a country whither our laws cannot reach him, or his concerns. How then can they take cognizance of any of his movements of departure or return? Counting from what point of time, shall the legal presumption of his absence arise, entitling his heirs (if our laws could take notice of that relationship) to claim provisional possession of his estate? Or, when shall be pronounced the judicial declaration of an absence which has never begun.

The truth is, the laws of every state are formed for the benefit, exclusively, of its own inhabitants, or of those, who have voluntarily performed some act, that subjects them wholly, or in some respect to its jurisdiction. This results from the very nature of civil societies, and the name of municipal law. To suppose a more extended sphere of operation, or object of legislation would lead to the idea, not pro-

perly of the effects of law, but of a conflict of sovereignties.

The complex idea of law embraces necessarily, the more simple ones of reciprocal power and obedience. And if the municipal law of one state could be imagined to be intended in any degree to influence the rights of the inhabitants of another, as such—then, since what (in this respect) would be true of it, would be true of every other nation, it would involve this absurdity, that the inhabitants of each and every nation could be subject at the same time, to different and contradictory laws.

It follows, that the laws of this state on the subject of successions for instance, however general may be the terms of description of the different classes and rights of heirs (though literally broad enough to embrace all mankind without exception, in so far, as they contain no express national discrimination of individuals) still they cannot be construed to extend to strangers who have never voluntarily, by any act, subjected themselves in any degree or respect to our jurisdiction, and of course not to the defendant in this cause. To ascribe to our laws a wider range would be to impute to our legislature the folly of a law without a sanction, a vain and idle form which in this court at least is an inadmissible supposition.

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But, where after all, is the fraud on the plaintiff or injury to his rights as a creditor? Both parties being inhabitants of New-York, the relations between them there, could alone be adopted as the ground of decision in this cause. Could the plaintiff contend in a court of justice in New-York, that the defendant was seized of a succession here in virtue of laws to which he was not subject? Or, that his omission to lay claim to an inheritance in Louisiana, was a refusal in fraud and prejudice of his creditors, authorising the plaintiff as one of them, to accept in his stead in the character of a forced heir according to the laws of Louisiana? If so, then would a New-York judicature be deciding on the rules of inheritance, and the rights of her citizens, according to the laws of another state in contradiction to her own.

But, suppose the defendant even came to Louisiana, and recovered one third of the succession as a forced heir, could he not have been afterwards compelled by a court of equity on his return, to account for the amount to the instituted heirs? Or, if the plaintiff could now recover by this attachment, in the face of all other objections to it, could not the instituted heirs afterwards, in equity there, compel him to refund? Would not a court of chancery

there, say to the defendant in the one case and to the plaintiff in the other: "it is the duty of a good citizen first to submit to the laws of his own country; as well, the laws regulating descents and testamentary dispositions, as any others. So, we cannot take notice of a foreign law, as binding on one of our own citizens, to which he has not submitted, much less would it become us to enforce his submission by pronouncing him guilty, according to such foreign law of a fraud upon his creditors: and a testament, executed here in due form by a competent testator, in favor of competent heirs, shall be carried into effect, and enforced as between our own citizens, as well concerning property abroad, as at home: and, that it shall never be permitted to the (defendant as) pretended legal heir by a foreign law, or his creditors, to evade the operation of our testamentary laws, by laying claim to property abroad which they know to be by our laws the property of others in exclusion of them." (*See, in the support of this point, the dictum of Ch. J Tilghman*, 4 *Binney*, 372, *Bank N. Ameri. vs. M'Call.*

If such would be the principles of a decree of a court of chancery in New-York, ought it not be the rule of this court in this cause? "We always import (says lord Ellenborough)

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together with their persons, the existing relations of foreigners, as between themselves, according to the laws of their respective countries: except indeed, when they clash with the rights of our own subjects here, and one or other of the laws must necessarily give way, in which case our own is entitled to the preference. This having been long settled in principle, and laid up amongst our acknowledged rules of jurisprudence, it is needless to discuss it further." 5 *East*, *Potter* vs. *Brown*, 131.

MATHEWS, J. delivered the opinion of the court.* This is a suit of attachment, in which the plaintiff claims a debt, as set forth in his petition, and requires that the defendant should be compelled to accept an inheritance, descended to him by the death of his son Samuel, or that he, the creditor, on his refusal, should be authorised to accept it in his name and stead. The prayer for an attachment is confined to a credit of the defendant, in the hands of E. Livingston.

The object of the action is to obtain the benefit secured to creditors, by the 83*d* and 92*d articles* of the *Code*, on the subject of accepting

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

or renouncing successions, and the prayer for an attachment is intended to give jurisdiction to the court; the defendant being an inhabitant of another state, where an ordinary process of citation could not reach him. So far as it relates to the credit, attached in the hands of the garnishee, it is clear that before service of the attachment, the defendant had legally assigned it over to other persons, and it was not then liable to be attached as his property, and did not afford means to the court of jurisdiction in the cause.

The petition states the testament of Samuel Winter, the son of the defendant, sets forth the legal claim and right of the father to one third of the succession as forced heir; although the whole had been willed away by the testator, and prays that his executors should be enjoined from disposing of the estate, as directed by his will. In pursuance of this prayer, an injunction was allowed by the judge of the court *a quo*; and a writ of attachment having issued in general terms was served on the executors, and all the property of the defendant in their possession was attached.

Admitting that the court had no jurisdiction by the levy of the attachment on the credit in the hands of Livingston; it is contended on the

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part of the plaintiff "that the defendant being forced heir to his son is seized *de plein droit*, and of course that the succession is a property liable to attachment."

The provisions of the code, which authorise the creditors of an insolvent debtor to accept an inheritance, which the latter may have fraudulently renounced to their prejudice, are so evidently just and equitable, that the court perhaps, in its anxiety to give them effect, did not allow, on the first hearing of the cause sufficient importance to the objection of the defendant, made to the jurisdiction of the court below; on the ground of the attachment being limited to a specific credit, which had ceased to exist at the time of levying it. Being of opinion that the district court was correct, in considering the execution of the writ of attachment, beyond the prayer of the plaintiff's petition, as irregular and void, it is unnecessary to investigate the question whether or no, forced heirs are seized of an inheritance in such a manner, as to subject it to be attached by their creditors, before acceptance. We would only remark that it is one of considerable difficulty in its solution, and that perhaps some further legislative provisions would be necessary to enable our courts to carry into effect the articles of the code above cit-

ed, in cases like the present where ordinary process cannot reach the heir.

If the suit is not sustained by the proceedings on the attachment, it is clear that no legal measures have been taken to compel the appearance of the defendant. The answer of a person appointed by the court does not cure the defect in the levy of the attachment, which so far from waiving, he pleads in opposition to the jurisdiction assumed in the cause. The eighth article of the code on the subject of curatorship of absent persons is relied on by the appellant's counsel, as giving authority to the judge of the district court, to appoint a defender for the appellee, and that, in consequence of such appointment, he was brought legally before the court to have his rights decided on.

We believe that this rule is not applicable to cases like the present, which is a suit instituted directly against the absent person, not one pending before the court, in which his rights and claims may be involved.

This view of the case precludes the necessity of enquiring into any of the other matters offered for consideration.

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

East'n District.
June, 1820.

CENTER
vs.
TORRY.

CENTER vs. *TORRY.*

APPEAL from the court of the first district.

Parol evidence cannot be admitted against the contents of a bill of lading.

Under the general issue, the defendant cannot give a another contract in evidence.

DERBIGNY, J. delivered the opinion of the court. The plaintiff claims from the estate of William Talman, of which the defendant is curator, a balance due for freight of a quantity of Columbo root, shipped in May, 1817, on board the Governor Griswold, a vessel belonging to the plaintiff's firm, bound from this port to Philadelphia.

The evidence shows that this merchandise being consigned to no particular person, the owners of the vessel kept it in store for about a year, and that receiving no instructions as to the disposal of it, and the freight remaining unpaid, they finally caused it to be sold, when the price of sale fell short of the amount of freight.

The defence set up against this action was the general issue; and the plaintiff having supported his claim by sufficient evidence, there will be no difficulty in affirming the judgment of the district court, unless the defendant has succeeded in showing that the counter evidence, which he tendered below, was improperly re-

The first was the testimony of John W. Oddie, by which the defendant offered to prove that the contract of freight was made with said Oddie, and that the deceased had no interest in it. This was rejected on the ground that the bill of lading, expressing the shipment to be made by Torry and Talman, was in the hand writing of Talman himself; and that against this instrument, no parol testimony could be admitted.

The second piece of evidence was for the purpose of showing that the freight of the Columbo, was not contracted for with the plaintiff, because the room between decks where it was stored, had been chartered by another person. This was rejected on the ground, that the defendant ought to have pleaded specially this different contract, and that under the issue, he could not show it in avoidance.

We think in both these positions, the district judge was correct.

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

Livermore for the plaintiff, *Morse* for the defendant.

East'n District
June, 1820.

CENTER
vs.
STOCKTON & AL.

CENTER vs. *STOCKTON & AL.*

APPEAL from the court of the first district.

If questions of law are submitted to the jury to be specially found, their finding ought to be disregarded.

If answers to interrogatories are sworn to abroad, it ought to appear that the officer has authority, by the laws of the country, to administer oaths.

If the swer does not appear to be properly sworn to, it needs not be excepted to as an insufficient answer.

DERBIGNY, J. delivered the opinion of the court. The plaintiff, as surviving partner of the house of Ripley, Center & co. of New-York, claims from the defendants the reimbursement of a balance due them upon a sum of money, which they advanced on a shipment of tobacco to them consigned, but the sale of which fell short of the amount so advanced.

The principal ground of defence is that the tobacco was not the property of the defendants, but that they shipped it as agents for Seth Briggs & co. the owners thereof to the knowledge of the plaintiff, and that, if any thing is due on account of that tobacco, it is due by the owners, not by the defendants.

The trial of the case below has been crowded with incidents, which will be examined as it may be found necessary. But the first and main difficulty is to ascertain whether the facts are settled by a special verdict, as contended for by the defendants, or still open for examination, as the plaintiff maintains.

Facts have been submitted on both sides to the jury, in the manner prescribed by the 10th

section of the act of 1817, entitled "an act to amend the several acts enacted, to organise the courts of this state, &c." By that section, it is provided that, when either of the parties shall require it, the facts set forth in the petition and answer shall be submitted to the jury, to obtain their special verdict thereon; and that "the jury shall be prohibited to give any general verdict in the case, but only a special one on the facts submitted to them."

Where the facts, so submitted to the jury, are altogether unmixed with any question of law, there is no difficulty in following the above directions. But when, under the name of facts, questions involving law and fact are presented to them, what is to be done? In a former case, *Chedoteau's heirs* vs. *Dominguez*, 7 *Martin*, 490, this point came before us, in a collateral manner, and we there expressed a disposition to consider as a general verdict, one in which among the facts found separately, there happened to be a general finding on one of the questions put to the jury. But, being now called upon to decide directly, whether or not such a finding on one of the questions will so far alter the nature of the verdict as to make it a general, instead of a special one, we must examine the point by itself, and pronounce without

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any regard to the opinion in which the question was treated collaterally.

The act under which facts are submitted to a jury is the paramount law which we are to obey. It makes it on one side the duty of the parties to submit nothing but facts, and of the judge to suffer none to go to the jury but such as are pertinent, and on the other side it imposes on the jury, as a rule of conduct, not to permit themselves to give a general, instead of a special verdict. Under this law, the parties here have presented, the judge has approved, and the jury have decided, what they must be presumed to have considered as facts. Among them, however, there happens to be a question, which involves matter of law as well as of fact. Must the finding on that question vitiate the whole verdict, and make all the other questions and answers stand, and the finding on the question of fact and law be deemed illegal and null?

There is no plainer rule than that any thing done contrary to the prohibitions of a law is not only useless, but void: *ea quæ lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro infectis etiam habeantur.* In a case like this, where the parties pretended to act under a law, prescribing the manner of submitting facts to a

jury, and prohibiting the jury to decide any thing else, so much of the statement made by the parties and of the verdict found upon it, as went beyond the limits established by that law is, of course, void; it is to be taken *pro infecto*. What then is to become of the remainder of the verdict? It must be viewed, we think, as if it had never been mixed with any heterogenous matter. But because the parties involuntarily (we are unwilling to suppose that it can be done intentionally) should have submitted to the jury some matter of law under the name of fact, to make all their findings on naked facts go for nothing, would be, we apprehend, countenancing inattention at least, and enabling suitors to avail themselves of their own wrong.

It may be further observed, that the law having prescribed three modes, in which facts may be brought up before this court, one of which is to cause the facts to be settled by a special verdict, parties who have made their choice of one of those modes, ought not to be indulged in an attempt to set it aside, by showing their own mistake; that they must be bound by their own acts, that if those acts are imperfect, the fault is theirs, and the inconvenience must be theirs also.

We think, therefore, that the verdict in this

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case is to be considered as containing the facts on which we have to decide. But before we proceed to examine them, we must ascertain whether, as the plaintiff has complained, certain evidence which he had a right to lay before the jury was wrongfully rejected. That evidence consists of answers to interrogatories propounded by the defendants to the plaintiff. The defendants objected to the reading of them on the ground that they were not sworn to before a competent officer; to which the plaintiff replies that the officer was a competent one, and that, could his competency be excepted to, the exception was made too late. The rule, on which the defendants rely, requires exceptions to insufficient answers to be made within three days after the answers are filed. This, we think is not applicable to a case where the answers are said to be the same as no answers at all. As to the competency of the officer, before whom they were sworn to, we are of opinion that it was the duty of the plaintiff to show that by the laws of New-York a notary public is authorised to administer oaths in such cases as this, because the function of administering oaths, which is generally one of the attributes of judicial authority, is not to be presumed to have been given specially to an officer not judicial.

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CENTER *vs.* STOCKTON & AL.

On the merits of the case there is no difficulty. The special verdict settles the main point in controversy, to wit, that the bills of exchange, the balance of which is here claimed, were given to the defendants as agents of Seth Briggs & co. the owners of the tobacco.

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

Livermore for the defendant, *Morse* for the defendant.

HARRISON vs. *LAVERTY.*

APPEAL from the court of the first district.

Parol evidence cannot be given against the contents of a deed. If a party gives part of a conversation in evidence, the other has a right to draw the whole of it out, on the cross examination.

MARTIN, J. delivered the opinion of the court. The plaintiff obtained an order of seizure and sale on a mortgage, given by the defendant to secure the payment of a note for $1016, 66 annexed to the record.

The mortage was contained in a notarial sale of several lots sold by the plaintiff to the defendant for $3050, for which the latter gave three notes of $1016, 66 each.

The answer states, that, "true it is, the defendant made the notes and mortgage mentioned

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in the petition, but it is not true that the purchase money now claimed by the plaintiff is due; on the contrary the defendant avers that the two first notes have been paid, and likewise the further sum of $1000 was paid by W. Boyd and son, for the defendant, to the plaintiff, on account of the price of said lots, which leaves only a balance of $16, 66, which the defendant has always beea and is ready to pay."

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

The evidence, which comes up with the record, is composed of two documents and two two depositions.

1. A note of the defendant to the plaintiff for 1000 dollars, payable six months after date, with credits on the back amounting to the whole sum, paid by W. Boyd & son, to the plaintiff.

This note was produced by the defendant on the motion of the plaintiff.

2. A receipt for said note, after it was paid, from the defendant to W. Boyd and son.

1. W. Rey, a witness for the defendant, proved the payment of the note for 1000 dollars, and deposed that in a conversation between the parties, he heard the plaintiff say, he had made an excellent bargain in the purchase of a house,

and being asked what profit he would take therefor, said 1000 dollars. That the defendant purchased the house, and he understood from both parties, that the above note of 1000 dollars, was given in consideration of this purchase. That the 1000 dollars profit of the plaintiff was to be paid by repressing cotton, and all but the last item (182,66) was so paid.

2. Davidson, a witness of the defendant, being interrogated by the plaintiff, says he took a cotton press from the defendant, who, on this occasion told him, he had purchased some property from the plaintiff and given him a 1000 or 1500 hundred dollars profit, which was to be taken out in repressing cotton.

On his cross examination, the witness added that the property he mentioned, was purchased by Harrison at a sheriff's sale for 3050 dollars, and by him sold to the defendant, and is the property of which part of the price is now demanded.

It was admitted that the plaintiff at the sheriff's sale gave 3050 dollars for the property.

There was no bill of exceptions, but an entry was made on the record, that the testimony was taken subject to every legal objection.

The defendant urges that he has shewn that he purchased these lots for 3050 dollars, as ap-

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pears by the deed of sale annexed to the petition, that the plaintiff has received payment of two notes of 1016 dollars, 66½ cents each, and from W. Boyd & son, on the defendant's account 1000 dollars, in all 3033 38½, leaving only a balance of 16 dollars 66 cents. That the parol proof, introduced by the plaintiff, and excepted to by the defendant, that there was a verbal agreement to pay 1000 more than the consideration money mentioned in the deed, was illegal and must be rejected.

He insists that this case cannot be distinguished from that of *Clark's ex'rs & al.* vs. *Farrar*, 3 *Martin*, 347, in which similar evidence having been received by the judge *a quo* this court held, after solemn argument, that the evidence was illegal, and that the payment must be imputed to the purchase money expressed in the deed. He argues that in the present case, the consideration of the note of 1000 dollars has been gone into, and the result is that there was no legal consideration. That in consequence of this, as the note is still in the hands of the original payee, the maker may avail himself of this want of consideration, and demand that the money thus paid may be imputed to the discharge of the purchase money mentioned in the deed.

It appears to us, no part of the parol testimony was admissible. The deed of sale bears date of the 3d of April, 1818, and acknowledges that the lots are sold for 3050 dollars, for which the defendant has given three notes of 1016 dollars, 66 cents each, for the last of which, the present suit is brought; and he attempts to shew, by parol evidence, that another note of 1000 dollars, of a date anterior to the deed, viz. 18th of March, 1818, was given as part of the purchase money. This cannot be done, and if it could, would certainly authorise the plaintiff to insist on the whole conversation, part of which is given by the defendant's witness, being related.

If we leave the parol evidence out of view, there is nothing to support the defence.

There is no similitude between the case of *Clark's ex'rs. & al.* vs. *Farrar* and this. Here the promise, to pay the 1000 dollars, is evidenced by a written act, executed a fortnight before the deed of sale.

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

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

East'n District.
June, 1820.

CATIN
vs.
D'ORGENOY'S
HEIRS.

CATIN vs. *D'ORGENOY'S HEIRS,*

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

A slave, who has a deed of emancipation, under which she is to be free at the grantor's death, is in the mean while, *a statuliber* and children born from her, in the mean while, are slaves.

The plaintiff claimed the freedom of her children, under a deed from her former master, the defendants' ancestor. They pleaded the general issue. There was judgment for them, and she appealed.

The defendant's ancestor, in the deed of emancipation produced by the plaintiff, says "I hold, as my slave, a creole negro girl named Catin, aged 18 years, born in my service, from the negro woman Martha, to whom I gave her freedom, according to the terms of the deed, which I executed before the present notary, last year, 1801, and I have offered to the said Catin her freedom, on certain conditions *(terminos)* which I shall express, gratuitously and without interest, in consideration of the good services of her mother, the said Martha. In consideration whereof, I grant by these presents, that I emancipate and liberate from all subjection, captivity and servitude, the said negro Catin, my slave, with the qualification and condition (*calidad y condition*) that she shall hold and enjoy freedom *(tener, disfrutar y gozar)*

immediately after my death. But during my life she is to remain in my service and power, continuing and contributing her services, as she has done to the date of these presents. By virtue of which, and immediately after my death, and thence forward, she may deal, contract, sell and purchase, appear in court, execute deeds, make a will, as a free person, &c."

The children were born, after the deed, but before the death of the grantor.

MATHEWS, J. delivered the opinion of the court. The decision of this case, depends entirely on the construction to be given to the act of emancipation, by which the appellant claims to have been made free, at the time of the birth of the children, for whom she now claims freedom.

We are of opinion that the court below has given a just interpretation to said act, and was correct in considering the mother to have been of that class of persons, known to the Roman law, by the appellation of *statuliberi* and that children born from her, while in such a state, are not entitled to freedom.

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

East'n District. *June*, 1820.

CATIN *vs* D'ORGENOYS HEIRS.

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

8 M. 220. 4 N. S. 586.

DURNFORD vs. *DEGRUYS & AL. SYNDICS.*

A bid, at a sheriff's sale, must be followed by a tender of the money; otherwise it may be disregarded.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff obtained an order of seizure and sale of a tract of land surrendered by the insolvent. J. Tricou and Bouligny, became the last bidders and purchasers of it. The land being claimed by a third person, and the insolvent's title appearing doubtful, they refused payment of their bid, and the plaintiff obtained an *alias* order of sale or *ven. exp.* on which the sheriff returned, that the bidders having paid the price at which the land had been struck to them, he had suspended the sale, till the further order of the court.

The bidders then obtained a rule, against the plaintiff, to shew cause why the *alias* order of sale or *ven. exp.* should not be set aside, and on argument the rule was discharged. The plaintiff then obtained a rule on the sheriff, to shew cause why he did not proceed to sell; which on argument was made absolute and a *pluries* order of sale issued.

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Whereupon the bidders appealed.

Their counsel contends that by the adjudication, the sale became complete and absolute, the property of the land was vested in them, and could not be divested without some act of theirs, and they could at any time prevent the sale of it, by paying the amount of their bid.

He relies on *Cur. Phil. Remate*, § 22, *n.* 26. "What is sold, at public auction, passes by an indissoluble and efficacious contract, from which the parties cannot retract, as says Dr. Salgrado: the proof of this is that the bidder can be coerced to pay, by the capture of his body."

This is certainly true: but the obligations which arise from the contract of sale, like all others, may be dissolved by the concurrent wills of the vendor and vendee. Here, the bidders positively declared their unwillness, to comply with their bid and pay the money, and persisted in it from the 11th of August, to the 2d January. By suing out an *alias* order of sale, the plaintiff unequivocally declared his intention that the bid might be considered as nothing, and if the concurrence of the sheriff was necessary, he gave it by advertising the land for sale a second time.

We understand the author of the *Curia* to

East'n District. *June*, 1820.

DURNFORD vs. DEGRUYS & AL. SYNDICS.

mean, that the sale is not dissoluble by the act of either party alone, and the concurrent wills of the parties are sufficient to put an end thereto. It is true, a bidder, at a sheriff sale, according to the *Curia*, is coercible by the imprisonment of his body, but that is only a cumulative remedy. The property, in the land sold by the sheriff, has never boen determined to pass by the sheriff's return, especially when like the present it shows the bidder's failure to pay. The law requires the sheriff to make out and deliver a deed of sale to the buyer and this is the period at which the property passes; till then the conveyance is only inchoate.

The sheriff on a *fi fa* is commanded to make the money, by the sale of the defendant's property, he puts it up for sale, bidders present themselves, and the property is struck to the one who offers the highest price. Now, if the latter wishes to avail himself of the bargain, he must pay: if he refuses, the sheriff may certainly go on and disregard the bid, though the law may have provided a summary remedy, if it be thought proper to resort thereto.

But this remedy, like the ordinary one, is intended to facilitate, not to retard, the making of the money. It would be monstrous if it became necessary, on the neglect of the bidder to

pay, to carry on legal proceedings against him; which, like others, might be lengthened by ill faith and chicane, whilst other bidders stood ready to bid and pay. It is not easy to see how often and how long, the intervention of a friendly bidder might delay an execution, if a bid, unaccompanied with a tender, could not be passed over.

In the present case, the land was struck to the appellants on the 11th of August, 1819, they declined to pay, and sought only to avail themselves of this bid on the 2nd of January of the following year. Can a cash sale be thus converted into one, at a credit of nearly six months, in that manner, without paying any interest?

We are of opinion that in cash sales by the sheriff, the money must be paid down at once, or the bid may be disregarded. In cash sales, the vendee acquires not the property of the thing without paying the price. The bidders have themselves alone to blame in this instance; they cannot ask to avail themselves of a bargain, by requiring the performance of the duties it imposed on the other party; while they themselves refused to comply with the obligations which it had laid them under.

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

Morel, on an application for a re-hearing. It is admitted by the judgment to be a principle of our laws, that a sale upon an execution, creates the same obligations as an ordinary sale, and that therefore, it can be dissolved by the mutual consent of the parties thereto; the judgment refers to the *Curia, Remate*, § 22, *n.* 26. It might also have referred to the *Civil Code*, 491, *art.* 1 & 3; to *Febrero, part 2d, book 3d, chap. 2d*, § 5, *n.* 330, which declares that "the judicial sale, when made in due form and accepted by the bidder, as prescribed by law, cannot be open, and that therefore, no more bids are to be accepted, because it is as firm and indissoluble, as if the very owner of the thing had made it by the contract: because the judge acts for him, and is thereto authorized by law, as well as to pass the sale in his own name and so the bidder can be compelled to pay by imprisonment, execution and all lawful means, to abide by his bid, and to fulfil the obligation which he has contracted; and pay the liquidate amount in cash and no otherwise, because it is for the payment of creditors.

and therefore, it must be made in cash, and to the *Politica de Villadiego, chap. 2d. de la instruccion, nos.* 141 and 142; such is the law which governs in cases of judicial sales. They are in all similar, as to their effects, to private sales; they are governed by the same rules; they create the same obligations: if this position be true, how can it be inferred, by any of the proceedings before this court, that the bidders Tricou and Bouligny, receded from their contract? Their consent to the dissolution of the contract is implied from their unwillingness to pay the money, in which they persisted from the 30th of August to the 2d of January ensuing. The appellants have two very strong reasons, to oppose to that implied mode of reasoning. 1. No consent to the dissolution of a contract can be implied from the refusal of the purchaser to pay. That refusal, let it proceed from whatever cause, such as inhability to pay actually, or even from bad faith, is not sufficient to dissolve the contract. An action only lies, either to oblige the purchaser to fulfil the conditions of the contract, or to have it dissolved; but it is never presumed to be dissolved of itself merely because the purchaser refuses to pay. Even the judge, before whom the action has been brought, may grant to the buyer, a

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delay according to circumstances, provided that delay does not exceed six months. *Civil Code*, 360, *art.* 86 and 87. There is in fact, no law to support the doctrine, that a mere refusal to pay can be construed into a consent to the dissolution of the sale. 2. The appellants had, as appears by their petition, to obtain a mandamus, to compel the district judge to grant their appeal, a very legal reason for not paying the purchase money; and that reason was, that a great part of the land was claimed by a third person, who very shortly after the adjudication, threatened them to institute, and did afterwards institute, against them an action, to wit, in November, 1819, for obtaining possession of said land: all which facts were sworn to by the appellants, and stand uncontradicted by the appellee, and were by the said appellee admitted to be true in open court; far from refusing to pay, with a view to rescind the sale, the appellants did always hold the price ready, provided they were secured against that claim, which was notified to them immediately after the judicial sale of the land. This court by merely referring to the *Civil Code*, 261, *art.* 85; 2 *Martin's Digest*, 171, and 173 *verbo courts*; *Part.* 5, 5, 34, will perceive that the danger of eviction is a sufficient cause for refusing pay-

ment. Therefore, it is not true, to say that the refusal of payment can be construed into a consent to the dissolution of a sale. Such a doctrine would render the provisions of the code, entirely nugatory: by its means, any man, after having *mala fide* caused the property of another to be seized and sold, as the property of his debtor, might get rid of the action for damages to which he was liable from the purchaser. We all know that in case of eviction, the purchaser has a right to claim against the vendor the value of the thing, at the time the eviction takes place, if that value is higher than the price agreed upon, at the time of the sale. Let us, therefore, suppose that the day after an adjudication is made, the purchaser is offered a profit of fifty per cent. that at the same time, he is threatened with an eviction, and refuses to pay the purchase money, until secured in his bargain, so as to be enabled to dispose of the thing and make the profit offered. Will it be contended with any appearance of justice or equity, that in such a case as that, the creditor, at whose suit the thing was seized and sold, shall have a right to consider the refusal of payment as a consent to annul and rescind the adjudication, and by merely taking of his own accord an *alias fi fa*, to cause the property to be sold again?

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It follows necessarily, that the only way to have this sale rescinded, which differs in no manner from a private sale as above said, was to have brought an action against the appellants, upon which they might have had an opportunity to prove that they had legal reasons for withholding the price from the seizing creditor, which, by following the course which the appellee has pursued, he has effectually prevented this cause coming before this court with all the proofs of matter of fact, with which the appellants expected to support their plea. No other facts (save those stated in the appellants' petition, which have been admitted, and of which this court have seemed to take no notice in their decision) have come before this court, except that the appellants have refused to pay on the 30th of August, and that they have paid in January ensuing? Is the court able then to give a correct decision, when they know, and when they see that by the course pursued by the appellee, the appellants have been debarred from their legal means of defence? Can an *alias fi fa*, taken without their privity or knowledge, be made to operate to the ruin of their cause? No, certainly. Let a regular suit be brought against them; let them have an opportunity to prove the facts they have sworn to,

and then the case will be fairly and legally before the court; or, let the court take for granted the uncontradicted facts, stated in their petition, and then their present decision, which is founded upon the implied consent of the appellants to the dissolution of the contract, must be reversed.

II. It is stated in the judgment, that the power to compel by imprisonment, and *via executiva*, execution. &c. a bidder to pay the purchase money, is a cumulative remedy. The appellants maintain that they know of no other legal remedies but those prescribed by our laws, which are those only, enumerated in the authorities above cited; either to compel summarily to pay or to bring an action for rescinding the sale. Those two remedies are pointed out by the *Civil Code*, 361, *art.* 86 & 87. "If the buyer does not pay the price, the seller may sue for the dissolution of the sale." The word sue sheweth that the matter must be decided by a tribunal. This law is nothing but the old Spanish law in more concise terms. The same doctrine is found in the *Part.* 5, 5, 38, commented by *Febrero*, *part* 1, *chap.* 10, § 1, *n.* 28, which only says, besides what is stated in the *Civil Code*, that when the vendor

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has made use of either one or the other remedy, that is to say, when he has asked the purchase money, he cannot alter his action, and would not be admitted to ask the recission of the sale, or when he has asked the rescission of the sale, he cannot ask the purchase money. Whatever may be the inconveniencies of that law, we have no other, and it is the only one which governs us. No other is referred to, in the judgment, and no argument can evade a formal law. Therefore, the appellants can safely conclude, that the two remedies abovementioned are not cumulative, since they are the only ones to be made use of in such codes.

III. By the sheriff's return, the property has been determined to pass at the time of the adjudication, for as the law says, *Curia, Remate, n. 26, loco citato,* "what is struck or adjudged at a judicial sale, is considered as a real and indissoluble contract, &c." *Feb. part. 2, chap. 2, § 5, loco citato,* uses the same expressions. It therefore, follows, that at the same moment that the land was adjudged to the appellants, the sale was perfect. The obligations of the parties to the contract arose. The bidders contracted the obligation to pay the purchase money; and the creditor the obligation to gua-

rantee the bidders, as we see by the laws of 1817, *p.* 41, *sect.* 19 and 20, that in case of eviction, he is bound to refund the money which he has received. Now, suppose the bidders should have immediately paid the purchase money, which they would have done, if they had not been apprised of the claim aforesaid, and the claimants would have brought against them their action to recover the land; was not the duty of the bidders pointed by the aforesaid law, to call in guarantee the seizing creditor? The claimants succeed; the appellants ask humbly of this court, what would have been their remedy? Would it not have been to compel by due course of law the creditor to refund the money? Could they oblige him to fulfil his obligation, by any other means but ordinary process? And the appellants ask it again, by virtue of what law, should the seizing creditor be entitled to a summary process unknown in our laws; to have the land seized and sold again, against our will, by virtue of a *fi fa*, taken in a suit to which we are no parties, and executed upon what is our property? It is true, that the law requires the "sheriff to make out and deliver a bill of sale", but this not, in the humble opinion of the appellants, the period at which the property passes. The *Civil*

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Code, 346, *art.* 1, saith "that the sale is considered perfect between the parties, and the property is of right acquired to the purchaser, with regard to the seller, as soon as there exists an agreement for the object and for the price thereof; although said object has not yet been delivered, nor the payment made." Therefore, the deed, to be delivered by the sheriff, is only the legal proof that a judicial sale has been made, but it is not necessary for conveying; the conveyance is complete as soon as the thing is adjudged (if the same principles are applicable to judicial and to private sales.) As it is complete in private sale, as soon as the parties have agreed upon the thing sold and upon its price; it requires only in both cases, to have a legal proof of it; in case of judicial sales, it is the return of the sheriff, or the deed of sale; in case of private sale, it is an act or writing, signed by the parties. In the case of the appellants, they have only the return of the sheriff, because he refused to deliver them a deed when they paid him the purchase money. At all events, the appellants hope that they could shew that, if the two returns of the sheriff are not a complete proof, that the land has been adjudged to them, they are at least a beginning of written proof, sufficient to admit them to complete their

proof by oral testimony; they refer for the soundness of their doctrine to *Martin's Reports*. in the case of *Zanico* vs. *Habine*. 5 *Martin*, 372.

IV. The appellants beg leave to be admitted to shew that there is nothing monstrous in the laws that govern the present case, and that the great inconveniences, which this court seem to fear from bad faith and chicanery, cannot be applicable to the doctrines laid down in the laws cited by the appellants, which are the only ones applicable to their cause. At all events, those reasons might be very good to induce the legislature to change those laws, but, as long as they remain in force, the appellants think that they must be observed.

V. It must be an easy matter to oblige the appellants to pay an interest, if they owe it; but they maintain that, having had good reasons to refuse payment, they do not owe any. They humbly beg to be admitted to shew, that the appellee has a sure remedy, to make them pay interests and damages, if they owe them, which would be to bring against them an action for that purpose.

VI. The laws above cited, which are the

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only ones applicable to this case, shew but two remedies—to obtain either the payment of the thing sold, or to rescind the sale. We see that the plaintiff and appellee, in this suit, has not used the first, which is to compel the purchaser by imprisonment or *via executiva*, to pay the purchase money; and that he has chosen to take the *via executiva* to obtain his purpose, in other words, that he has taken an *alias fi fa*, for selling again the land at a judicial sale. It it is a well known law of this state, that the debtor has always the faculty of liberating himself from the effects of the execution, by his paying the deb', at any time, before the adjudication of the property seized upon him takes place. 2 *Martin's Digest, verbo Courts.* Therefore, the said property having been, by the adjudication aforesaid, transferred to the appellants, although the thing was not delivered, nor the purchase money paid *(Civil Code, loco citato)* could only be seized upon them, and not upon the defendant Degruys, who had no more interest in it, and these appellants could, by virtue of the aforesaid law, liberate themselves, before the judicial sale of said property seized upon them took place, which they have done, and the sheriff, the legal agent of the creditor, accepted their tender and received the

purchase money. They believe that they can satisfactorily shew, that the return of the sheriff on the first *fi fa*, and his return on the second, (both of which shew, by a written proof, making part of the records of this court, that the property has been adjudicated to them, and that they have paid for it) form a most complete title in favor of the appellants to the said land. The consequence is, that they cannot be deprived of it by the summary process of the *via executiva*, and that a regular suit should be brought against them by any person who would choose to dispute their title. The plaintiff, T. Durnford, cannot, therefore, resort to the mode which he has pursued. He cannot divest the appellants of their title by any summary process; by any *fi fa* taken in execution of a judgment to which the appellants were not parties. No *alias fi fa* then can be issued in the said suit, by virtue of which the said land can be sold again by a judicial sale.

No rehearing was granted.

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APPEAL from the court of the first district.

Pleadings, in our practice, consisting only of the petition and answer, pleas *puis darrein continu-*

The defendant, on the 5th of April, 1810, purchased, at a sheriff's sale, eight slaves, part of the estate of V. Dufour, deceased.

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On the 4th of September, 1817, the plaintiff, as heir, with the benefit of inventory, of V. Dufour, jointly with Mad. Lafitte, his sister, instituted the present suit, to claim the slaves and their hire.

The defendant pleaded the general issue, and further, "that he is the bona fide purchaser of the slaves claimed, at a sale made by the sheriff, on a judgment rendered, on the 2d of February, 1810, against the absent heirs of said V. Dufour, in the suit of Jean Laroque Turgeau, acting by Carlier d'Outremer, as more fully appears by the deed of sale, executed by the sheriff."

ance are not known, but the party is to be protected from surprise, and in case of any new occurrence allowed time. When justice requires it a case is remanded for more ample proof.

On the 10th of August, 1818, pending the suit, the plaintiff received 1500 dollars from Carlier d'Outremer, (without expressing in what capacity) as a part of the proceeds of the sale of the slaves of the estate of V. Dufour, sold by the sheriff, eight of whom were purchased by the defendant: Carlier d'Outremer having received the proceeds of the sale, as agent or attorney of J. Laroque Turgeau, of whom the plaintiff is a legal heir for a part. Carlier d'Outremer, having given surety to refund the money received, on the appearance of the creditors of the estate of V. Dufour.

During the trial, the defendant offered in evi-

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that too in a case where of all others, the party has the least excuse for inaccuracy; the case of a record to which he was himself a party. We have, it is true, no niceties of pleading, but we have one plain unbending rule, from which parties are never permitted to swerve: that they must set forth their case truly. The same precision being required from a defendant, who alledges a fact in avoidance of the plaintiff's claim, that is required, from the plaintiff himself, in stating his case. And for the same reason, that the opposite party may not only be prepared to contest it, but also, that if it be illegal, irrelevant or otherwise improper, to be alledged, he may admit and demur to it.

Here the plaintiff claims the slaves as heir of his brother, Victor Dufour; the defendant says, though this be true, yet you cannot recover; because the sheriff sold them to me, under a judgment and execution against the heirs of Victor Dufour, at the suit of *Laroque Turgeau*. These then were the points in issue: was there a judgment against the heirs of Victor Dufour obtained by Laroque Turgeau? Was there a *legal sale* of these slaves under it?

The first question will be presently examined. On the second, it is held, that the sale produced is a legal sale, under that judgment,

and was properly received as evidence, under the plea, with the explanation given by the production of the record, in the suit of Camfrancq, against the same defendants.

I shall strive to convince the court, 1. that this position is untenable, and to make it out by argument and authority. 2. That the record in the suit of Camfrancq ought not to have been received to explain the sale: and that with, or without, the explanation, the sale produced ought not to have been received as evidence in the cause.

I. The sheriff has no right to make any sale, except first by order of the court; secondly in the *manner* prescribed by law. If either of them be wanting, the sheriff's sale is *void*, not *voidable* merely, but *ipso facto* void; these positions seem too clear to be contradicted. The sheriff's sale is not an act emanating from his will, it does not stand by itself, as the act of any vendor; it is an act done in obedience to the mandate of a court, and refers to the proceedings of which it is the complement. There must be a mandate, a judgment of the court ordering him to make the sale. If the sheriff sell at *the suit of A.* the proceedings may certainly be consulted to examine whether there be a

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judgment against the defendant, at the *suit of A.* This is not to explain, but to examine whether one of the two requisites for the validity of a sheriff's sale, to wit, the judgment exists. And therefore, the plaintiff made no objection to the introduction of the record of the judgment and execution at the suit of *Laroque Turgeau.* But, when the defendant offered a judgment and execution (not at all pleaded) one at the suit of *Camfrancq* (the defendant himself) he objected to them, because they seem totally variant from the fact pleaded, viz. that he bought them under an execution, at the suit of *Laroque Turgeau.*

It is suggested that this record was introduced to explain the sheriff's deed. But a closer attention to the record will shew that this is not the case, and that if it was, it would be inadmissible. They plead a sale, at the suit of *Laroque Turgeau*; they produce one at the suit of *Camfrancq and others.* Now, how could the introduction of the record, in the suit of Camfrancq, prove that the sale was as they alleged at the suit of Laroque Turgeau? How could it explain that the one meant the other? If it did so, it must go to contradict the deed, not to explain it; for when a deed says I sell in the suit of A. and B., any record, which

and was properly received as evidence, under the plea, with the explanation given by the production of the record, in the suit of Camfrancq, against the same defendants.

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goes to shew that he sold in the suit of C. and B, must contradict the deed, and contradict it in a most material part. Can it be intended, that the ambiguity arises from the words *and others* in the deed, and that the record ought to be admitted to prove who those *others* were? If so, it would be a good reason for admitting the record in the suit of Laroque Turgeau, which we were willing to admit; but it can be none for bringing in the record of Camfrancq; because, that record shews what was sufficiently apparent from the sale, that Camfrancq was a party to the suit in which it was made. But, there is no ambiguity whatever in the sale: it states, as the law directs it should state the suit, in which the sale was made. One of Camfrancq *and others* (that is other plaintiffs in the same suit) against the heirs of Victor Dufour. It, therefore, required and could receive no *explanation*. It was clearly a sale different from that pleaded, and one to authorise which, no judgment was produced. Therefore, the record in the suit of Camfrancq, and the heirs of Victor Dufour, ought not to have been received as evidence.

But it may be urged further, that neither this record, nor *any other evidence whatever*, can be received to shew that a sheriff's sale

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expressed to be in the suit of *A. B. and others* was really made, or intended to be made in the suit of *C. D.*

The law organising the superior court, under which this sale was made, not only directs the mode in which sheriff's sales shall be made, but prescribes the very *form*. When forms, in which an act is to be done, are prescribed by the law which authorises the act (and without which law, it could not be done at all) those forms must be pursued, or the act is *void*, for this plain reason, that the person doing the act having no authority to perform it but that which the law gives, can do nothing but what is delegated; and the law which delegates it, doing so only on *condition* that he pursues the forms, the moment he departs from those forms, he breaks the condition and his power ceases.

If a clerk be authorised to issue a writ for the arrest of a debtor, and a form of the writ be given, of which the plaintiff's name and the sum form a part, could there be a doubt, that the arrest of a person where these were omitted would be illegal, and that the defendant would be discharged. Again, supposing two petitions filed by different plaintiffs A. and B. and *one* writ issued against the defendant, at

the *suit of A. and others*, would it be permitted to explain this error, by shewing the different petitions? And after they were shewn, could it cure the error? It would appear not. The defendant would certainly be discharged, and the arrest declared void.

So, in case an executor be authorised to sell real estate, with the *approbation of the judge*, and a form should be prescribed for the act of sale, in which that approbation is expressed, would a sale omitting it be good?

Again, if a guardian should be authorised to sell at auction, and a form of sale be given in which this circumstance is mentioned, can it be said that a sale without it would be good?

In the present instance, the authority of the sheriff was derived from the 15th section of the act regulating the practice of the inferior court, which directs "that on any sale of land or slaves under execution, the sheriff shall deliver to the purchaser a *conveyance in the form prescribed* by the act for dividing the territory, &c." 2 *Martin's Digest*, 174. That form is set forth in the 10th section of the act referred to? 2 *Martin's Digest*, 334. And by it the sheriff is obliged to set forth the suit in which the execution issued, and under which the sale was made. He has done so,—he has

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declared that he seized the negroes by virtue of *a* writ of *fieri facias* ; not several writs : at the *suit ;* not *suits* in the plural, but at the suit of *Camfrancq and others.* Now, shall the party to this deed, the purchaser by this sale, be allowed to come in and shew that there was no such suit, in order afterwards, to prove by presumption, that "*Camfrancq*" meant one suit, and *others*, meant another suit to wit, that of *Laroque Turgeau.* Would not this, independent of other objections, be doing that which is expressly forbidden by the code in the following provisions?

"The authentic act is full proof of the agreement contained in it, against the contracting parties, their heirs or assigns, unless it be declared and proved a forgery." *Civil Code*, 304, *art.* 219.

The agreement, contained in this act, is on the part of the sheriff, that he sells by virtue of a writ issued at the suit of *Camfrancq and others.* On the part of the purchaser, that he buys in a suit, where he jointly with others is a party. Whether this be true or false, may, as I shall presently shew, make a most material difference to the parties ; but if they have agreed to it, by an authentic act, it is full proof against them, unless it be declared a *forgery.* But,

can it be full proof, if they are allowed, to bring other evidence to explain or contradict it?

That this is an authentic act, is proved by the definition given of such act, *Civil Code*, 301. *art.* 217, and by the provisions of the act respecting sheriff's sales.

The argument, on this article of the code, stands thus—The authentic act is full proof against the parties of what is agreed by it. This is an authentic act: therefore, it is full proof against the defendant, of what he agrees to in it. But, it was agreed by the act, that the purchase was made under an execution in the suit of Camfranco and others: therefore, the act, is full proof of that fact. But, full proof admits neither of explanation, or of contradiction, *ex vi termini*: therefore, no evidence ought to have been admitted to that end. If this reasoning be just, we cannot, without violating express law, receive any evidence explanatory or contradictory to the sale.

Should it be said, that there is no *express agreement*, in the sale; that it was made under the *particular execution* cited in it, and therefore is not *full proof* of any other fact than the *sale*. I reply by quoting the next article (220) "an act whether authentic, or under private signature, is proof between the parties, even of what is there expressed only in *enun-*

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ciative terms, provided the enunciation have a direct reference to the disposition." Now, here there can be no doubt, that the enunciation of the execution, by virtue of which the sale was made, has a *direct* reference to the disposition, because without it, no disposition whatever could have been made.

The next provision of the code, which forbids the introduction of the evidence, is the following. Neither shall parol evidence be admitted against, or beyond what is contained in the acts, nor what may have been said before, or at the time of making the said acts, or since. *Civil Code*, 310, *art.* 242. This might seem not to apply, inasmuch as the evidence offered, was written not parol: but it must be remarked, that the written evidence of itself, neither explains nor contradicts the sale. The sale says it was made in the cause of *Camfrancq and others*; now the introduction of the records shews that there were two other suits, one of Laroque Turgeau, and the other of Camfrancq, but does not of itself, shew that there was no suit of *Camfrancq and others*. This fact is taken as one proved, and it is said "if it is ascertained *that no such case as that of Camfrancq and others* vs. *the estate of Dufour, is to be found among the records of the court,*

but that there are other cases against that estate, in which these identical slaves were attached, and in which judgment was rendered and execution issued, why should not the sheriff's sale be explained by a reference to these executions, judgments and proceedings?" Now, how could it be proved but by *parol testimony*, that no such record existed? But such parol testimony, even if any had been offered, is expressly forbidden by the article quoted. But, *no such testimony either verbal or written was offered*, or appears on the record.

I have no fear that the want of this parol testimony (in itself inadmissible) will, in the opinion of the court, be supplied by the lighter testimony of presumption: and even, if that could be resorted to, it is difficult to discover on what it can be founded. For it is just as probable, that there were not, as that there were other suits; unless, indeed, the recital in the sheriff's deed should turn the scale of probability in favor of the existence of such a suit.

On this head then, my argument is this: the law forbids the introduction of parol proof, to explain or contradict a deed. The evidence, introduced and excepted to, could only be made applicable (if it could at all) by the parol testimony. Therefore, the evidence was inadmissible.

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Again, the proposition is grounded upon the supposition of the existence of testimony, which is not in the record. "If (they say) it is ascertained, that no such cause as Camfrancq and others, &c." But it is not ascertained.

On these grounds, it is respectfully submitted to the consideration of the court; whether, the record in the cause of Camfrancq. and he heirs of Dufour, ought to have been admitted in evidence, to explain or contradict the enunciation, in the sale produced, that it was made at the suit of Camfrancq and others.

II. But, explained or unexplained by the record, the sale in the case of Camfrancq and others, ought not to have been introduced in evidence; because, it differs essentially from the sale set forth in the answer: because, it is unsupported by the judgment; because, if the explanation of the record be admitted, the sale must have been made, not at the suit of Laroque Turgeau, but at the suit of Camfrancq.

1. It differs in essence from the sale pleaded; that it differs is not denied, but it is said the difference is not material. But, what can be more material than the point of difference; not only for the reasons urged in shewing that

the record ought not to have been admitted, viz. that it differs from the form required by law; but, for this further reason, that a sale might be valid, if made in one suit, that would be void in another; that relief might be granted against a purchaser in one suit, which would not be afforded in another. For instance, to go no further for illustration than the arguments used in this very cause. The sale, if made in the suit of Camfrancq, might be void; but it might be valid by ratification (if we have ratified, it by receiving the money as the heir of Laroque Turgeau) should the sale have been made in that suit. We might obtain relief against Camfrancq as the purchaser under his own judgment, which (under circumstances) might be denied to us, if he were the innocent purchaser under the judgment of another. Again, the opposite party is enabled to examine the records, and discover whether there be fraud, error or nullity in the judgment, or whether there be any judgment to found the sale upon; if the sale be truly set forth. But, how can he do that, if the defendant be allowed to plead a judgment at the suit of A. and to prove one at the suit of B.? There may, *for any thing that appears*, have been a suit of Camfrancq against the heirs of Victor Dufour. That suit may have been

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conducted so as to make the proceedings a perfect nullity; the heirs might not have been named, represented or summoned; there may have been no judgment to warrant the execution; no execution to warrant the sale. And yet, as a sale in that suit was not pleaded, the plaintiff was not only left without notice, but was misled. And the defendant, besides this, gained the manifest advantage of appearing not as the purchaser under his own judgment, but under that o Laroque Turgeau, when perhaps the proceedings in the one might be regular and void in the other.

The decision of this court, in the case of *Harvey* vs. *Fitzgerald*, confirms fully my reasoning upon this head; and expresses in forcible language the principles for which I here contend. "Our laws (says the court) on the subject of the practice of courts in civil cases, contain provisions tending as much as possible to simplify it, and relieve us from all unnecessary technical rules, relating to special pleadings. But, parties in a suit are bound on the one side plainly and substantially to set forth the cause of action, and on the other, the *means of defence*. A denial of the facts stated in the petition, or a *statement of other facts in avoidance of them*. It is necessary to a fair admin-

istration of justice, that such certainty should prevail, as to put each party on his guard. The rule of law that requires that judgment should be rendered *super allegata et probata*, is founded on common sense, and principles of justice." 6 *Martin*, 549. Now, with these principles to direct us, how can we say that a deed so totally and materially different from the one pleaded, ought to have been introduced in evidence? The English law is not more precise than ours, on this subject; it is founded on the same reason. I will, therefore, quote two or three out of many decisions in their books.

1 *Espinasse's Reports*, 726. *Brown* vs. *Jacobs*. The record pleaded was in the name of *Southall;* the record produced was in the name of *Suthall:* here, though the record was the same, lord Kenyon ruled that, as it was written evidence, it was bad.

1 *Term Reports*, 656. The variance was in the date of a return; which being deemed *material*, the court held the variance to be fatal.

In the United States, we find the same doctrine, wherever the variance is a *material* part. 4 *Johnson*, 456. 1 *Cranch*, 283. If the *materiality* of the variance be the ground of decision, what can be more material than that which exists in the present instance?

One therefore, of two things, either the judg-

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ments, if they are the true ones, are not recited, as they should be, in the sale, or there is no such judgment as is recited; either of which is fatal. But, what shews beyond all manner of dispute, that the sale was not made under two executions, is the date of the docketting of the judgment, which, by law, is directed to be inserted in the deed, and which here is the 27th of January. Now, the two judgments produced were, as appears by the record, docketted on different days. Can a sale then, conveying all the estate which the defendant had on one of those days, satisfy the statute, which directs that the day of docketting *the* judgment, shall be inserted both in the execution and sale? The sheriff then, has complied with the law. He has recited a suit. He has inserted a day of docketting. But, there is no judgment produced in the cause recited, and of course, there can be no docketting of such judgment on the day specified. Therefore, for this reason also, the sale ought not to have been suffered to be read in evidence.

3. If the records should be considered as good explanatory evidence, and are made to apply to the sale produced in this cause; they shew directly the reverse of what they were introduced

to show, viz. that the sale was made at the suit of *Camfrancq*, not, as pleaded, at the suit of *Turgeau*.

1. The negroes sold under the sale, are principally those attached at the suit of Camfrancq: of the eight contained in the sale, only three, to wit: *La Fleur*, *Victor* and *Jeudi*, were attached at the suit of Laroque.

2. The day of docketting, referred to in the execution and the deed, is the 27th of January, which agrees with the judgment of Camfrancq, but differs by many days from the docketting in the cause of Turgeau.

3. As the sale is *under a suit* and recites *one day* of docketting, it is clear that only one suit was intended by the sale. And if (contrary, in my opinion, to the best rules of evidence) we are suffered to construe the deed contrary to its plain and clear import, and to substitute a suit not expressed, instead of one that is, to change the suit of *Camfrancq and others* for another; what other shall we substitute? Shall we strike out Camfrancq altogether, and by changing the word *others* into Turgeau, make the deed speak what the defendant wishes? If we must alter, will it not be easier to reject the words *and others* as surplusage? But, what would be gained by this, though in itself,

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a most violent inroad on the rules of evidence ? When we had even gone thus far, the defendant would not be advanced in his cause, for then the deed would stand as a sale made in the cause of *Camfrancq*, which was not pleaded, and therefore, could not be given in evidence, and then I pray the court again to remark, that the *ratification*, by receiving the money as heirs of *Turgeau* (inconclusive, as I shall shew it on other grounds to be) would totally fail.

But the defendant seemed to think, that all difficulties would vanish, if they could persuade the court that the sales were made under both executions. For this, they have no foundation *in the facts* as they appear. They presume it first, because there are *two executions*, and only one sale. But, what proves that this is the only sale ? The presumption is against it. For ten slaves were attached in the two causes, and only seven of them are sold, *Frosine*, one of the eight, not being included in either attachment; and this, although the sum raised by this sale is not sufficient to satisfy the judgments. And the fact is otherwise : two suits being now pending for negroes purchased under one of these judgments.

Secondly. They presume it, because they

asserted that the negroes sold were the same with those attached in the suit of Turgeau ; but the assertion is incorrect, only *three* out of the *eight* having been so attached.

There is neither proof or even presumption, that the sale was made under both executions ; but there is proof, that it was not. 1. The evidence of an *authentic act*, which declares the contrary in a manner unequivocal, unsusceptible of explanation, and repeated in the most important clauses of the act. 2. If it were not absurd to support by argument, full and conclusive proof, I would say, that the sheriff's acts, when they appear, on the face of them, to be done according to the forms of law, shall not be explained by other evidence, or construed so as to make them illegal. Now, here, the law directs the sheriff, by the strongest implication, to proceed *separately* on *each execution ;* he is ordered to endorse the day and hour, on which he receives *cash* ; he must refer to the day of docketting, in the body of the sale ; he must recite the judgment, under which he sells, and all this for the strongest reasons of utility and justice, which would fail, if he was allowed to sell on several executions, at the same time, without distinguishing, in which the sale was made. It would be impossible, in that case, to

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distinguish against which of the plaintiffs recourse must be had, in case of eviction, for want of title, which recourse always existed and is still in force, tho' somewhat restricted by the 20th sect. of the act of 28th of Jan. 1819, p. 40. If one execution were set aside for irregularity, the sale under all would be void; where he sells on all, he cannot do the duty the law imposes on him. of holding the surplus money, if any, after paying the particular debts, to the use of the defendant; because no one can tell what that surplus is, on each execution, if the property be sold *en masse*, in each execution. With this *positive* law, against an indiscriminate sale, with these manifest inconveniences attending a breach of it; the sheriff has returned under his oath of office, that he did sell in a *single suit*, that of *Camfrancq and others*. Shall presumptions then, or even proofs, be admitted in a cause to which he is not a party to shew that he has acted illegally?

On this denomination of the suit, *Camfrancq and others*, permit me to remark. It is a known formula to describe a suit where there is more than one plaintiff; but never yet, I believe, was used to shew, that there were several suits. The title of a suit, is an index to find the proceeding in it, both on the records and minutes of the court.

To express the name first used answers this end, although the rest are not named, but are referred to, by the description "*others* :" but, if this description were, in any proceedings, permitted to express other *suits*, by other plaintiffs, how could any proceeding be found? In the case before the court, it would be impossible to discover, what other causes the sheriff meant, until we had examined, one by one, the many thousand titles of causes, on the clerk's docket. Therefore, when the sheriff, or any other officer, uses this formula, it must be taken in its usual and legal acceptation, not in one that would create confusion, and always call for the aid of other proof to explain it.

I conclude this long, and I fear tedious disquisition, on the admissibility, and effect of the testimony, by entreating the court, to consider whether there is any thing whatever, in the record before them, to shew by *legal proof*. that there was no such suit as that of *Camfrancq and others*. If there be not (and I can discover, not even a presumption of the kind) how can they say, that this sale was made at the suit of Laroque Turgeau, as pleaded. And if hereafter, the plaintiff should be able to shew, that there was such a suit, and that there was no judgment to support the execution, no citation

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to support the judgment, or no execution to support the sale. Would it not be manifest, that injustice and irreparable injustice had been done to him, and yet may not this be the case? What evidence is there that the records of the court have been searched? What evidence that the two suits, mentioned in the record, are all that exist? No such evidence has been produced, for the fact is different; there were other suits, and any one of them may as well be substituted for the word "*others*" as the suit of Turgeau. It will not surely be said, that *we* ought to have produced proof on this point. The defendant pleaded a title under the judgment against Turgean. He ought to have produced that title, or if he relied on *presumptions* to supply it, it was for him to produce all the evidence which was to give weight to them. If the mere existence of such a suit as "*C. and others*" was necessary to create a presumption that Laroque Turgeau was intended, it was for him, not for us to produce it.

But, suppose no such judgment or suit to exist, so much the worse for the defendant. He was bound in the first instance, to look at his own title. He is, as I have shewn, bound by every thing enounced or declared in it; and he, not the plaintiff, ought to suffer for

the defects of his title. And he was bound afterwards, to plead his true defence, if he relied on shewing that this deed was not what it purported to be, and to have given us the means of defence.

III. The plaintiff objected to the introduction of a notarial receipt, given by him to Carlier d'Outremer.

Before examining the grounds of this exception, it will be necessary to examine the evidence on the record first, to shew that the money mentioned in this receipt, is by no means identified with that produced on the sale. It is only described as money deposited with C. d'Outremer, belonging to the estate of Laroque Turgeau, which had been enjoined in his hands by the defendant, and by Lafitte. Now, this might have been these monies, or it might have been other monies. The thing was susceptible of proof, and it was the defendant's business; if he thought the circumstance material, he could have produced it. It is not for the court to supply such material defects in testimony, by supposing it to be the same, because it was enjoined by the present defendant and Lafitte. Supposing this to be the case, might not this be another sum equally

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enjoined by these persons? The receipt itself calls it "part of a larger sum." The plaintiff could not be prepared to shew this, because he had no notice, as I shall shew he ought to have had, of the production of this receipt.

But, where is the evidence that the sum, for which the negroes was sold, was enjoined by Lafitte? It was indeed, enjoined by the defendant in this suit. But, the sum received was not the sum for which the negroes were sold, because, that was enjoined only by the defendant; whereas, the sum received was represented as being enjoined by both.

Secondly. The case shews that this receipt was given during the pendency of the suit, long after it was at issue; and therefore, was inadmissible.

The enquiry on a trial only relates to the situation of the parties with respect to each other, at the time the suit was commenced; or, on the broadest principles, to the time of the issue being joined. The plaintiff here declares, that, at the time of filing his petition, he was entitled to relief; the defendant, in his answer, denies his right, and states special circumstances in avoidance. The issue joined there, is whether the party was entitled to relief at that period. Should any thing occur

afterwards, to charge the relation of the parties with respect to each other. If a release should be given, or a new title accrue to the defendant by succession or otherwise, that fact must be set forth by an amended answer, that the opposite party may have notice of the new fact relied upon.

This is an acknowledged maxim in jurisprudence, and is founded on the strictest principles of justice. If the fact, relied on, had happened before the bringing of the suit, the defendant would undoubtedly have been obliged to set it forth in his answer, before he is permitted to adduce it in evidence: and what reason can there be, to exonerate him from giving this notice by an amended plea, if he allege that it happened afterwards. There is the same necessity for notice, the same or a greater danger of surprise, I say a *greater*, because, a party is naturally supposed to be better prepared with testimony to explain all his acts prior to the suit; but cannot be supposed to provide against suggestions of what happened afterwards, unless he have notice. Here at the time of the suit brought, Turgeau was alive. The plaintiff could do no act as his heir to injure his claim. If any act of that kind was alleged to have been done during

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the pending of the suit, it ought to have been alleged by an amended answer, and then the plaintiff might have disproved or explained it. The common law provides for this by a plea *puis darreign continuance*, and all codes of practice have similar.

This is not like permitting what the parties have said, since the bringing of the suit, to go in evidence. This is done because it is proof, not of any change, but of their acknowledgment of the state of things previous to the suit. This case is widely different. It is a new act which, if true, changes the state of the parties, and which therefore, ought to have been set forth.

In 1 *Dallas*, 65, it is stated and acknowledged as "*a principle not to receive evidence of any thing that happens after the suit*," though the acknowledgment, after the suit, of a *fact existing* before is good evidence.

I enlarge no more on this point, because it is apparent that if the fact had happened before the suit brought, the defendant would not have been permitted to give it in evidence without pleading it, as it is a *distinct fact*, not arising out of the pleadings as they stand. That the plaintiff could not claim the negroes sold, because he was heir to the plaintiff in the suit, in

which they were sold, and had, by receiving the money, ratified the sale—is as much a fact necessary to be pleaded, as the sale itself was. According to this principle, the court has decided in the case of the *Planters' Bank* vs. *George*, that the agency of the persons who made the contract for the defendant, is not a circumstance to be submitted to a jury, because it was not specially set forth. Now, certainly that is a point much more readily to be inferred from the allegation, that the defendant made the agreement in that cause, than it is in this, that the plaintiff ratified the act of the sale, which ratification is no where set forth, or relied on in the pleadings. The record shews that this receipt is *res inter alios* and, therefore, ought not to have been admitted.

IV. But suppose, the paper properly admitted, what does it prove: and what ought, in common justice, to be its effect on the cause?

Let us concede, for the sake of argument, that the money, received by the plaintiff, was part of the proceeds of the negroes, which he now claims, and that it came into the hands of d'Outremer, as the agent of Turgeau, where it was attached on the bringing of this suit by the defendants; Camfrancq and Lafitte, as guar-

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dians of the other heirs of Victor Dufour. He held it then, as a judicial deposit, to be returned to the purchaser of the negroes, if the sale should be declared void; to be paid to Turgeau, if the sale should be affirmed. He was a mere stake holder, indifferent who should gain, and ready, on a proper indemnification, to deliver it to either. In this state of things, Turgeau dies. The plaintiff becomes entitled to a share of his estate, and a portion of this money, in case the sale of the negroes, which he has brought a suit to cancel, should be affirmed. Seeing the money lie idle in the hands of the depository, he tells him "give me the money, if I lose my suit, it is mine of right, if I gain, I will give you security to refund it, that you may pay it, as the law directs, to the purchasers of the negroes, who have enjoined it in your hands." This is done, and the receipt records this transaction and nothing more. It is a mere change of the deposit, but, so far from containing, as has been supposed, any acknowlegement or ratification of the sale, or any abandonment of the suit to cancel it which had been long pending, it expressly provides for the event of the plaintiff's gaining that suit, and gives security in that case to refund. If this were a ratification of the sale, to what end

give security? A simple receipt and discharge would have been sufficient; it was clearly, therefore, not the intent of the plaintiff to ratify the sale and release his suit. It was not his *intent* to have the price and recover the thing sold. He has expressly declared, that this was not his intent; he has expressly provided for that event (the recovery of the slaves) which the defendant says he intended to abandon; and he has expressly renounced the idea of keeping the price, in case he annulled the sale; for he has not only consented, but given security, in that event, to repay it. To give the construction contended for on this transaction, would be to go counter to the *intent* of the parties, *plainly and manifestly expressed* in their deed. This appears so clear, so apparent, that I can only account for the view taken of it by the court, from its not being properly stated to them, that the injunction on this money, in the hands of C. d'Outremer, was laid by the defendant in this suit, when it was brought to secure him the repayment of his money in case the slaves should be recovered by the plaintiff; but this appears by the record of the cause.

If the money had been in the hands of the court, instead of being deposited with d'Outremer, would it have injured the rights of any

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litigant party to take it out, furnishing security to refund? Surely, this is every day's practice; and how does it change the nature of this case, if any other person is the deposi ary?

Surely, if there be any thing uncertain in the wording of the receipt (which I cannot, however, perceive) it would neither be legal nor just to construe that into a relinquishment of a right of action, which could bear another and more obvious construction. If the original judgment would not have bound the plaintiff, independent of this receipt, then the receipt must be considered as a "recognitive or confirmative act"; but, by the civil code, page 310, art. 238, such an act is only valid when it contains the substance of the voidable act that is confirmed, and the motive for confirming it, neither of which is combined in the receipt; therefore it cannot avail as a confirmation or recognition.

Some stress seems to be laid on the receipt containing a discharge; but connected with the plain state of the transaction, this can have no operation. It was necessary, if he lost his suit for the slaves; for then he would keep the money; but, as has been repeated, he agrees to refund it, if he prevailed in recovering them. If this be construed into a ratification of the sale, or into a discharge of his suit, no party

will be safe in making deposits of the fund in litigation; and every object must remain in sequestration, until the final decision of the cause. Should this be the true construction I can only lament the ignorance which considered it as a transaction, that could in no sort put his interests in danger, since he took care clearly to express his intent, and was not aware that, that intent could interfere with the prosecution of this suit.

If, then, this paper be considered, according to its terms, a change of deposit only and not a ratification or release, the court then will proceed to examine the record, and should they even determine that the words "*Camfranco and others*" mean "*Laroque Turgeau;*" they will find that the property of the plaintiff has been taken from him in a suit:—

1. When he was not *named* as is expressly required by law. 2. When he was not cited. 3. When no answer was filed for him, the only answer being filed, long before the nomination of any attorney. 4. When notice directed by law to be given in cases of attachment, by posting up the writ, was not given, and the only service being on the *plaintiff* himself. 5. When he was condemned unheard.

But, if they find that the record cannot be

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construed in a manner directly contrary to its words, in addition to the above defects, they must be convinced that no judgment or writ of execution has been produced to justify the sale.

But independent of all these grounds, and admitting all these arguments, proofs and authorities to be of no avail, why ought not the plaintiff to have judgment for the five negroes, viz: *Baco*, *Levantine*, *Nanette*, *Susanne*, and *Frosine*, neither of whom were attached, under the suit of Laroque Turgeau, under which the defendant alone claims?

Moreau, for the defendant. The sheriff's deed to the defendant must be considered by this court as legal evidence, as it was read in the court *a quo*, without any opposition from the plaintiff. But, the plaintiff's counsel contends, that the defendant cannot avail himself of the record of the suit, in which he (the present defendant) was plaintiff against the heirs of V Dufour, because in the answer, the slaves are stated to have been purchased at a sale made in pursuance of a judgment, in which Laroque Turgeau was plaintiff against these heirs.

II. Justice would often be defeated, if de-

fendants could, in their defence, be confined within the strict and narrow limits within which the plaintiff contends we are to be kept. Naturally, it behooves the plaintiff to prove his claim, when the defendant denies it. The latter ought to be discharged, if the former fails in this proof, and, as negative facts are not susceptible of proof, those who deny any allegation, in court, are dispensed from adducing any proof. *Part.* 3, 1, 14, *Ei incumbit probatio qui dicit, non qui negat. ff.* 22, 2, 2. 3 *Hulot*, 248.

The defendant might then confine himself to the general denial, in his answer; and under it, he would have been authorised to produce every document which he has offered, in order to destroy the plaintiff's claim. Can the latter complain that the former has done too much, in adding to his general denial, a special allegation, of the right which he claims, under a sale made to him by the plaintiff, as one of the co-heirs of V. Dufour, on an execution obtained by these co-heirs?

Admitting, that the same strictness of proof, which is required from the plaintiff, is demanded of a defendant, who alleges a fact in his defence, because, he becomes so far a plaintiff, *ff.* 22, 3, 19, 3 *Hulot*, 252, let us examine

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whether this principle has been violated in this case. The courts of the English common law, on the decision of which, the plaintiff relies, may have exacted a strict compliance with it, in regard to the special exceptions pleaded by either of the parties, and this court may have held that "our laws, or the subject of the practice of courts in civil cases, contain provisions tending, as much as possible to simplify it, and relieve us from all unnecessary technical rules, relating to special pleadings; but, parties are bound, on the one side, plainly and substantially to set forth the cause of action, and on the other, the means of defence—a denial of the facts stated in the petition, or a statement of other facts, in avoidance of these. It is necessary to a firm administration of justice that, such a certainty should prevail in pleading, as to put each party on their guard." *Harvey* vs. *Fitzgerald*, 6 *Martin*, 549. Nothing in this can affect our defence.

Let us rejoice, that our courts are not bound down to the rigorous practice of the common law of England, which compelled lord Kenyon, in *Brown* vs. *Jacobs*, *Espinasse*, 26, to reject a record, offered in evidence, because the name of one of the parties was there spelt *Southal*, instead of *Suthal*. Our legislature has re-

lieved us from so dreadful a situation, by providing that, "the supreme court shall proceed and give judgment, according as the rights of the cause and matter in law shall appear unto them, without regarding any imperfection or want of form, in the process or cause of proceeding whatever." 1 *Martin's Digest*, 444, *n.* 9.

If the irregularities of an act, in the course of proceeding, cannot be fatal and affect the justice of the case, will it be contended that an error in the defendant's plea, may destroy his right, especially when it is clearly cured by the production of titles which he produces, and to which he referred the court in his answer, when a general denial would have sufficed? That would be against both the spirit and the letter of the law, which we have cited. It is to be observed, that, the defendant was not satisfied with alleging in his answer, that he was a *bona fide* purchaser of the slaves claimed, at a sale, under a judgment against the heirs of V. Dufour, obtained by Laroque Turgeau, on the 2d of February, 1810, but did refer to the deed of sale, which he considered as his title, as more fully appears by the deed of the sheriff, of the first district of the superior court of the late territory of Orleans, on the 5th of April, 1810.

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The sheriff's deed, then, constitutes a part of the defendant's answer, and if he had annexed a copy of it thereto, no doubt could have been entertained of its being proper evidence at the trial. Will not a reference to the deed in the answer have the same effect? Most certainly. Either party has a right, at any time before the trial, to a communication of any paper referred to in the record of the suit by his adversary, or to insist on his annexing a copy of it to the record. The plaintiff was then sufficiently informed of the defendant's reliance on the sheriff's deed; he could not, therefore, oppose its introduction in evidence, and if he could, it is now too late for him to complain, since he did not except to its production in the court *a quo*.

We are next to enquire whether this deed having been read in evidence, the defendant cannot avail himself of it in order to give the imperfection in the answer. His object in this suit is to resist the plaintiff's claim to the slaves, as one of the heirs of V. Dufour, by shewing that he had acquired a title to them under an execution bottomed on the judgment obtained on the 2d of February, 1810, by Laroque Turgeau against these very heirs, and he refers to the deed given to him by the sheriff, on the 5th of April following, in which the slaves are named.

This deed is evidently then the title on which the defendant relies. The circumstances, preceding or accompanying this sale, the judgments obtained by Laroque Turgeau and the defendant, the subsequent seizures, are only accessories or incidents, which are to have their explanation, and are to be corrected, if erroneous, by this deed.

It purports that the sale is made to him, in pursuance to a writ of *fieri facias* commanding the sheriff to cause the money to be made, out of the goods and chattels, and lands and tenements of the heirs of Dufour, at the instance of Camfrancq and others. These expressions explain what the defendant means in the part of his answer, where he alleges the seizure of the slaves at the instance of Laroque Turgeau, altho' some of them, Baco, Laventine, Nanette and Susann, were adjudicated to him in a suit against the heirs, in which he was himself plaintiff.

It is in vain contended that this would be to allow the defendant to prove what he did not allege. We answer that, in every case in which a reference is had to a deed, and through error its contents are incorrectly stated, the contents of the deed, not the statement of them, must be attended to.

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There is no contradiction between the allegations in the answer and the contents of the deed; the first speak of slaves sold and seized at the suit of Laroque Turgeau, and the latter at the suit of Camfrancq and others; the former is less explicit than the latter.

The record shews that the seizure was made, as well at the instance of the present defendant, as that of Laroque Turgeau, and it is clear that it is the latter the sheriff alludes to, in the words *and others.*

III. The plaintiff's counsel further contends, that the sheriff's deed is null and void, because it does not mention the names of the parties to the suit; because it mentions one writ of *fieri facias*, and one judgment only; because it appears the sale took place under Camfrancq's judgment only; and, lastly, on account of the identity of the slaves seized and sold at Camfrancq's instance, with those seized at Laroque Turgeau's.

1. The form of the deed, which is to be given by the sheriff to purchasers of property, sold under a writ of fieri facias, is prescribed by the legislature. 2 *Martin's Digest*, 334. The preamble is in these words: "Whereas I, A. B. sheriff of the county of ——, by virtue of a

writ of *fieri facias*, to me directed, against the goods and chattels, lands and tenements of C. D. at the suit of E. F. &c."

Is the deed void, if the names of the parties be omitted? The 14th section, of the act of 1805, provides that the sheriff's sale, whether of real or personal estate, shall vest in the purchaser all the estate, right and title of the person against whom such execution is issued. *Idem*. 172. It is only in the following section, that the form of the deed, to be given after the sale, is mentioned. It is by the sale, of which the deed is only an evidence, that the property is transferred.

It suffices then, that this evidence of the sale be written or subscribed, by the officer, who is directed to give it. All the particulars, which are mentioned in the law, are not of the essence of the deed. It would be highly injurious to the fortunes and destructive of the rights of individuals, if the least omission in a deed, rendered it null and void.

It is not true, that all the forms, which the law prescribes, are so rigorously imposed, that the least omission or deviation, avoids a deed. The 18th title of the third partida, is full of forms of different acts; but, it has never been held that acts, in which the notaries do not li-

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terally use these forms, are void. It is true, *prohibitive* laws import a nullity, although it be not formally expressed. *Code Civil*, 4, *art.* 12. It is otherwise with laws purely *imperative*. They must denounce the nullity, and the infraction, on which it is pronounced, must attack the essence of the act. 1 *Jurisp. du Code Napoleon*, 67. It is always difficult to distinguish vices, which attack the substance of the act, from mere irregularities. This requires often all the sagacity of an enlightened judge, whose intelligence and learning are a necessary supplement to the law. *Idem.*

If the court, then, has a discretion to exercise, can we doubt that it will not consider the alleged omission, as relating to the substance or essence of the deed, but, as an irregularity, which may be remedied by a reference to the records introduced. The only imperfection being the want of a direct reference, to more than one *fieri facias*, and the omission of the name of Laroque Turgeau, who is evidently designated under the words *and others*.

2. Two writs of *fieri facias* were clearly referred to by the sheriff. We produce the records of two distinct suits, one in which Camfrancq alone, was plaintiff, and another in which Laroque Turgeau was.

There was no suit in which Camfrancq was a joint plaintiff with one or more others.

It is true, the law forbids the introduction of parol evidence beyond, or against the contents of an act. But, it is not by witnesses, that we have sought to prove that the sheriff erred, when in his deed, he referred to a single writ of *fieri facias*, in the suit of Camfrancq and others. We have shewn by records, that he meant to refer to two writs, issued in two different suits; one in which Camfrancq was plaintiff, and another in which another person, viz. Laroque Turgeau, was so.

Nothing prevents evidence being received beyond or against the contents of an act, or of what was done before, at the time, or since its confection, as in the case of a counter letter, in the case of a simulated contract; provided, the evidence result from an act, in which the parties intervened.

3. The same answer may be given to the allegation, that one judgment only is mentioned.

4. Although, five of the slaves, purchased by the defendant, are part of those whom he had seized, it does not follow that the seizure, at his instance, was alone acted upon. It appears, and the plaintiff admits, that three of

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the slaves sold to the defendant, had been seized at the suit of Laroque Turgeau, viz. *Lafleur*, *Victor* and *Jeudi*, and the sheriff could not give a title in them to the defendant, had they not been seized in the latter suit. Besides, Camfrancq's claim amounting only to $971 75, the five slaves seized in his suit, were more than sufficient to cover it. Laroque Turgeau's claim amounted, according to the record, to 3494 dollars. What puts the fact, of there being two writs of execution, beyond a doubt, is that the sheriff sold eight slaves to Camfrancq for 4040 dollars, while the claim of the latter was below a fourth of that sum.

5. It is not easy to discover on what ground the plaintiff assumes it as a fact, that the slaves seized by Camfrancq and Laroque Turgeau, have not been seized and sold, but that others were sold in their stead.

IV. The notarial receipts, given by the plaintiff to Carlier d'Outremer, on the 10th of August, 1818, for $1560, was properly admitted in evidence.

1. This document establishes that the money, thus paid to the plaintiff, was received by him, as part of the proceeds of the slaves, seized as part of the estate of V. Dufour by the present defendant and Laroque Turgeau.

The plaintiff acknowledges the receipt of $1560 part of a larger sum, belonging to the estate of Laroque Turgeau, of which Carlier d'Outremer is depositary; and engages that, as there are seizures and oppositions, in the name of Camfrancq and Lafitte, of Jamaica, the plaintiff promises to refund the sum received, if the claims of these persons prevail; and he gives surety therefor.

The record shews that the sum in the hands of Carlier d'Outremer, and of which the plaintiff received a part, was the proceeds of Laroque Turgeau's claim, on the estate of V. Dufour, part of which had been levied on his absent heirs. For this claim, the slaves Scapin, Lafleur, Jeudy, Victor and Dupont, had been seized; and on the 2d of February, 1810, Laroque Turgeau had judgment for $6051 30 on which that of 3494 58 was levied. It likewise appears, that Laroque Turgeau obtained this money, on condition of his giving security to refund it, if Lafitte, who had intervened in the suit, established his claim on the estate of V. Dufour, and the court determined that the creditors of the deceased were to be paid by contribution; a security which was given by Carlier d'Outremer, agent of Laroque Turgeau, on the 24th of April, 1810.

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Lastly, the record shews that on the 6th of March, 1818, the defendant obtained an injunction, by which Carlier d'Outremer was inhibited from disposing, on any account, of the $3491 50 which he had received on the seizure made by Laroque Turgeau; in contempt of which Carlier d'Outremer, on the 10th of August, 1818, paid 1560 dollars to the plaintiff.

A comparison of all these facts must create a conviction, that these 1560 dollars are a part of the 3491 50. It is true that, originally, Carlier d'Outremer was not strictly, what is deemed in law, a depositary of the proceeds of the seizure of Laroque Turgeau, on the estate of V. Dufour; but held them as the agent of the former. But the injunction obtained, by the defendant, renders him a depositary, since it commanded him to hold these proceeds at the order and disposal of the court. The payment, which he afterwards made to the plaintiff, on his giving security to refund, cannot have changed his character of depositary.

2. But it is contended, that the defendant cannot avail himself of this payment, which was posterior to the institution of this suit; because he has not pleaded it. This is a vain effort to introduce in our tribunals the strictness of the common law of England, which I think will prove abortive.

In civil law courts, the defendant is not bound to allege his exceptions, whether they result from facts anterior or posterior to the inception of the suit. Part. 3, 14, 1. *Harvey* vs. *Fitzgerald*, 6 *Martin*, 549. See on this point, the argument of the counsel for the defendant, in the case of *Nagel* vs. *Mignot*, 7 *Martin*, 657.

3. It is further urged that the plaintiff's receipt to Carlier d'Outremer cannot be used by the defendant, it being *res inter alios acta*.

When a succession is opened, the acts by which the person, entitled thereto, may accept or decline it, cannot be considered as indifferent to the creditors of it. They may avail themselves of his acceptance of it, whether it be evidenced by a formal act before a notary, out of their presence, or by any instrument, in which the party acted as heir. *Civil Code*, 77, *art.* 163. If, in the receipt to Carlier d'Outremer, the plaintiff had styled himself heir to Laroque Turgeau, the defendant could, undoubtedly, avail himself of the evidence resulting therefrom, that he had accepted the succession. If the same evidence result from a fact, of which this receipt is a proof, he may have the benefit of it.

V. The plaintiff has confirmed the sale of

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the negroes, purchased by the defendant, by receiving his share of the price.

Whether the proceeds of the sale were deposited in court, or remained in the hands of a third person, on account of the seizure and opposition made by the creditors of Laroque Turgeau, any act by which he, or his heir, accepts or receives these proceeds, must, in law, be considered as a confirmation of the sale. In default of an act of confirmation or ratification, it is sufficient that the obligation be voluntarily executed, subsequent to the period at which the obligation could have been validly confirmed or ratified. *Civil Code*, 310, *art.* 238. To execute a convention, even in part, is to approve it, 10 *Pandectes Francaises*, 330, *n.* 226.

The obligations, resulting from the contracts of sale, are chiefly the delivery of the thing and the payment of the price.

The acceptance of the price, in whole, or in part, even in the case of a sale, made during the minority of the vendor, if the price be paid after his coming of age, is a confirmation of the sale. 3 *Merlin, Decisions de droit*, 440, 445, *verbo Mineur*, where a decree of the court of cassation of the 4th of Thermidor, 4th year, is cited.

The circumstance, of the plaintiff having given security to refund, does not alter the case.

This was a business absolutely personal to Cadlier d'Oremer and the plaintiff. The former having himself given security, before he received the money, naturally required it, when he emptied his hands of it. Another consideration, which induced it to be required, is that he had been enjoined from paying the money.

All that we want, to shew that the plaintiff confirmed the sale, is that he did an act which is evidence of his assent to the sale having its effect. Now, his receipt of the money is such an act. He could not intend to have both the slaves and their price.

Now, if the plaintiff, by receiving the price, would be prevented from ever disturbing the vendees of these slaves, had they been illegally sold, during his minority, *a fortiori*, must the vendees be confirmed in their titles, by the receipt of the price, while the sale was made during the majority of Laroque Turgeau, and the plaintiff, one of his heirs.

Lastly, the effect of the receipt, given by the plaintiff, must be precisely the same as that of such a document, under the hand of Laroque Turgeau himself. It is true, the receipt does not expressly shew that the plaintiff gave it as one of the heirs. It is shewn that he is the

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next of kin, and he does not shew that he has any other title to the money, than as heir to Laroque Turgeau. The consequence must be, that he received the money in the capacity, which gave him a right thereto.

By receiving this money, the plaintiff accepted the succession of Laroque Turgeau.

The acceptance of a succession is express or tacit. It is tacit, when some act is done by which the intention of being heir must necessarily be supposed. *Civil Code*, 162, *art.* 77. From what act may this intention be more correctly presumed, than the receipt of a sum of money belonging to the estate, with the view of applying it to one's own use. If one, who has capacity to inherit, takes the goods of a succession, or part thereof, he does thereby the act of an heir. 1 *Pothier, Succession*, 183; and this, even when the party takes the goods in some other capacity than that of an heir; as for example as creditor, or legatee, unless he alleges and proves that, in the latter capacity, he had a right to take the goods. If one of the next of kin, be likewise a creditor or legatee, his taking goods will be the act of a kin, and be construed as an acceptance of the succession; for, as a creditor, or legatee, he had no right to take, of his own authority, what was due or bequeathed

to him, but only to demand it of the heir. *Idem*, 18.).

VII. Lastly, the plaintiff urges he is not to be concluded by the record, because he was not expressly named in the petition; because he was not regularly cited, and did not answer; because no notice of the attachment was posted up, and he was condemned unheard.

1. The act of the legislature, which requires that the names of the parties be inserted in the petition, 2 *Martin's Digest*, 149, must be understood only in regard to cases in which inhabitants of the state are personally sued; not to those in which the plaintiff proceeds by attachment and *in rem*, against absentees; the names of whom, especially in the cases of heirs, are unknown. Where it otherwise it would be impossible to obtain a debt due from a vacant estate. In such a case, it ought to suffice, that the curator or the defensor, appointed to absent heirs, be named. Such has been the constant practice of our court and it is conformable to that of Spanish tribunals. *Ayora, de partitionbus*, 87, *n.* 16 and 17.

2. This author, *loco citato*, observes, that in order that what is done by the curator of an absentee be valid, it is needful that the absentee

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be cited, at his domicil or by publication; otherwise curators cannot be given to absentees.so that they be concluded by their acts, according to *Baldus*, *&c.* But, this rule is not observed in practice, and judges are in the habit, after satisfying themselves of the absence of the heir, or having caused an information to be made, to appoint a defensor to the absentee, without a previous citation, which I take to be regular and to suffice.

3. In the case of Laroque Turgeau against the heirs of V. Dufour, J. B. Prevost was appointed defensor of the heirs, on the 27th of January, 1810, and the only answer is that of Lafitte, in the name of his minor children, subscribed by Moreau Lislet, and J. B. Prevost, which bears date of the 6th of February, 1809.

In the case of Camfrancq, against the same heirs, Paillette was appointed defensor of the assentees, at the moment of trial, as appears from the judgment rendered on the 24th of January, 1810, and there is no other answer than the one filed by the same attorney, Paillette, for the minor children of Lafitte, heirs of V. Dufour.

It is, therefore, to be presumed, in the first suit, that Prevost did not subscribe the answer filed by Moreau Lislet, till after his appoint-

ment as defensor of the absent heirs, as an evidence of his adherence, in their behalf, to the answer filed by Moreau Lislet, for the other heirs.

Admitting, however, that no answer was ever filed for the present plaintiff, in either of these two cases, as one of the coheirs of V. Dufour, by the defensor appointed to him by the court, could he, on account of this omission, demand the reversal of the judgments rendered in these two suits in the year 1810, while he did not bring his action for the recovery of the slaves, sold in pursuance of the judgments obtained, in these suits, till the 11th of September, 1817? For, whatever defects may exist in the proceedings, which preceded these judgments, while they remain unreversed, they are an insurmountable obstacle to his recovery; for, as to him, they are *res judicatæ*.

It is then necessary to inquire, whether, according to our present jurisprudence, a party, who has not appealed from a judgment rendered against him, may attack it as null, and if so, within what time, in what manner, and in what cases he, may avail himself of its nullity.

Under the Spanish system, a party, who had not appealed within the legal delay from a

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judgment, might obtain its reversal when there were radical defects in the proceedings. These are defined in *Part.* 3, 6. *Cur. Ph.* 97, *n.* 12 and 13.

It is doubtful, whether this action of nullity, which was brought before the court who rendered the judgment, may be now resorted to. *Meeker's ass.* vs. *Williamson's syndics*, 1 *Martin*, 625. Our statute seems not to afford any means of reversing a judgment, but the appeal within the legal delay.

Admitting, however, that this action of nullity may be resorted to, it is not every error that will avail: some are perpetual, others temporary only, in their effects. The action of nullity is perpetual, in case of the want of citation of the party, or of jurisdiction in the court. In all other cases, except that of a judgment rendered on forged documents, false testimony, or through the corruption of the judge, in which relief may be had during twenty years, the judgment must be attacked within seventy days, after its notification to the party. *Cur. Phil. loco citato.* The plaintiff, therefore, could not be admitted to demand the reversal of these judgments.

The want of *a contestatio litis*, will likewise be urged, on the ground that the defensor, ap-

pointed by the court, has not answered in his (the present plaintiff's) name. To this, we answer that, he cannot be permitted to plead any kind of nullity, perpetual or temporary, while he has not directly attacked these judgments. No one can avail himself of the nullity of a judgment by *exception* or plea; it must be done by *action*. *Cur. Phil. loco citato, n.* 15.

Further, even *radical* nullities, such as a want of citation or even of jurisdiction, may be cured, by the appearance and answer of the party. It is true, the law provides, that "judges shall not give judgment, in any case, except those of appeal, unless the suit be commenced by petition and answer; and if they do so, the judgment shall be null." *Part.* 3, 16, 5. But, in practice, the want of the citation is cured, when the party voluntarily appears and defends himself.

"The plaintiff ought to give a copy of his petition to the defendant, and cause him to be cited, &c. The citation is the beginning, the root, and essential foundation of the proceedings, and is every where considered as indispensable for the defence of the defendant, and cannot be dispensed with: if it be omitted, the judgment is null; unless the defendant appears in person, or by attorney, before he be cited,

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for then the citation is superfluous." *Febrero, Juicio ordinario, n.* 129

The want of an answer, ought not to be more fatal than that of a citation. If the present plaintiff had appeared personally, or by attorney, in these suits, and omitted to file an answer, but it appeared that his attorney had attended, and defended him at the trial, so as to render the judgment rendered therein, contradictory, reason and equity would reject his claim for a reversal of it, on account of the absence of a written answer. The consequence must be the same, since he was represented by a defensor, and, according to *Ayora*, every thing done by, or against the defensor of an absentee, is as valid as if done by, or against him.

4. The statute requires the posting up of the notice, in case of attachment, in regard to these absentees only, who have resided in the state, since it must be at the last place of abode of the defendant. 1 *Martin's Digest*, 514. No provision being made in case of an absentee, who never resided in the state, we must resort to the practice, which existed before the statute. *Ayora* informs us, that judges do not usually order absentees to be cited by notices or proclamations, *edictos*, but appoint to them

a defensor immediately, to whom the different acts, in the proceedings are, notified : *ante* 285.

5. The present plaintiff cannot complain that he was not defended in these suits. It is true, there is not any written answer filed expressly in his name, in either of them : but his defensor filed written answers, in the name of the minors. Lafitte, who as coheirs with him of V. Dufour had the same interest.

In the suit of *Camfraucq* vs. *the heirs of Dufour*, Paillette, the attorney who appeared for the minors Lafitte, and had filed an answer for them, was appointed defensor of the other coheirs, and therefore of the present plaintiff, on the 24th of June, 1810, the very day on which the trial took place, and it cannot be said that the latter was condemned unheard, since the attorney, appointed his defensor, argued the cause. In the other case, Prevost was appointed defensor of the absent heirs, and subscribed the answer, filed by Moreau Lislet, for the minors Lafitte, and afterwards moved for a new trial, and after for a suspension of the execution.

The present plaintiff cannot, therefore, say that he was not heard.

Seghers, on the same side. It is admitted

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that the plaintiff is one of the coheirs of V. Dufour, for one half, and of Laroque Turgeau for a smaller part. This appears by the statement of facts.

The plaintiff's counsel states, that Laroque Turgeau was alive at the inception of the suit; but died after Carlier d'Outremer was enjoined, on the application of the defendant, to pay the money in his hands, *ante* 264. This is an error of fact, which it is important to correct. The suit was instituted, on the 4th of March, 1817, and Laroque Turgeau died, in Kingston, Jamaica, on the 8th of January, 1815. The counsel stated it so, in the district court: but the date of his death was not noticed in the statement of facts: at all events, as there is no legal proof of this, no argument can be correctly drawn from it.

It is urged that it does not appear, from any thing on the record of this suit, that there was no suit, in the late superior court, brought by Camfranco and others, against the heirs of V. Dufour, &c. We answer, that a negative is not susceptible of proof; that we have indicated, in our answer, the date of the deed of sale of the sheriff, and of the judgment, on which the execution issued; that, according to the provisions of the law, there is kept a regis-

ter of all sales made by the sheriff, in the clerk's office, and another in which all judgments are docketted in chronological order; that the sheriff is also required, by law, to keep a book, in which he enters all sales, made by him, mentioning the date, the thing sold, the name of the purchaser and the price, which book is open to public inspection. *Act of* 1805, *April* 10. The plaintiff was, therefore enabled by the dates, stated in the defendant's answer, to obtain any information which he might desire, to guard against surprise.

If a suit of Camfranq and others, *vs.* the heirs of Dufour existed, the party, whom it could avail, could easily have produced the record of it. It must, have been easily found, as it could only have existed in the short period of a year, which elapsed between the death of V. Dufour, and the date of the sheriff's deed. A very short time would have been sufficient to run over the list of causes during that time, and a much shorter one to ascertain the fact by a reference to the index kept by the clerk. The very great pains taken by the plaintiff's counsel, in this case, leave no doubt that so victorious a mean of attack, would not have been overlooked, had it existed.

The act of 1805 provides, that every sheriff

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shall keep a just and true account of all sales, by him made, in a book, to be kept for that purpose, in which shall be entered the date, the articles sold, the name of the purchaser and the price paid, which shall be kept open for the inspection of any person, demanding the same. And such a sale, whether of personal or real estate, shall vest in the purchaser all the estate, right and title of the person against whom such execution issued. 2 *Martin's Digest*, 172, and it is in the following section only, that a deed to be given by the sheriff, is spoken of. The defendant's title to the slaves he purchased was then perfect, immediately after the sale, and its registry in the sheriff's sale.

These books then, as well as the records of the two suits were proper evidence, by which any inaccuracy, that might have occurred in the confection of the deed, would have been corrected. They were introduced in the two suits, brought by the present plaintiff, against Dussuau de la Croix, to recover three slaves sold by the sheriff, by virtue of the executions under which, those claimed by the present defendant, were purchased. These two cases are now pending before this court.

It is further urged, that "ten slaves were

attached in the two causes, and only seven of them sold; Frosine, one of the eight, not being included in either attachment." The three others were sold, under the same writs of execution, and on the same day, to Dussuau de la Croix, against whom the present plaintiff carries on suits, now pending before this court. As to Frosine, she was a child of tender years, her name might have been omitted on the return, as she could not be separated from her mother. It suffices, that she was purchased by the defendant, under the same *fi fa.*

Finally, the plaintiff's counsel contends, that the sheriff cannot have intended to refer to two distinct suits, by the words *Camfrancq and others*, because the law requires him to refer to the judgment, on which he sells, and to state the date of its registry; and hence, when he has several writs of execution, he cannot seize and sell property *en masse*. We, however, see daily in the newspapers, the sheriff advertising property for sale, as seized under several writs of execution.

Livingston, for the plaintiff. We are told that the plaintiff cannot now say, that the sale produced by Camfrancq, ought not to have been received in proof, because, in the num-

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bers by which the several proofs are referred to, in the bill of exceptions, the one, corresponding to this paper, is omitted. This is evidently, a clerical mistake, because the judgment of Camfrancq, being contained in the bill of exceptions, because it was different from the one pleaded, how is it possible to suppose, that the same counsel could consent that a sale under a *third judgment* to wit, *Camfrancq and others*, could have been introduced? But, the defendant wants some advantage; let him take all that his carelessness or mistake, will give him, (but he must excuse me, if I observe, *en passant*, that this statement but ill agrees with the latitude of practice, which, as he contends, will permit him to plead one thing and prove another.) Let him have his advantage: what will it avail him? If I am sued on a note of hand, and I make no objection to their giving evidence of an assault and battery, can they obtain judgment? Or, if they obtain it, will it not be reversed? Thus, if the sale, he produces in evidence, is not conformable to the one he has pleaded; or, is not supported by a judgment, my omitting to except to its introduction, or my expressly agreeing to receive it, will avail him little, in support of his judgment. The force of this

is felt by the defendant's counsel, and he exerts all his strength to prove, that although the terms of the sale produced are acknowledged to be in contradiction to the one pleaded, that this is immaterial. Let us follow him, in this attempt.

First, we are told that justice would frequently be defeated, if such strictness were observed; the answer to this general objection, has been anticipated in the plaintiff's argument, and in doing it, he has borrowed the explicit language of the court itself, in former decisions. But, we are told, however proper this might be, as applied to the pleadings of the plaintiff, they are not so with respect to those of the defendant: because, the plaintiff must prove his right, but the defendant may restrain hi self to a simple denegation. But, when the defendant alleges a fact in avoidance, I should be glad to know, whether justice does not require the same certainty, in the exposition of the fact, as if it was one alleged on the part of the plaintiff.

The defendant seems to think, that such denegation is always sufficient, to enable the defendant to prove any thing, which would destroy the plaintiff's action; and that here, as he was under no necessity to plead the sale, his pleading it erroneously cannot injure him.

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I apprehend, this is one of the few errors into which the learned counsel is ever led.

When the plaintiff alleges, and proves a complete title, which would entitle him to recover *prima facie*, and the defendant relies on an act, which destroys that right (not proceeding from the plaintiff himself) then he is bound to give notice of such act by his answer. I have said, *not proceeding from the party himself*, in order to avoid a collision with what seems to have been the opinion of this court, on a former occasion, that payment might be given in evidence, under a general denial. If that point were necessary to be argued here, I should, however, contend that in that case also, it ought to be alleged as well as proved; but this is not necessary here.

In this case, the plaintiff proves property by shewing that the negroes belonged to Victor Dufor, and that he is his heir. These facts are not disputed; but a totally distinct one is set up to defeat the action, one proceeding neither from Victor Dufour nor the plaintiff; an alienation by the operation of law. If this be a fact, which might have been proved under a general denial of the plaintiff's right, I know of none that requires a particular specification. How could the plaintiff know of this sale, unless he

was apprised of it by the answer. How could he be prepared to shew irregularity, the want of identity, fraud, or any other fact, that might exist to avoid such a sale, if he was to be surprised by hearing it for the first time on the trial?

The defendant, then, in this case, was obliged by every rule of justice and law, on the subject, to set forth the sale under which he claimed, and if obliged to set it forth, to state it truly and exactly.

But, he was in a dilemma: he knew, that he had an *irregular*, and if *irregular* (in a case like the present) a *bad title*; he knew, then, there was no such judgment or execution as was wanted in his sale, there was neither *judgment* nor *execution* in the case of *Camfrancq and others*; yet his sale was in that suit. What was he to do? Plead his sale truly? Say that he bought at the suit of *C. and others?* That would not do. The plaintiff would ask for the judgment that could warrant the sale; he would have time to examine and detect the irregularity; therefore, it would not do to plead the sale *truly*; it was safer, he thought, to plead a sale under a judgment which *did exist*, and endeavor under it, to introduce his irregular sale, in the hope that the variance would not have been observed;—but I have digressed a little. To

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return to my reply, I think it has been shewn that there was a necessity to plead the sale, under which the defendant claimed, and, as a corrollary, to plead it *truly*. And I shall refer the court to my original argument, to shew that has not been done, and that the variance is material and *fatal*.

The next argument is that, the sheriff's sale transfers the property, independent of the act of sale; that the act of sale, is only the *evidence* of the sale, and provided this be reduced to writing, and signed by the officer, it is no matter in what terms it may be couched.

This doctrine may be very sound, but I own that neither my studies, nor my practice, have ever taught me any thing like it. I always thought that, when the law directed an act to be done by one of its officers, prescribed the manner in which he should do it, and declared what should be the evidence of his having performed it, that the evidence thus required was the *only* evidence. And, I moreover thought, that this principle would be most strictly enforced, in a case where property was to be transferred without the consent of the owner. I supposed, that so far from being a mere matter of form, the act of sale, on the execution, was of the essence of the transaction;

and that when the lawgiver took the trouble to prescribe a form for the officer, that something was to be done by the direction; if the defendant's reasoning be true, there is no necessity for an act of sale at all; if the adjudication gives the property, of what use is the act of sale?

But is there not a kind of solecism, in telling us, the act of sale, signed by the sheriff, is the evidence, required by the law, that the thing was sold, but yet that sale may be shewn, without the evidence of it. It is true, the defendant adds, that, provided it be reduced to writing and signed, it is sufficient; but if his first principle be true, if the sale is complete, without the evidence of it, where is the necessity for reducing to writing or signing at all; the general law, respecting sales of real property, would not render it necessary, in case of special provision as this is, and, on the defendant's reasoning, judicial sales might always be proven by oral testimony, carrying with it, this absurdity, that this act of a third person, conveying my property, may be proved by parol, against me, but that, for my own acts, there must be written proof.

The defendant pronounces rather too emphatically, that it is *false* to say, that when the law describes forms, they must be strictly pursued, under pain of nullity, &c. Whether

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this general doctrine be true or false, would seem to be perfectly immaterial, in the defendant's answer to my argument, because, no such doctrine can be found there. If the court have not forgotten my argument, they will recollect, that I contended, "that when forms, in which an act is to be done, are prescribed by the law, which authorises such act *(and without which law it could not be done at all)* then those forms must be pursued, or the act is *void*; for this plain reason, that the person doing the act, having no authority to perform it, but that which the law gives him, can do nothing but what is so delegated, and the law, which delegates it, doing so, only on condition that he pursues the form, the moment he departs from these forms he breaks the condition and his power ceases, &c. I exemplify and illustrate this by several cases and some other reasoning. Now, instead of answering this, the defendant has found it much more convenient to impute to me the general and broad assertion that, when the law prescribes forms, they must be observed in all cases under pain of nullity, without attending to the manifest distinction, I had broadly, and, I thought, *intelligibly* drawn, between cases where the act might have been legally done before the law prescribing the form, in which

case, there would be *nullity* only in case of prohibitive terms being used in the law, and cases where the act could not have been done, but in virtue of the law which prescribed the form. If the defendant's counsel had attended to that part of my argument, he would have found that his argument, drawn from the forms prescribed by the laws of the partidas, is of little force; because it applies to nothing I had said.

I could not, without a tedious, and, I think, a very useless repetition of my former arguments, reply to that part of the defendant's argument, on the variance and defects of the sale.

I will only observe, for regularity in argument, that I do not think the reference to other suits, not made evidence in this, is admissible, merely because they happen to be before the court at the same time. If this were admitted, evidence that could not be received in a cause might be brought before the court, because it was received in another.

I make the same excuse for not replying to that part of the answer relating to the admissibility of the receipt, and particularly as to the effect it ought to have on the decision of the cause. All the replies, to these points, have been anticipated, and I ask nothing but a review of those, I had the honor to offer.

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DERBIGNY, J. delivered the opinion of the court. A re-hearing has been granted on the whole case, the court being not completely satisfied upon either of the questions raised by the respective parties. Further attention having now been paid to the subject, and the arguments of counsel attended to with much care, we find it necessary to alter our former opinion, in order to ascertain one point of fact, upon which must turn the decision of the case, and without a full knowledge of which we think that justice cannot be done.

Leaving, therefore, aside all that part of the plaintiff's argument, which tends to show the irregularity and illegality of the proceedings carried on in the suits of Camfrancq, and of Laroque Turgeau, *vs.* the estate of Victor Dufour, (as well as the imperfection of the defendant's title to the slaves here in dispute, as resulting from a bill of sale, which neither agrees with the defendant's pleadings, nor with the names of the suits, in which executions had issued against Victor Dufour's estate) we will proceed to enquire, if the plaintiff has not received part of the proceeds of the sale, under which the defendant holds the slaves in question; and if by that act he has not given up all objections to those irregularities and imperfections.

It is in proof, that the plaintiff is, at the same time, one of the heirs of Victor Dufour, whose estate was seized and sold, and one of the heirs of Laroque Turgeau, at the suit of whom an execution had issued against that estate. It is in proof, that part of the proceeds of the sale went to satisfy Laroque Turgeau's claim, and was paid into the hands of Philip Carlier d'Outremer, his attorney in fact.

The defendant has offered further to prove, that the plaintiff has received part of this identical money, and to that effect, he has tendered a receipt, given by the plaintiff, to Carlier d' Outremer; and the plaintiff having excepted to the introduction of that document as improper, it becomes necessary to dispose first of that bill of exceptions. The bill, itself, recites not the ground of the plaintiff's objection to the admission; but the grounds, as stated in argument, are, first, that the receipt does not show the money received to be part of the proceeds of the sale of the negroes in dispute: secondly, that the receipt bears a date posterior to the beginning of this suit.

1. The first objection appears, to this court, to be a petition of principle. The evidence offered was said to go the whole length of proving the identity of the purchase money with

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the money received. That, surely, was proper evidence to be produced ; whether it was as full as the defendant maintained, was a question to be discussed after its admission.

2. The other ground of objection to the introduction of that piece of evidence is, that the receipt tendered shows itself to have been given since the beginning of this suit, and is no part of the issue on which this cause was to be tried.

We do not find it necessary to examine how far this doctrine may be sound, with respect to facts which happen pending the suit, without the act of the parties ; but, surely, it would be strange, if no act of theirs could alter the situation of the suit, after it is once begun. If, pending the suit, one of the parties chooses to do that, for the specific performance of which he was sued, will not that destroy the cause of action, and leave nothing for the court to adjudicate upon but the costs? Surely, any act of the party, which is said to amount to a relinquishment of his claim, is proper matter for the court to ascertain, before they proceed to enquire into a dispute, which perhaps no longer exists. As to the pretended obligation of the defendant, to give notice to the plaintiff, that he will avail himself of the relinquishment of his claim, it really would be a very idle ceremony.

The question here is not, shall a new fact be made a part of the issue; but, is there still any issue between the parties; does the suit yet exist, or does it not? Besides, as the pleadings in our practice consist only of the petition and answer, and no such thing is known to us, as a plea *puis darrein continuance*, all that can be reasonably required is, that the party be not taken by surprise, but be allowed, in case of any new occurrence in the suit, a sufficient time to make his defence. It does not appear, that the plaintiff here even suggested that he had any means of repelling this piece of evidence; he barely opposed its admission.

We think, upon the whole, that the plaintiff's receipt was rightfully admitted; and will now enquire, whether the money by him received, is part of the price of sale of the negroes in dispute.

In the receipt, the money paid is said to be part of a larger sum, deposited in the hands of Carlier d'Outremer, belonging to the estate of Laroque Turgeau, upon which sum, there exist several oppositions and attachments. Now the proceeds of the sale of the slaves in dispute, were delivered by the sheriff to Carlier d'Outremer as agent of Laroque Turgeau, and sub-

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sequently enjoined by an order, in which it is recited, that the said proceeds were already attached in his hands in several suits, still depending against Laroque Turgeau. A greater presumption of identity can hardly be presented. But, as the plaintiff has chosen to deny it, we think that the justice of the case requires that we should proceed no further, until the fact be ascertained.

Using, therefore, the powers given us by the 18th section of the act supplementary to the act, organizing this court, we deem it necessary to remand the case.

It is, therefore, ordered adjudged and decreed, that the judgment of the district court be reversed, and that the case be remanded for a new trial, with instructions to the judge, to admit any legal proof which the defendant may adduce to shew that the moneys mentioned in the plaintiff's receipt, as part of the sum enjoined in the hands of Carlier d'Outremer, are the identical funds which had been paid him by the sheriff, as the proceeds of the sale of the negroes claimed by the plaintiff in this suit; it is further ordered, that the appellee do pay the costs of this appeal.

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UNITED STATES BANK vs. *FLECKNER.*

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs sue on a promissory note which, they say, was indorsed to them by the Planters' Bank. They are accordingly bound to show that indorsement and transfer. In attempting to do so, however, they prove only that the indorsement was made by the cashier. Was the cashier authorised to transfer the property of the bank by his indorsement alone? The plaintiffs have endeavored to show that, by exhibiting a resolution of the board of directors, purporting to authorise the *president and cashier* to liquidate the balance due to the plaintiffs. We do not think that it follows from this resolution that the PRESIDENT AND CASHIER were authorised to transfer the property of the bank by their indorsement; but, if it could so be construed, the signature of both ought certainly to be deemed necessary.

An usage common to all the banks of a city, cannot be deemed a legal rule of conduct for any of them

The plaintiffs have offered to prove by the testimony of two of the cashiers of the banks in this city, that it was the common usage for notes or bills belonging to the banks, to be transferred by the cashier's indorsement, without a

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written authority for that purpose. We think that such evidence was rightfully refused to be admitted, because the business of banks is directed by law to be conducted according to the rules and regulations, which they may think fit to adopt, and no such thing as an usage common to them all, established only by practice, could be deemed a legal rule of conduct for the management of the concerns of any of them, especially when their property is to be disposed of.

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

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

BRANT & AL. as. LOUISIANA STATE BANK.

No relief can be had against a forfeiture of antecedent instalments paid to the state bank, on failure of posterior ones.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court.* The statement of facts in this case shews, that the appellants became owners of a certain number of shares of stock, in the state bank, on which they paid the first instalment and were admitted as stockholders; but from

*MARTIN, J. did not join in this opinion, being a stockholder

the embarrassed situation of their affairs, they were unable to pay the second instalment as required by the regulations of the bank; and that, in consequence of this failure to pay, the sum paid by them, as above stated, is claimed by said bank as being forfeited under the 7th section of its charter.

The plaintiffs pray for relief against this penalty or forfeiture, and ask a judgment of the court, by which they may, on payment of the second instalment, which became due in October, 1819, with interest, &c. be now admitted to the enjoyment of all the privileges of stockholders.

In cases of penalties or forfeitures incurred by individuals, according to the stipulations of their contracts, courts of justice have generally interposed their equitable powers to relieve against the hardship and iniquity of an unreasonable penalty, by reducing the damages to an equality with the injury which the party claiming may have sustained. But it is believed, that no instance can be adduced wherein they have interfered to relieve against a forfeiture to which a person may have become liable under an express statute, clear and explicit in its terms.

It is possible that events might occur to prevent the fulfilment of engagements, the neglect

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of what would cause a forfeiture by express provisions of law, sufficient to authorise the equitable interference of courts to grant relief. None such have occurred in the present case. The appellants failed in the payment of the second instalment of their bank shares, in consequence of want of means wherewith to pay. If the relief prayed for, against the forfeiture incurred, were granted to them, it is difficult to imagine any case, in which it might not confidently be asked, whenever a stockholder was able to tender payment, no matter how long after the money became due. Punctuality is essential to the existence of banking institutions: this can only be maintained and their conduct properly supported by making individuals punctual in the performance of their engagements toward them. If the court should grant the remedy prayed for by the plaintiffs, and this case be not distinguished from any other, which might arise from inability in stockholders to meet their engagements, at the time prescribed, and who may afterwards be able to pay, it would virtually amount to a repeal or reduce to nullity, the section of the law under which the bank claims the present forfeiture. Such a decision, in our opinion, would be an open violation of judicial powers.

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

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

BLONDEAU vs. *GALES.*

A sale will be rescinded, if the services of the slave appear so inconvenient, difficult and interrupted, that it is presumed he would not have been bought, had they been known so to be.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff's object is the rescission of the sale of a negro woman, whom he purchased from the defendant, on account of her being addicted to robbery; being in the habit of running away, and attacked with a convulsive disorder, incurable in its nature, during which she is every time near the grave. He avers that these redhibitory defects existed, in the knowledge of the vendor, before the sale. The general issue was pleaded. There was judgment for the plaintiff, and the defendant appealed.

Celeste deposed that the defendant brought Caroline to her house, with an iron collar and her hands tied, and told the deponent she had stolen

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some handsome dresses, and he wished to know, whether, as she said, they belonged to the deponent, or some of her people. He said that she, Caroline, had run away several times. The deponent came on board of the same vessel from Baltimore, to New-Orleans, with Caroline, who, during the voyage, complained of being sick and of a pain in her side.

Dr. Martin deposed, that on the 13th of May, 1817, at midnight or one of the clock, he was called by the defendant to Caroline, whom he found on a bed quite senseless, from an hysteric affection, that he attended to her for forty-eight hours, when she recovered, and he withdrew, not being the family physician.

Desiree Leblanc deposed, that Caroline was placed under her, to learn how to plait, the defendant put an iron collar on her, because she ranaway for eight days. She remained five months with the witness.

Dr. Lacroix deposed, that during the last eighteen months, the plaintiff called him four or five times to Caroline, whom he found attacked by hysteric fits, which rendered her senseless for several hours. The first time he saw her, she clattered her teeth, and several persons were required to hold her; she bellowed and had a difculty in swallowing. It would be dangerous

for her to be near fire or water, when the fit comes on. He believes the disease incurable, and seated in the nervous system.

Prevot deposed, that Caroline, was for five or six months in his service: that she had, during that time, three or four fits, which appeared to be symptoms of epilepsy; that the last lasted two hours, during which she was totally senseless, and for the two following days, she was unable to do any thing.

Mrs. Goiffon deposed, that she is intimate at the defendant's; that she has known Caroline for three years, she was the nurse of the children; that Mr. and Mrs. Gales have too much sense to suffer near them a servant attacked by any bad disorder; that she never knew her to runaway but once, when she was absent for four days. She enjoyed good health.

Miss Reynaud is a relation of the defendant, and has known Caroline in his possession three or four years, always healthy. She only ran away once, and was then absent for four or five days, having been threatened with a whipping.

Dr. Goiffon was the defendant's physician. Caroline was subject to hysteric fits, otherwise called *mal de mere*. He does not consider the disease as incurable, it yields in four or five days to anti-spasmodic medicines.

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It does not appear to us, that the parish judge erred. It is true, the doctors, examined on each side, disagree as to the curability of the disorder. Certain it is that, in the language of the code, the slave's "services are so inconvenient, difficult and interrupted, that it is presumed the buyer would not have bought her at all, if he had been acquainted with the defect." *Civil Code*, 358, *art.* 80.

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

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

LATAPIE vs. GRAVIER.

Whether the payee and indorser of a lost note be a legal witness to prove it?

The acknowledgement of the maker of a lost note, suffices to prove it.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is a suit brought by the appellee, who was plaintiff in the court below, on a lost note of hand; stated to have been made by the defendant, payable to one Pierre Durive, and by him regularly transferred to the plaintiff, for a valuable consideration, by indorsement.

The existence and loss of a note, such as is described in the petition, are proven by two witnesses; but neither of them was acquainted with the hand-writing of the alleged drawer, so as to establish the genuineness of his signature. This fact the plaintiff offered to prove in the district court by the testimony of the payee and indorser, who was rejected by that court as an incompetent witness, and, to the opinion of the judge thus rejecting him, a bill of exceptions was taken, on the part of said plaintiff. On the propriety or incorrectness of this opinion we deem it unnecessary to decide, as it is believed that the record contains, independent of the testimony of this rejected witness, sufficient evidence to authorise a judgment against the defendant, viz. his acknowledgement, as proven by one of the witnesses, that he had made the note, as described in the plaintiff's petition. No injury can result from compelling the defendant to pay, in the manner decreed by the court below; as security is required from the plaintiff against any injury or loss, which might arise from any further claim on said note.

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

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

STEEL vs. CAZEAUX.

The record of the conviction of a slave cannot be offered in evidence against his owner.

APPEAL from the court of the first district.

The petition charged that the plaintiff's slave was beaten and wounded by the defendant's, so that he died; that the defendant's slave was tried therefore, and found guilty. Wherefore the plaintiff claimed the sum of 1200 dollars, the value of said slave. The defendant denied all the allegations in the petition.

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

Dr. Robertson declared that he was called upon by the plaintiff to visit a negro boy, whom, he said, had, on the preceding night but one, received a severe blow on the head, with some heavy weapon, supposed to be a laden whip. The deponent, accompanied by Dr. Webb, examined the wound, and discovered a cut, reaching from the left eye brow to the hair, in an oblique direction outwards and upwards. A part of the scull was bare; but not so as to al-

low a thorough examination. They laid the bone bare the whole length of the original wound, but were not able to discover any fracture. The boy was in a state of partial stupor and complete delirium. Although the utmost attention was paid to the boy, and a third doctor was called in, he died about three days after.

Dr. Webb's deposition is to the same purport.

Joseph Given deposed, that the plaintiff resides in Kentucky, and came down in a keel boat with several slaves, as oarsmen, one of whom was the one, who is the subject of the present suit. The deponent was present at two or three interviews, which the plaintiff and defendant had; in one of which, immediately after the trial of the defendant's slave, the defendant observed, that he believed his boy had killed the plaintiff's; that it was hard for the plaintiff to lose his slave, and would be equally so for him to lose his; that Mr. Fortin, at whose house there was a frolic, in which the slave was killed, was very wrong in allowing the frolic, and he would make him pay for the slave. On the cross examination, the deponent observed the first interview was at the defendant's, where the plaintiff went to demand payment of his slave, and was informed the defendant would give a final answer the next day,

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at Day's hotel. The defendant proved the slave to be worth 1200 dollars. He said the defendant speaks bad English, but well enough to be understood by him.

Hampton deposed he was present at a conversation at the plaintiff's room, in Day's hotel; and heard the defendant say he believed his slave killed the plaintiff's.

The record of the conviction of the defendant's slave was introduced, notwithstanding the opposition of the defendant's counsel who objected thereto

MATHEWS, J. delivered the opinion of the court.* This is a case, in which the plaintiff sues to recover damages, for the loss of his slave, who, he alledges, was killed by a slave belonging to the defendant.

His claim for indemnification, is founded on the 22d section of the *Black Code*, 1 *Martin's Digest*, 629, and the *Civil Code*. 40, *art.* 22. These laws, by the terms in which they are expressed, seem to require that the act of a slave which causes damage to any person should amount to an offence punishable on the person of the slave.

* This opinion was delivered at January term; and was not printed with those of that month, a re-hearing having been granted.

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In the course of the trial in the court below, the plaintiff offered in evidence, the record of a prosecution and conviction of the slave of the defendant, for the offence which is alleged to have caused the damage complained of in his petition, and it being admitted by the court, in opposition to objections raised by the counsel of the defendant, he took a bill of exceptions. If this evidence were properly received in the cause, it would prove satisfactorily a criminal act, to have been committed by the slave, whose master is now pursued for damages caused by it, and the plaintiff would only have to shew, in addition, the extent of the injury done him.

But, we are of opinion that this testimony was erroneously admitted. The general rule of evidence is, that a record of conviction, in a criminal prosecution, cannot be given in evidence in a civil suit, for damages occasioned by the offence, of which the party stands convicted. The reasons in support of this rule are, that it is *res inter alios acta*, and that the conviction may have been effected by testimony not admissible in the civil action. If there be sound reasons for the rule, it cannot be contended, with any kind of propriety, that convictions of slaves under our black code, ought to form an exception to it; they exist in greater

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force; for the criminal prosecution against a slave, in which his master is no party, more clearly establishes the distinction of the parties; and such conviction may be originally had on the testimony of slaves, which is not to be received against free persons.

Rejecting the record of the criminal prosecution as improper evidence, the plaintiff's claim for indemnification is supported only by proof of some loose, indefinite, extrajudicial confessions, on the part of the defendant, of his belief that his slave did kill the slave of the other, too light in our opinion, to sustain his demand. They do not carry with them any evidence that the appellant knew the fact of killing or any of the circumstances attendant on it; for any thing that appears to the contrary (admitting that it did take place) it may have happened in a manner which would release the master from all responsibility in damages. It is true, that in a criminal prosecution, for the offence of killing, it is always presumed to have been done feloniously, and the proof of innocence must be made out by the person charged with the crime; but in a civil action for damages, it is believed that a plaintiff ought to be required to shew every circumstance necessary to authorise a recovery. We are of opinion that the judgment of the district court is erroneous.

It is, therefore, ordered, adjudged and decreed, that it be reversed and annulled; and it is further adjudged and decreed, that judgement be entered for the defendant and appellant with costs in both courts.

The plaintiff obtained a re-hearing.

Hawkins, for the plaintiff. The act of the legislature, and the provisions of the civil code, are so clear upon the subject of recovery against owners for "*any damage*" done, by the crimes or offences of their slaves, as to admit neither doubt nor difficulty. This action being brought by Steel to recover the damage sustained by the death of a negro slave, killed, as is alleged, by the slave of the appellant, the only facts necessary for a recovery were: 1. ownership, in the plaintiff, of the slave killed: 2. that he came to his death by the hands of a slave, the property of the defendant. That the plaintiff was the owner of the slave killed, is fully proved; nor was it controverted. The only question, then, for consideration is, was the slave killed, or his death caused, by the slave of the defendant? This fact being established, and no cause of justification alleged for the offence

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committed, recovery for the plaintiff follows, as matter of course. What was the evidence adduced by Steel, the plaintiff, on the trial of the cause below, calculated to establish these facts? It is proved that three physicians were called in to attend his slave, who was found in a state of delirium, from a wound received on the head; that the skull was bare for some inches, and the wound so severe that doubts were entertained whether or not the skull was fractured; that every effort was made, and medical skill rendered; but in vain. The boy lingered one day or two, and died. That he died of his wounds, is proved by both the physicians examined as witnesses; that the slave was killed or came to his death by wounds inflicted by violence, with some weapon of destruction, is therefore clearly established. Having established these facts, we might, with propriety, enquire how numerous the cases in the books, where, unaided by confessions of the party, mere *presumptions*, added to such facts, have required even the life of the accused, as necessary to the ends of justice. In the cause, however, before the court, we need not bring to our aid presumptive evidence; for, we have other facts in proof, and which are relied on, as clearly establishing the offence (which caused the

death of the plaintiff's slave) to have been committed by the slave of the defendant. Some short time after the death of the slave, spoken of in the depositions of the two physicians, the plaintiff served on the defendant a written and legal demand, for the damages he had sustained.

The law gave to the party, of whom damages were claimed, the right of either paying them in money, or abandoning the slave, committing the offence, to be sold for the benefit of the claimant. And hence, a legal demand, on Cazeaux, was deemed indispensable. The demand was made, and written notice served, at Cazeaux's own house, and in presence of a witness.

The court seem, also, to have laboured under the impression, that the admissions of the defendant were of vague, loose, and unmeaning conversations. And, it is apprehended, this view of the subject grew out of the imperfect manner, in which the testimony was presented to the consideration of the court, by the counsel for the plaintiff. The counsel may be indulged in now doing what was then omitted.

Keeping in view the fact, previously established, that the death of the slave had been caused by violence, the wound received being of the most severe and dangerous character, so

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much so as to produce sudden delirium, uninterrupted, except for moments, till death ensued : connecting the fact, thus developed, with the admissions and the circumstances under which they were made, it is humbly conceived a chain of rational and connected proof is furnished, too strong to be repelled by any circumstance or argument found in the defence.

It is in proof, that there were two or three interviews between the parties, and in two of which, the admissions relied on were made. In the first instance, they were made at the defendant's own house, whither the plaintiff had gone, not to compromise, as was intimated in argument, but to demand what the law gave and required should be demanded, pay for the damage sustained. It is not to be presumed that the defendant, in his own house, and thus put on his guard by the demand made of him, would be surprized into any idle, or involuntary admissions not warranted by fact. But, admit, for the sake of argument, that the admissions of Cazeaux, at his own house, were not sufficiently solemn, or advisedly made, what follows ? In the language of the witness, after being served with a copy of the written, legal demand, " Cazeaux declined a final answer that day, but promised to give one the next day."

His motives in requiring until next day, to give a final answer, might have been various: perhaps to obtain legal advice; perhaps to satisfy his own mind more fully as to his rights, and the facts of the case. Suffice it to say, he took time to deliberate and be advised, and the next day, conformably to promise, he met the plaintiff at Day's hotel, and again declined a final answer, promising one at 4 o'clock of the same day, but which he failed to give, or attend at the appointed hour. In the interview, however, in the morning, at Day's hotel, after a night's reflection, and in the presence of more than one witness, the appellant again acknowledged that "he was satisfied his boy had killed Steel's." Thus, then, upon two different occasions, and under circumstances of the most impressive character, we have these deliberate, voluntary and unsought admissions. And, what is their character? What stronger language could have well been used in the admission of the only remaining fact necessary to a recovery by the defendant, to wit, that his damage had been sustained, or caused, by the slave of the defendant? Upon one occasion, Cazeaux admitted, that he believed his slave had killed Mr. Steel's boy; and, on another, he repeats the same language, and strengthens

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the force of the confession, by declaring himself "satisfied that his boy had killed Steel's." Can it be important to the justice of the case by what process of reasoning, or combination of facts, Cazeaux had satisfied his own mind that his boy had perpetrated the deed, or what were his motives in thus voluntarily admitting the fact? To believe, is to have formed an opinion: to be satisfied, is to have been convinced. Can it be presumed that Cazeaux, would have formed an opinion, or been convinced of the facts so admitted, without rational and satisfactory evidence of their existence? Such was the nature of this evidence, and so conclusive was it on the mind of Cazeaux, that, in the various interviews between the parties, not even a doubt or conjecture is made that any other than his own slave, had committed the offence. And these admissions are made time after time, giving to the party making them, ample opportunity for that vigilance of investigation so natural to men with rights thus involved.

It is not just, however, to confine the interpretation of the words used in the admissions, or by the witnesses, to a strict grammatical sense. Giving to them a fair and ordinary interpretation, and rarely will be found language

more strong and conclusive, in the admission of facts. Suppose the defendant had, in so many words, admitted the fact that "his slave did kill the slave of the appellee," would that have been a more satisfactory or weighty admission than to have said "I believe, or I am satisfied my slave did kill yours?" Can any doubt be entertained that the parties and witnesses both understood the language used as admitting the fact, that the slave of the one did kill the slave of the other? Add this fact to those already established, and how can recovery by the plaintiff be avoided?

If to kill, or so to maim or wound that death ensues, does not come within the provisions of the law, that declares "that masters shall be bound to indemnify those who shall have suffered *any damage* by the crimes or offences of their slaves, and that, independently of public punishment, masters shall be bound to indemnify those who shall suffer any damage from such crimes or offences," may it not be asked, what class of cases was contemplated to be embraced by the law? Is not this enquiry solved in the case of *Jordan* vs. *Patton*, 5 *Martin*, 615? In that case, the fact upon which the court decreed in favor of the plaintiff, was *an admission* on record; that the only eye of the plain-

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tiff's slave was put out or destroyed by the slave of the defendant, by some weapon or instrument adequate to the destruction.

In the case, now before the court, death ensued from the infliction of wounds by some adequate implement or weapon: and the party admits himself satisfied, that his slave killed or caused the death.

In the opinion, however, pronounced in this case, the court seem to require, that all the circumstances, attending the killing, should be proved; for facts might exist (even admitting the killing) which would induce a court to refuse awarding damages.

Although, it does not appear, that this was required in the case of *Jordan* vs. *Patton*, yet, it is not deemed at all requisite to question the soundness of the position, applied to cases, where any thing is alleged, inducing a belief, that facts attended the transaction, not proven, and which if exhibited, might influence the judgment of the court.

But, in this case, it is not even intimated that any one fact exists calculated to weaken the admissions of the appellant, or the grounds of recovery by the appellee.

On the contrary, so far as any thing appears on the record calculated to influence the mind, it is decidedly in favor of the appellee.

Under a well known rule of law, the whole admission of the party is to be taken together; for garbled, rights might be compromitted which would be saved by preserving the admission entire. Nor will the appellee's case be weakened by the application of this rule.

It may, with justice be premised (previous to examining all the facts found in the admission) that at no period, neither in the interviews between the parties nor elsewhere, has the slightest fault or wrong been imputed to the appellee himself, or his slave.

Surely it cannot be just, either in criminal or civil cases, to presume *wrong*, where none is alleged or imputed.

Had any facts existed in this cause, calculated to weaken the claim of the appellee or to justify or excuse the slave of the appellant in the killing, should we not have heard something of their existence? But, let us examine the whole admissions by the defendant.

After admitting that "he believes his boy, Burton, had killed Mr. Steel's boy," the appellant, in the first interview had with the appellee, and at the time of this admission, added; "*that it was very hard for* Mr. *Steel* to loose his boy, and equally hard for him. *Cazeaux*, to give up his boy."

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There is nothing in this language of censure to the appellee or his slave, but on the contrary, that it was a hard case. The declaration also shews that the appellant was reflecting (upon the duties enjoined by law, and demanded by his adversary) whether he should pay the damage sustained, or abandon his slave; and, what was most natural to most men, under similar circumstances, the appellant deemed it as a hard case, on his side also.

But, why hard? No doubt was entertained or expressed as to his slave having perpetrated the offence. Nor was it pretended that the slave of the plaintiff had been guilty of conduct that would have justified or excused the outrage.

The defendant, at the same time, proceeded further to declare, "*that Fortin, where the boys had the frolic, was in the wrong, for suffering it*, and that he (the defendant) would make Fortin pay for it, or *remunerate him for his loss*, or words to that effect."

This admission clearly shews that the defendant had neither been indifferent nor idle in investigating the whole transaction; and that he had ascertained sufficient to feel satisfied that the loss must ultimately be his; but that he would make Fortin remunerate him, who had improperly suffered the negroes to frolic at his house.

Whether the defendant obtained from his neighbour Fortin, or from any other source a knowledge of the facts thus admitted, surely they should not be made to operate against the plaintiff. Their admission was all that was necessary to fill up the chain of evidence establishing the plaintiff's right to recover the damages claimed in this action.

It is believed the reporters furnish no case where, in addition to the admission of facts, it has been required, that the reasons or evidence, upon which the *admission* is made, shall, also, be assigned and established. If in addition to the evidence and admissions, now before the court, it should be required that all the circumstances attending the outrage or injury should be also proved,—how numerous would be the cases, where the most aggravated wrongs would be without redress?

Carry this doctrine to the extent necessary to defeat the claim of the plaintiff in this cause, and the most valuable, and unoffending of our slaves, may be daily murdered with impunity.

In vain, may you pursue and find the murderer at the mansion of his owner, and there be told, "it is true, sir, I am satisfied my slave killed yours; it is a very hard case on your side; but it is hard for me, to abandon my boy;

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my neighbour is in the wrong, I will make him, pay for it." No circumstances of justification or palliation are alleged; nor, is even fault or neglect, imputed to the slave killed, or his owner.

If under circumstances like these, combining the evidence and admissions adduced in this case, more is required to justify recovery for the damage sustained, that is demanded, which will rarely be in the power of the party to furnish. And I repeat, in vain might we seek redress for similar wrongs, committed under the most aggravating circumstances.

The best evidence in the power of the party, is all that is required.

In the case under consideration, no suggestion has been made, that any other, or better evidence, was behind, or in the power of the plaintiff. In this respect, his adversary, had the decided advantage. The plaintiff was a stranger, proven to be temporarily in the city, on a trading voyage, with slaves for his boat hands; the defendant was at home, surrounded by friends, possessing all the means to satisfy his own mind as to the facts of the case, and hence, his admissions are entitled to additional weight and consideration.

When the party has furnished the best evi-

dence in his power, what more can be required than that the evidence thus adduced by fair and rational interpretation of its import, should satisfy the mind of the existence of the facts, upon which redress can be awarded?

In examining the testimony before the court, it is worthy of remark, that all the testimony is found in depositions, at the taking of which, the counsel for the defendant was present, and cross examined the principal witness in the cause. So that the inference is but fair, that all was developed, which had a bearing on the controversy, and nothing is found either in the examination in chief, or cross examination, calculated to weaken the view of the testimony now presented to the court.

If this view be not wholly incorrect, can a single doubt remain on the mind of the court, that the slave of the plaintiff was killed by the slave of the defendant? Can one man kill another, without committing a crime or offence? If no circumstances appear calculated to justify or palliate the killing, how can the party avoid recovery for the damages sustained, and so expressly given by law? In the case of *Jordan* vs. *Patton*, however, the court did not require the establishment of any crime or offence, but awarded recovery upon the simple admission

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of the act causing the injury. Lord Mansfield has declared "that judges in forming their opinion of events and in deciding upon the truth or falsehood of controverted facts, must be guided by the rules of probability: and as mathematical or absolute certainty is seldom to be obtained in human affairs, reason and public utility, require that judges, and all mankind, in forming their opinion of the truth of facts, should be regulated by the superior number of the probabilities on the one side or the other, whether the amount of these probabilities be expressed in words and arguments, or by figures and numbers."

Applied to the affairs of civil life, in reference to which the observation was made, and no position, in regard to evidence, can be more true. Applied to the case now before the court, is there ground for hesitation that the testimony preponderates in favour of the plaintiff?

The court seem to attach less value to the admissions of the party, in this case, because of their being extrajudicial. Although the one may be preferred to the other, yet it is well settled that either, when voluntarily made, is deemed the highest and best sort of evidence; whether made in civil or criminal cases. And it is expressly declared, by Phillips, that the

admissions by a party, to the suit, are evidence, whether made before or after the commencement of the action; whether before arrest, or after; whether in *writing*, or by *parole*. *P. Ev.* 79, 2 *Espinasse*, 5 9, and cases cited. *Gilbert*, 137 4 *Hawk. P. C.* 424. The court have only to see that the admissions are made freely and without the excitement of hopes or fears; that the whole is to be taken together; that no mistake may be made as to their meaning and effect. Yet so far has the doctrine on this subject been carried; it is now a well settled rule of evidence that *facts* disclosed, in consequence of a confession, obtained by *threats* or *promises*, may be given in evidence, because *they* must be immutably the same, and *justice* cannot suffer by their *admission*. 2 *Espinasse*, 520, and cases cited. 4 *Hawk*, 423, *Leach*, 298, 1 *Leach*, 301 and note, *Phillips' Evid* 83, 84.

In regard to admissions, there is also, another long and well settled principle which, it is believed, would be conclusive, in favor of the appellee, if applied to this cause.

Not only is that good evidence which the party has been heard to say, respecting the matter in dispute, but it is expressly laid down that "*conversations* which have passed in the hearing of the party respecting the matters in

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difference, and which were *uncontradicted*, or *admitted*, are good evidence, and such is the constant practice." *Swift's Evi.* 126, *Peake Ev. Miller's N. P.* 294. Cases referred to. 2 *Espinasse*, 519.

Had the plaintiff, then, charged the slave of the defendant, *in his presence*, with having killed his, the appellee's slave, and such a declaration gone *uncontradicted*, it would be good evidence on which to found a recovery.

How much stronger the case where the act has been *charged*, and the party declares himself *satisfied* of its truth!

It is not deemed necessary to fatigue the court with the great variety of cases reported on the subject of parole admissions.

The decisions on this subject, have been so fully collated and commented on by the writers on evidence, that it is only to those authors the attention of the court need be called; and where the cases referred, to furnish ample illustration of the principles laid down. *Phillip's Evi.* 71 *to* 80. *Peake's Evi.* 71, *to* 30. *Espinasse Nisi Prius*, 516, *to* 221, 2*d vol.* late edition.

Davezac, for the defendant. The action brought by the plaintiff is one, which, though founded on our statutes, is well known in the

Roman jurisprudence; it is there called *noxalis actio.* The word *noxa* being used by the Roman jurists, to designate the offending slave and sometimes to express the offence itself. A careful perusal of the Roman law will shew, that under the civil law, that action could only be maintained in cases when the injury, caused by the slave, was of the nature of private wrong, not subjecting the offender to capital punishment. This appears clearly from this passage: *Hæc stipulatio noxis solutam præstari non existimatur ad eas noxas pertinere quæ publicam exercitionem et cœrcitionem capitalem habent. ff.* 50, 15, 200.

When a slave had been guilty of a capital crime, the law required that he should be punished in the same manner as if he were a free man. *ff.* 21, 1, 17. *l.* 17 § 18, 18, 2, 12, § 3 and 4; 50, 18, 200.

Having shewn, that the Roman law refused this action to the man, who had been injured by the act of a slave, who, by that same act had committed a crime, no doubt because the loss of the slave, doomed to be sacrificed to the vengeance of society, was deemed a sufficient hardship for the owner, without adding to it the penalty of paying, also, the person injured, and because, also, the alternative which that action alwaye

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leaves to the one subjected to it to avoid the pecuniary obligation of compensating the injury, by the abandonment of the offending slave, does not exist, in cases where the slave is either put to death or sentenced to a long imprisonment :

I shall now proceed to prove, that our own statutes have changed nothing in the ancient jurisprudence, and that they are merely declaratory of the former law. It is said in the 22d section of the *Black Code*, *Martin's Digest*, 621, "the owners shall be bound in case of robbery, or other damage, caused by their slave or slaves, besides the corporal punishment incurred by the said slaves, to pay the said damage, unless they prefer to abandon the slave or slaves to the person robbed."

If we examine this clause of the statute attentively, we shall find that it relates to damages done to the property of individuals, by the depredation committed by slaves ; for, though it says, "in case of robbery and other damages," we are not permitted to generalize that expression so as to extend it to every other injury to proprerty, because, we find immediately after that, "the owner, thus bound, may always liberate himself by abandoning the offending slave to the person robbed." Does it not follow imperatively from that passage, that it is

only when deprived of property by the act of a slave, or to use the emphatic expression of the law, *when damaged by robbery*, that a man can resort to this kind of action? What does he demand? To be compensated either by money or by the abandonment in his favor of the slave for the loss experienced: but the law says that the slave may be abandoned to the person robbed. Has Steel been robbed of his slave?

This is a penal statute, one which inflicts a pecuniary penalty. Must it not be strictly construed, and must not he, that invokes its provisions, show clearly that his case is embraced by them? Has the plaintiff done so? No, for in order to render the law, on which he relies, applicable to him, the court must enlarge the statute and say that the expressions, "to the person robbed," a phrase that has a distinct and clear legal meaning, was intended to designate every other class of injuries. That it means, also, "the person whose slave has been murdered," or, "the person who has been slandered," or, "the person who has been insulted." Such a construction would do violence to the letter as well as to the spirit of the statute. To the letter, because the words used have a clear, and distinct signification, which cannot be made to extend to any thing else: to its spirit, be-

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cause in recurring to the pre-existing laws it is evident that the word *robbery* was not used inconsiderately, since it is, also, used by the Roman jurists, when legislating on the same matter. Had this kind of relief been intended to be indiscriminately granted to every person, suffering from the acts of a slave, without any exception as to the nature of such acts, it was easy for the legislature to have expressed that intention. But, I shall be told that the legislature intended to give to persons injured by slaves, the relief sought for by this action, even, when that injury resulted from crimes committed by slaves; and subjecting them to capital punishment. And my adversary will endeavor to support that assertion by refering to the *Civil Code*, 41, *art.* 21; where it is said that independently of the public punishment, which may be pronounced against slaves having committed *des delits et des quasi délits*, their masters shall be bound to indemnify those who shall have suffered any damages from such *offence and quasi offences*. I will examine this article and it will not be, I trust, a difficult task to show that it contains nothing from which the arguments of my opponent can derive support. He contends that the expressions, "independently of the public punishment," show evidently that the

person injured has a right to claim compensation in all cases where such public punishments are inflicted even for crimes punishable capitally. But the very next article of the code adds, "the master, however, may discharge himself by *abandoning* his slave, &c." If the legislator had intended to speak of capital punishment by using the expressions "public punishment," he would have been aware that when the crime, from which the injury originated, was once punished by death, it was a mockery to say, that the *master might discharge himself* of such responsibility by abandoning his slave." Is it necessary to show the impossibility of such an abandonment here. Under our laws, slaves, accused of capital crimes, are tried and executed in a summary manner. The slave accused of a crime of that kind is in the hands of the public officer, how can he be abandoned? And again, how is the amount of the injury sustained to be determined? If the parties disagree, it can only be done by a competent tribunal and by a regular action. It is only when that has been determined that the abandonment is to take place within three days after judgment. Civil causes do not proceed here as rapidly as criminal prosecutions, particularly when the accused is a slave. It is certain that the public punishment,

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as my adversary calls the infliction of death, will have taken place many months previous to the rendering of the judgment after which the owner of the slave must surrender him, or pay the damage sustained through his act; but where is the possibility of making this choice of the two alternatives? Can he surrender a slave who exists no longer? How can that construction be given to the law from which such absurd consequences would result? And again, suppose that, during the pendency of a noxal action, the slave, whose act had given rise to it, was to die, will it be contended that the action could still be maintained? I presume not; for, in such a case, the owner could not take advantage of that part of the law, which gave him the privilege of discharging himself by abandoning his slave. The same argument applies in all cases, when the act of the offending slave subject him to capital punishment. The operation of the penal law places the parties in a situation not embraced by the provisions of the black code, or by those of the civil law, and the noxal action is merged in the felony.

Having shewn, that the expression "public punishment," does not embrace capital punishment; I will now proceed to explain its meaning. The black code existed, previous to the

enactment of the civil code, and I believe, that conformably to the soundest principles, that should guide a tribunal, in the construction of statutes, every provision of that code should be enforced, that is not repealed by, or repugnant to, those of the civil code. In the black code art. 20, where the law-giver says, "besides corporal punishment," &c. in the *Civil Code*, 40, *art.* 21, legislating on the same subject, he says: "independently of the public punishment," &c. it is not more than probable, that he intended to convey the same meaning, which he had already expressed, in an other code (both are the work of the same hand) and is it not natural to believe, that if the precise words were not repeated, it was probably owing to their not being immediately under the eyes of the legislator? But it matters not; the same legislative idea was in his mind, and it has been clearly reproduced, though clothed in different language.

If I have succeeded in imparting to the court the conviction which I myself feel, as to the identity of the legislative will on the subject of the noxal action, though the enactments of the two codes are not worded alike, it will be easy to prove, that the provisions of the laws, made on that subject, do not embrace capital

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cases. It is enacted in the *Black Code, art.* 112, that "if any crime or offence, not capital, shall be committed by any slave, he shall be prosecuted before a justice of the peace, and three freeholders, who shall pronounce a sentence on the said slave, which shall inflict corporal punishment, which shall not extend to the loss of life or limb," &c.

There we have the true definition of the legislator of what he meant, by the words "besides the corporal punishment," used in the 22*d art.* of the same code. They relate only to cases "not capital, and when the punishment shall not extend to the loss of life or limb." It explains also, by a very natural analogy, the expression of "public punishment," contained in the *Civil Code.* We find in two articles of the *Civil Code*, 322, *art.* 22, 40, that the master may abandon his slave who shall be sold at public auction, in order that the price of him may serve to repair the damage caused, &c.

How could the slave be sold at auction, if he is in prison, under a prosecution: or, if he has suffered the penalty of death, previous to the rendering of the judgment, awarding the damages?

I will now proceed to shew, that the act of

killing, which is the crime, said to have been committed by the slave of the defendant, is a capital offence. In the *Black Code, art.* 51, it is said "every slave who shall kill any person, unless by accident, or in the act of defending his master, shall suffer death."

In the petition of the plaintiff, it is averred that the negro Benton, the slave of the defendant, "was found guilty of killing the slave of Steel." If so, he must have been sentenced to death, under the 51*st article* of the *Black Code*, above cited; and, in that case, he either no longer exists, or he will shortly be executed. And in either of these hypothesis, it is impossible for the defendant to surrender him, in order that he may be sold to pay the damage sustained through his act. Let it not be said, that the negro has not been sentenced to death, but only to imprisonment; for, to that objection, I shall answer there is no proof of that allegation; and presumption, on the contrary, would lead to a contrary conclusion. You say, that he was accused of killing, and found guilty. The law condemns offenders of that description to death. He was found guilty of killing: it follows, that he has been sentenced to suffer death, for we find in the 41*st article* of the *Black Code*, that "in case the offender shall be

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convicted of any crime, which the present code deems punishable by death, the judges shall pronounce sentence to that effect; which sentence, shall be put to execution, by their order," &c. I have already shewn that killing by a negro by the 51*st article* of the *Black Code*, was a "capital offence, punishable by death, unless done by accident, or in the act of defending his master." do you say now, that he has not been found guilty? Even if you were allowed to contradict your own declaration judicially, it would avail you nothing, for in that case, he must have been acquitted, either because there was no proof of the charge, or because the killing took place in one of the two cases in which the law renders it justifiable even in a negro, "by accident, or in the defence of his master." If he was acquitted, because he was innocent of the act charged in the information, and not made to receive either a corporal punishment, to use the language of the *Black Code*, or a public punishment, if we adopt that of the *Civil Code*, you must fail in your action: for, the kind of redress you seek, is only given "besides the corporal punishments." You cannot separate them. The one must precede, and is required to entitle you to the other. Do you prefer taking the other hy-

pothesis, and supposing the accidental killing, or the killing in defence of his master. The former, the accidental, leaves you still in the inseparable difficulty presented to your success in the cause by the want of a sentence to public punishment; and, surely, you would not pretend that the faithful slave who, in defence of his master, had killed that of an other person, would, by such an act of valour and loyalty, expose that master to the *noxal action.* And again; in that case, the court would still ask you for the evidence of the sentence by which the public punishment had been inflicted.

I dismiss this branch of my argument with the persuasion, that there remains no doubt on the subject; for, unless I am strangely infatuated by a predilection for my own powers of reasoning, I have, I believe, left no one argument of my antagonist unanswered, either of those now urged in the argument on a new hearing, or, in my memory, from the recollection of the debate on the former.

It remains now for me to speak of what the plaintiff considers all important to his cause. I mean the pretended confession of Cazeaux. I need not observe that, if I have been success-

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ful in the other part of my argument, I have but little to apprehend from this; for, if the action cannot be sustained under our statute, confession of facts, from which the plaintiff can draw no advantage, cannot be very prejudicial to the defendant. Nevertheless, I will proceed as if I labored myself under the same error, which I impute to my adversary, and considered the revelations of Cazeaux as likely to have great weight in the decision of this cause. It seems to me that the plaintiff has been mistaken in supposing that, should the court consider now the declarations of Cazeaux as clear and explicit, instead of regarding them as they did in a former decision as *loose, indefinite, extrajudicial* confessions, he must succeed. This error arises from not considering those declarations in their proper light, isolated, and unsupported by any other evidence; and viewing them in connection with other facts, always bearing on his judgment, but which cannot exercise any influence on that of the court; since, the record of the conviction before the parish court being deemed inadmissible, by this tribunal, there is nothing in proof before them relative to the death of the slave of Cazeaux, excepting the declaration alluded to. Two witnesses, it is acknowledged, prove the death of Steel's negro

in consequence of blows received; but there is not a word of testimony tending to shew that *Benton*, the accused slave, had any agency in causing that fatal event. If, in the absence of testimony, we resort to the petition and answer, it will be seen that the allegation of the one tend to prejudice the cause of the plaintiff. if admitted as facts, and that the defendant by the most positive denial has put the plaintiff to the strict proof of all his assertions. After these preliminary remarks, which I thought necessary to make in order to divest that part of the subject of the exagerated importance attached to it by my adversary, I will proceed to examine what are these extra-judicial declarations.

It will not be denied that the interviews which took place, were had with a view to *settle the matter without a suit.* This is evident from the testimony of Joseph Given, whose very words I have used. He adds, it is true that Cazeaux expressed no such a wish; but the very fact of having conversed with the plaintiff on the subject of the note addressed to him by Steel, requesting an *amicable* arrangement, is a proof that he must have been conscious of that intention on the part of the plaintiff; and that he must have considered all that passed as mutual efforts to avoid, what a man, like Cazeaux, un-

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informed of his rights, and so likely to commit mistakes of law most dreads, a final resort to courts of justice. Let us suppose, that Cazeaux, in order to avoid the expense of a suit, instead of using the words attributed to him, had said: "very well, sir, will you take five hundred dollars? and that his offer had been rejected by Steel, who required a larger sum in order to consent to give up his claim; would the evidence of such an offer shew that Cazeaux acknowledged the legitimacy of the demand made on him? Would it prove that Steel could maintain his action, and was entitled to recover the value of this slave? I do not hesitate to say that my adversary will not contend that the evidence of such an offer would be decisive against Cazeaux, in the decision of a suit subsequently brought after the failure of the attempts towards a compromise of the dispute.

Let us see if the vague expressions used by Cazeaux, when conversing in a language which the witness says he speaks *badly*, can have any effect in the determination of the cause. Cazeaux "observed," says Joseph Given, "that he believed his boy *Benton*, had killed Adam Steel's boy." Cazeaux further observed, that Alexander Fortin, where the negro had the frolic, was in the wrong, for suffering it; that

he would make him pay for it, or remunerate him for his loss, or words to that effect." The same witness adds, that this conversation took place after the trial in the parish court.

Is the *belief* of Cazeaux sufficient to render him liable, under the law? Nothing is said by him, as to what has induced such a belief; but we may infer, from the declaration of the witness, that it arose from the testimony, given in the trial at the parish court, since this conversation took place, subsequently to that trial, as the witness informs us. If so, could a belief, produced on the mind of Cazeaux by testimony, which this court has rejected, as illegal, render him subject to the operation of the law? Now, could the belief, in the evidence which this court has rejected, operate a decision which that evidence itself, when offered to the court, could not produce. Cazeaux may have believed, that his negro had killed the slave of Steel accidentally, for instance, and yet have considered himself as not bound to remunerate Steel for his loss; and this appears to have been the fact, since he finally declined the propositions, contained in that note. What is stated, in the other part of the conversation, surely cannot be considered, as offering proof against Cazeaux. "Fortin, where the negroes had the

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frolic, was wrong." This opinion, certainly, cannot render the defendant answerable to the plaintiff, for the loss of his negro. "He would make him pay for it, or remunerate him for his loss." Who is meant by *him*? *Pay* whom, for *his loss*? Certainly Steel; for it was Steel, who had to lose, not Cazeaux. It was undoubtedly, in examining thus the testimony, that the court considered it as too *loose* and *indefinite*, to have any weight in their decision. All the commentaries made on the words, *I am satisfied*, will fall to the ground, by a reference to the testimony of Joseph Given. There they will be found to have been used by the witness, himself, to express the idea, which the words of Cazeaux, in his broken *English*, had conveyed to the mind of that witness, not as the precise expression, used in English by Cazeaux. So that, all the reasoning employed, to show how great and entire the belief must be, which is expressed by the words: *I am satisfied*, as synonimous with those, *I believe*, is totally lost. To the members of this court, whose native language is the French, I hardly need to remark, that, these expressions *I am satisfied*, used in order to express the act of believing, form a phrase truly and idiomatically English. Such a mode of speaking, never would be em-

ployed, to express that idea, by a Frenchman, speaking with difficulty a foreign idiom: persons, in that first state of knowledge of a foreign language, generally, when endeavoring to convey their meaning, by the language newly and imperfectly acquired, translate literally their own. Taking this for granted: how would a Frenchman express the idea attributed to Cazeaux, and which he supposed to have been desirous of conveying? *Je crois que*, certainly: which is, *I believe*, not *je suis satisfait que*, which, in French is nonsense.

Hawkins, in reply. It is difficult to conceive the applicability of much of the grounds relied on in the defence. The first of which is an effort to establish the principle that the Roman law gave no action of damage for the private injury where the offence, from which the injury resulted was punished capitally. And the reason furnished the Roman jurists, by the counsel in defence, is that the loss of the slave, committing the capital offence, was deemed a sufficient hardship.

It will be time enough to examine the value of this position and how far it can be made to bear upon the positive enactments of our country, when such a case is presented to the consideration of the court.

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The opposite counsel assumes the position, that, under the provisions of the black code, the person, from whom damages are claimed, "may always liberate himself by abandoning the offending slave to the person robbed." Admit, for the sake of argument, that this subject was to be exclusively governed by the *Black Code*, which, however, is not the case : neither the letter or spirit of the statute, justify such construction ; unless the abandonment be "in five days from the day when the sentence shall have been pronounced." Alluding of course to the sentence, pronouncing public punishment.

Before the appellant, therefore, could derive any benefit from this provision, even if it were applicable to the case, he must shew that the sentence pronouncing the public punishment has put it out of his power to abandon his slave, under the provision of the statute.

Has the party exhibited such a sentence ? On the contrary, the only sentence before the court, or adverted to, either in argument or in the testimony, is a sentence of imprisonment, not death.

Surely, imprisoning the appellant's slave has not put it out of his power to abandon him, subject to his imprisonment, to the use of the appellee.

Whatever doubts may have existed on this subject, prior to the adoption of the *Civil Code*, must be removed by adverting to its provisions.

It is the last, and therefore, the true source from whence we must draw our conclusions. The legislative body could not well have brought stronger terms to their aid, in providing for private redress, independently of public punishment. And they do not confine themselves to cases of offences or misdemeanors, but provide generally, for all cases of damage, whether the result of crimes or offences. *Civil Code*, 43, *art.* 21.

Whether or not the subsequent article in the code, providing that the master may discharge himself, by abandoning his slave to the injured party, shall restrict the operation of the previous general terms, and exclude private redress, in cases where the public punishment of the slave has been death, is a question of importance, not at all necessary to be examined or decided in the present case.

The opposite counsel has laboured, to prove to the court, that because the slave was tried for murder, therefore, sentence of death has, or ought to have, been pronounced; and because, sentence of death ought to have been pronounced, therefore, *execution* has taken place; and

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because execution ought to have taken place, it was out of the power of the party to abandon his slave, and hence, no damage can be awarded for the private injury.

It cannot be expected of me, to occupy time in repelling such conclusions, from such premises. It would be time enough to do so, when a case presents itself where sentence of death has actually been pronounced, and execution had pursuant to the sentence.

Exclude the record of the parish court from the evidence in the cause, as this court has done, and then the other testimony must be resorted to for the facts on which to pronounce judgment.

Is there any testimony in the case which shews that the slave of the appellant was actually executed pursuant to sentence, and therefore, not within the power of the party to yield up in satisfaction of the judgment for the private injury?

On the contrary, the witnesses state that the interviews between the parties were had after the trial in the parish court, and after Steel had demanded pay for the damage he had sustained. And Cazeaux then declares himself satisfied, that his slave had killed Steel's; and proceeds further to add, "that it was very hard

for Mr. Steel to lose his boy; but it would be equally hard for him, Cazeaux, to *give up his boy.*" It would indeed have been a hard task, if his boy had suffered death under sentence of the parish court, as the counsel for the appellant feels it so necessary for this court to presume; and this too not only contrary to the fact (for the boy is still living) but contrary to the parties' own admission of the fact.

The hardship, therefore, did not arise from the boy being dead; but from the unwillingness of his master to *give him up*, even in satisfaction of injury, which his offence had caused; and by doing which he could alone *discharge* himself from the damages awarded in the civil action.

It may be well here to suggest the provisions in the civil code (which differs in this respect essentially from the black code) in providing that the party may discharge himself by abandoning his slave "provided it be done within *three days* after the *judgment*, avoiding such *damages*, shall have been *rendered.*"

Here Cazeaux has failed to abandon, within three days after the judgment, for the damages in the court below, and he must now submit to the payment of the damages in money.

The second ground, urged in defence, is the

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idea (for it is ideal only) that the admissions of Cazeaux were made with the view to compromise, and therefore inadmissible as testimony.

There is not a word of testimony in the cause which justifies such impression, even in the mind of the appellant's counsel.

The written and legal demand for the payment of the 1200 dollars damage, which Steel alleged he had sustained, bears no stamp of proposition to compromise. Nor, is there any proof that either of the parties, in any of their various interviews, suggested the idea of compromise. And Given, the witness, proves that "he was present, when Steel *demanded* of Cazeaux pay for the boy, according to the written notice."

If legally to demand payment of the damages we had sustained, and fixing in the demand the amount of damage, can be tortured into an offer of compromise, it were better for the purposes of justice, that the benignity of the law had been converted into oppression, by requiring in all cases judicial process, as the only demand entitled to the sanction of our institutions.

The last ground, taken by the counsel in defence, is not an examination of the force and effect of the confessions actually made by his client; but an attempt to impress on the minds

of the court what a Frenchman, speaking bad English, would have said, upon such an occasion.

It is in proof, that his client spoke well enough to be understood by the witness, and that he used terms, and made conclusions, so strong and explicit, as to leave no doubt on the minds of the witnesses, as to the facts admitted and the satisfaction of the appellant, of their truth.

The counsel for the appellant will readily pardon me for declining a critical examination of idiomatical phrases, which might have been employed by his client in the French language. It is fortunate for the appellee, that the appellant spoke English also; and that he has employed English phrases to those understanding English only, and of such strong and conclusive character, as to leave no doubt or ambiguity, as to the phrases themselves, or their legal extent and operation.

Tested as these admissions have been, by the authorities to which the court has already been referred, it is humbly conceived the judgment of the court below must be confirmed, awarding damages to the plaintiff, Steel.

That the counsel for Cazeaux deemed these authorities conclusive against him, is but fair to infer from his having failed to make any

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reply to them, or submit others, calculated to weaken the principles sanctioned by those submitted to the court.

This duty was the more incumbent on the opposite counsel, if any counter authorities could have been adduced, because he was well aware that the strong ground relied on for a rehearing, was the examination of authorities not before the court, in the argument of the cause.

MATHEWS, J. delivered the opinion of the court. In this case, the court, having doubted the correctness of their decision, granted a rehearing.

We have examined, with attention, the arguments of the counsel in the cause, which have been submitted to us in writing, and can perceive no good reason to change the judgment heretofore given. It rests entirely on certain extrajudicial confessions of the appellant, drawn from him by a demand of reparation for an alleged injury to the property of the appellee, and verified by witnesses called (no doubt) for the express purpose of testifying to any thing favorable to the claim of the latter, which might be expressed by the former in conversations between the parties, entered into for that

purpose. These confessions, as stated in our former opinion, amount to nothing more than a belief on the part of the appellant, that the injury, complained of, was committed by his slave, not sufficient under all the circumstances of the case to authorise a judgment against him. Although no legal objection exists to the credibility of the witnesses, as nothing appears on the record, directly to impeach their credit, yet, it is thought, that testimony, thus given by witnesses called on by one party (as we believe) for the express purpose of afterwards relating on oath whatever they might hear favorable to his interest, ought to be received with some small allowance, in favor of the defendant.

It is, therefore, ordered, that the judgment heretofore pronounced in this court remain undisturbed.

RACHEL vs. *ST. AMAND.*

The decision of an inferior court, on a question of fact will prevail in the supreme court, if it be not manifestly erroneous.

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

The plaintiff sued for her freedom; there was judgment against her, and she appealed.

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ST. AMAND.

MARTIN, J. delivered the opinion of the court. This case turns entirely on a question of fact The parish judge has been of opinion that the plaintiff has not proven that, on which she expected the judgment of the court.

On the best consideration that we have been able to give to the testimony, which is voluminous, it is not very clear on which side the testimony preponderates, and we are not able to say that the parish judge erred. He heard the testimony from the lips of the witnesses, saw their countenances and was consequently better enabled to come to a correct conclusion, than we can be. In such a case, especially when the judgment is for the defendant, it ought not to be disturbed.

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

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

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MEEKER'S ASS. vs. *WILLIAMSON & AL. SYND.*

MEEKER'S ASS. *vs.* WILLIAMSON & AL. SYNDICS.

APPEAL, from the court of the first district.

This case was remanded by this court, at January term last, for a trial by jury. 7 *Martin*, 315.

A party does not become a legal witness, by depositing a sum of money, sufficient for the payment of the costs to which he may be liable.

A defendant may, in good faith, abandon apparent good grounds of defence.

The parties submitted the following issues to the jury:

1. The plaintiffs have not proven themselves to be the assignees of W. P. Meeker, or that any assignment whatever of the claims, which the said Meeker might have on Williamson and Patton, or Meeker, Williamson and Patton, or either of them, was ever executed or made by and for the said W. P. Meeker to the plaintiff.

2. No assignment of any right or claim of W. P Meeker and S. Denman, trading under the firm of W. P. Meeker & co., upon the house of Meeker, Williamson & Patton, appear to have been executed, by the said W. P. Meeker, or S. Denman.

3. The plaintiff brought three several suits, in the late superior court of the territory of Orleans, against Meeker, Williamson & Patton, and such proceedings were had therein, as appear by the records hereto annexed.

4. At the time of the institution of said suits,

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Meeker, Williamson & Patton, were not indebted to the plaintiffs, or if indebted, were so only in a small part of the sum, for which they obtained judgment.

5. At the time of the institution of said suits, the defendants therein were in insolvent circumstances, and continued so, until the time they made a surrender of their property, and this circumstance was known to the agents of the plaintiffs in the said suits.

6. The plaintiffs in the said suit, in part satisfaction of the said judgment, received from the defendants a conveyance of property, which was set aside by a decree of the superior court as fraudulent.

7. Williamson & Patton, in the three several suits, brought against them by the plaintiffs, had a good and legal defence, which was voluntarily withdrawn, and in consequence thereof, the plaintiffs obtained the judgment on which they now claim, to the prejudice of the other creditors, if it be maintained.

At the trial, the defendants offered as a witness, P. V. Ogden, a partner of the house of Harrod & Ogdens, who had executed to George M. Ogden, an assignment of all his rights, claims and demands whatsoever, in his

individual capacity, or as a partner of said firm, on the assignees or the estate of Meeker, Williamson & Patton, and Williamson & Patton, or either of them. He further offered to deposit $100, or any other sum, which the court might deem reasonable, for the discharge of any costs, which he might be liable to pay. The plaintiffs opposed the admission of the offered witness, and the court sustained the exception, whereupon the defendants' counsel took his bill of exceptions.

In the charge to the jury, the court observed on the first fact, that the record was sufficient proof in law, that the plaintiffs were assignees of W. P. Meeker.

On the second, that the record was sufficient legal evidence, that there was no assignment from W. P. Meeker & S. Denman, to the plaintiffs, unless the jury should be satisfied, that there was collusion or fraud, in the voluntary withdrawal of the peremptory exceptions.

On the fourth, that the sum due to the plaintiffs was settled by the judgment, as a *res judicata*, and could not now be inquired into, unless there was evidence of collusion or fraud.

On the last, that the peremptory exceptions made by Meeker, Williamson & Patton, were

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legal exceptions, if the facts stated therein were true; but, as they had been withdrawn, they were not to be considered, as exceptions at all; unless they were withdrawn thro' fraud or collusion.

The defendants' counsel objected to these parts of the charge and prayed the court to direct the jury simply, on the last fact, that the exception made by Meeker, Williamson & Patton, to the suits of the plaintiffs were legal exceptions, under all the circumstances appearing on the record; but the court declined doing so.

Whereupon the defendants' counsel took a bill of exceptions to the charge of the court.

The jury found that 1st.: That the plaintiffs have proved themselves the assignees of W. P. Meeker, and that an assignment of the claims which the said Meeker might have on Williamson and Patton, or Meeker, Williamson and Patton, or either of them, was, therefore, made by him to the plaintiffs.

An assignment of the claims of W. P. Meeker & co. and S. Denman, trading under the firm of W. P. Meeker & co. upon the house of Meeker, Williamson and Patton, has been executed by said W. P. Meeker and S. Denman, in favor of the plaintiffs, inasmuch as no excep-

tion was effectually interposed to the suit, until a judgment was previously obtained.

3. The third issue is found agreeably to the record of the proceedings had in the previous suits.

4. Meeker, Williamson & Patton were indebted to the plaintiffs, at the time of instituting the said suits, in the full sum of $14,711,92, for which judgment was obtained.

5. The jury are unable to judge positively of the situation of the affairs of Meeker, Williamson & Patton, at the time of instituting these suits; but have had no evidence of their being in insolvent circumstances.

6. The fact admitted.

7. Meeker, Williamson & Patton had a good and legal defence, had it been proven; but it having been withdrawn, without any proof, the jury do not consider that it was any defence at all.

The court made the rule absolute and ordered the defendants to pay the plaintiffs $ 17,820, the proceeds of the property, referred to in the rule; it appearing by the answer of the syndics, and it being admitted by the plaintiffs, that the syndics have made the transfer and raised the mortgage on the property; and the syndics

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not having shewn any good cause why the monies proceeding from the sale of said property should not be paid, as required, and the court being satisfied, from the facts and exhibits in the suit, that the plaintiffs are entitled thereto.

The defendants appealed.

DERBIGNY, J. delivered the opinion of the court. This case comes again before this court upon bills of exceptions to several opinions of the judge of the first district, on points which arose since the cause was remanded for the last time.

The first is taken against his refusal to admit the testimony of Peter V. Ogden, one of the parties to this suit, who, to make himself a witness, executed a transfer of his rights and claims, to his partner in trade, and offered to deposit any sum of money, which might be deemed sufficient for the payment of the costs, *in case he should be decreed to pay any.* We think that the district judge was right in considering P. V. Ogden as still incompetent to be a witness, after this transfer and tender.

The second bill of exceptions contains the several objections, which the appellants made to the charge, addressed by the judge to the jury

on some of the questions of fact submitted to them.

On the first fact, we are of opinion that the judge charged the jury correctly, when he told them that the record was sufficient legal evidence, that the plaintiffs were assignees of Wm. P. Meeker. He might, indeed, well have refused to suffer that fact to go to the jury, because these exceptions to the persons of the plaintiffs, or pleas in abatement, were inadmissible at this stage of the cause, after the charac- of the plaintiffs had been recognised by the creditors of Williamson and Patton, in a variety of ways, since the beginning of these proceedings.

On the second fact, we deem it useless to examine whether the judge was right or wrong, in his charge to the jury, because we consider that fact, as unimportant in this controversy, where the title, on which the present claim is founded, is a judgment rendered in favor of the assignees of Wm. P. Meeker.

On the fourth question, we also think that the judge's charge to the jury was right; because, no third person can disturb a judgment rendered between two parties, unless he can show that such judgment was obtained by collusion, to defraud other persons.

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On the seventh, we are also of opinion that the district judge was correct in saying that fraud and collusion were necessary to be proved, in the withdrawal of the exceptions there alluded to; because a defendant may in very good faith abandon some apparently good grounds of defence, and it is only the ill faith of the parties that gives a third person a right to attack the judgment.

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

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JULY TERM, 1820.

East'n District.
July, 1820.

M'NEIL & AL.
vs.
COLEMAN.

M'NEIL & AL. vs. *COLEMAN.*

APPEAL from the court of the first district.

Whether a sale by a common carrier, vests the property of the goods?

If the defendant relies on special pleas alone, there is no need of any proof of the allegation in the petition.

Eustis, for the plaintiff. This is an action of revendication, for the recovery of thirteen bales of cotton, which the plaintiffs claim as consignees, for the benefit of their principal, W. King of Mississippi.

They aver that, on the third of April last, the cotton was shipped on board of a boat, of which one Crawford was master, to be transported to New-Orleans; that it was shipped as the property of King by Fisk & M'Neil, the consignors; that Crawford was a common carrier; and that the defendant has unlawfully taken possession of, and refuses to deliver it.

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The answer contains no general denial of the allegations of the petition ; but sets forth, that the defendant purchased the cotton for a valuable consideration, in market overt ; that it is his property and not the property of King; and that there was no consideration given by King to Crawford.

Our statute requires that defendants shall answer, without evasion, every material fact stated in the plaintiff's petition. 2 *Martin's Digest*, 154. Our practice has been, and the construction of the statute warrants it, that all these allegations, which are not answered without evasion, shall be taken pro confesso.

We have then the following facts which are established by the defendant's admission :

That the bill of lading, annexed to the petition, is that which was given by Crawford for the latter.

That Crawford was a common carrier.

The fact of the shipment and consignment to the plaintiffs.

The counsel for the defendant has rested his principal defence, on a supposed deficiency in our proof, with regard to the property being vested in the individual, for whose benefit this suit is instituted, unless it appears that the right of property is in him. Let it be admitted, for the sake

of argument only, that the plaintiffs cannot recover.

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Fisk and M'Neil, of Natchez, commission merchants, were the factors of King, and consigned the thirteen bales of cotton to their friends in New Orleans, M'Neil, Fisk & co. as the property of Wm. King. This is proved by the affidavit of Lessassier, one of the partners of the latter house, and by the testimony of Stebbins Fisk, a witness for the plaintiffs, who derives his knowledge from the letters of the consignors to the consignees. When one merchant ships goods to another and informs him by letter, that they do not belong to him, but are the property of some one else, the consignee holds the goods for his benefit and the principal is in possession of them, by the interposition of his agent. *Tit. de adquirenda & amittenda possessione, ff.* 41. 2. 1. § 20. *Commentary of Cujas quoted* 7 *Martin*, 60.

The letters accompanying consignments are conclusive evidence of the property, as it regards the consignee ; he knows no one else, in his transactions, but the person whose property he has in his possession. The bill of lading shews for whom the carrier, Crawford, possessed ; as that instrument is not denied, full effect must be given to its contents ; and it imports

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that the cotton was to be delivered at New-Orleans to the consignees, who would have held it subject to the instructions they had received from the consignors at Natchez, as the property of Wm. King.

So that it appears that the possession of Wm. King was maintained by him, through the interposition of his agents, until it was divested by the tortious conversion of the carrier.

It is sufficient for the plaintiffs to shew, that the cotton was lawfully in the possession of the agents of King, before it came into the possession of the defendant. The fact of previous possession, on their part, established as it is by testimony and by the admission of the defendant, would entitle them to recover the possession against the defendant, who is proved to have acquired the actual seizin of the cotton under the strongest circumstances of suspicion. It is proved and admitted that he knew the character of Crawford; they were seen frequently together in company; it is not denied that he was a common carrier. The men, engaged in transporting the cotton from the boat to Rust's house, had been previously arrested by the marshal of the United States; and the people, who were in the habit of being about the house may have done them and Craw-

ford injustice, in supposing they were all concerned in an unlawful enterprize: nevertheless, such was the report and understanding.

The house, to which he brought the cotton, was the last place in the city in which a person, unless he wished to escape the observation of merchants and persons who would be apt to recognize him, would have thought of storing cotton. The character of the house and its visitors is fully explained in the evidence, and we cannot hesitate, for a moment, in believing, with one of the witnesses, that no cotton has been brought there before or since the present parcel. The circumstance of the defendant's applying to the proprietor of the house in the night, for the storage of the cotton, and the general sentiment of the by-standers, ought to induce the opinion, that the possession was not such as to form the basis of a title to the property. *Melius est nullum titulum habere, quam vitiosum.*

The defendant has not pretended to prove, in what manner and under what circumstances, the cotton came into his possession. He has averred that he bought it in open market; he has not proved it. He relies on his simple possession, which we have shewn to be tortious, and acquired from a person who had no right to divest himself of it, to the prejudice of the owner.

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The right of consignees, to property consigned to them, is very fully explained in the argument of justice Buller, before the house of lords, in the case of *Leckborrow* vs. *Mason*, reported in 6 *East*, 72, to which I beg leave to refer the court, in order to shew that no person had any right to transfer the property claimed in this case, except the consignees, M'Neil, Fisk & co.

But, if we had no proof of the property being vested in King, by the defendant's answer alone, we contend, that we should be entitled to recover.

The general issue is not pleaded; the allegations of the petition are not denied, but a special defence is set up against our demand, of a purchase for a valuable consideration in market overt; which the defendant has not deemed material, to support by testimony. On the face of the pleadings, we should have prevailed, without the aid of testimony; the bill of lading, which is the title of property, being admitted, or taken as confessed (it not being denied by the defendant) and the plea of the want of consideration between King and Crawford, not being substantiated, judgment for the plaintiffs ought to have followed of course.

The defendant says, in his answer, "that no

consideration was ever paid by the said King, to the said Crawford, for the said cotton; that the same was fraudulent, as between the said two parties."

Is this not an express recognition of the existence of a contract between these parties; and what contract can be alluded to, except the contract of affreightment? There is no other averred in the petition; none other stated in the answer, between King and Crawford.

It admits then, that King was a party to the contract made with Crawford for the transportation, that there was an obligation on the part of King to pay Crawford, which it is averred he has not done. On what was this obligation founded, we ask, unless on his being the owner of the cotton, and, as such, bound to pay the carrier for its transportation? Such was the fact: King contracted through his agents, Fisk and M'Neil with Crawford the carrier, for the transportation of the cotton. The defendant has pleaded that this contract was in fraud and without consideration; but has proved neither.

A plaintiff in his action on a written contract, if it be not denied, and if the want of consideration and fraud are pleaded, is surely not obliged to prove the execution. This would not be required in any court of justice, for *suggestio*

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unius confessio alterius est. So, in the present case, the defendant will not be permitted to say that the contract of affreightment was not made with King, nor to deny that the person, with whom Crawford contracted, was not the owner of the cotton, or had such an interest therein, as would authorise him to contract for its transportation, and to reclaim it from the possession of any person, unless it was bought for a bona fide consideration from the consignees.

But, how happens it, we ask, that the defendant knew of this fraud and want of consideration between the carrier and the owner? Was he informed of this, when he bought the cotton, if he ever can be supposed to have bought it? Did he know that the carrier contracted with King for the transportation of the cotton, and will he pretend that he has a better right to it, than King?

The possession of Coleman was not of such a nature as to form the basis of a title to the property, to enable him to retain it against him who was in possession prior to its being delivered to the defendant by Crawford. *Domat*, 7, 3, § 7.

It was acquired from a person, who had no right to deliver it or to dispose of it, in any manner, to the prejudice of his principal, who

received it under a contract of bailment which, from the character of Crawford, must have been known to the defendant, who could not have been ignorant of the inability of a common carrier to convey any property, in the goods entrusted to his care, by a sale, to a third person.

Une quatriéme espece de vice ou defant, dans les possessions est celle qui resulte de l'inhabilitè du titre *dont elle procède á transferer la proprieté. Pot. traité de la possession, no.* 20.

A possessor *de manvaise foi* is he who pos-esses, with a knowlege that he has no title or of the defects of the title. *Domat*, 7, 1, § 1.

"These, also, are considered as possessors in bad faith, who, foreseeing that the right they pretend to have will be contested, and that they will be prevented from taking possession, take some occasion to obtain it by stealth, without the knowledge of those who have a right to oust them." *Ib.* 12.

The different consequences and rights which possession gives to them who hold in good or in bad faith are explained in *Domat*, 7, 3, 7.

From these authorities, and from the evidence of the plaintiffs, the conclusion is irresistible, that, the defendant cannot retain possession of the property to the prejudice of the party, from whom the carrier received it.

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The case of *Mitchell* vs. *Comyns*, 1 *Martin*, 133, resembles, in very many respects, the present. The answer there *did not deny any of the allegations of the petition*, but set up a claim to the slave (which was the property sued for) grounded on a contract of sale, which, it was contended, was made in market overt. The sale was not proved to have been made in market overt; no evidence was adduced by the plaintiff; nothing was brought forward to establish his claim to the property, except the affidavit of his agent, and on the defendant's failing to establish his defence, judgment was entered for the plaintiff.

The case, now before the court, is much stronger than that just cited. No proof of property was there adduced by the plaintiff; but, in this case, we have an implied acknowlegment of it by the defendant, supported by testimony, which is incontrovertible.

In the opinion of judge Derbigny, pronounced in the case of *M'Neil* vs. *Thompson*, 5 *Martin*, 561, in which one person sued in behalf of another, will be found the law on the subject of nominal and real plaintiffs. The learned judge there intimates, that the declaration of one person, that he sues for the use of another amounts to a relinquishment of the

rights of the former to the latter, and in that case, he ruled that it was sufficient to enable the individual, in whose favour the relinquishment was made, to appear as plaintiff.

But there is another allegation in our petition which is very material and is not denied or controverted by the defendant. We aver, that we, as consignees of the cotton, have the right to sue for the same, for the use of the said King. Thus it is admitted, that we have a right to sue on behalf of our principal; that we are his agents; and we have declared in the affidavit, on which the order of sequestration was issued, that, though we were the consignees and had a beneficial interest therein, that our principal, W. King, was the proprietor of the cotton.

The district judge has predicated his judgment, on what he thought to be the custom. It is sufficient to observe, in answer to this, that no such custom was pleaded or proved. Customs can have no effect in suits, unless they have been heretofore established by judicial decision, or are proved by testimony. 1 *Blackstone's Commentary*, 76.

The law under which we claim is so well settled, that it would be useless to urge arguments in its support. The following are a few of the authorities to which the court is referred. *Do-*

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mat, supplement, 3, 8, § 10. *Merlin, Répertoir de Jurisprudence. Verbo Vol. Jurisprudence du Code Civil.* Commentary on the article in the civil code relating to stolen goods. 1 *Livermore on Agency*, 123. 172, 177, 2d *vol.* 225, 6, 8 *Massachusetts Term Reports*, 518, which contain a mass of decisions of the English courts to the same effect.

Ripley, for the defendant. In this case, there can be no room, as appears to me, for doubt. The defendant had in his possession thirteen bales of cotton, which he had fairly purchased. The plaintiffs claim them. To their demand, the defendant files an answer, in the nature of double pleading.

The first allegation in the answer is, that the thirteen bales of cotton, mentioned in the plaintiffs' petition, were sold to him in market overt, and that the said cotton is lawfully the property of him, the said Coleman.

The second, that said King never had paid Crawford any consideration for the said cotton, and that the transaction was fraudulent.

Either of these allegations, if true, is sufficient to bar the plaintiff's title to the cotton.

The proof of the cotton being lawfully the property is possession. The defendant is bound

to prove nothing else, until a color of title is set up. This allegation, that the defendant had a lawful title, puts the plaintiff upon his proof of a paramount one. Let us see what that proof amounts to, in the present case.

Crawford's bill of lading is not proved, nor is it even proved that King had the property in his possession. The only attempt at proof is in a letter from M'Neil & Fisk, of Natchez, stating that they would ship cotton to the house in New-Orleans. This testimony amounts to no legal proof, for it is the letter of the plaintiffs on record. If M'Neil & Fisk could be witnesses, their depositions ought to be taken. If they cannot be, it is not competent to read their letters in evidence.

Again, even the letter is not produced; but its contents are testified to. This is violating all the rules of evidence.

By averring that the legal property was in us, we have made a general denial of all the allegations in the plaintiffs' petition. If to an action on a note of hand, the defendant answers he owes nothing, it is incumbent on the plaintiff to prove the execution of the note. If, in an action of trover, the defendant pleads legal property in himself, it is incumbent on the plaintiff to prove a paramount title. And possession is

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good against all the world, unless a better title is proved. The present action is in the nature of the common law action of trover. We have the possession of the property, and we have averred that the legal property was in us. There is no testimony adduced which shows a particle of right or title in the petition.

In a case of this kind, it is impossible to reason; for there are no facts about which, to raise a discussion. It is impracticable to quote authority; for there is no case, whatever, made out by the plaintiffs, to which they can be applied. They have made a claim to property which we contest; but they have adduced no evidence in support of their claim.

Martin, J. delivered the opinion of the court. M'Neil, Fisk & co. of New-Orleans, who sue in behalf of W. King, of the state of Mississippi, state that Fisk & M'Neil, of Natchez, shipped on board of a boat, of which Samuel Crawford was master, and a common carrier, thirteen bales of cotton, for the account of said King, consigned to M'Neil, Fisk & co. that the defendant has unlawfully possessed himself of the cotton.

The defendant answers that the cotton was by him fairly purchased in market overt, and he is

a *bona fide* purchaser, for a valuable consideration; that no consideration was paid by King to Crawford, and the transaction between them is a fraudulent one.

The district court gave judgment for the defendant, being of opinion that "there was no evidence which she vs the defendant had any knowledge that the cotton was consigned to he plaintiffs; that a large portion of the growers of the upper country produce are their own carriers, and whoever arrives at this port with produce is presumed to be owner of it. A *bona fide* purchaser, under such a title, ought to be maintained in the property; that there was no sufficient evidence to establish collusion or fraud between the defendant and Crawford, the seller, and that the purchaser was not in good faith."

The plaintiffs appealed, and the district judge has certified that the whole evidence appears on the record.

Stebbins Fisk deposed that he knew the bill of lading; that it was to be given for the cotton sued for, which he knows to belong to King. Crawford, on his arrival, called at the plaintiffs' counting house, and offered to deliver the cotton as soon as he should find a birth. A year ago, last winter, he, Crawford, brought some tobacco, consigned to the plaintiffs.

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On his cross examination, this witness said, he never saw Crawford write, and does not know that the bill of lading is signed by him. He knows the cotton belongs to King, by the letters from Fisk & M'Neil to M'Neil, Fisk & co.: these houses being connected in co partnership, and he knows it no other way. Crawford called several times on the plaintiffs; saying he could not land the cotton, because he was not able to come to the levee; that, when he landed the cotton, he would inform them. The two houses are composed of the same members, except the latter, of which Mr. Lesassier is a member.

Manning deposed that the cotton was brought to the house occupied by one Rust, on the batture, at the corner of the canal, at 9 A. M. accompanied by ten men, who had been arrested by the marshal, and a few days before discharged from prison. He knew the cotton to have been ginned at Cochran's gin, and communicated his suspicion that every thing was not right to Rust and Rogers, and would not have bought the cotton. It was put in a room in the lower part of the house, next to which was another used as a grog shop, and another in which were gambling tables. The upper part of the house is occupied by a bar, two billiard and gambling

tables. The house stands alone, directly on the river. When the cotton was brought the weather and roads were good, and it came from a considerable distance above.

Rust deposed he was called upon by the defendant and another person, who said he was the owner of the cotton, the night before it was brought, and asked leave to store it, which he granted. With the cotton, came, besides the negroes driving the drays, ten men: he received the cotton as the defendant's, and held it subject to his order. He has frequently seen the defendant and Crawford, in company, at his house. The latter was generally considered, by the persons about the house, as engaged in the Mexican expedition, as well as several of the men who came with the cotton. The lower part of his house is occupied as a grog shop and gambling house, and is a place of common resort for boatmen. No cotton was ever before or since brought there.

Rogers was at Rust's, when the cotton came; he corroborates what he has deposed. His suspicions were excited by the appearance of things. He took down the marks and numbers of the bales: they correspond with the bill of lading annexed to the petition.

It appears to us that the district court erred.

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The plaintiffs ought to recover, if their allegations be uncontradicted or proven, unless some further fact be alleged and proven.

None of the allegations are contradicted; but it is alleged that no consideration was paid by King to Crawford, and that the transaction between them is a fraudulent one. Crawford is not alleged, or pretended, to be King's vendor of the cotton, he is only known in this suit as the master of the boat, and nothing was to be paid to him but the freight, and that, not till after the delivery of the cotton to the consignees. There is not any proof of fraud. So that the plaintiffs' right to the cotton, as stated in the petition, is made out.

If the *bona fide* purchase of the cotton, alleged in the answer, was proven, it would be proper to enquire whether a sale by a common carrier transfers the property. But there is not any evidence of a sale, nor of any payment.

The defendant's counsel contends that the cotton must be presumed to be his client's, because it is proven that Rust received it as his, from a person who is not named, or whom he does not appear to know.

The cotton claimed, in the petition, is therein described by the marks and numbers of the

bales, in the margin of the bill of lading; and Rogers proves that the cotton brought to Rusts, had the same marks and numbers. The defendant has not denied any of the *facts* in the petition, but has relied on special pleas, which the evidence does not support.

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 plaintiffs, with costs in both courts.

BETHEMONT vs. *DAVIS.*

If the plaintiff aver a faithful compliance with his part of the contract, and the answer allege generally a violation of it, the defendant may give evidence of a breach

8 M. 391
4 L. 303

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. In this case, the plaintiff alleges that, having engaged his services, as a cook to the defendant, for a fixed space of time, he was turned out of defendant's house, before the expiration of that time, though he had faithfully complied with his obligations. The defendant denies the allegations of the petition, and further answers, that the plaintiff violated his contract by his improper conduct. Under such pleadings, the defendant offered to make proof

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of the particular acts by which the plaintiff had committed the alleged breach of contract. He was refused, and the reason given by the district court for such refusal is, that the defendant's answer does not mention any particular breach of covenant, nor any particular act of improper conduct, which the plaintiff could have been prepared to repel.

We think that, unless we are disposed to introduce in our practice the nicities of special pleading, the proof offered by the defendant ought to have been received. Under a denial that the plaintiff had faithfully complied with his obligations, the defendant surely could show how he had failed to comply with them. The parties were at issue on that general allegation and denial. The particular facts, on which the defendant might rely to support the negative of that general issue, were component parts of it, not special and separate grounds of defence. It is necessary, as we have already said, in the case of *Harvey* vs. *Fitzgerald*, that such certainty should prevail in pleading, as to put each party on his guard." Therefore, wherever, a party attempts to introduce evidence in support of some ground of defence, distinct from those which are set up in the pleadings, such evidence ought to be refused. But, to re-

quire the suitors to specify in their pleadings the particular facts, out of which, the truth of a general allegation will result, would, we apprehend, be creating embarrassment, in the administration of justice, for no possible good purpose.

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 to be tried anew, with instructions to the judge, to admit any legal evidence, which the defendant may offer to shew the particular act or acts, by which the plaintiff may have committed a breach of his contract with the defendant; and it is further ordered, that the appellee do pay the costs of this appeal.

Preston for the plaintiff, *Davesac* for the defendant.

BROWN & AL. vs. LOUISIANA BANK.

Questions of fact which do not appear clearly to have been incorrectly decided in the court *a quo*,

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is a suit brought by the appellees,

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will not be touched in the supreme court.

(who were plaintiffs in the court below) against the bank; to recover damages to the amount of a note of hand, set forth in their petition, on account of negligence and misconduct, on the part of said bank, by its officers, in not pursuing proper and legal means, for the collection of said note, by demanding payment from the maker, at the place therein expressed, &c.

The evidence in the cause shews clearly, that the demand of payment was not made, at the house designated in the note, but at another place. As an excuse for this change, in making the demand; the testimony of the runner of the bank is given, to shew that it was made, in consequence of instructions from the plaintiffs, through their clerk; who is also produced as a witness, and testifies to facts, directly contradictory to those established by the runner.

The testimony of these two witnesses, which is very important, in the decision of the suit, cannot be reconciled, and as credit is given to one or the other, so must be the judgment either in favor of the plaintiffs or defendants. The district court, before which the witnesses were heard, seems to have believed the clerk of the appellees; and we can perceive no good reason to induce us to view the testimony in a different light, from that in which it was considered

by the court below. But suppose the contradictory facts, as related by these witnesses, are put entirely out of the question, on the principle of two equal and opposite powers, by destroying each other, being incapable of producing any effect; then it is clear, from the face of the note and other evidence in the case, not contradicted, that the demand of payment was not legally made; and consequently, that the bank is liable for its negligence and misconduct.

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

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

HARVEY vs. *GRIMES & AL.*

Property, under an attachment, cannot be mortgaged by the debtor so as to defeat the attaching creditor's lien

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

DERBIGNY, J. delivered the opinion of the court. The plaintiff had instituted a suit by attachment against Robert Fitzgerald. Having obtained judgment in his favour, he caused execution to issue against the property attached,

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but found it incumbered by a mortgage, given by the defendant, since the beginning of the suit. Could the defendant mortgage his property while attached, is the only question to be decided in this case.

Suits by attachment were, for the first time, established in this country by special law in the year 1805. Their object is to enable a creditor to obtain payment of his debt, even in the absence of his debtor, if he finds property belonging to him, within the jurisdiction of the court. The first step, in such a suit, is to lay hold of the property, and place it under the custody of the law, to await the judgment to be rendered. It is not indeed expressly said, that property thus circumstanced, shall not be disposed of by the defendant. But, was there any necessity to express it? Can the property be, at the same time, in the custody of the law and at the disposal of the defendant? If the property consists of moveables, it is evident that the defendant can neither sell or pledge it, because he cannot deliver it. Is the case different, with respect to immoveables, because they can be mortgaged without delivery? We think not. We think that the property placed in the custody of the law, must remain *in statu quo*, until released in the manner pointed out by

law, or disposed of according to law—that it is placed out of the reach of the defendant, until released; and that to suppose in the defendant a right to dispose of it, while in the custody of the law, is to make the whole proceeding on attachment a mere derision.

If not satisfied with the obvious meaning and intent of our law of attachment, we go in search of authorities to understand the nature of this kind of seizure, and the extent of its effects, we find in the Spanish laws, abundant information on the subject. A proceeding very similar to this formerly existed under the name of *assentamiento*. *Part.* 3, *tit.* 8. When the defendant either refused to appear, or absconded to prevent a citation from being served on him, the judge ordered the plaintiff to be put in possession of so much of his property, as would suffice to discharge his debt. The defendant could, in like manner, release his property by appearing and giving security to abide by the judgment of the court. We do not find there, any more than in our laws of attachment, that property thus situated can be mortgaged to the prejudice of the plaintiff; but we see in law 5, of the said title, that any person who has the audacity *(osadia)* to take from such possessor the thing thus put in his pos-

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session, is bound to return it and to indemnify the possessor, and is besides punished with fine.

Now, although it is not added in so many words, that the property attached shall not only be protected against any open violence, but also against any attempt to make it slip out of the hands of the creditor by other means, we think that the law fully embraces every act by which the debtor may contrive to defeat the object of the attachment.

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

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

CARTER & AL. vs. *MORSE.*

A debt is liquidated, so as to be susceptible of being set off, when it appears that something, and how much, is due.

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

MARTIN, J. delivered the opinion of the court. The defendant is sued as endorser of a promissory note, which was duly protested, and came to the hands of the plaintiffs, after its protest.

He pleads, among other pleas, as a set off, an account for professional services to the holders of the note, at the time of its protest, which is duly proven.

The plaintiffs oppose the set off, on the ground, that the defendant's demand is *unliquidated.*

A debt, says Pothier, is liquidated when it appears that something is due, and how much. *Cum certum sit an debeatur & quantum debeatur.*

A contested debt, therefore, is not a liquidated one; and so cannot be set off, unless he, who claims to set it off, has the proof in his hands, and be ready to prove it promptly and summarily. 2 *Pothier's Oligations, n.* 174.

In this case, the demand does not appear ever to have been contested by the debtors: they were aware of its existence and refrained from demanding what was due to them, in the belief that their demand was discharged by the defendant's claim.

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

Preston for the plaintiffs, the defendant *in propriâ personâ.*

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vs.
MOULON.

VICTOIRE & AL. vs. *MOULON.*

APPEAL from the court of the first district.

The proof must correspond with the allegation.

MARTIN, J. delivered the opinion of the court. The plaintiffs state that they had a judgment against Wiltz and Arnaud, and that having received from Arnaud one half of its amount, they had an execution levied for the other on Wiltz's property, and the defendant prevailed on the sheriff, not to proceed therein, taking on himself and positively promising to pay the sum due, in the month of March following, whereupon the plaintiffs' counsel assented thereto; that soon after the said Wiltz died and the defendant, being appointed administrator of his estate, took possession thereof. Notwithstanding which he absolutely refuses to comply with his promise or to pay or satisfy the plaintiffs.

The defendant pleaded the general issue, denied that the sheriff seized any part of Wiltz's property, the whole of which was pledged to the defendant as a security for a very large debt, before the judgment of the plaintiffs was recorded; that the sheriff was informed of this, by the defendant; that if he promised to pay, he did so in his capacity of syndics of Wiltz's creditors.

George W. Morgan, the sheriff, deposed that when he demanded payment of the plaintiffs' judgment, the present defendant promised to pay it as soon as Arnaud came to town, and requested him to stay the execution on that condition. Some time after, he demanded payment and the defendant answered, he was advised not to pay, as he was not liable. The demand was made on the defendant, in consequence of the deponent being informed, that he had the slaves of Wiltz.

It was admitted that Wiltz's property had since been sold by the defendant, as hypothecary creditor.

The plaintiffs introduced the execution mentioned in the petition.

The district court gave judgment for the defendant, being of opinion that "the *assumpsit*, if made, was made to the sheriff, who had no authority to receive it, and it was not binding on the defendant." Whereupon the plaintiffs appealed.

It appears to us, that the proof does not correspond with the allegation and is incomplete. A promise to pay, in March or April, is charged and evidence given, of one to pay as soon as Arnaud came; and it is not either shown or alleged that Arnaud ever came.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that judgment of nonsuit be entered, and that the costs of this court be borne by the defendant and appellee, and those of the district court by the plaintiff and appellant.

Seghers for the plaintiffs, *Cuvillier* for the defendant.

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There is not any necessity of a case being set forth in the petition in various modes or counts, to authorise the plaintiff to offer proof, which supports his case in substance.

If the vendee refuses to take away the goods, the vendor, after proper notice may sell them for the account of the vendee.

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

The petition alleged that the plaintiffs sold the defendant, one hundred barrels of flour, half fine and half superfine, at 13 dollars per barrel, then lying in their warehouse; that in order to accomodate him, they agreed to suffer the flour to remain there for a few weeks, and he promised to pay a part of the price in a few days after the sale (May 21, 1817) and the residue at, or before, the removal, which he promised to effect within weeks; that they frequently applied to him to remove

the flour, which he as often promised to do and which he utterly neglected, till a few days before the 31st of July, when he absolutely refused either to take the flour or pay the price; that they applied by letter to him (inclosing a bill for said flour) as appears by a copy of said letter and bill, annexed to the petition, warning him that, if he did not come forward, they would have the flour sold on his account; that he still neglected to come, and the flour growing daily worse, on account of the heat, they caused it to be sold at auction, and the net proceeds amounted only to $ 108 84, which deducted from 1350, leaves a balance of $953 66, including 12 50, for storage due them.

The defendant, in his answer, denied that he purchased the flour mentioned in the petition, and pleaded that if the plaintiffs ever did sell it, or any other to him, they lost their recourse in sacrificing it, by an unauthorised sale.

Dutillet deposed, that in May, 1817, he was a clerk to the plaintiffs, and on the 22d of that month, the plaintiff Gilly told this deponent to keep one hundred barrels of flour, from a parcel out of which he had sold one hundred barrels to Liddle, as he had sold that quantity to the defendant; that towards the beginning of June,

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he went to the defendant with a note from the plaintiffs, desiring him to send them 650 dollars, in part payment of the one hundred barrels, spoken of, informing him they were at his disposal: that the defendant, having read the note, replied he had payments to make which prevented an immediate compliance, but he would pay the sum, in the course of the following week; that some time after, he handed the defendant a letter, a copy of which is annexed to the petition, which he returned unopened, observing he had nothing to do with the plaintiffs. Flour of the quality sold to the defendant, sold from 13 dollars, to 13 50. A fortnight after, flour fell considerably; in the latter part of June, it was at 9 or 10 dollars. The plaintiffs had that, sold to the defendant, disposed of at public auction.

On his cross examination, this witness added, that one M'Gowan, kept the plaintiffs' books at the time, and the entry, charging the defendant with the flour, is in the hand writing of said M'Gowan, who is now absent, and, as he believes, in England.

M'Clellan deposed that he was, at the same time, a clerk of the plaintiffs; the defendant went with the plaintiff Gilly into the back yard and on their return the latter told the deponent he

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had sold to the defendant one hundred barrels of flour, and desired that they might be kept for him, out of a lot, from which Liddle lately had the same quantity. Those kept were of a superior brand. There were frequent applications made, and the quantity might have been sold several times, had it not been reserved for the defendant. Seven or eight days after, flour began to fall, and in June was down to 9 or 10 dollars. The quantity reserved was afterwards sold at auction, as it grew sour. The deponent tried to have a conversation with the defendant about the flour, but could not succeed; he would always evade it, and once particularly he turned off in a pet, saying something which the deponent did not understand. The deponent saw the defendant with the plaintiff, Gilly, looking at the flour.

It was admitted that on the 20th of May, 1817, the defendant was not indebted to th plaintiffs.

The auctioneer's bill and printed advertisement was read by consent.

Judgment was given in the parish court f the defendant, the judge being of opinion, th the testimony of Dutillet left no doubt that sale had been agreed upon between the parties.

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as is alleged in the petition: but, it appeared to him that the conduct of the plaintiffs was a bold step, without any legal authority; that our laws provided for the vendors proper proceedings for redress by sequestration and provisional sale, if the article be of a perishable nature; that their proceeding, without authority of justice, to the resale of the flour by auction, was unjustifiable. The plaintiffs appealed.

Porter, for the plaintiffs. Two questions present themselves to the court. Has there been a sale of the flour, made to the defendant? If there was, had the plaintiffs a right to dispose of it at auction, as they have done, and charge the defendant with the loss?

I. The evidence of Dutillet and M'Clelland establishes the sale beyond controversy. And really it is believed, that few cases of this nature could be more satisfactorily proven. What constitutes a sale? A "thing sold, the price and consent." *Civ. Cod.* 344, *art.* 1. For proof of mercantile sales, "the non controverted deposition of a single competent and credible witness may be sufficient," *id.* 310, *art.* 245. Let us then examine the testimony, to this point. It is admitted, as appears by the record in this case, that the defendant, on the 20th

of May, 1817, owed the plaintiffs nothing, that he is charged with the purchase of the flour in question, on the 21st of May, 1817, that on the day following, the plaintiffs directed Dutillet, their clerk, to reserve 100 barrels out of a certain parcel of flour, part of which he had sold to Liddle, observing, that he had sold the same to the defendant. That about the latter end of the same month, or the beginning of June following, Dutillet was sent by the plaintiffs, with a note to the defendant, requesting the defendant, to send them 650 dollars. *on account of the said* 100 *barrels of flour, before spoken of, and that the same was at his disposal in their warehouse, that is, in the warehouse of Gilly and Pryor. That Dutillet handed this note to the defendant, who read it, and then returned for answer, that he had some cash to pay that week, on account of some purchases he had made, and could not then pay, but that he would pay in the week following.* M'Clelland, also, a clerk of the plaintiff, stated, that sometime between the 20th and 30th of May, 1817, the defendant went with Gilly, one of the plaintiffs, in their back yard, where they had some conversation; that upon their return, Gilly told the deponent, that he had sold the defendant 100 barrels of flour, and directed him to keep the

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same for the defendant, out of a certain parcel, which they had then on hand, in Canal street, next door to Liddle's; that the said one hundred barrels of flour, reserved for the defendant, were of a superior brand. Both witnesses declare, this flour would have been frequently sold, both at the time and some days after, for the same price charged to defendant, and even higher. That flour fell a few days after in value.

Can there then, it is repeated, be evidence, more conclusive, in a mercantile transaction of this kind, to establish the sale of the flour in question. Is it natural—might it not be said, is it not absurd to suppose, that the defendant being thus addressed by the plaintiffs, claiming $650, in part payment of 100 barrels of flour purchased of them, should return the answer he did, if he had not made the purchase. And what inducement it may be asked, had the plaintiffs to reserve this flour, for the defendant, when they could, with facility, have disposed of it to others, at the same and perhaps, at a higher price, unless a sale was actually made to the defendant? The reason of the defendant not taking the flour is obvious; at the time he purchased, flour was scarce, and at a high price; he was a baker, and must have the article; a few days after, a

quantity of flour arrived in market and the article depreciated. But it may be said, admitting the purchase to have been made by the defendant, what was the price to be paid by him for the flour? In the first place, the defendant does not dispute the price, at which the flour is charged to him, 13 dollars, but contents himself by denying, that he ever purchased the flour in question; that the plaintiffs, by their sale of the flour, have lost their recourse upon him. Proving, therefore, a purchase (the price charged not being disputed) of the flour in question, would seem to be satisfactory evidence of the price at which it was sold: it ought to be conclusive. But, to go further, let us examine the testimony of Dutillet and M'Clelland upon this point. Dutillet declares "that the price of flour at the time, and of the quality of that in question was then from 13 to 13½ dollars. Flour was then scarce, and he could have sold it several times, at the same price that the defendant was to give for it, after the 22d of May, when he first understood it was sold to the defendant; that about ten or fifteen days after the sale made to the defendant, flour fell considerably in price; that the defendant is charged on the plaintiffs' books, with the flour, as stated in the account sued upon, as appears from the

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witness' cross examination by the defendant's counsel.

M'Clelland declares, "that the 160 barrels of flour reserved by the plaintiffs for the defendant, were of a superior brand (Brown and Worthington) that at the time of the sale to defendant, flour were selling from 13 to 14 dollars; that at this time the plaintiffs had frequent applications for flour of this brand, but did not consider themselves at liberty to dispose of the flour in question, in consequence of the sale made to the defendant. It is, therefore, submitted whether the defendant, by his plea, not disputing the price charged by the plaintiffs, is not an admission of the price charged by the plaintiffs to be correct. But supposing that this should be no proof in favor of the plaintiffs to establish the price at which the flour was sold, is not the testimony of Dutillet and M'Clelland abundantly satisfactory to fix that price? Because it cannot be reasonably supposed, that the plaintiffs, when flour was in demand at from 13, 13½ to 14 dollars of the same description, would have sold it to the defendant under the market price, or if they had not previously sold the flour to the defendant, that they would have kept it on hand for the defendant, when they could have sold it for the same or perhaps a higher price.

It is not even probable that any man would thus act.

Suppose the flour had been taken away by the defendant, and there was no other evidence of the price, than exhibited in the present suit, to wit: that flour, at the time it was sold to the defendant, of the same quality as that sold to the defendant, commanded, with facility, 13, to 13 1 2 dollars, and even 14 dollars per barrel, would not this evidence have been abundantly sufficient to entitle the plaintiff to recover? If such evidence would not be satisfactory, in what situation is the merchant placed, for it cannot be supposed that he can have at his elbow, in every sale he makes, a witness not only to the sale but price? It would be naturally and certainly reasonable to suppose, that the merchant proving the sale of a particular thing, notwithstanding he could prove no price agreed upon, should be entitled to recover the current price of the thing at the time it was sold. And this from necessity, because, one half of the bargains that take place in the mercantile world, are made between the vendor and vendee, without witnesses. And because, it is not to be supposed, that, an article would be sold under the current price it commanded in the market. And this is the rule adopted in practice in this

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state. If A., sues B., on a bill of parcels for goods sold and delivered to him at a particular price, what evidence, under the practice of our courts, would be required of A. to recover of B.? Proof that he sold the goods to B. and that the goods are charged at the current price; because, I repeat, it cannot be supposed, that an individual would sell his property under the current price. If he does so, it must be for the vendee to show it.

It is, therefore, confidently asserted, that the evidence in this case, established beyond questioning the sale of the thing in question and the price.

II. Had the plaintiffs a right to sell the flour on account of the defendant, and charge him with the loss on the resale?

This is a question of law, arising upon the facts of the case, and thought to be too plain to require an argument. The plaintiffs required the defendant to remove the flour, or they would sell it at auction, on his account, and charge him with any balance that might result from such resale. The defendant neglected to remove the flour, the plaintiffs advertised the flour, sold it at auction, and charged the defendant with the balance, for which this suit is brought; that he had

a right to do so, see 5 *Part.* 5, 24. *Curia Phili. Venta*, 46, 49. 5 *John. R.* 395 *to* 406, 1 *Esp.* 251.

Livingston, for the defendant. The petition states a sale of 100 barrels of flour, half fine and half superfine, at 13 dollars per barrel, but declares that the object sold was not delivered, *but was ready for delivery*; and that there was a special agreement on the part of the sellers, that they would suffer the flour to remain a few weeks in their store; on the part purchaser, that he would pay a part of the price, after the purchase, and the residue when it should be removed, and that he would remove the said flour within weeks. This is the contract; the breach assigned is that the defendant refused to remove the flour and to pay for the same.

Here is a *special contract set forth*; first, on the sale, it is 100 barrels of flour, one half fine, one half superfine, for a certain price, 13 dollars per barrel. This then must be specially proven; here is no statement of a *quantum valebant*, the plaintiffs have chosen to rely on a *positive contract* for a *particular thing* at a *certain price*; they must prove their allegation or they fail. What is the proof? The deposition of Du-

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tillet. He does not pretend to have been present at the contract. The plaintiffs, indeed, told him, that they had sold the defendant 100 barrels of flour. I need not surely request the court to reject this part of the testimony; but even the plaintiffs did not tell him the price, nor did they speak to him of the description, *one half fine the other superfine*: on the contrary, they tell him to keep the 100 barrels out of *one parcel* such as they had sold Liddle. The only part of this testimony that can bear on the case, is the conversation that took place between the witness and the deponent, in the beginning of June. He says, he then "went with a note from the plaintiffs, requesting him to send by the deponent the sum of six hundred and fifty dollars, on account of the 100 barrels of flour before spoken of, and that the same was at his disposal in the warehouse of Gilly and Prior;" that the defendant read the note, and said he could not pay it, but would pay it the week following. This is the whole testimony, for the other witness, M'Clellan, only speaks of what he heard from the plaintffs. Dutillet then knows nothing of the price, nothing of the terms of payment, and only testifies that the defendant, on being asked for the 650 dollars, on account of the 100 barrels of flour, said he could not pay then, but

would pay in a short time. Now this reply is quite consistent with an inchoate as with a perfect purchase and sale. Suppose Gilly and Prior had offered the defendant 100 barrels of flour, on condition that he would pay them 650 dollars in cash, and the same other sum at a subsequent period, and that the defendant had only said, "if I like the flour, on further examination, I will take it," or "if I find it convenient to raise the money I will take it;" and they had sent him a note requesting the payment of the six hundred and fifty dollars and telling him that the flour was at his disposal." Might he not have made precisely the answer the witness states him to have made, and yet not have intended to conclude the bargain, further than he had done in the original conversation, that is to say, leaving it still conditional, that if he paid the money it should be a sale, but not otherwise. "I cannot pay this week, but I will the next;" if I do there is a sale, if not, I make no new contract. Now, if the evidence will admit of these two constructions, that most in favor of the defendant shall be taken; for the plaintiff must make out his case. But independent of this, the strong ground is that this testimony does not support the allegation in the petition; there is not the slightest evidence either

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of the *description of the goods*, or of the price or of the terms of payment.

The allegation, relative to the agreement which is stated as forming part of the sale, that the plaintiffs would suffer the flour to remain a few weeks, and that the defendant would take it away in any given time, is totally unsupported by any evidence.

The allegation is, that the defendant promised to remove the flour in —— weeks. How many, twenty, thirty or an hundred? There is no evidence to supply this blank, the defendant may fill it as he pleases, and if he inserts the word *ten*, the plaintiff has no cause of action; for the flour was sold in less than that time from the day of the pretended sale.

MARTIN, J. delivered the opinion of the court. The question of fact appears to us to have been correctly decided in the parish court. The plaintiffs have clearly shewn, by the testimony of Dutillet, and that of M'Clellan, that they sold one hundred barrels of flour to the defendant: and that flour of the quality sold was then worth 13 dollars per barrel. The defendant, on receiving the plaintiffs' note, by the hands of Dutillet, in which 650 dollars were demanded, as a part of the price of the 100

barrels of flour sold, but not yet delivered, to have excused himself, and promised payment in the course of the week th n following. This is clearly sufficient evidence, that a purchase of one hundred barrels of flour had taken place, and the defendant drew from the witness, in the cross examination, the fact that M'Gowan, another clerk of the plaintiffs, who was out of the reach of the process of the court at the time of the trial, had made an entry of the sale, in the plaintiffs' books. Although the testimony shews a marked intention in the defendant, to avoid paying the plaintiffs, it does not appear, from any part of the record, that his counsel, in the parish court, complained ofan overcharge.

It is true, there is no evidence of the defendant having expressly agreed to pay 13 dollars per barrel, but it is shewn that this was the fair and current price. The defendant has not objected to evidence of the current price being received, and it does not appear, that any question was raised in the parish court on this head.

According to the mode of practice, in courts of common law, the plaintiff who expects to avail himself, in case of his inability to prove the contract as it was really made, of the obligation which the law raises in the vendee, to pay

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the fair price of the thing must have a count in his declaration, stating that the defendant promised to pay what the goods were worth, *quantum valebant*. In courts, in which the practice of the civil law prevails, the plaintiff does not produce his case in various forms, and evidence is admitted, when in supports the allegation in substance.

Here the petition states, that the defendant owes to the plaintiffs 1300 dollars, because they sold him 100 barrels of flour, at 13 dollars. Now, evidence that the defendant purchased from the plaintiffs 100 barrels of flour, which were really *bona fide* worth 13 dollars per barrel, substantially and perhaps literally, supports this allegation: if there be no evidence of a positive agreement at a specific price. If the defendant purchased flour, which was worth thirteen dollars per barrel, without any specific price being agreed upon, he impliedly purchased it at thirteen dollars.

That 1300 dollars were the amount of the flour, according to the intention of the parties, is corroborated by the circumstance, that part of the flour was to be paid in a few days, and the rest when it was taken away, in a few weeks; and the defendant, when in a few days after, he was called on for 650 dollars, expressed no

dissatisfaction at the demand. On such a contract, the parts mentioned not being defined, *equal* ones must be presumed to have been intended. If, therefore, the flour was sold at 13 dollars, the sum of 650 dollars claimed, as the first part of the amount, must be that which should be called for.

It is next objected, that the number of weeks, after which the last payment was to be made, is undefined—a *few* weeks. This mode of speaking is seldom used to denote a longer period than *eight* weeks, or fifty six days. The next period is usually described by the words sixty, ninety, or one hundred and twenty days—two, three, four or six months.

Upon the whole, we think, that the parish judge correctly decided the question of fact. But we think he erred in that of law.

We have in a case like this, a statute provision. *Part.* 5, 5, 24. When the vendee refuses to come and take away the goods, and the vendor has occasion for the vessels, in which they are contained, he has a right to hire others, and if none are to be had, after notice to the vendor, he may, after a reasonable time, let the liquor run in the street, or sell it to another.

Habiendo la dicha mora o tardanza en el comprador, puede el vendedorr vende lasmercaderias

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para sacar su pago del precio y cobrar lo que se perde de el en ellas, del comprador. Cur. Phil. Venta, 49, *Cur. Phil. ill.. Venta*, 46.

So it is in England. In the case of *Martin* vs. *Addock*, 4 *Esp.* 251, lord Ellenborough decided that the vendor might recover the loss or difference of price arising on a resale, as well as damages for not taking away the goods, and that it was no objection to his recovery, on the general count for goods sold and delivered, that he had not the goods then ready to deliver.

Similar decisions have taken place, in New-York. *Hermanes & al.* vs. *Yeomans*, 5 *Johnson*, 406. *Sands & al.* vs. *Taylor & al. id.* 395.

The court there observed "that after the defendants' refusal, to come and take away the property (wheat) it was thrown on the plaintiffs' hands, and they were, by necessity, made the defendants' trustees to manage it; and being thus constituted trustees or agents, for the defendants, they must either abandon the property to destruction, by refusing to have any concern with it, or take a course more for the advantage of the defendants, by selling it. There is a strong analogy between this case, and that of the assured in the case of abandonment. In both cases, the party, in possession, is to be considered as an agent of the

other party from necessity, and his exercise of the right to sell ought not to be viewed, as a waiver of his rights on the contract. This rule operates justly, as respects both parties: for the reason, which induced the one party to refuse the acceptance of the property, will induce the other to act fairly, and sell it to the best advantage. It is a much fitter rule, than to require it of the party, on whom the possession of the thing is thrown against his will, and contrary to the duty of the other party, to suffer the property to perish, as a condition on which his right to damages is to depend.

Where a merchant orders goods from abroad, and they do not correspond with the order, he sells them, as the agent, and for the account of the shipper.

The parish court thought that the plaintiffs, in the case under consideration, might have prayed for a sequestration of the property, and, on shewing it to be perishable, have obtained an order for the sale of it. In many cases, especially in that of an absent defendant, the delay and expences attending this mode of seeking relief, would leave but little to satisfy the claim of the vendor. We are of opinion that the parish court erred.

It is, therefore, ordered, adjudged and de

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creed, that its judged be annulled, avoided and reversed, and that the plaintiffs recover from the defendant, the sum of $903 66, with costs in both courts.

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If an agent sells goods, for which he takes notes, tho' the principal afterwards takes new notes payable to himself, with an extension of credit, there is no novation.

The vendor of moveable goods has a privilege on them while they remain in the possession of the vendee.

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

The plaintiffs stated that they sold, by J. K. West, their agent, a quantity of merchandise to the insolvent, to the amount of $4313 57, according to the account annexed to the petition that $2882 92, remain due, and a general sequestration has issued against his goods, which, accordingly, have been taken by the sheriff. Among them is a part of the goods sold by them; whereupon they obtained a particular and separate sequestration,

The defendant pleaded the general issue and denied that the plaintiffs had any privilege.

J. K. West deposed that on the 4th. 6th and 11th of November, 1818, he sold to the insolvent goods, according to the list annexed to his deposition, amounting to $4313 57, on account of the plaintiffs, as their agent; that on the day of his deposition he examined eight pieces of swansdown, and found that the pieces

numbered 2061, 62 and 66, agree in the numbers and quantity of yards, with those in the invoice; that the numbers, in the pieces marked 63, 64, 70 and 76, agree with those in the invoice. He added he had also examined 19 pieces of velveteen cord and thickset, and compared them with the invoice and pattern card by which he sold, and believes them those sold by him to the insolvent; that he likewise examined two pieces of cassimere, no. 29187, and 22497, and found them to agree with the same numbers on the pattern card and invoice, and also three remnants, no. 24028, 22263 and 126 and found them to agree with the pattern card and invoice, except as to the number of yards. He also examined fourteen pieces of steam loom shirting; but from there being no mark or number on them or in the invoice, and the pattern card by which he sold them being lost, he cannot be positive that the pieces shown him are the same; but, on comparing the goods with the sterling cost of the invoice, he thinks they are. They are now in a case marked H. no. 91, in which they appeared to fit exactly, as if they were imported therein and it has the same mark as that sold by him. He also examined four pieces of toilinet, and found them to agree with the invoice and pattern card.

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There was judgment for the defendant and the plaintiffs appealed.

By the statement of facts, the parties admitted that the goods specified in the petition were sold by J. K. West to W. Davidson. The copies annexed to the petition are copies of the invoices given by West to Davidson. Payment was made in notes, as stated in a receipt given by West's clerk and annexed to the petition; and the plaintiffs took the notes annexed to the petition, which remain unpaid, in lieu of those given to West for the same debt; interest however was added in the last notes for the extention of the time of payment. That the goods sequestered are the same, as were sold by West to Davidson and the remnants of broken passage are also part of them.

The competency of West, as a witness, to be examined in the supreme court, as if there was a formal bill of exceptions.

Hennen, for the defendant. The judgment of the parish court is correct. The privilege claimed in this case is resisted on two grounds: No privilege ever attached on the goods sold, in favor of the plaintiffs; if any did, it has been lost.

1. The goods were sold by J. K. West in

his own name and as his own property to Davidson, without any mention of his acting as the agent of the plaintiffs. The notes were given in favor of West, and in his name, the receipt for the notes, taken in payment, was given.

By the Roman law no privilege existed in favor of the vendor of moveable property sold on a credit. The delivery to the purchaser vested in him an absolute right to the thing sold. *Pothier, Traite du Contrat de vente, nos.* 318, 322, 3.

The Spanish law is in concordance, in this respect, with the Roman law. *Part.* 3, 28, 46. *Curia Philippica, Prelacion, nos.* 6, 7. See, also, *Salgrado Labyrinth, credit, concur. Part* 1, *chapter* 14, *no.* 78, who quotes the opinion of above twenty doctors to the same effect. According to these laws, then, no privilege exits on the goods sold in this case on a credit to Davidson, even in favor of West: much less in favor of the plaintiffs, who wish to show that West acted as their agent, in a transaction in which he appears from the invoices and receipt to have been the principal

But, it is said, the ordinance of Bilbao grants a privilege to the vendor (even in cases of goods sold on a credit) and that the laws of the *Partidas* have been thus far abrogated.

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The exact extent to which this ordinance has been introduced as law in this state, has never been ascertained. This court (4 *Martin*, 93) has declared it is not applicable to bills of exchange. Supposing, however, that the whole ordinance is law, the plaintiffs case will not be aided by it.

2. For, if there existed a privilege in favour of the plaintiffs, it has been lost.

The ordinance of Bilbao gives a privilege on the things sold, if the demand be made prior to the expiration of the credit. *Cap.* 17, *no.* 37. And as privileges must be construed strictly, the plaintiffs must bring their case within the very letter of the law. The same ordinance, *cap.* 17, *no.* 34, limits the privilege to six months after the expiration of the credit given to the purchaser; but in this case more than six months expired previous to the action.

There has been, moreover, a novation of the debt; new notes of hand were given, taken in the name of one of the plaintiffs, and the credit extended, by which, alone, their privilege would be destroyed. *Civil Code*, 296, *art.* 173 *and* 179.

As regards the remnants of the goods, no privilege, whatever, can ever be claimed. *Ord Bilbao, ch.* 17. *no.* 35.

Workman, for the plaintiffs. The agency of West, in making the sale of the goods, in which the plaintiffs claim the vendor's privilege, cannot take away or diminish the rights of his principals. The making of the notes, given for the price of these goods, in the agent's own name, was conformable to the general course of the commission business. Were the notes made payable to the absent consignors, they could not be indorsed, nor consequently negotiated. But, by making them payable to the commission merchant, he can, if required, negotiate them and make his returns immediately.

The position, that no privilege exists on moveable goods, sold on credit, is incorrect. The contrary appears even from the authorities, cited by the defendant's counsel. According to the Roman law, the property of the goods sold is not transferred to the purchaser, even by delivery, unless the price of them has been paid or secured to the vendor. But it is held, that when a term of credit has been expressly agreed upon, the delivery, made in consequence of the contract, tranfers the property to the purchaser. The counsel seems to have confounded the *question of property*, with the *question of privilege*. We do not dispute the point of property with the defendant. It is even requisite

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for our cause, that the property of the goods, should have been lawfully vested in the insolvent, in order that we might maintain our privilege in them. Our action is not to rescind the sale, but, admitting it to have been valid, to secure the price.

The provisions of the ordinance of Bilbao, (were they ever fully in force here) cannot contravene or modify the enactments of our own Civil Code. With respect to the remnants of pieces of cloth, linen, and the like, the 35th no. of the 17th chapter of that ordinance does, as the learned gentleman remarks, take away the privilege upon them. But the code requires only that the goods, in which the vendor's privilege is claimed, shall be in the debtor's possession, and in the same condition as they were when delivered. These words, in the last clause of the sentence, evidently mean, *unchanged in nature or kind:* unmingled with any thing from which they could not be separated, or by which their value might be affected.

The credit on these goods, having been renewed at the debtor's desire, cannot be said to have expired before the demand of payment was made. The greater part of the notes are still due; and this action is the claim for payment of the price. It would be most strikingly

unjust, absurd and preposterous, that the creditor should be put in a worse condition with respect to the debtor, or the mass of his creditors, from having extended to him a credit, equally beneficial to the interest of both.

The sole question remaining to be examined is, whether the renewal of the original notes has effected a novation of the debt. That it has not done so, appears clearly from the judgment and the reasoning of this court in the case of *Cox* vs. *Rabaud's syndics*. 4 *Martin's Reports*, 11. It is deemed unnecessary to re-examine a subject which in that case was so fully, ably and satisfactorily investigated, and decided.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs claim a privilege on sundry goods, which were sold to William Davidson, an insolvent debtor, of whose creditors the defendant is syndic. The goods were found in the insolvent's possession, and there is no dispute about their identity.

The claim is resisted, on the ground, that the sale was not made by the plaintiffs, but by another person, to wit, John K. West, to whom Davidson had given in payment his promissory notes, which were subsequently replaced by other notes, subscribed directly to one of the

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plaintiffs: from this circumstance, it is argued that a novation has taken place, and that the privilege is lost.

It is clear, we think, that if a novation has taken place here, it must result from the substitution of one creditor to another. For the mere act of having received from the debtor other notes, at a longer credit than the first, would not, if between the same parties, produce a novation of the debt. "If since the debt was contracted, says Pothier, in his treatise on obligations, no. 559, a new agreement has taken place between the creditor and the debtor, by which *a longer time of payment has been given*, or a new place for the payment appointed, or the debtor allowed the liberty of paying to another person than the creditor, or even by which the debtor should have bound himself to pay a larger sum or a lesser one, to which the creditor was willing to confine his demand; in all these cases and the like, according to the principle that the novation is not to be presumed, it must be decided that there has been no novation, and that the parties intended only to modify, diminish or augment the debt, rather than extinguish it, in order to substitute a new one to it, if they did no explain themselves." It is also the opinion of Merlin. *Rep. de jur. vo. novation* § 5.

But was there a substitution of one creditor to another? John K. West, who has been heard as a witness, and against the competency of whose testimony nothing has been shewn, has declared that in this transaction, he acted as the agent of the plaintiffs; the true creditors then of the price of those goods were the plaintiffs. When a prolongation of credit was granted for the payment of that price, one of the plaintiffs acted in person, and the notes were made payable to him. We do not see there a change of creditor.

We think that both by our civil code and the Spanish commercial law, often enforced here in that respect, vendors of moveable goods, unpaid for, retain a privilege on them, so long as they remain in the possession of the buyer.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be reversed; and proceeding to give such judgment as we think ought to have been rendered below, it is further adjudged and decreed, that the goods sequestered in this case be sold by the sheriff, and that out of their proceeds, if so much there is, the plaintiffs do recover the sum sued for; and it is further ordered, that the appellees pay the costs of this appeal, and that those in the inferior court be paid by the appellant.

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De Armas & wife vs. Hampton.

A judgment set aside by consent of the parties.

DE ARMAS & WIFE vs. *HAMPTON.*

Derbigny, J. delivered the opinion of the court. When this court on, a former occasion, 6 *Martin*, 567, was about to enter a final decree, directing the court below what judgment should be rendered between the parties, the court, at the instance of the parties, suspended the rendition of their decree, and entered the judgment of reversal only. And now, at this day, this cause being again called up by consent of parties, who, by their counsel, pray that the judgment of reversal be set aside, with the view to remand the cause to the court below, to amend the pleadings and bring new matter and evidence before the court, alleged to be important to the rights of the parties.

This court doth now, with the consent of the parties and under the circumstances of the case, order the reversal of the judgment of the court below, entered at a former term of this court, to be now set aside. And the court doth further more, on motion and with consent of the parties by their counsel, grant leave to the party appellant to withdraw his appeal.

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ABAT vs. *POEYFARRE.*

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

On a rule to show cause why an order suspending the sale of property taken on an order of seizure and sale, should not be set aside, the merits of the case cannot be gone into

The plaintiff obtained an order of seizure and sale of the defendant's property, which was suspended on the answer of the latter, who therein put interrogatories, which were answered by the former, who on the next day, obtained a rule that the defendant shew cause, on the sixth day then following, why the order suspending the sale should not be set aside. On the return day, the rule was set aside, "the court being satisfied with the proof exhibited."

The defendant appealed, and the case was brought up on the agreement of the counsel of the parties, that the appeal was taken from the opinion of the parish court deciding this case, on the rule to shew cause, which point alone was submitted to the court.

Grymes, for the plaintiff. The parish court did not err. The defendant, in the *via executiva*, must always be ready to maintain his opposition to the execution issued on a judgment, of which he cannot complain, since he has himself confessed it.

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In the present case, the defence rests on a fact, the knowledge of the plaintiff of certain circumstances which are alleged to give to the defendant some relief on principles of equity. He here probed the conscience of his adversary, without success. If he had witnesses, who may disprove the answer to his interrogatories, it was his duty to have them ready to depose, at the expiration of the period which was assigned him, and to have shown, by contradicting the plaintiff's answer, that the order which he had obtained to suspend the sale, was not to be rescinded. This he neglected to do. He showed no cause, and the order was, therefore, correctly rescinded.

Pierce, for the defendant. It is said that, in proceedings by the *via executiva*, the summary proceedings of the court *a quo* are authorised. Admitting that the laws of Spain do so, our mode of practice is exclusively our own, and the statutes regulating it embrace every possible case that may arise, and present to our tribunals the only legitimate rule of conduct.

The parish court, from which this appeal is taken, is governed, in its mode of proceeding, by the act of 1805, regulating the practice of the superior court, in which it is enacted that *all suits*

shall commence by petition, &c. ; that the day of appearance, when the defendant resides in New-Orleans, shall be on the 10th day after the service of the petition, when he must file his answer, &c. ; that the defendant may subjoin interrogatories to his answer, of the pertinency or materiality of which the court shall judge, and, if approved, shall order them to be answered by the plaintiff within a reasonable time ; which answer shall be received as true, unless disproved by the oath of two witnesses, &c. ; and that the defendant shall have three days, after the plaintiff's answer is filed, to except to it.

These are matters of every day practice, and the subsequent course is well known. After the answer to the interrogatories, and the three subsequent days, for excepting to it are elapsed, the cause is considered as at issue, and is placed on the docket in its order, and is called and fixed for trial in its turn, at not less than a week beforehand, when the parties come into court with their witnesses, and the cause is finally adjudged.

This statute, of 1805, applies to *all suits*, therefore, that one kind of cause should be distinguished and determined, in any manner different from all others, there should certainly

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be some statute or law authorising it. What is said in our laws, or code of actions of seizure on titles, amounting to confession of judgment? They are not mentioned in our statutes; but our statute, *Civil Code*, 460, *art.* 40, directs, that when the title amounts to confession of judgment, the creditor may on his oath that the debt is due, obtain an order for an immediate seizure of the said thing. This is all that is any where said concerning them, and the reason of this privilege is obvious: as the title amounts to a confession of judgment, he shall be entitled at first to proceed as if he had obtained a judgment by process of law. But though the title, upon which he prays a seizure, does amount to confession of judgment, yet there may be many good grounds of defence, which would not so be considered, had the judgment been obtained in the usual way; because, then, all exceptions would have ben previously put forth, discussed and adjudged upon. How is the defendant to come in with his opposition? The statute appears to have amply provided for such a case. The plaintiff cannot come into court in any other way than by petition, in this he prays that the property mortgaged may be seized and sold as upon a judgment. As the defendant has, in the eye of the law, confessed judgment, the judge

may legally order that the usual proceedings upon a judgment may be had forthwith, to wit: seizure, appraisement and sale. But, as the plaintiff is obliged to commence by petition so is the clerk obliged to issue a citation to the defendant to appear and file his answer. His property being seized and about to be sold he will, as may be supposed, be in haste to file an answer within the legal delay; but as he has, as it were, confessed judgment, by the character of the title, which he has given to the plaintiff, is his answer to be admitted of course? No, for then there would be no virtue in the title given. Yet, on the other hand, as he has not had the same opportunity of making his exceptions, as if judgment had been obtained after a trial; as it is only on a title, *amounting* to a confession of judgment, that the demand is instituted, and the defendant may have numeous causes of defence, such as that the debt is not yet due, and subsequent release, fraud, or, as in this case, an imperfect title. It must be left to the discretion of the judge, in examining his answer, to determine, if he has a good defence, and to admit his answer, if it contains sufficient grounds, and is supported by affidavit; but this discretion, can only be exercised, as to admitting or refusing the answer

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in toto, it cannot be halved or quartered, he cannot admit the answer, and order it to be proven, in less than the usual and legal term. If he does admit the answer, he brings the case within the statute of 1805; it is no longer a proceeding as upon confession of judgment, it is a *suit* between A. and B., as any other on the docket, and its course of proceeding, must hereafter be the same. By admitting the answer, the judge has said, as if in so many words, that there is sufficient cause, shown to him, why this title should not be considered as a judgment, entered up against the defendant; for if he did consider it as such, he could not admit any answer, as it would be palpably a contradiction, there would be a *contestatio litis*, and a judgment existing at the same time, between the same parties and for the same thing.

Again, the defendant had by law a right to except to the answer of the plaintiff, at any time, within three days? Can the cause be considered as at issue, until these three days have passed by? And can the cause be fixed for trial, before it is at issue?

And if it could be fixed for trial, at the discretion of the judge, and out of the usual course, could it be, by a rule taken upon the defendant, to show cause, why the order sus-

pending the order of sale, should not be set aside? Was this a rule, upon which to decide the merits of a cause, and finally adjudge it, if it could be adjuged at all, by any rule. If the petition or answer had required a jury, would the clerk have been authorised on such a rule being taken, to issue a *venire* to the sheriff, to summon a jury thereon. Even in the summary, mode of proceeding under the Spanish law, it may be required within the delay of ten days allowed, that each party should explicitly notify the other, *a comparoitre, pour voir presenter, connoitre, et affirmer temoins, &c. O'Reilly's instructions.* 10, *art* 7, *no.* 7.

But this rule was taken upon the defendant, merely concerning the suspension of the order of sale, which he had obtained upon giving sufficient security, which if it had been rescinded, and the sale taken place, would in no way affect the merits of the cause, after being once at issue. It might proceed, notwithstanding the sale, through to the injury of the defendant.

The defendant, therefore, avers: 1st. That his answer having been admitted, the cause is at issue, and must hereafter proceed, as all suits are directed to proceed by our statutes.

2. That if it could be called up out of its course, it could not be, before the three days,

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allowed to the defendnat to except, had expired.

3. Nor could the merits be decided, upon a rule to show cause, why an order suspending an order of sale, should not be set aside, as this question was every way foreign to the merits of the cause.

MARTIN, J. delivered the opinion of the court. The answer presented an issue for trial, and the defendant, on the plaintiff's answer to his interrogatories being filed, had three days to except to it as insufficient. 2 *Martin's Digest*, 162.

The issue was to be tried, in the same manner as issues in ordinary cases, and either party was entitled to a jury. Whether such cases are to be set down for trial, in their turn among all others on the docket, we find it unnecessary to determine: but, the law having made no provision for any other mode, the case must be set down for trial.

The present does not appear to us, to have been set down for trial. A rule to show cause why an order, suspending a sale, should not be set aside, is obtained when the plaintiff thinks it irregularly issued. On the argument, the merits are not enquired into, any more than on a rule to shew cause why an attachment should

not be set aside. *Taylor & al.* vs. *Hood*, 2 *Martin*, 113. The grant of the order alone is considered, and it is clear that the opinion of the court does not put an end to the suit, if the order be not set aside. The case must then, undoubtedly, be set down for trial on the merits. If the order be set aside, it being the opinion of the court that it was irregularly obtained, it is done without pronouncing on the merits, or as in the present case, on the validity and force of the proof.

Admitting that the rule to shew cause was (as being directed to be tried summarily, and as such perhaps entitled to a preference) according to the plaintiff's counsel, a correct mean to set down the cause for trial, this was done prematurely. The defendant had two days farther to except to the answer to interrogatories and the case was not ripe for trial.

It is, therefore, ordered adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the cause be remanded with directions to the court, to proceed to hear the merits of the cause, after it shall have been set down for hearing, and it is ordered that the plaintiff and appellee, pay the costs of this appeal.

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BERNARD & AL. vs. VIGNAUD.

BERNARD & AL. vs. VIGNAUD.

APPEAL from the court of the first district.

A tutor's liability is not prevented by his neglecting to take the oath, give security, &c.

A farther-in-law is an incompetent witness

The judgment obtained by a minor against his tutor, is evidence of his claim on the tutor's property, sold to a third person.

The petition stated that, at the time of the death of the plaintiffs' mother, they were minors and one Joseph Fouque took upon himself to act as their tutor and curator *ad bona*, and not only assisted as such at the inventory of her estate, but took possession of the plaintiffs' estate, to the amount of $5000, which he received from the testamentary executor; that he never rendered any account, but afterwards failed, and the syndics of his creditors have paid the plaintiffs a part of the said sum, which leaves a balance of $3584 38 due them, for which they have judgment against the said Fouque; that they have a legal mortgage therefor, from the 7th of December, 1810, when he made the first act of administration of the plaintiffs' property; that at that time, he was possessed of twelve slaves, which he afterwards sold to the defendant, by an act under private signature, bearing date June 22d, 1811, which was not recorded till the 9th of July, 1812, wherefore, they prayed, that the said slaves, now in the possession of the defendant, may be seized and sold, to satisfy their claim.

The answer denied that Fouque ever acted as tutor or curator *ad bona*, as stated in the pe-

tition. It averred that he borrowed from Vellio, executor of the plaintiffs' mother, 5000 dollars, on a mortgage of a house, which the executor released on receiving other security, on the 3d of June, 1812. It suggested that the negroes mentioned in the petition were never affected by any tacit mortgage, that no such mortgage was ever recorded. The defendant further pleaded a judgment in his favor against Fouque's syndics.

At the trial the plaintiffs introduced, as evidence, the record of the suit in which they recovered judgment against Fouque, and a certified copy of the inventory of their mother's estate.

Briere deposed, that from the records of the court of probates it does not appear that Fouque ever presented himself to be confirmed as tutor, or curator of the plaintiffs, or had letters therefor.

The signature of Fouque, at the foot of the inventory, was admitted.

The defendant introduced the will of the plaintiffs' mother, the record of the proceedings of Fouque against his creditors, and the record of the case of Fouque's syndics vs. Vignaud, the present defendant.

At the trial, the defendant offered Fouque as a witness. He was objected to, as incompetent, being the defendant's father-in-law. The ob-

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jection was overruled, and the defendant took his bill of exceptions.

In an act passed before a notary, Fouque declared that, as tutor and curator of the plaintiffs, he was indebted to Vellio, executor of their mother, in the sum of 5000 dollars, which he had borrowed from the executor, and had bound himself to pay, in about nine months, and mortgaged sundry slaves therefor.

The district court gave judgment for the defendant. It observed, that "the executor is charged with the administration of the estate, and is responsible for its misapplication. It is his duty to make an inventory, and if necessary, to sell the property, and he is accountable for every thing that comes to his hands. The duties of a tutor are principally confined to the person of the minor. A loan by the executor, of the monies of the estate, gives no lien on the estate of the borrower: and there is no difference in the principle, whether the loan be made to a person, styling himself tutor, or any other individual. That this loan to Fouque must have been made for his individual benefit, appears from facts and law. It is evident, from the fact of his obliging himself to return the money, which would not have been the case, if it had been intended for the use and benefit of

the minors. It is evident from the law, because the tutor cannot borrow for the minor, nor enter into any transaction or compromise, without the authority of the judge. *Civil Code*, 70, *art.* 65. Nor could he lay it out, in the purchase of any property for the minor, *Id. art.* 72. In this case, it is considered, that the loan, made to Fouque, was for his personal use and benefit, and not for that of the minors, and gives no lien on his property. For it, he is responsible to the executor of the latter, who is charged with the administration of it, is alone accountable to the heirs." The plaintiffs appealed.

Seghers, for the plaintiffs. The plaintiffs are the children of Catherine, lately widow Bernard, in her life time a merchant at New Orleans. At the death of their mother, which happened sometime in or about the month of December, 1810, they were all minors; one of them (John Anthony) became of age shortly before bringing this suit; the others are still minors and are assisted by their curator *ad lites*, lately appointed for that purpose.

Their mother, by her last will, appointed Joseph Fouque their tutor and curator *ad bona*, together with Joseph Vellio, and the latter her testamentary executor.

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Vellio took out letters testamentary, and acted as executor up to the 2d of July, 1812, and afterwards.

Neither Fouque nor Vellio did ever take out letters of tutorship or curatorship, nor cause their appointment to be confirmed; nor caused any other tutor, or curator, *ad bona*, to be appointed.

Vellio made, on the 7th of December, 1810, as executor, an inventory of the estate, amounting to 6600 dollars, the greater part of which was cash.

This inventory was made with the intervention of Fouque, who assisted thereat as tutor and curator *ad bona*. It was made under private signature without the intervention of any person but two appraisers. On the 15th the inventory was filed in the office of the register.

The defendant states that Fouque borrowed from Joseph Vellio, the executor of the mother of his minors, a sum of 5000 dollars; for which he gave a mortgage on a house and lot: that afterwards, on the 3d of June, 1812, Vellio gave an acquittance and discharge of this mortgage, on receiving other security; and, in an affidavit of his on record, the defendant also informs us that Vellio, as testamentary executor, lent to

Fouque all the money of the estate, and took security therefor; first on the house of Fouque, and afterwards his personal security by endorsed notes.

In a notarial deed between Fouque and Vellio, on the 2d July, 1812, Fouque appears as tutor and curator, and declares himself indebted to Vellio, as executor, in the sum of 5000 dollars, belonging to the minors; and in the same deed undertakes to repay Vellio; in March, 1813, gives him to that effect his endorsed note, and a mortgage of sundry slaves for greater security; the mortgage was then recorded.

On the 2d of January, 1813, Fouque surrendered his property to his creditors. At their meeting, 6th of February, 1813, Vellio appeared as tutor of the minors. This is the first time that he assumes that capacity, and the only instance in which he appears as such. The syndics having sold the slaves mortgaged to Vellio, or so much of them as they could reach, paid the proceeds of the same to the plaintiffs in two instalments, 1st $1265 62½, and 2dly 150 dollars, which left a balance, due by Fouque, of $3584 37½, independently of the interest.

For this balance and interest, the plaintiffs recovered judgment against Fouque, as their tutor and curator. The plaintiffs, in their peti-

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tion claim a legal mortgage, from the 7th of December, 1810, on all the real property and slaves, of which Fouque was possessed, at that time or since, for all the sums, which have come to his hands during his tutor and curatorship.

It is in evidence, that on the 7th of December, 1810, Fouque possessed a house, sold to Harang in June, 1812, by a notarial deed, and twelve slaves, sold to the defendant, by a deed, under private signature, bearing date, June 22d, 1811, and which was afterwards, recorded on the 11th of July, 1812.

On those twelve slaves, the plaintiffs have brought their hypothecary action, for the recovery of the amount of the judgment, rendered against Fouque, in the former suit; the defendant, who is the third possessor under Fouque, opposed their demand, and judgment having been rendered for him, the plaintiffs appealed.

They rest their claim on the following grounds:

1. Fouque having acted as their tutor and curator, without having been legally authorised as such, and having intermeddled *(s'étant immiscé)* with the administration of their property, they have a legal mortgage on his property, from the day he made the first act of that ad-

ministration. *Civil Code*, 457, *art.* 20 and 28. 71, *art.* 75; 75, *art.* 82; 455, *art.* 15.—*ff.* 27, 3, 25, *eod. lib* 5, 1· § 1.—*Cod.* 5, 45, 1 & 2. *Domat, tom.* I, *fol.* 182, *no.* 45.—*Pothier, traité de l'hypoth. chap.* 1, *art.* 3.—*Partida* 5, 13, 23.—*Febrero, Adicion.* 2, 3, 3, § 11, *no.* 51 & 53.

2. This legal mortgage lies, not only for all the monies belonging to his wards, which have come to his hands, but also for the interest thereon, at the rate of five per cent. per annum, from the time he has received such sums respectively. *Civil Code*, 71, *art.* 71.—*ff.* 27, 5. *l.* 1, § 8.

3. The tacit mortgage, lies on the property of Fouque, because he has received and wasted the monies of his wards; it does likewise lie for his responsibility, if, without having ever received any part of the monies, he has, by his neglect or contrivance, suffered them either to remain unsecured in the hands of the executor, after the time of his executorship had expired, or to be then lent out, by the executor, to any body else who should afterwards have failed; because it was his duty, at the expiration of a year, to wit: in December, 1811, to compel the executor to render his account. It was likewise his duty to take care that the balance belonging to the minors should be safely collocated; and by fail-

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ing to perform that duty he became liable for the subsequent insolvency of the executor, as well as for that of the borrower. *Civil Code*, 69, *art.* 52; 71, *art.* 75. *ff* 27, 3, 1, ; *eod. lib.* 5, § 9, *l.* 4 ; 26, 7, 15. *Domat*, 1, 179, *no.* 23. *Ferrière, Dict. de Pratique*, 2, 731, *verbo tuteur*, 3 *Ancien Denisart*, 297, *verbo tuteur, nos.* 69 and 61.

It is to be observed that the defendant does not deny any of the facts alleged in the petition; but confines himself to the following points: 1 That Fouque never acted as tutor or curator *ad bona*. 2. That he borrowed 5000 dollars from Vellio, the executor of their mother, and gave a mortgage on a house and lot, which was afterwards released by Vellio on receiving other security. 3. That the slaves purchased from Fouque by the defendant, never were subject to mortgage. 4. That a judgment has been rendered in his favor in relation to the property in the said slaves between him and the sindycs of Fouque, and is, therefore, *res judicata* against the plaintiffs. 5. That their legal mortgage not having ever been recorded, can have no effect against him.

I. The first point fails on the mere inspection of the two documents in evidence, viz. the in

ventory and the deed passed before the notary on the 2d of July, 1812; in both of which he assumed the character of, and acted as tutor and curator.

To this the counsel for the defendant objects that the assistance of Fouque, at the inventory, was not an administrative, but merely a conservatory act, and that thereby no tacit mortgage accrued.

It is certain, however, that without the intervention of a tutor, no inventory could have been made; that this was the only act the tutor had to perform at that period, and that, had he been legally appointed, his administration would have begun by that act, and stopped there till the expiration of the year of the executorship.

Now the tutor could not assist at the inventory unless duly appointed by the judge; and it is from the very day of that appointment that the tacit mortgage attaches, *Civil Code*, 71, *art.* 75. We have already shown from the authorities above cited, and chiefly from Pothier, that intruders are not entitled to greater favor than legal administrators.

II. It does not appear at what period the money was borrowed; whether during the year of the executorship, or after its expiration; but

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I beg leave to observe that the question as to the first point being once settled, it follows that Fouque, tutor of the minors, borrowing their money from their deceased mother's executor, whom it was his duty to controul, and afterwards receiving from him, at a period when his executorship had certainly expired, a release of the mortgage that was to secure that loan ; it follows that, in such circumstances, Fouque cannot but be suspected of having intended, either with or without connivance on the part of the executor, to defraud his wards of that money, which constituted their inheritance, and with the preservation of which he was entrusted. Is it not to guard against such fraudulent practices that the law has secured to minors that legal and tacit mortgage, which lies on the property of the perpetrator of such acts, and affords to his victims a relief against such a flagrant abuse of his legal or assumed character ?

Here it is no idle observation that from the very outset of the transaction, the mind of Fouque seemed bent on the means of defrauding his wards ; for, by acting without the authorisation of the judge, he could have no other intent than to avoid giving security for his administration as directed by our *Civil Code*, 59, *art.* 55, and 75, *art* 82.

III. The statement of the case, together with the authorities cited in support of the first ground, is sufficient is defeat the third objection.

IV. The defendant states that the judgment alluded to, is in relation to the property in the slaves, and this is an hypothecary action upon the same slaves ; thus the two actions are distinct and of a different nature. Besides, the plaintiffs were not parties to the suit alluded to, nor were the syndics of Fouque anywise qualified to represent them ; thus this is moreover, as to the plaintiffs *res inter alias acta.* Therefore, there is no occasion to plead on this head the *res judicata* in bar of this action. The court will be convinced of the correctness of these observations, by the inspection of the suit, the record of which, is admitted as evidence.

V. The fifth ground of defence will be answered by our *Civil Code*, 455, *art.* 15, 457, *art.* 27 and 28 ; and by the act of March 26, 1813, directing tacit mortgages to be recorded ; and by the 3d section whereof, the tacit mortgages in favor of minors, are expressly dispensed from the formality of the recording.

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Were it admissible for the plaintiffs to leave the strong ground they have taken, for one far weaker, it would be intimated that even then this fifth point, would not in fact prevail. For the deed by which Fouque, acting as tutor and curator, acknowledges to have received 5000 dollars, belonging to the minors, was executed before a notary, and recorded on the 2d of July, 1812, and it was only nine days afterwards, on the 11th of the same month, that the deed of sale of the slaves from Fouque to the defendant was recorded. But, it is contended, that the legal mortgage of the plaintiffs existed against any one claiming under Fouque, as well as against Fouque himself, without the formality of the record.

The preceding observation as to the day, on which Fouque received the money of his wards, would also apply, if necessary, to the objection made by the defendant's counsel in support of his first point, to wit : that assisting at the inventory was not an administrative act ; for, receiving their money was certainly such an act in the meaning of the law. And should even the legal mortgage lie only from that date, it would yet be nine days anterior to the title of the defendant, as it has been just now demonstrated.

But, it is said, this deed of the 2d July, 1812, is but a loan of money from the executor to Fouque. It is true, that the borrower appeared as the tutor and curator of the minors, and acknowledged that the monies were theirs, but in the first place, in assuming that character, he styles himself tutor and curator of the minor and major children, &c. which latter part destroys the idea of a tutor or curatorship; and in the second place, the responsibility rested entirely on the executor, who was answerable for the misapplication of the estate. The judge *a quo* held that the duties of a tutor are principally confined to the person of the minors A loan by the executor gives no lien upon the estate of the borrower, and there is no difference in the principle, whether the loan be made to a person styling himself tutor, or to any other individual. Then he goes on to show that it is evident both from fact and law, that this loan to Fouque was made for his personal use and benefit, and not for the use and benefit of the minors, and gives no lien upon his property; that for this sum he is responsible to the executor and that the executor, who was charged with the administration of it, is alone accountable to the heirs.

In addition to this reasoning of the judge,

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the counsel for the defendant contends that Vellio having been designated together with Fouque, as tutor, by the mother of the plaintiffs and having appeared as such at the meeting of Fouque's creditors, it is to him and not to Fouque, that they must look for their money, as he alone is responsible for it in either capacity; for he alone has administered it and disposed of it.

I shall now proceed to shew, how groundless are those reasons alleged, by the defendant's counsel; and that the judge erred in his decision on the question, that there is no lieu upon the estate of the tutor.

I am first, to dispose of the objection as to the two-fold capacity of executor and tutor in Vellio. It is true, that he was designated for both by the will; but from the evidence in the cause, it appears that from the outset, he had made his election, by taking out testamentary letters, and by acting in the sole capacity of executor. It will be observed, that in this instance, the duty of an executor, was incompatible with that of the tutor; because the executor being accountable to the heirs, and the tutor representing the heirs, it was the duty of the latter to controul the former; thus it was only after the executor's administration was at an end,

and his account settled, that he could have been appointed tutor to the minors. In fact, we find in the proceedings of Fouque against his creditors, which are in evidence in this case, that Vellio, for the first and only time, styles himself tutor, after Fouque's failure, and at the meeting of his creditors in 1813, and that he there claims the $5000; as being due to him in the capacity *of tutor*. Now, if this act of Vellio, subjects him to a *legal* mortgage, it would lie only from that date, (1813) when there was nothing left to the minors. Fouque having got the whole of the estate, and when, therefore, there was nothing left for the tutor to administer.

Reverting to the other arguments of the counsel for the defendant, and to the reasoning of the judge, we observe, that the irregularities of the words, *tutor and curator of the minor and major children, &c.* which are to be found in the notarial deed, cannot prejudice the plaintiffs, who were not parties to it, and who are not to suffer for the connivance of the parties, or the ignorance of the notary. But the nature of the thing shews by itself, that by the word *minor*, the notary meant the minors, under the age of puberty, and by the word *major*, those above that age. The facts in the cause, which are not

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denied by the defendant, shew that the plaintiffs were then all minors.

I demonstrate by the deed, that Fouque was still acting as their tutor and curator, and that he received their money. This is all I ought to prove, to make him liable to repay. It cannot be said, that he was in the same position, as another borrower; for it was a duty incumbent upon him, to oppose the loan, and to compel the executor to settle his account, and to pay the money of the minors, that it might be safely disposed of, for their own benefit. I have shewn, that it was his duty to do so, and that he would be still liable, even had he not been himself the borrower. With how much more reason, then, shall he be held, when neglecting, misusing the sacred trust, which a dying friend had entrusted him? When instead of protecting his wards, we find him deceiving their mother's executor, conniving with him, and using every fraudulent practice, to despoil them of the little fortune, laid up for them, by the labour and industry of their parents!

I do not contest what the judge has said, that a loan, made by an executor, gives no lien upon the estate of the borrower. But he travels out of the question, when he says, that there is no difference in the principle, whether the loan be

to a person, styling himself tutor, or to any other individual. To have drawn such a conclusion, he must have overlooked the grounds taken by the plaintiffs, and even totally disregarded their third and last ground, together with the authorities quoted in support of it. The duties of a tutor, says he, are principally confined to the person of the minor; but, that does not lessen his duties as to the conservation of the property. And he forgets that Fouque was also curator, and that the duties of a curator are principally confined to the property of the minor. Nay, as to the preservation of that property, the duties are the same.

An appeal to law and fact seems quite unnecessary to prove that, on which we all agree, viz: that it was for his personal use and benefit, and not the use and benefit of the minors, that Fouque borrowed their money. But, we are at a loss to make out upon what principle is founded the conclusion drawn by the judge; that therefore, this loan gives no lien upon the property of Fouque. He was their tutor; he ought to have received and safely collocated that money on their account. Is he less liable for having diverted it to his own use? Has he not in fact received and pocketed or wasted the money? To maintain, by such reasoning, that

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Fouque is only responsibile to he executor for this sum, that the executor was exclusively charged with the administration of it, and is, therefore, alone accountable to the heirs, is exactly granting to Fouque what, from the beginning, he intended to procure, by his fraudulent practices, viz. to avoid any lien on his property, and thus to deprive the plaintiffs of any effectual relief and confine them to a nugatory one.

Indeed, what would avail their recourse against Vellio? He is worth nothing. This is a fact, 'tis true, not in evidence; but that he has left the country, for Cuba, is a fact stated by the defendant himself in his affidavit on record in the cause.

When the judge positively asserts that the executor was exclusively charged with the administration of the money, he forgets that at that period (24 July, 1812) the legal period of executorship had expired for six months and upwards, and that it was the duty of the tutor and curator not to allow him any further administration, but to have the estate settled, and the balance paid and safely collocated.

It is not contested that the plaintiffs, as heirs to their mother, have at all events, an action against Vellio, as her executor; but, that action gives them no lien upon his property,

even if he had any. As minors, they have a lien on the property of Fouque, their tutor and curator. It follows, that they have both remedies, and thus the election is theirs. In this position shall they be forced to abandon their first, direct and effectual remedy, in order to look to a secondary, circuitous and delusory one?

I have a single observation to make on the bill of exceptions, on the refusal to admit the testimony of Fouque.

Fouque is the father-in-law of the defendant. It is contended that the law which excludes the father from being a witness for his son, is as applicable to the father-in-law as to the natural or legitimate one. As the principle of exclusion is on account of interest, it is contended that the wife of the defendant, who is the witness's daughter, has a like and indivisible interest with the defendant in the event of this suit; for she is in community with her husband, and the value of the slaves form a part of the common stock, which by the event of the suit is either to be left entire or to be lessened by the whole amount of the mortgage. That the slaves are a part of the common stock, is in evidence; for in the suit alluded to (the record of which

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has been introduced) it is proved that they were already married, for a long while, and living with Fouque, when he sold the slaves to the defendant.

Livingston, for the defendant. Joseph Fouque and Vellio are appointed tutors of the minors Bernard, by their mother's will. Neither of them take out letters of tentorship, or take the oath and give the security required by law. Vellio is, also, named executor and detainer of the property by the same will.

Fouque, however, signs the inventory and in the caption of it he is called tutor; but he never received any part of the estate (otherwise than by the loan hereafter mentioned) nor did he intermeddle with the administration of the property, the whole remaining in the hands of Vellio, the executor and also named tutor by the will. On the 2d day of July, 1811, Fouque borrowed $5000, part of the estate of the minors for which he gave his promissory note secured by an obligation before a notary, &c. a mortgage of several slaves for the payment *to Vellio*, in this instrument he is called tutor of the minor and major children of Mrs. Bernard. In January, 1813, Fouque becomes insolvent, *Vellio* appears as a creditor for the 5000 dollars, and swears to

the debt as *tutor* of the plaintiffs, and as such receives a dividend. For the deficiency of this, suit is brought against Vignaud, who, on the 22d of June, 1811, purchased 12 slaves from Fouque, under the supposition that, Fouque being the tutor, his estate is mortgaged for the amount of the plaintiff's claim, that this mortgage accrued from the time Fouque first signed the inventory, or at least from the time he received the money, the 2d July, 1812, which was 7 days before Fouque's deed, to Vignaud was recorded.

First, it is stated that the tacit mortgage took place from the time that Fouque signed the inventory as tutor. The law gives this mortgage on the estate of the *tutor* from the day of his *appointment*. On the estate of those who, without being tutors, take upon themselves *the administration of the minor's property* from the day when they made the first act of *that administration*. *Civil Code*, 456, *art.* 19, 20.

Now Fouque was never *tutor*, he had been named in the will, but he had done none of the requisites to complete his appointment. He had taken no oath, given no security, obtained no confirmation from the judge, procured no under tutor to be appointed: all this is required by the code. He was not, therefore, a tutor, and therefore there can be no mortgage attached to his

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property as such. Nor can he be liable to any of the consequences to which a tutor would be liable, as such. Has he taken upon himself the administration of the minors, property ?

The only two acts he has done in relation to them, are the signing the inventory, and secondly the borrowing a sum of money from the executor for which he gave special security and a note. The assisting at the inventory is clearly not an *administration of the property*, it is merely a preparatory act to such administration. Which administration was clearly intended to be made by the executor Vellio. He retained the property ; he was authorised to retain it by the will, he *administered* it ; that is to say he possessed and disposed of it for the use of the minors. If I understand the term ; it implies exclusive possession, and that no man can administer that which he does not possess. Now Fouque never possessed, never used, he consequently did not administer. The signing the inventory is, therefore, not an act of administration.

The borrowing of the sum of 5000 dollars, can (it appears to me) as little as the signing the inventory, be construed into an act of administration. It shews on the contrary, as strongly as any circumstance can shew, that *Vellio*

administered or he could not have *lent* them. Fouque *did not* administer or he would not have been under the necessity of *borrowing*, and giving security, for that which he himself could dispose of, if he had really administered.

Fouque, therefore, was neither tutor, nor has he *administered* as tutor: therefore, there is no mortgage accruing to the plaintiffs, on his property.

A number of authorities are quoted to prove that Fouque was liable for neglect, in not calling on Vellio to account, after the year of his executorship expired: to this there are two answers, one of which has been anticipated. Fouque was never the tutor. The other is that, supposing him to be a tutor, Vellio was equally so, and he, Fouque, had no right to call him to account.

But, suppose the mortgage to have accrued, from the day Fouque received the money, I think it will not much avail the plaintiffs. He borrowed the money on the 2d of July, 1812; but Vignaud had bought the negroes on the 22d of June, 1811, by an act under private signature. But, it is said that this act, being registered only on the 12th of June, 1812, is to take effect only from that day, which is subsequent to the mort-

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gage, arising from the receipt of the money. The code, on this subject, says that the acts under private signature, shall have effect from the time of their registry only *against third persons.* The third persons must be such as have acquired an interest, in consequence of the acts being not found on the register, which they would not have taken, if they had had notice by the registering; but suppose, in the present instance, that Vignaud's deed had been recorded before the 2d of July, would Vellio not have lent this money to Fouque? Certainly he would, for he took only a special, not a general mortgage. Therefore, this case is not within the reason of the law, and it cannot apply, even if there be a mortgage, which, I trust, I have shewn there is not.

Another objection to the plaintiffs' recovery is, that they have not described the property specially mortgaged by Fouque. It is true, that they say (and perhaps, it may be so stated, on the tableau of distribution of Fouque's estate) that some of the negroes were dead, and others were previously mortgaged by Fonque. Yet, these facts ought to have been proved to the satisfaction of the court, more especially, as the existence of the prior mortgage, on the slaves is inconsistent with the certificate

which the register of mortgages must have given, when the negroes were specially mortgaged by Fouque to Vellio. I pray the court to examine the tableau of distribution with a view to this point.

It appears, also, by the notarial act made by Fouque to Vellio, that this and the mortgage it contained was only a collateral security for the payment of a negociable promissory note, which is not produced. Fouque, and still less an innocent purchaser under him, cannot be adjudged to pay so large a sum, without the production of the security that was given for it; besides, this note was indorsed, the indorser, therefore, is liable and ought to have been called on before the innocent purchaser, or, at any rate, that purchaser, if he be obliged to pay, ought to have the benefit of a subrogation to all the rights of the contracting party. Now, one of these rights would have been that of suing the indorser, as well as the drawer of the note; but how can he have this, unless the note be produced?

I pray the court to remark, during the whole of this discussion, that the plaintiffs consider Fouque as incurring the responsibility of a tutor because *he acted as such*; but the law has no such provision. A man may do an hundred acts, that none but a guardian could properly do,

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and yet not subject himself to the responsibility of one, or impose a tacit mortgage on all his property. It is only when he *takes upon himself the administration of the property*, that these effects ensue, and, by a natural consequence, only to the amount of the property that he administers. He may take care of the person of the minor; he may educate him, give his consent to his marriage, do any thing in short relative to him, provided he does not administer the property as *tutor*, and in behalf of the minor. In this case Fouque has done neither. He signed the inventory, which is not an act of administration; he borrowed money, for which he gave a note and security in the common form, which is still less an administrative act, and this is all. And for this, a bona fide purchaser of his property, an industrious father of a family is to be utterly ruined by a tacit mortgage, which could not have been discovered, by the most scrupulous research. For, if Vignaud, when he made the purchase, had gone to the probate office to enquire whether Fouque had taken upon himself any charge that would have this effect, the answer would, undoubtedly, have been "no, he is named tutor for the minors Bernard, but he has never accepted, he has not been sworn, he has not given security, his nomination has not been

confirmed, and the administration of the property is still in the hands of Vellio, the executor, who was also named guardian of the minors." It, not satisfied with this, he was to go to Vellio, he would certainly tell him the same thing; that Fouque had not administered the property, but that he had borrowed a sum, for which an indorsed note and mortgage had been given, as it would have been by any other borrower. This account would certainly have satisfied the most scrupulous that there was no risque, and until the ingenuity of the plaintiffs' counsel was applied to the subject, none of the parties interested, saw in the transaction any thing but a common deed secured by special mortgage. Vellio considered it so, when he proved the debt, Fouque when he put it on the bilan, the syndics when they made the dividend, the plaintiffs when they received it.

Should these cursory reasonings fail to prove that the plaintiffs can have no relief on the merits, let us then have recourse to the exception for the rejection of Fouque's testimony. He was offered as a witness for the defendant; but was rejected, because of a supposed interest, arising from his connection with the defendant, who married his daughter,—because the exclusion of the father to be a witness for the son ex-

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tends to the father in law. Neither of these are believed by the defendant to apply.

First, as to the interest, in order to exclude it must be direct or indirect, *Civil Code*, 312 ; but it must be an interest a *certain* not an eventual one. Direct interest is a gain that will accrue, or a loss that will be avoided, to the witness, by the *immediate* operation of the judgment in favor of the party who produces him : as if he is to receive part of the money recovered, or would be liable to pay the costs or part of the sum, if he lost ; an indirect interest is where the advantage or loss is more remote, as if the verdict to be obtained by his oath could be used in another suit for the witness, or the loss of the suit in which he testifies would give rise to another action against him. But whether direct or indirect, the interest, in order to exclude, must be apparent, it must not be eventual; and thus this court decided in the case of *Hewes* vs. *Lauve*, wheer the witness might receive a benefit from the judgment, yet as this was not certain, he was not excluded. Now, what is the interest of Fouque. His daughter is the wife of the defendant : *if* the plaintiff recovers, the community between her and her husband will be lessened. *If* the community is lessened, and *if* Mrs. Vignaud dies without children, then

Fouque, *if* he survives her, will inherit so much less from his daughter's estate: here are certainly too many contingencies to create an interest. And we accordingly find that this species of expectancy in another's estate, is not, by the law, considered as an interest either direct or indirect; for, after establishing that criterion (direct or indirect interest) it proceeds to exclude expressly the ascending or descending heirs. Now, if they had an interest, they would have been excluded by the general provision. It is clear, therefore, that the law did not consider them so, and before the code they were always admitted in our courts, while interest alone was the rule of exclusion under the territorial law.

It remains then to be considered, whether the exclusion of the father extends to the father in law. There is nothing to shew this; on the contrary, the exclusion being an express one, in derogation of the general rule, must be taken strictly. All persons are good witnesses who are of full age, not infamous, not interested, and who do not come within the enumerated relations to the parties. Here the witnesss is not within either. He is therefore a competent witness. The interest of the wife, even if that were of any consequence, is here gratuitously asserted. She may, or may not be in

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community with her husband : that depends on contract. Or, if it should be presumable, in marriages contracted here, yet, it does not appear where she was married. All this ought to have be enproven by the plaintiffs, is necessary to support the objection. Besides, the wife has no interest in the case properly : until the dissolution of the marriage, the husband is perfectly master of it, may spend, dissipate, or throw it away, as he pleases.

The objection, arising from Fouque being the vendor was not urged by the plaintiffs on the trial ; nor, is it mentioned in this court. Had the objection been raised, all doubt would have been removed by a release. But, there is no doubt Fouque is perfectly indifferent. He is insolvent, and the plaintiffs have accepted his cession. And again, if Vignaud should lose the slaves, they would be applied to the payment of his, Fouque's debts : so he is interested in the decision against us, and this action of warranty, would be barred by his cession. At any rate, if personally responsible on such warranty, he can be so, for no more than the value of the negroes ; and the full amount of that value would, in that case, go to the discharge of his debts. So that he stands, in this view, perfectly indifferent between the parties.

Seghers, in reply. It is erroneously asserted that Vellio, received a dividend from the syndics of Fouque. These syndics have not paid any dividend; the ordinary creditors have not received any thing, and some mortgages and privileges are left unsatisfied. The syndics have paid only to privileged and mortgage creditors, the net proceeds of the sale of the objects specially affected to the respective mortgages or privileges, as far as those proceeds would go. This was not received by Vellio, but by the plaintiffs. This fact is set forth in the petition, not denied by the answer, and admitted by the defendant at the end of his argument on the merits. It was paid to J. A. Bernard, the eldest of the plaintiffs, whom, though not of full age, the syndics did not hesitate to trust with that payment.

The defendant maintains that Fouque never was *tutor*. though he was named in the will and had, in that capacity, assisted at the inventory. In support of this position he states that *Fouque had done none of the requisites to complete his appointment;* here he makes the enumeration of all the duties required from a tutor by the code; and because Fouque has willfully failed to comply with those duties, *he was*, says he, *therefore, not a tutor, and therefore there can*

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be no mortgage attached to his property as such, nor can he be liable to any of the consequences to which a tutor would be liable as such ; as if Fouque, or his assignee, could be admitted to plead his own wrong. On the contrary, is he not within the principle laid down by Pothier, where he says that intruders are not entitled to greater favour than legal administrators ?

The defendant further urged that Fouque did not take upon himself the administration of the minors' property, because he has done only two acts in relation to them, viz. : signing the inventory and borrowing their money. He forgets that we have it from himself, both in his answer and affidavit on record, that between those two transactions, many other took place between Fouque and Vellio in relation to the money of the minors. He goes on and says that Vellio retained the property as executor and that he was authorised to retain it by the will ; that he administered it and disposed of it ; that the signing of the inventory was not an act of administration ; that Fouque never was the tutor, and if so, that Vellio was equally tutor and that Fouque had no right to call him to account.

I think I have satisfactorily established that the signing of the inventory, in the manner that Fouque has done, is an act of administration,

because that inventory could not have been made without the intervention of a tutor, and if legally appointed, the lien would have affected his property from the day of his appointment, though during the year of the executorship he would have had no other act of administration to perform, than that of attending the inventory. The executor, it is true, was authorised by the will to detain the property; but by law he was bound to give it up at the expiration of one year, and it was the duty of the tutor to enforce that provision of the law; and if he continued to administer and dispose of it, after that period, it was wrong in the tutor to suffer it, and he or his assignee can certainly not be admitted to be benefited thereby. I have likewise proved that Vellio was no tutor, having made his election, and that, therefore, Fouque alone was tutor; and that even if Vellio had also been tutor this trust would have been suspended during his executorship, as being incompatible with it; and therefore it is clear that Fouque had not only the right to call him to account, but that it was his bounden duty so to do.

The defendant next takes a new ground and maintains, 1st. that the special mortgage, mentioned in the deed of July 2d. 1812, must be first discussed; and, 2d, that the note, also

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mentioned in the same deed, must be produced; *for*, says he, *at any rate, if the purchaser be obliged to pay, he ought to have the benefit of a subrogation to all the rights of the contracting party.* In reply I shall first observe, that neither of those grounds have been urged in the court below, where even he would not have been admitted to urge them, as they were not pleaded, and that thus the plaintiffs could not have come prepared to meet them. I therefore maintain that it is now too late, that the court cannot listen thereto; but even admitting (which I by no means do) that they could now be pleaded, it would be very easy to shew that they cannot avail the defendant.

In the suit against Fouque and his syndics in which we have recovered the judgment on which this action is brought, and the records of which is in evidence in this cause, we have set forth the manner in which the several slaves mortgaged were disposed of, to wit: that some were dead, and others were subject to the privilege of the vendors for the amount of the price for which they were sold to Fouque; and that the net proceeds of the sale of the remainder were paid to us by the syndics; these facts were not denied; they are confirmed by the tableau of distribution filed by Fouque's syndics, which ta-

bleau has been introduced as evidence in this case by the defendant; for there the syndics after having sold every property surrendered by Fouque, apply the proceeds of each to the privilege or mortgage to which it was subject; and there it appears that no other proceeds were applied to the special mortgage than those which we have accounted for in our demand. And if this ground had been pleaded, it would have been easy to introduce at the trial any further or collateral evidence to establish those facts.

It is asserted that the certificate of the recorder of mortgages mentioned in the act of the 2d July, 1812, excludes the presumption of any of the slaves being subject to other charges. We contend that this certificate proves nothing against the privilege of the vendor, in as much as the sale may have been made by private instrument, and afterwards recorded before a notary. If it appears on the face of the instrument that the price be due, the privilege lies without needing to be recorded with the register of mortgages. *Civil Code*, 470, *art.* 75, 468, *art.* 68.

The same observations apply to the production of the note; for it is to be presumed that it was delivered by Vellio to the syndics of Fouque, because had they not been satisfied on

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this subject, they would not have paid us the proceeds of the property mortgaged, to secure the payment of said note.

Besides, we shall remark, that the minors were no party to the transaction between Vellio and Fouque, when the latter received their money; that the note never came to their possession, and therefore, they cannot be held to produce the note: when the defendant will have discharged their claim, he will of course be subrogated by the operation of the law to all their rights both against Fouque and against Vellio, and shall therefore, be entitled to claim the note if he thinks proper, in whosesoever hands it may be.

One of the grounds relied on by the defendant, and on which he much insists, is the want of recording our tacit mortgage. I have nothing to add on this subject. But, having stated that at all events, this mortgage would lie from the 2d of July, 1812, because Fouque on that day received the money, and the tacit mortgage was on the same day virtually recorded, by recording the deed. executed before Quinones, in which the capacity of tutor and curator was clearly set forth; and having stated also, that this was anterior by nine days to the recording of the sale of the slaves from Fouque to Vig-

naud : the defendant endeavours to prove by the reason of the law, that the date of his private deed of sale, which is the 22d of June, 1811, and not that of the recording which is the 11th of July, 1812, must prevail against the plaintiffs, as they are not those third persons whom the code had in view, when its provisions on that head were enacted.

Those provisions are clear, they admit of no exception, and however ingenious the argument of the defendant's counsel on this subject may be, we will confine ourselves to quote the statute in reply, which provides "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 defendant remarks, that during the whole of this controversy, we consider Fouque as incurring the responsibility of a tutor, because, he acted as such ; and he asserts that the law has no such provisions, and here he enumerates many acts which he pretends that a man may do without incurring that responsibility. He forgets that he has himself maintained that Vellio, for having done one of these acts (in 1813, after Fouque's failure) had incurred that responsibility which he now endeavours to throw from Fouque, pretending that these ef-

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fects ensue only when one takes upon himself the administration of the property. Here the compliment of ingenuity well may be returned to the defendant's counsel; for in truth, his argument is a very ingenious one; but what can it avail the defendant? Does it go any way to disprove the fact of Fouque's having received the money of his wards, when he styled himself their tutor; and when in fact, he acted as such? Again, shall he, or his assignee, be admitted to take advantage of his own wrong, in violating every duty which the law impo-es on him, and designedly employing the circuitous means of a loan, in order to avoid that very responsibility from which the defendant's counsel in vain attempts to exonerate him? "He signed, says he, the inventory, and borrowed the money; this is all." We do not conceive what he could have done more. For by this, he got the whole of his minors' estate: and if a consideration of the nature of the one set forth by the defendant, could prevail on the court, we would beg leave to lay before them the situation of unhappy orphans despoiled of their whole fortune by the very man to whom their dying mother entrusted them, and against whose fraudulent contrivances they were utterly defenceless. It is to guard against such abuses, that, those benevo-

lent laws have been enacted, which we invoke, and think it the duty of the court to enforce.

Of what can the defendant complain? He lived in the same house and family with Fouque, and had thus an opportunity of knowing that he was entrusted with the tutorship of the minors. Had he inquired at the probates' office, he would there have been informed that Fouque had intervened in that capacity, at the inventory of their mother's estate; had he gone to the recorder of mortgages, on the 11th of July, 1812 (the only legal date of his conveyance) he could likewise have known there, that Fouque had acted as their tutor, and received $5000 of their money, on the 2d of the same month.

It is asserted, that none of the parties interested saw in the transaction any thing but a common debt, secured by special mortgage. Vellio, says the defendant, considered "it so, when he proved the debt; Fouque, when he put it on the bilan; the syndics, when they made the dividend, and the plaintiffs, when they received it." This assertion, we most positively deny. If Vellio was not deceived by Fouque, then he thought surely that he was entrusting the money to the tutor of the minors; and if he connived at this transaction, then he, as well as

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Fouque, and the latter at any rate, saw in it what it effectively was, the means of possessing himself of the monies of his wards, without incurring the legal responsibility. As to the syndics and the plaintiffs, they saw and could see nothing in it, but the one paying and the other receiving what was legally due. Moreover how can the acts of Vellio, Fouque, or the syndics, affect the rights of the plaintiffs? As to their own act, they received the money on account of their claim, and this is all. It will, certainly not be seriously contended, that thereby they renounced their legal remedy to recover the balance. On the exception to Fouque's testimony it is pretended, that the exclusion of the ascendants does not extend to a father-in law; that the community, between the defendant and his wife is not proved, as it does not appear where they were married, that the objection of Fouque's being the vendor, was not made on the trial, nor is it mentioned in the record, that Fouque is insolvent, and that the plaintiffs have accepted his cession.

This last point is denied; the plaintiffs could neither accept nor refuse his cession, being minors, nor did they accept: that Fouque is the vendor, I asserted at the end of my argument; the fact appears throughout the record, and need

not therefore be argued, to enable the court to apply it either to the merits or the exceptions in the cause.

The case cited of *Hewes* vs. *Lauve* does not apply. The community need not be proved, because it is presumed by law; nor is it material where the defendant and his wife married: for, when a married couple emigrate from the country where their marriage was contracted to another, the laws of which are different, the property which they acquire, in the place where they have moved, is governed by the laws of that place. *Gales* vs. *Davis' heirs*, 4 *Martin*, 649. On the first point, I will confine myself to a single observation. Marriage is prohibited between ascendants and descendants. Would it be lawful, to marry one's mother-in-law?—If not, the principle applies to the evidence.*

ROWLETT vs. *GRIEVE'S SYNDICS.*

APPEAL from the court of the first district.

A partner, who pays partnership debts, is subrogated to the creditor's rights, on the joint property.

DERBIGNY, J. delivered the opinion of the court. The plaintiff, a merchant of London, was a partner in trade with Samuel Corp, a

* The opinion of the court, in this case, is not printed now, the the time for the application for a rehearing having been extended by consent, and not being expired when this sheet was put to press.

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merchant of New-York. They traded in London, under the firm of Rowlett & co., and in New-York, under the firm of Samuel Corp, alone. In the year 1799, Rowlett sent to Corp for their joint concern the ship Chesapeake, richly loaded, which Corp sent to New-Orleans, consigned to one Samuel Watson, afterwards superseded in this agency by George Pollock, who was himself succeeded in it by John Grieve, of whose creditors the defendants are syndics. At the expiration of the agency of Pollock, part of the proceeds of the cargo of the Chesapeake, consisting of outstanding debts some of them secured by mortgage, and a certain plantation, in the parish of New-Orleans, bought with the said proceeds, were delivered by Pollock to Grieve. Grieve, having afterwards become bankrupt, put all that property in his bilan as his own, and the object of the present suit is to recover it from his syndics.

It appears that Corp, independently of his connexion with Rowlett the plaintiff, was a partner of the mercantile house of Corp, Ellis & Shaw, of New-York, with whom Grieve had dealings; and that Grieve, being a creditor of that house, pretended to apply Corp's particular property to the payment of that debt. But Grieve, as the successor of Pollock in the agen-

cy of the business of Corp and of Rowlett, must be presumed to have known that the proceeds of the Chesapeake belonged to that concern; nei her could he be ignorant that Rowlett, on the expiration of his partnership with Corp, settled and paid all his debts, and was of course subrogated to the rights of the creditors of that partnership on the joint property. But, whether he knew it or not, the fact being that the property here claimed is the proceeds of the Chesapeake's cargo, belonging to the concern of Corp & Rowlett, and subsequently to Rowlett alone after payment of the debts of that concern, and there being no evidence that Grieve was induced to make any advances to the house of Corp, Ellis, & Shaw, from a belief that he held in his hands property belonging to Corp, as a kind of pledge or security, the property claimed must go to its real owner, William Rowlett.

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

Smith for the plaintiff, *Livingston* for the defendants.

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PATTERSON & AL. vs. *M'GAHEY.*

APPEAL from the court of the first district.

A factor has a lien, on the goods of his principal in his hands, for the general balance of his account.

DERBIGNY, J. delivered the opinlon of the court. The plaintiffs attached 44 bales of cotton belonging to the defendant Daniel M'Gahey, proved their debt and obtained judgment; but Wm. Fitz, in whose possession the cotton was, claims to be paid, in preference to the plaintiffs, the amount of his account of advances to M' Gahey.

It appears that, since the month of September, 1819, a course of commercial dealings were carried on between Fitz and M'Gahey; Fitz selling him goods on credit, and paying his drafts, and M'Gahey sending him cotton from time to time. Fitz's books show that he sold that cotton for M'Gahey's account, and carried the amount of sales to his credit; and that, at the time when the attachment took place, a balance of three thousand three hundred and fifty-three dollars, and eighty nine cents, were due from M'Gahey to Fitz. There can be no hesitation in saying that between men thus connected, whether they are viewed as principal and agent, or as creditor and debtor, property so situated must be considered as liable to the payment of

the advances made from one party to the other. It is a principle of the law-merchant, settled by repea ed decisions, that the factor has a lien upon the goods of his principal in his hands, for the general balance of his account; but when the factor, being the creditor of his principal for advances already made, receives from him a consignment of produce for sale, that principle applies with particular force; for such consignment is evidently a remittance. For the balance then, which was due to Fitz previous to the attachment, we say that he has a right to be paid out of the proceeds of the cotton consigned to him. We have not been able to ascertain whether the account last produced, purporting to be for acceptances by him made, on account of the cotton, is included in the account taken from his books, though we presume it must be. The objection raised by the plaintiffs against the production of that account, is, we think, without foundation; the claim of Fitz comprehending the advances made on the cotton, distinctly from the general balance as per account annexed.

It has been contended that whatever lien Fitz had on the 44 bales of cotton, he has lost it by taking a mortgage on sundry slaves and immoveables, the property of the defendant and

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giving him one year's credit to pay the sum therein recognised to be due him. If it clearly appeared that the sum, for which the mortgage is given, includes the amount here claimed, it would be worth enquiring, if Fitz has, in reality, given up his lien on the cotton by taking the mortgage. But although it is admitted that at the date of the attachment there was no other debt due from M'Gahey to Fitz, than the account presented in this case may establish, there is no certainty that the mortgage includes it; because the attachment and the mortgage are both of the same day, and the debt mentioned in the mortgage may, for aught that appears, have been created after the attachment was laid.

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

Smith for the plaintiffs, *Turner* for the defendant, *Morse* for the claimant.

NAGEL vs. *MIGNOT.*

If a note, not payable to order, given in payment of goods be mislaid, and the de-

See the argument of counsel, in this case, 7 *Martin*, 657—707.

DERBIGNY, J. delivered the opinion of the

court. This is an action to recover the amount of a note of hand said to be lost. The plaintiff does not allege that this loss has been occasioned by a fortuitous event, unforeseen accident or overpowering force, the only cases, in which the law permits the introduction of verbal evidence to establish the former existence of a written title, and to prove its contents. But he says, that the provision of our code, which excludes oral evidence in other cases, is not applicable to commercial matters, of which kind he alleges this transaction to be. Supposing, however, such exemption to obtain in favor of commercial dealings, we do not see its applicability to the present case. Negociable notes, payable to order or to bearer, are indeed considered as drawn in the course of trade, and are governed by the same rules as bills of exchange. But, what stamps upon them the character of a mercantile transaction, is their negotiability, or liability to be bartered away for the convenience of commerce. Take that feature from them, and they become simple obligations between man and man, which, so far from bearing any resemblance to commercial transactions, are entirely confined at home, and untransferable, except under conditions adverse to the nature of commercial dealings.

fendant does not plead payment, the court will be satisfied with slight evidence of its being mislaid.

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The note in this case, not being negotiable, we consider the article of our code, which is relied on by the defendant, as applicable to this claim, and we think that the plaintiff cannot recover the amount of the note, merely on making proof of its former existence, without shewing that its loss happened through one of the causes expressed in the said article; unless he has, by some admission, relieved the plaintiff from the necessity of proving that fact.

We will proceed to examine first, whether the plaintiff has shewn sufficient cause to entitle him to establish his claim by oral evidence? The law requires proof of a fortuitous event, from which, as we conceive, the loss of the title may be fairly inforced: for, the case can hardly be supposed, where a witness could swear absolutely to the loss of the title, unless he had lost it himself. The French text speaks of the accident by which the party *may have lost* his title, *par lequel il auroit pu le perdre.* Somewhat differing in that from the English, which says: "the event by which he *has lost* it." "If in the fire and pillage of my house (says Pothier, in his treatise on obligations, no. 781) I have lost any papers, among which were notes from my debtor, to whom I had lent money, I ought to be admitted to prove, by witnesses, the sum which I lent &c.

In the above case, it is necessary that it should be admitted, or that I should prove, that my house was burnt or pillaged, before I can be permitted to introduce testimonial proof of the loans of money, of which I pretend to have lost the written evidence." It is enough then to prove a fortuitous event, by which it may be fairly presumed, that the loss complained of, was occasioned; for if nothing short of a deposition, that the title was seen by the witness, at the very moment of its destruction, was deemed sufficient, it would hardly ever happen that the loss of a title could be supplied by oral proof.

But the fortuitous event, by which the loss is presumed to have been caused, must be proved. Was any such thing done in this case? We are inclined to think that enough has been shewn to open the door to testimonial proof. What amounts to a fortuitous event, in cases of this nature, must greatly depend on the kind of title which has been lost. A note of hand, sent out for collection, is exposed to more hazards than a sealed bond or a bill of sale in a desk. If when carried about, it should drop from the pocket of the carrier and disappear, would not this be a fortuitous event, with regard to the owner? It would seem just to consider it so. In the present case, a note, which had been so car-

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ried about, is returned to the owner at a moment when his shop is full of people. May it not be reasonably inferred, that in the bustle it was mislaid and lost? And will not that be sufficient to give access to testimonial proof? We think it ought. In all suits of this kind, much is, of necessity, left to the discretion of courts of justice. The accidental occurrence must be weighed by them, and if deemed sufficient to create a strong presumption of the loss, ought to open the door to oral evidence; for after that proof is permitted to be introduced, they will, in all cases of this nature, hear it with great diffidence, and finally refuse it belief, if not altogether satisfactory.

But should this interpretation still leave some doubt in the mind, as to the sufficiency of the evidence produced, in this case, to create a presumption of the loss, there is one very forcible reason why the rigor of the law, relied on by the defendant, should bend on occasions like this. Whether nothing short of some very serious accident will suffice to authorise the introduction of oral testimony to prove the loss of a written act, or whether occurrences of less magnitude will be deemed sufficient, in case of the loss of one of those papers which are usually carried about, one thing is, at least, certain,

which is, that a law, intended to guard against, the abuses of verbal evidence, can be invoked only by those who deny absolutely the execution of the written act, the existence of which is offered to be proved by parol : for if the party, against whom the loss of the written title is alleged, discloses, in any manner, that he is not ignorant of its former existence, and does not plead its extinction by payment or otherwise, there is not the same danger in admitting parol proof of its contents, and therefore no reason to apply with rigour to his case the law above mentioned.

Is there in this case an absolute denial that the note sued upon did ever exist ? We think not. There are, to be sure, in the answer, expressions which would amount to that, if they stood alone. But the defendant pleads especially, in a manner which destroys their force. He first alleges that, at the time when the obligation is said to have been contracted, he was under age and unable to contract ; and further, that the obligation, if ever contracted (which he denies) was without any legal consideration. Now, although, independently of the general issue, a defendant may set up other means of defence, to use them in case the general denial fails him, such special pleas must be consistent with the general one, not contradictory of it. In

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this case, the defendant begins by saying that he did not execute the obligation; but, by and by, he says that the obligation, if ever contracted, was without any legal consideration. How can he know whether it was or not, unless he knows first that the obligation did exist? How can he plead want of legal consideration, without admitting the existence of the note? But he first denied that the note ever existed. This mode of pleading double, *on facts within the knowledge of the party*, appears irregular and illegal, and is not in conformity with the positive provision of our statute, which requires the defendant to answer without evasion. He must either deny or admit *such facts*. He cannot say at once, that he did not, and that he did execute the act for which he is sued; and when after having said that he did not, he discloses in other words that he did, his denial ought not to avail him.

We, therefore, think, that in a case like this, where there is an implicit admission of the existence of the written title, on the part of the person who is said to have executed it, there is no occasion for those rigid rules, which require proof of the loss of it by a fortuitous event.

We make no mention of the bill of exceptions, taken by the defendant in the course of

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the trial below, the point which is contested in it, having been yielded in the court by the plaintiff.

We think upon the whole, that the judgment of the district court is correct; but the judge having omitted to provide for the security of the appellant, in case the note should again appear, we are obliged to reverse the judgment on that account.

It is, adjudged and decreed, that the judgment of the district court be reversed; and that judgment be entered for the appellee, for fourteen hundred and eighty nine dollars, he the appellee giving security to the appellant, in the like sum, that he shall return him his note of that amount, if he should again obtain possession of it, or indemnify him, if he should ever be sued upon that note; it is further ordered, that the appellee pay the costs of this appeal.

SCHOLEFIELD & AL. vs. *BRADLEE.*

APPEAL from the court of the first district.

It is sufficient to place the property attached in the custody of the law, that it be attached in the

Several suits were brought by attachment against this defendant, his property was taken thereon, and judgments were rendered in the

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garnishee's hands

The debtor's property, becomes the common stock of his creditors, in case of insolvency only.

respective suits for the plaintiffs. The plaintiffs, in the present suit, obtained a rule against the plaintiffs in the other suits, to shew cause why the proceeds of the property attached, should not be applied to the discharge of thier judgment. Thomas Holt & J. Goddard, two of them, shewed cause, and prevailed in the district court. The present plaintiffs appealed.

The counsel agreed that the record of the suits against Bradlee, should constitute the statement of facts.

With the record came a bill of exceptions taken by the counsel of the plaintiffs to the opinion of the district court, in rejecting parol evidence to shew that the goods attached had never been in the possession of Hyde, the garnishee. The district court being of opinion that evidence out of the record and the answer of the garnishee was inadmissible.

Hoffman, for the appellees. The present case comes before this court, in such a shape, as to make it difficult to come at the merits of it, without a recurrence to the records of the cases, lately decided in this court, between the attaching creditors S. S. Bradlee and Jos P. Bradlee, *ante* 21, and on that account, those cases

were made part of the statement of facts. The motion or rule for the distribution of the proceeds of the property, attached in the several attachment suits, against S. S. Bradlee, was entered at the instance of the counsel for Goddard, the first attaching creditor, and stands on the minutes of the court separately, in all the attachment cases, being six in number, to wit: *Holt* vs. *Bradlee*; *Goddard* vs. *same*; *Lee* & *Francis* vs. *same*; *Henshaw* & *Jarvis* vs. *same*; *J. Homdiked* vs. *same* and *Scholefield, Redborn* & *co.* vs. *same*. To the rule thus taken and entered, cause was shewn by the counsel for the appellants only, and the rule was made absolute. The judgment of the court below, does not order that the proceeds of the property attached at the suit of the appellants only, be distributed &c. but that the proceeds attached in all the attachment cases, against the defendant, be distributed according to the priority of their attachments. This judgment, therefore, must stand, unless the appellants can shew we did not attach the property in question. The transcript of the record sent to this court is imperfect, in as much as it does not give the rule as taken in all the cases; but should any difficulty grow out of this irregularity, it can prove injurious only to the appellants, who were bound

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to bring the case properly before this court. They complain that the judgment of the court below is erroneous, and ask its reversal, and this they must make out. The presumption is, that the judgment is correct. A difficulty is now raised, which was not attempted in the court below. It is said that the property, attached by the appellants, cannot be shewn to be the same attached by Goddard and others, and claimed by Joseph P. Bradlee. This we contend, does fully appear from the record in the case; but if it be not the same, then the appellants have no claim to make against the judgment of the court. On the 23d of December, 1818, process of attachment was served upon J. W. Hyde, and the property of the defendant, S. S Bradlee, attached. On the 7th of January following, the garnishee answers and sets forth the property in dispute, as the property of the defendant in his possession. Two days after, to wit: on the 9th of January, 1819, when the property of the defendant had thus been made known by the answer of the garnishee, the present appellants prevail on the sheriff to seize and take possession of it under their attachment, even after the garnishee had returned that same property into court as attached, once already by the present appellants. A claim to the

property, thus attached, was filed by Joseph P. Bradlee, as well in the case of the present appellants as in those of the other attaching creditors. That claim was decided against the claimant in the court below, and on appeal the judgment was confirmed. Can the appellants now be listened to, in their attempt to show that the property now in dispute is not the same claimed by Joseph P. Bradlee? But the testimony, on file, in the case of Lee & Francis, which makes part of the record in this case, removes all doubt on the subject. The return of the sheriff, to the writ of attachment of the present appellants, describes the property attached in the same manner, as it is described in the testimony above referred to, and proves it to be the same.

Having removed the difficulty, which has originated in this court, we now proceed to examine the cause, shown in the court below, why the rule taken should not be made absolute. 1. That the property in dispute was not in the possession of the garnishee, at the time of the service of our attachment upon him. 2. That no sufficient levy of our attachment was made upon the property, inasmuch as there was no seizure or corporal possession taken by the sheriff. In support of the first point, parole evi-

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dence was offered in the court below, but was deemed inadmissible, and a bill of exceptions was taken by the appellants. The return of the sheriff to the writ of attachment must be taken for true and parole evidence is inadmissible, to prove the contrary. We further contend that the fact attempted to be disproved was settled by a judgment, in one of the cases which now form part of the record in this case, and that the appellant was completely stopped thereby. That judgment cannot be said to be *res inter alios acta*, because it makes part of the record in this case. The appellants obtained a judgment, in this court, against Joseph P. Bradlee, upon the same testimony which now makes part of the record, filed in *Lee & Francis* vs. *S. S. Bradlee*, and now ask leave to prove the testimony not true and consequently the judgment erroneous. This we say the court below was correct in refusing.

2. We come now to examine whether there was a sufficient levy of our attachments on the goods, the proceeds of which are now the object of controversy. Upon this point, we contend that the return of the sheriff is conclusive. He tells us that he did attach all the goods, &c. in the possession of the Messrs. Hydes, belonging to the defendant. Who can be heard to contra-

dict this return? But admit, for a moment, that our attachments were incomplete, until it appeared, from the answer of the garnishee that he had property belonging to the defendant. Surely that cannot be pretended after answer made, and a statement of the property given into court. The property then, at least, may be said to be in the custody of the law. We place much reliance on the fact that the property attached by the appellants had been, two days previously, described and returned into court as in the possession of the garnishee and that, not only in our attachments, but also in that of the appellants. Thus, it appears that the boasted diligence of our opponents consisted in wresting the key of the store, in which the goods were deposited, from the garnishees, to wit: Messrs. Hydes, and taking what they please to call corporal possession of them. Let it be remembered, that the store in which the goods were deposited was occupied by the Hydes; the rent of it was paid by them and that no other person had any other control over it. These facts are fully established by the testimony in the case of Lee & Francis, making part of the statement of facts. But all this enquiry, we contend, the appellants are stopped from making, by the decision of this court between the attaching credit-

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ors and the claimant. There is no weight in the objection that, with regard to the appellants, it is *res inter alios actu*, because it forms part of the record in the present case. The claimant there contended that Sweetzer, the agent of Joseph P. Bradlee, took possession of the property in question before the attachment, in that particular case, was levied. But, in answer to this, the court say "The goods were then in the custody of the law." Now, it is clear that, if that be true with regard to the claimant, it must be so with regard to subsequent attachments. How came the property in the custody of the law? The answer must be by force of the writ of attachment in the case of *Goddard* vs. *Bradlee*. Upon this principle have the appellants obtained a judgment against the claimant, and will the court now hear them to show its incorrectness?

Admitting, however, that we were reduced to the necessity of supporting our attachment by a recurrence to our statutes alone, the result must be the same. Under our attachment law of the 10th of April, 1805, some doubt might exist, as there is no provision respecting garnishees; but the law of the 20th of March, 1811, enlarges the remedy, facilitating a discovery of the property of an absent defendant It is con-

tended that this latter law was intended for the discovery of the rights and credits only; the words of the act, however, do not authorize such a construction, for the garnishee is required to answer touching the *goods, chattels, moneys, &c.* of the defendant in his possession. This is an act to extend a remedy heretofore but imperfectly given, and should, therefore, be liberally construed. The great object in view, in creating garnishees, was to prevent the seizure of the property of third persons, and to prevent the litigation attendant on such errors. The court must be sensible of the fraudulent practices, a construction such as the appellants contend for must give rise to; for a garnishee, when summoned to answer, might have the property of the defendant so intermingled with his own as to prevent the sheriff touching it; but on the service of process, at the suit of one he might wish to befriend, he might point out the property to the sheriff and thus defeat the prior attachment. All such evils and inconveniencies are avoided by recognizing the principle that service upon the garnishee binds the property in his hands, and that is in conformity to the principle practised upon under the custom of London in cases of attachment, as also the attachment law of Pennsylvania. (See *Sergeant*

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on attachment, 12, 14, 15 *and* 20, *and* 1 *Mass. T. R.* 117. The fact that the property attached was sold by order of the court, upon application of the appellants, is much relied on, but can have no weight: for the order of the sale was made in such a manner as to preserve the rights of all others concerned. The property was perishable, which made it necessary that it should be sold, and it was deemed by the court unnecessary that it should be sold in the name of all the attaching creditors. The proceeds were ordered to be held subject to the further order of the court, with a view that previous liens might be first satisfied. Such is the usual mode in a court of admiralty, and is often practised in a court of common law.

Grymes, for the appellants. We contend that the judgment of the court below is erroneous, in ordering the proceeds of the property attached by us, to be paid over to other attaching creditors of the defendant, when it does not, nor cannot be made, appear that their attachments were ever levied, on the property the proceeds of which are now in question. The appellees, in support of that judgment, have attempted to shew that their attachments were the first levied upon this property; but neither the return of

the sheriff, nor the answer of the garnishee, shews it to be the same. The return of the sheriff in our case, is quite different from that made in those of the appellees, and we contend that the answer of the garnishee does not embrace it, because he never had it in his possession. The appellees caused their attachments to be served on Hyde, the garnishee, under an entire ignorance of the existence of the property we have attached, and to our exertions alone, are they indebted for the discovery. They are now striving to reap the fruits of our labor, and would fain imitate the lordly lion, by making jackals of us, to run down their prey. The proceeds in question are the same returned into the court by the sheriff, as the products of the sale of this property, made by order of court in our case only. In the order of sale, no mention is made of any other attachment. It was certainly incumbent on the appellees, to shew that they attached this same property; but the court below did not only dispense with that, but refused to hear our testimony to shew the contrary. To this opinion a bill of exceptions was taken by us, and should this court think we were bound to prove the negative, this case must be remanded to give us an opportunity of so doing. The court will ob-

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serve that this is not the only property belonging to the defendant, and attached by his creditors. The Hydes had a large amount in their possession, to which we never laid any claim, and which has been sold by order of court, on application of the appellees. It is alleged that the sheriff received the key of the store, containing the goods on which our attachment was levied, from the Hydes: but, can any person for a moment, believe that these gentlemen would have delivered to the sheriff the key of a store, in which there was a large amount of property, without an order of court, and at his mere request.

Admitting, however, that the property in question was in the possession of the Hydes, there never was any other levy of the attachment of the appellees, than by citing the Hydes as garnishees. This, we contend, was not a sufficient service of the writ. It may bind the rights and credits of the defendant, in the hands of the garnishee, but nothing more. The act of the legislature of 1805 gives the remedy by attachment and by the words of the writ therein given, the sheriff is commanded to seize and take into his possession, the goods and chattels &c. of the defendant. The sheriff is likewise required to execute the said writ in the manner

therein directed, and to make a particular return of all goods, &c. which he shall have attached, or seized by virtue thereof. The return of the sheriff, to the writs of attachment sued out by the appellees, shews that nothing of the kind has been done by him.

The law has been complied with in the service of our attachment only, and it is, therefore, the only one which can bind the property. But it is contended by the appellees, that the act of 1811 has altered the former law, so far as to make it no longer necessary that actual possession should be taken, where property is attached. There is nothing in that law from which such an inference can be made. The object of that law was to enable the creditor to attach the rights and credits of his debtor, in the hands of a third person, and in that case only, leaves the amount to be developed by the answer of the garnishee. An actual seizure is not dispensed with, in all cases where it can be made; and it is, with reference to rights and credits only, that the authorities cited from *Sergeant on attachments* must be understood.

Derbigny, J. delivered the opinion of the court. The plaintiffs having attached the property of the defendant, and obtained judgment

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against him, were proceeding to have it levied on the proceeds of the goods attached, when Thomas Holt interfered and pretended to be paid in preference to them; being an attaching creditor of the defendant's property of an anterior date. Three questions arise on this contest: 1. Is the property attached the same? 2. Are both attachments equally regular and complete? 3. Has the first attaching creditor a right to be paid first?

I. The property in dispute consists in goods of the defendant, which had been in the possession of Charles B. Sweetzer, an agent of his, and which Sweetzer, on leaving this country, had placed under the care of Wm. and Joseph Hyde, of this place, according to instructions from his employer. The goods were not received from the store in which they were deposited; but the key of the store and the invoices of the goods were delivered to the Hydes. Things were in that situation, when Thomas Holt laid the first attachment on the property of the defendant in their hands. The answer and deposition of J. W. Hyde, as garnishee, establish the facts, as above stated. The plaintiffs in this case and several other creditors afterwards laid attachments also on the goods of the defen-

dant in the hands of J. W. Hyde. His answers are the same in all cases.

But, the plaintiffs, some days after having attached the property, in the same lands and in the same manner, as the other creditors, caused the sheriff to attach, particularly, a certain quantity of goods *in a store no. 4 Bienville-street.* Are these goods distinct from those which had been already attached in the hands of J. W. Hyde? An attempt has been made to shew that they are; and, by the manner in which this second attachment is described, some doubt has been created respecting their identity; but, from an examination of the records of the several suits brought against Samuel S. Bradlee's property and the whole course of those proceedings, it evidently results that the goods here in dispute are the identical goods which were placed under the care of the Hydes, by Sweetzer, and which, having been attached in the hands of J. W. Hyde in this suit and several others, were claimed by Joseph P. Bradlee, and finally released from that claim by the judgment of this court. Should it, however, be deemed satisfactory that direct proof should be quoted in support of that belief, it may be found in the sheriff's account of the sale of the goods, where, among the items, deducted out of the gross

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amount, he mentions the store rent and other charges which he paid to the Hydes, and the costs of court in all the attachment suits carried on against those very goods; and it may be further proved in the testimony of J. W. Hyde, who swears that the store in which those goods were placed, and of which the Hydes paid the rent, is the same store in which the same goods were afterwards sold by the sheriff.

The bill of exceptions, by which the plaintiffs complain that they were not permitted to show by oral testimony, that Hyde, the garnishee, never was in possession of the goods attached in this case, we think, cannot avail them. They themselves attached in his hands these identical goods, before they pretended to attach them again in another form. There is abundant proof on record that Hyde had them in his possession, and among others the sheriff's account, and return, against which we think that oral evidence could not be received.

II. The second ground, insisted on by these plaintiffs, is that their attachment is regular and right, while the others are insufficient. The fact on which they rely, in support of that assertion is, that not content with attaching in the hands of the garnishee the property of the de-

fendant, as did the other creditors, they afterwards caused the sheriff to take it into his particular custody. We think, however, not only that an attachment in the hands of a garnishee is sufficient to place the property in the custody of the law; but that, after the service of such an attachment, the sheriff had no right to go and take the property from the garnishee, without a further order of the court; and that, by taking it, he has neither bettered the situation of these plaintiffs, nor made the condition of the others worse.

III. These plaintiffs contend that the first attaching creditor has no right to be paid in preference to them, in other words, that the property attached ought to be distributed among the attaching creditors. We know of no circumstance where the property of a debtor becomes the common stock of his creditors, except that of insolvency. The debtor in this case is a foreigner, and resides abroad. He cannot claim the benefit of our insolvent laws, nor can his creditors invoke those laws in their behalf.

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

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

This case, which was originally instituted against the deceased's executor alone, was before this court, in June term, 1819, and remanded. On its return to the parish court, the heirs were made parties. 6 *Martin*, 731.

They pleaded the insanity of the testator, and consequent nullity of the will; that neither the plaintiff, nor her child, could receive any thing under a will; nor could she, being a slave, maintain any action, except against such persons as unlawfully detained, and deprived her of her liberty; that the clauses of the said will invoked by the plaintiff, are contrary to law and void. They prayed that the cause might be tried by a jury.

The following issue was submitted to the jury, by the defendant: E. R. Avart, was not of sound mind, at the time of making and signing the last will and testament, upon which this action is brought.

The plaintiff's counsel objected thereto, urging that under the *Civil Code* 80, *art.* 17, *such proof is inadmissible.* The parish court

overruled the objection and he took a bill of exceptions.

The jury found the issue for the defendants.

A new trial was moved for on the affidavit of the plaintiff's counsel, stating the discovery of new and material evidence, not in his knowledge before, viz: that Cherbonnier went to see the testator about the time, and after he made his will, remained with him a considerable time, and he believes he was during the whole time of perfect, sound mind. Risteau was present, when A. Choppin, one of the heirs, came to the testator's house (after he had given himself the stroke with a sword, which occasioned his death, and before he made his will) and took out from a desk a check which he, Choppin, had given to Avart the day before, to purchase and emancipate the plaintiff.

The new trial was refused, and the plaintiff appealed.

De Armas, for the plaintiff. The will is an authentic one and has the following clause: *Erasmus R. Avart, residing in this city, in Conti-street, has been found, by the said notary and witnesses, lying on his bed, sick of body, but of sound mind, memory and understanding, as it appeared to the said notary and witnes-*

East'n District. *ses.* Among other dispositions, the testator ac-
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MARIE son of the plaintiff, a mulatto woman, belonging
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AVART'S HEIRS. to Nicholas Lauve. bequeathes freedom to her and the usufruct during her life of two houses and the lot of ground on which they stand, with a sum of money ; and to the said Gaston, at the death of his mother, the property of the said houses and lot, burdened with the usufruct. He made several other legacies and concluded by instituting for his heirs, by equal shares, his brothers and sisters, and appointing his brother Robert Avart, his executor. The will terminates by the following clause : *it is thus, that this last will has been dictated by the testator to the notary, who has written the same as it has been dictated ; and the said notary, having read this said will to the testator, he has declared to understand and comprehend well the same, and to persevere therein ; the whole in the presence of the said witnesses.*

There were two exceptions to the admission of the testimony, introduced in this case.

1. The first is grounded on the statute providing that, after the death of a person, the validity of acts done by him or her, cannot be contested for cause of insanity, unless the interdiction was pronounced or petitioned for, previous to the

death of such person. *Civil Code*, 80, *art.* 16.

It was necessary before the defendants should have been permitted to contest the will, for cause of insanity, that they should have shewn that an interdiction had been pronounced or petitioned for, previous to the testator's death.

This article of the code cited is a legislative innovation. No doubt that, according to the Spanish law, before the promulgation of our code, a will could be contested for cause of insanity, though there was no interdiction pronounced or petitioned for, against the testator; but this article changes the legislation, and forbids, in the most express, clear and energetic terms, that after the death of a person, the acts done by him be contested, for cause of insanity, unless an interdiction has been pronounced or petitioned for, previous to his death.

But, perhaps, it will be said that it relates only to the ordinary acts of life, and cannot be applied to donations and testaments; but, it is indefinite, and embraces all kinds of acts, without any distinction, and where the law makes no distinction, the court cannot make any; and our law has provided that, 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*, 5, *art.* 13.

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That, in France some courts of justice have decided that this disposition does not apply to donations and testaments, and others quite the reverse, cannot be denied; but in that country, a greater latitude is allowed to the judges than in ours, where we are the slaves of the laws, in order that we may be free.

Besides, *non exemplis sed legibus est judicandum. C. de sent.* 1, 13. *Etenim non tam spectandum quid Romæ factum est, quam quid fieri debuit. ff. de offic. prætor. l.* 12.

Our code speaks of all acts without exception. The only question which remains for us to examine is, whether the framers of it, our legislators, to whom we had delegated the power of prescribing the rules of our civil conduct, with the solemn obligation on our part, to submit to such rules, have considered testaments and donations, as *acts*. This examination, they have taken the trouble to facilitate to us, by declaring that a donation *inter vivos* is an *act* by which, &c. *Id.* 208, *art.* 2. A donation *mortis causa* is an *act* by which, &c. *id. art.* 3. A testament is the *act*, &c. *id.* 226, *art.* 82.

After this, can any doubt remain? Will our supreme court permit themselves to be guided by the interpretation, or the application that some of the French jurists and tribunals have

adopted, as to the corresponding article in the *Code Napoleon?* No, they will say as heretofore; "with whatever deference and respect, we may view the opinions of the authors cited (French judges and jurists) we are not certainly bound to adopt them. As the article of our code is indefinite, and does not distinguish and limit the species intended to be embraced by it, courts of justice cannot make any distinction." *Turpin* vs. *his creditors.* 7 *Martin*, 53.

The only answer they will make to the defendants is, *sero accusatis mores quos probavistis.*

2. The second exception, not less founded in law, is that the evidence is inadmissible, indepently of the article of the code cited.

According to the Spanish law, not repealed in this particular, an insane person may make a will, during a lucid interval.

An insane person cannot make a will, whilst he is so. *Part.* 6, 1, 13.

It is forbidden to make a will to a person who is out of his memory, *desmemoriado*, by which name the law of the Partidas, means a mad person or *non compos mentis. Sala, illustracion del derecho real de Espana, lib.* 2, *tit.* 4, *de los testamentos, n.* 9.

An insane person, and a person out of his me-

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mory, as long as they continue so, cannot make a will: but the will which they make before the madness or insanity is valid, as also the will which a madman makes during his lucid interval, if he concludes it within the lucid interval; for if before the will is terminated, the fit of madness returns, the will will not be valid. *Febrero, contratos* 1, 1, § 6, *n.* 20.

In this respect, the Spanish law agrees with the Roman law. The princes who have preceded us, and we have been pleased to decide that a madman may make a last will, during his lucid intervals, though the ancients entertained some doubts about it. Now it is a question to be decided, what would be the consequence, in case, after having begun his last will, the testator should become mad again, a point about which the ancients had also doubts We therefore, enact, that the testament of a man who, in the very act of making his testament, may labor under the disease, be null and void. But if he should wish, during a lucid interval, to make his testament or his last will, and should begin it, being of sound mind, and should finish it before such disease should return, we order that the testament or last will, whatever it be, be valid; provided, all the other formalities, which are required by law for such acts, be complied with. *C.* 6, 22, 9.

But in this respect, the Spanish law differs from the French, which I beg the court to attend to: as this difference serves to account for the inapplicability of many French doctrines and rules of proceedings, to the present case.

In France, from the very instant madness has made its appearance in an individual, he is to be considered always as mad: *Semel furiosus, semper furiosus presumitur*, and he is thereby rendered absolutely incapable of making a will, at any time afterwards, though he should have the most evident and longest lucid intervals.

Besides, says Merlin, it is very difficult, in France, to admit the circumstance of lucid intervals. They have felt there the inconveniencies of the Roman law, or rather of the interpretation that has been attempted to be given to it. All would be doubtful and arbitrary; the condition of men must be more certain. It is true, that old practitioners, who thought they had done much, when they had translated a Roman law into French, have said that the Roman law contained an exception, in favour of those intervals. But Mornac has judged of that law more correctly than them, when he said: "we hold, from the decisions of the courts, that the testament made by a testator who has lucid in-

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tervals is null." And in fact, no judgment of a court can be cited which has admitted and authorised the distinction of intervals, in order to support a testament, made since the commencement of the insanity. *Repert. de jurisp. vo. Testament.*

According to the Spanish, which is our law in this case, Erasmus R. Avart, could then make his will, during a lucid interval, and though he may have been mad before and after the making of the will, if it has been made during a lucid interval, it must be maintained.

If the notary, who has received the will of Avart, knew his professional duties and has complied with them, which must be taken for granted, till the contrary is proved, nobody else but the notary, the three witnesses to the will and the testator were in the room at the time of making and signing it.

Febrero, speaking of the manner in which the notary is to receive a last will, says: "nobody must know what it (the testament) contains, if it is an open one, till the moment of its being read to and approved of by the testator, at which time none else must be present, but the witnesses. 1 *Contratos*, 1, 1, § 20, *n.* 275.

In the same number, he gives the reasons why nobody else, but the witnesses, should be pre-

sent: in order to avoid, by this means, all kind of suggestion, particularly if he (the testator) is sick, and that he may be at liberty to explain what his wishes are and to discharge his conscience; because experience has taught that, when that is not complied with, testators make dispositions forced, repugnant and hurtful, which serve only to create discord and law suits.

In the second volume of a work entitled, *Cartilla real theorica practica, segun las leyes reales, de Castilla, para escrivanos, notarios y procuradores,* and which contains all the duties that the laws and usages of Spain have imposed on notaries, together with the forms of the acts to be passed before them, *(p.* 1.*)* it is said the notary, before all, should never lose sight of the following warning: when he is going to receive a will, he should not consent that there be present any other person than he, the witnesses and the testator. The presence of other persons serves only to embarass, and it has happened often that sinistrous wills have been executed, because the notary permitted persons to remain, who ought not to have been present. It is important that this warning be attended to, because the will of the testator (as it will be said afterwards) in what he is permitted to do, and his wishes must be free and spontaneous, and no

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person should remain there who, by force, caresses or prayers, may induce him to dispose of his property, in a manner contrary to his intention and conscience. The person, who should remain there and the notary, who might permit it, would be bound to indemnify the person to whom the testator was prevented from bequeathing what he intended to bequeath; and the notary, besides, if that be proven, ought to be punished.

Now, by whom is it intended to prove that Erasmus R. Avart was not in a lucid interval (supposing that he has ever been insane) when he made his will? It must be either by persons who were not present, at the making of the will, or by the notary and the three witnesses, who were present.

I say that this proof cannot be made by the former, not only because not being present they cannot say that it was not in a lucid interval that the will was received; but, because, in the will, there is the attestation of the notary and the three subscribing witnesses (who were, by the by, the only competent judges of the mind of the testator, at the time he made his will) that he appeared, at that time, of sound mind, memory and understanding, and as the attestation was signed after the will was dictated by the testator, written and read to him, by the nota-

ry, it follows that he appeared so to the witnesses, from the beginning to the end; which is evidence of a lucid interval. We have then in the testament a written proof of the sanity of the testator at the time, against which no oral testimony can be admitted. *Contra scriptum testimonium, non scriptum testimonium non fertur*, is a maxim of the civil law which receives exception but in few cases, of which the present is not one. But, supposing that the law should not prohibit oral testimony to be received in a case like this, of what weight can be the deposition of witnesses, on the lucid interval during which Erasmus R. Avart is said to have made his will, when they were not present? Let one hundred witnesses declare that the testator was as insane as a man could be, before and after he made his will, does it necessarily follow that the will was not made during a lucid interval? The notary and witnesses affirm that it was; the other witnesses can only deny it: and, in this case, it is a principle of law that more credit is to be given to two witnesses who assert an affirmative, than even to ten who deny it.

Castillo, in his work entitled, *Quotidianarum controversiarum juris opus*, gives a full treatise *de conjecturis et interpretatione ultimarum voluntatum* (chapter 28) and observes "that the

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proof by two witnesses, that a person was of sound mind, at the time of making an act, has the preference over the proof by many that he was insane before. More credit is given to witnesses who depose that a person is of sound mind, than to those who depose the contrary, and it is alike as to sanity and madness; because witnesses, who depose in favor of sanity, depose of a quality which naturally exists in every body; therefore, they are preferred to the others who depose of the insanity. Two witnesses who depose that a man was of sound mind, deserve more to be believed than ONE THOUSAND, who should attest that he was mad or insane.

Therefore, according to law, to reason and to the very nature of things, the court below ought not to have admitted witnesses, who were not present at the making of the will, in order to prove that it was not made during a lucid interval.

Let us examine now whether the notary and the witnesses, who have received the will, are competent witnesses in the present case.

Febrero observes, "that in order to have the testament of a mad person, who has lucid intervals declared null, it is necessary to prove in a clear and convincing manner (this is the translation

of the word *concluyentemente*, given by Newman, in his much esteemed dictionary of the Spanish and English languages, London, 1817) by the notary and subscribing witnesses that, at the time of making his will, the testator was mad and had no such lucid interval. 1 *Contratos*, 1, 1, § 1, *n.* 10.

The wisdom of this doctrine, founded on the nature of things, which considers the notary and the subscribing witnesses as the only persons fit to depose upon a transaction, at which they alone were present, is of the highest evidence. But is it general, that is to say, are the notary and subscribing witnesses to be heard, in every case? Is it not modified and restrained by any other disposition of the law?

There is a maxim, in regard to the interpretation, which judges and jurists ought never lose sight of, and that is, that laws are to be taken together, and interpreted the one by the other: *Incivile est, nisi tota lege perspectâ, unâ aliquâ particula ejus propositâ, judicare, vel respondere. L.* 24. *ff. de leg.*

When a witness contradicts himself, in what he says, his testimony shall not be valid. *Part.* 3, 16, 41.

When a person, without being put under his oath, relates a fact extrajudicially, and after-

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wards, being interrogated judicially, contradicts himself, it is in the discretion of the judge to believe, or not, his judicial deposition. 3 *Covarrubias*, 302.

Let it be permitted to me, to make here, by the bye, an observation which I consider as being important. In Spain, the judges are in general obliged to decide conformably to the testimony submitted to them; they may be sued, when they do not decide according to the testimony; but here, in every case, a certain latitude is left to our courts of justice, to appreciate the credit which is due to the witness.

Let us return to Covarrubias. He contines: if a witness extrajudicially affirm something under oath, and afterwards depose the contrary in court, neither of his testimonies ought to have any force.

The person who has given testimony in a suit which has been declared irregular and null, and afterwards says the contrary, before the legitimate judge, deserves no credit.

So it is, when a person has previously said some thing, though not under oath, but under his signature or seal: because then credit ought rather to be given to his first declaration (that under his signature or seal) than to the second given in court. *Id. loco citato.*

This doctrine rests upon considerations of morality and justice, the wisdom of which cannot certainly be disputed. Truth is one; it is the same at all times, and in all places. If, in order to administer justice, it be necessary to know the truth, can one flatter himself to know it, when, like a cameleon, it will, according to time and place, put on different colours and present itself under different forms.

True it is, that in countries, where the common law prevails, it is held that, except in regard to a negociable paper, a witness can be heard to contradict what he has said or written before. But, sound morality reproves such a doctrine and happily for us we live under a system of law, which rejects entirely such a monstrous doctrine.

In those countries, we have seen great men, of superior genius, oppose this doctrine with energy; but the current of authorities and the strength of habit got the better of them. Let us listen to lord Mansfield, one of the most celebrated jurists of England, who had made a particular study of the civil law, of which he was an admirer and zealous partisan. In the opinion he gave in *Walton* vs. *Shelley*, 3, *Durnford & East*, he observed "the old cases, upon the competency of witnesses, have

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gone upon very subtle grounds; but, of late years, the courts have endeavored, as far as possible, consistent with those authorities, to let the objection go to the credit, rather than to the competency, of a witness. What strikes me is the rule of law founded on public policy, which I take to be this: that no party who has signed a paper or deed shall ever be permitted to give testimony to invalidate that instrument which he has so signed. And there is sound reason for it; because every man, who is a party to an instrument, gives a credit to it. It is of consequence to mankind that no person should hang out false colours to deceive others; by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it. The civil law says, *nemo allegans suam turpitudinem est audiendus.*"

Judge Lyons, of the supreme court of appeals of Virginia, in *Baring* vs. *Reeder*, speaking of the dangerous consequences which result from permitting a man to depose against his acts, says: "for my part, I conceive that the case of *Walton* vs. *Shelley* was the best law, and ought to prevail against the latter opinion, *which opens a door to fraud and perjury.* 1 *Hen. & Mumf.* 174.

If this doctrine be sound, as to all acts in ge-

neral, how much the more is it when applied to wills? May the fate of so solemn an act depend on the perjury of witnesses, so indelicate as to come and give the lie before a court of justice to the truth, which their signature attests in an authentic act? A witness, after he has voluntarily put his signature to an act, in which he declares that the testator appeared to him of sound mind, is not to be believed afterwards, when he comes to declare the contrary. Why? because his signature gives a perpetual lie to his declaration, and because it is necessary that those, who affirm a fact before a court of justice, should not have previously attested the contrary. When in an act, the notary and witnesses have attested a fact, they may not be called on to disprove it, because once more their deposition would be in contradiction with what they have stated under their signatures; their prevarication must always be proved by other witnesses. If we could deviate in any particular circumstance, from principles so evidently founded on reason, certainly it could never be in the case of a will. When, in such an act, witnesses have attested that the testator appeared of sound mind, they cannot come and say, without belying themselves, that the testator was not so found.

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If the morality of a witness is to influence the credit due his deposition, pray what idea presents of himself the subscribing witness, who comes forward, in order to contradict what is contained in an act, which he has subscribed? When he was signing the will, the law, which consecrated his functions, presumed him to be honest and worthy of confidence. The testator, who sent for him, confirmed by his confidence this presumption. But the moment he opens his mouth to contradict what he has attested, he places himself in the most unfavorable point of view. The court, filled with indignation, evidently sees that the man who addresses it is an impostor; what confidence can it give, therefore, to the testimony of a man who, by his own act, shows himself unworthy of credit?

The public good demands that the fate of acts should not depend on the seduction and corruption of those who, after giving them authenticity, attempt to annihilate them.

A notary is an officer, in whom the public have placed their confidence. He is commonly one, whose probity and talents have been acknowledged. He is commissioned by the executive with the consent and advice of the highest branch of our legislature. Every thing

makes it his duty to preserve the good opinion that he must necessarily have given of himself in order to deserve that such important and honorable functions should be trusted to him. His rank in society is so high, that he must be either very blind or very corrupt to expose himself to lose, or even bring his character in question.

The persons who are commonly called to witness the execution of wills are offered by chance on the spur of the occasion, and their morality is often at least equivocal.

Let us suppose, and that is often the case, that a notary be sent for to a remote part of the city, and at a late hour, to receive the will of a wealthy man, having collateral heirs, whose conduct towards him has stifled all sentiments of benevolence, whilst more remote relations, or even strangers, have acquired sacred titles to his beneficence. The notary causes the three witnesses to be called, who are the most easily to be found. He is convinced that the mental situation of the sick man permits him to make his will. He receives his last dispositions; and in order to have a written proof that he has complied with the disposition of the code, which forbids to receive the testament of any person insane, because he knows that a notary, like Cesar's wife, not only must be pure, but must

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also be unsuspected, he takes the wise precaution to state in the act the sanity of the testator by a clause, to which the witnesses agree, inasmuch as they sign it, without any kind of constraint or opposition. If afterwards these witnesses can be heard to contradict the attestation, will not the heirs use every effort to seduce the witnesses and bring them forward in order to invalidate the will, and if it be a truth, which nobody can deny that interest is the principal cause of all crimes, will not witnesses in many cases be tempted to accept a bribe?

If such witnesses could be heard, who is the man, who has collateral heirs having a legal right to his succession, *ab intestato*, who could dispose in favor of friends or even remote relations conformably to law, with the assurance that after he descends into the grave his greedy legal heir will not attempt to question his capacity and sully his memory by indiscreet inquiries. There is a doctrine more humane, more moral, in a word more conformable to the rules of justice, contained in our statute book, which provides, that, as soon as death has seized upon an individual, he ceases to belong to human justice, except in a specified case; that the living shall not be permitted to take him out of his grave and drag him before a court, where it is no

longer in his power to defend himself, and there attack his capacity and his memory, with the view of seizing upon the estate he left. *Civil Code*, 80, *art.* 16.

Let us conclude, therefore, that we cannot absolutely receive either the declaration or deposition of a witness to a will, in which the mental capacity of the testator has been certified; his deposition cannot be of any weight before a court of justice; it is declared null by the law, without it being necessary to examine whether it be contrary or conformable to his written testimony. It adds no credit to it, if it contains the same facts; it does not shake it, if it contains contrary ones.

If in France, wills containing the attestation of the notary and witnesses, that the testator was of sound mind, have been attacked on an allegation of the insanity of the testator, and witnesses heard to prove it: it is because, there, as we have already observed, from the very moment that an individual committed an act of insanity he was, by law, rendered absolutely incapable of making a will, and though he should have made one in a lucid interval, however wisely and legally he might have disposed of his estate, his will was null and void. The attestation of the notary and witnesses that the testator was

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of sound mind shewed that the will had been made in a lucid interval; but, as that was not sufficient for its validity, the heirs were permitted to prove the insanity of the testator before the will. But, I defy any one to cite a single case in France, where the subscribing witnesses to a will containing a declaration that the testator, at the time of making his will, appeared to them of sound mind, have been admitted to prove the contrary.

By a judgment of the 16th of June, 1753, reported by de Gras senior, it was decided in the grand chamber (of the Parliament) that on a will contested on the ground of the insanity of the testator, at the time, before or after, the subscribing witnesses could not be heard, and their depositions were rejected by the tribunal when it pronounced on the objections against them, though they had been already heard in the inquest made by the party who maintained the validity of the will. This decision was grounded on a consideration of the consequences prejudicial to the repose of families, if witnesses, after having signed a will, in which it was said that the testator was of sound mind, could be heard again. Their depositions, in favor of the will, would be useless, inasmuch as the testator having the presumption in his favor, strengthen-

ed by the attestation of the notary and witnesses, those persons cannot give to it an additional force by their depositions in an inquest, and it would be attended with the most dangerous consequences allow them to depose against the will and disavow or contradict what they had attested and to permit the most solemn acts to be thus destroyed.

Will it be said, after such a decision, and without legal authority, that the declaration or attestation, which the notary and witnesses give in the will, that the testator is of sound mind is a matter of form, is a clause of style to which no importance is attached? Let a court of justice, before they sanction such a legal heresy, reflect maturely, and consider the dreadful consequences to which it would lead. If any part of so solemn an act as a testament is to day declared a matter of form, there will be no bounds to the doctrine. To-morrow a like decision will take place concerning another part of it; the ordinary contracts will soon have the same fate, and the broadest of all doors will be opened to suits, disorder, confusion and ruin. There will be few testaments, in which the testator shall have disposed so as to deprive his legal heirs of a portion of his succession which, if the will is annulled, will go entire to them that shall not be successfully attacked.

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In Spain notaries generally receive wills according to the form prescribed in *Part.* 3, 18. 103, and that given by Febrero.

That given by the Partida is as follows: "Know all men who shall see this instrument, that I, Estevan Fernandez, being sick of body, but of sound mind, make this my testament, &c."

After prescribing how the testator is to dictate his will, in which it makes him speak always in the first person, it concludes: "and on his part the notary is to state the place where the will was made, and before what witnesses, and the day, month and year."

The form given by Febrero is as follows: "In the name of God Almighty, amen. I, *such a one*, *&c*, being through the divine mercy well and sound and in my entire understanding, &c."

Here follow the dispositions of the testator, who speaks always in the first person, and the only words spoken by the notary, at the end of the will, are these: "Thus dictated and signed before the present notary, at such a place, on such a day of such a month and year, A. B. C. and D. residing in the same place, being witnesses."

It is clearly to be seen by what is stated, that in Spain the notary and witnesses are silent on the sanity of the testator, and it is in such cases

(and no in a case where the notary and witnesses have declared in the will that the testator appeared to them of sound mind) that they can be heard upon his sanity, according to what Febrero says : and even in that case, unless it be proved by the notary and subscribing witnesses in a clear and convincing manner, that the madman, at the time of making his will, was not in a lucid interval, the will is to stand.

Another reason which opposed the admission of the parole evidence of the insanity of the testator, at the time of making his will, is that which results from the wisdom with which he has disposed of his property. In it we see, it is true, that Erasmus R. Avart disposes of a portion of his property in favor of two natural children ; but, in these dispositions, who is the man, callous enough to all natural sentiments, who instead of seeing feelings natural not only to men, but to animals, will discover an act of insanity ? Certainly Avart, in becoming father of such children is not exempt from reproach in the eyes of morality ; but he did not infringe the laws of his country, since the framers of our code (more humane than certain stoics who have no indulgence for the frailties of others, because they were lucky enough to be born virtuous, or perhaps because circumstances have

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favoured them) have impliedly permitted donations *causa mortis* and *inter vivos*, to be made to concubines, *Civ. Code*, 211, *article* 10, and, in several places, not only have permitted dispositions in favor of natural children, but have given them certain rights on the successions of their fathers and mothers. Our legislators knew that they were framing laws for men like themselves. At the time, that they wished to favor marriages, on which the prosperity and good order of society chiefly depend, they knew, also, that *jura sanguinis nullo jure civili dirimi possant. C.* 8. *de reg. jur.* It is evident, therefore, that Erasmus R. Avart, not only obeyed the dictates of nature, but, also, acted under the authority of the law. He could, according to it, institute as his heirs other persons than his brothers and sisters. He could, as it is often practised in this country, after disposing in favor of his concubine and natural children of all the law permitted him to bequeath to them, institute for his heir some friend, who would have taken the obligation to dispose of his succession, according to his directions. But that he did not do; he again obeyed the dictates of nature. and instituted as his heirs those very brothers and sisters, who come now to contest his mental capacity.

Let any person read the will with attention; let him examine every one of its clauses; let him reflect that it is the testator himself who has dictated it, as appears not only from the instrument itself, but from the declaration contained in the opinion given by the judge *a quo*, in refusing the new trial, in which, he says: "*it is fully admitted that the last will was dictated to the notary in the presence of the witnesses, as the copy thereof has exhibited it,*" and let him pronounce, if he dares, that it is not the work of a man who, at that time, did enjoy the plenitude of his mental faculties.

There is not an impartial man, but, who after reading the will carefully, will declare that if the testator had ever been mad, he was, beyond any doubt, in a lucid interval, when he dictated it.

Castillo says, the common opinion of doctors is that a contract, or testament, properly made by an insane or mad person, who had lucid intervals, is good and valid in the same manner as if it had been made by another, though there would be no proof, that at the time of making the act, he had lucid intervals: because, the presumption of madness is destroyed by the quality of the act made afterwards, to such a degree, that if the act made becomes a man of a

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sound mind, the person, who has made the act, must be presumed to be of sound mind at the time of making it. *Loco citato.* He adds: Petrus Magdalenus, adopting the sentiment of a great number of others, observes that if it be proved that a madman has lucid intervals, and should make an act becoming a man of sound mind, then from the very quality of the act, it must be presumed that the act has been made at the time of a lucid interval, and therefore, it shall be valid. *Id.*

Chancellor d'Aguesseau, in his famous argument, in the case of the abbe d'Orleans, treated of all that concerns insanity with a superiority of genius, which was the characteristic of that illustrious magistrate. He said: it must be confessed, that the wisdom of a testament is, without difficulty, a very strong presumption of the sanity of the testator. It was by the authority of this presumption that the senate of Rome anciently confirmed a testament made by a madman, because there was nothing in it, but reasonable dispositions. It was probably presumed that it had been made in a lucid interval, and no regard was paid to the unquestionable insanity of the testator, in order to consider only the uncontested wisdom of the testament. It was also, for a like reason, that the emperor

Leo, the philosopher, decided in his 39th novel, that the testament of a prodigal *interdicted* ought to be executed, provided it should not contain any thing unbecoming the wisdom of a good father of family.

As to the suicide of Erasmus R. Avart, in which some would find an evident proof of insanity, and particularly the judge *a quo* in his reasons for refusing a new trial, I would observe that it is true, in some particular instances, that madmen have committed suicide; but it is paralogizing, it is infringing the precept of logic which forbids to conclude from the particular to the general, to say that all suicides are the acts of madmen. Never has suicide been considered as the necessary effect of madness. The only question which has been agitated concerning suicide, by great men of all ages and countries, is whether it be an act of cowardice or bravery; much has been ably said for and against and *adhuc sub judice lis est.* A celebrated author has written, on the subject of suicide, two admirable letters; one for, and the other against. Let any one read those letters of Jean Jacques Rousseau, and I am persuaded, that it is ten to one, that he will consider the arguments for suicide a great deal stronger, than those against it, though the author's intention was to be a-

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gainst it. What can be answered to what he says in the first letter?

"According to them (the sophists) it is cowardice to rid one's self from grief and pain, and those are cowards, who put an end to their existence. O Rome, the conqueror of the world! That Arria, Eponina, Lucretia be called cowards, may be conceived: they were women. But, Brutus, but Cassius, and thou, who didst share with the gods, the respect of mortals, great and wise Cato, whose august and sacred image filled thy countrymen with a holy zeal, and made tyrants tremble, thy proud admirers were far from thinking, that one day, in the dusty recesses of a college, vile schoolmen would demonstrate that it was through cowardice, that thou didst refuse to successful crime the homage due to enslaved virtue. O modern writers! how great and sublime are you, and with what intrepidity do you wield a pen!"

We will add here the remark made by a great writer, after reading Rousseau's letters:—

"Let us not trust to the prejudices of ages and nations. When it is not fashionable to kill one's self, those who do it are considered as mad; all acts of valour are as many chimeras for week souls: every one judges of others by

himself. However, how many well attested examples have we of wise men in every other respect who, without remorse, without madness, without despair, renounce life, only because they are tired of it, and die with more composure than they lived!"

But even if it be admitted that suicide is always the effect of madness, Avart's will was received after suicide had been committed by the testator, and of course at a time when he could be in a lucid interval.

Yes, it was in a lucid interval it was received. The judge *a quo*, through whom every particle of testimony went to the jury in this case, in refusing the new trial, says: *no doubt, in this case, that the testator appeared of sound mind to the notary, as long as he remained with him;* and a little after, he adds, *we think then, and so will every body, that the notary was imposed upon* (meaning, without doubt, *deceived*, which is the correct translation of the word *tromper* in this case) *by the lucid interval in which he found the testator.*

Is it not evident from these expressions, used by the judge *a quo* that he took for his guide the French laws, which do not permit to make a will in a lucid interval? This is a question, which I beg this court to weigh in their wis-

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dom and decide in their justice. *If the testator appeared of sound mind to the notary, as long as he remained with him*, how, in the name of God, did he not appear so to the witnesses? And if he did not appear of sound mind to them, how, in the name of God again, could they certify that he did, without the least representation to the notary on that score? That no such representation was made to the notary, appears in what the judge, *a quo*, says of the testimony given in court by Pignatel, one of the witnesses: that it is *somewhat less explicit* than that given by the other witnesses, which shows that not even a doubt was suggested by the witnesses, at the time of making the will.

Again, if the testimony, given by one of the witnesses to the will, is not explicit, then the three witnesses do not prove, as Febrero says, *in a clear and convincing manner* that the testator was not in a lucid interval, when he made his will, and for that reason, it ought to be maintained.

I ought to stop here, convinced that what I have said is sufficient to determine the court to decide that the defendants cannot contest the will of their brother for cause of insanity, or at least that no testimony was admissible against

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the attestation of the notary and witnesses, contained in the will, that the testator was of sound mind, no fraud or constraint being alleged. But the plaintiff has appealed from the refusal of the parish judge to grant a new trial, and it is the duty of her counsel to examine whether he did not err in this respect.

Judges, as all other public officers, are essentially established for the advantage of society. Their first guide, that which they cannot abandon without prevarication, is the law ; their first duty, that of which they must be the slaves, is justice. In certain cases a discretionary power is left them ; but always under the solemn, though tacit condition, that they shall use it only for the promotion of justice.

Let us weigh the reasons which might have induced the judge to refuse the new trial and those which ought to have induced him to grant it ; as I take it to be the rule that when this court are of opinion that, had they been in the place of the judge *a quo*, they would have granted the new trial, they are bound by law and their conscience to order it to be granted.

The law says, *that, as well in causes where facts are tried by a jury, as where the trial is had by the court, whenever new evidence, material to the cause, shall have been discovered af-*

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ter the said trial, which the party could not, by reasonable diligence, have discovered before, if it shall appear that justice has not been done, the court, on the application of the party injured by such verdict or decision, may grant a new trial.

The plaintiff's counsel having discovered, after the trial, new evidence, of the nature contemplated by the law, applied for a new trial.

What were the motives of the judge in refusing it? Before transcribing them, let me be permitted to make an observation, on a doubt which the judge expressed, and on which I would expatiate, were I not the person who made the affidavit. It is a maxim of law, I believe, that what a person declares, under oath, is to be believed, till the contrary is proved, and according to this maxim, I think the judge would not have been correct had he done, what he declares, with a sham generosity, to have waived to do, that is: *expatiating in order to ascertain whether or not, the new evidence, by reasonable diligence, could have been discovered before.*

He says that Cherbonnier's testimony (offered to prove, that he saw the testator about two hours after he made his will, remained and conversed with him a considerable time, and verily

believes that he was, during the whole of that time, of sound mind) not being stronger than that of father Antonio, who was introduced to the testator, just as he had finished his will, and declared that the testator had appeared of sound mind, the court could not be convinced that this weaker and later testimony, could alter the opinion of the jury.

How could the judge know, what impression the testimony of Cherbonnier, added to that of father Anthonio, would make in the minds of the jury. The judge might declare that such testimony would not alter his opinion; but it seems to me, that he went too far, in deciding for the jury.

The judge declares that the testimony of Ristaud, is no more material, than that of Cherbonnier, because it *only corroborates what is evidenced by the testament*; *that is to say, the testator's constant desire to make the plaintiff free.* Had the judge paid any attention to the signification of these words, when he put them on paper? What! the testament evidences by itself the testator's *constant desire* to make the plaintiff free? If it does, I must confess my incapacity of discovering it.

But let us see, what the testimony of Ristaud would have established. It would have shown

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that Choppin, the brother-in-law, and the intimate friend of Erasmus R. Avart, and who of course knew whether Avart was mad or not, had lent him the day before, a check in order to purchase the plaintiff, and emancipate her; and that the disposition of Avart, in favour of the plaintiff and her child, was the consequence of a premeditated and long entertained resolution of the testator, of which he had informed a man nearly related to him, his sister's husband.

It is a testimony of this kind that the judge calls trifling, and which he takes upon himself to declare incapable of operating on the minds of the jury? How! a jury would not have a strong reason to believe that Avart's insanity was not a fact so constant, when they should have seen that his brother-in law lent him a check, of no small amount, since it was for the purchase of the plaintiff and her child, the very day before he made his will! Is money now so easily to be had, as to be lent to madmen?

Let us now examine, what reasons ought to have induced him to grant the new trial.

What the plaintiff and her child had at stake, in this case, was their freedom, a thing which the Roman law, agreeing with that of nature and reason, proclaims emphatically *inestima-*

bilis res, and the Spanish law *la libertad es una de las mas honradas cosas, e mas caras de este mundo. Part.* 4, 22, 8. By the judgment she and her child (the blood of the testator) were deprived of the blessing which the testator bestowed on them.

What injury could result to the defendants, if a new trial was granted? If their cause was so evidently just, that it left in the mind of the judge no shadow of doubt, a new jury would have given a similar verdict. There was no fear that a jury would have been influenced by any consideration whatsoever, in favor of the plaintiff, to the detriment of the defendants. She poor, a slave and of a colour reprobated by our social institutions, having to contend with many respectable, wealthy and influential citizens, would have obtained only what strict justice could not have refused.

One of the reasons on which the judge grounds his refusal is, that the statute provides that a special verdict shall be conclusive between the parties as to the facts in the cause as well in the court where the cause is tried, as on the appeal, and *must be the judgment of the court*. The law does not say that the finding of the jury shall be the judgment of the court, because in such a case, it would be a general finding, which is reproved by law.

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Has the legislator meant that the judge should always adhere to the special finding of the jury, however unjust, or erroneous it may be? No such monstruosity: he has taken the care, with a paternal solicitude, to add immediately to that legal disposition two provisoes: one of which is, that *nothing shall prevent the court from granting a new trial, when by law, either of the two parties is entitled to the same.*

The very reason that the special finding of the jury was to be conclusive against Marie, on the appeal, ought to have been a consideration for the judge below to grant a new trial, in which his conscience, better informed, would have guided more surely his justice.

But it was enough to determine him to grant the new trial, that new and material testimony had been discovered.

We have often seen judges after deciding cases themselves grant new trials, for, they were convinced their judgments were not infallible, and their minds were always open to conviction.

Have we not seen many a time this court, where certainly we are not to find less information and experience than in our other courts, grant rehearings and alter decisions which they had rendered after the most mature reflexion?

And, in this conduct, which does the more honor to the judges who preside, the public find an assurance, that their only aim is justice.

Mazureau, for the defendants. The record shows that the plaintiff did not object to the introduction of any witness, offered by the defendants.

The 10th section of the act of 1817, has provided, that in every case to be tried by a jury, if one of the parties demand that the facts, set forth in the petition and answer, should be submitted to a jury, to have a special verdict thereon, both parties shall proceed, before the swearing of the jury, to make a written statement of the facts so alleged and denied, the pertinency of which statement shall be judged of by the court and signed by the judge, and the jury shall be sworn to decide the question of fact or facts, so alleged and denied, and their verdict, or opinion thereof, shall be unanimously given in open court, and shall be recorded by the clerk, and after having been so given and recorded, be conclusive between the parties, as to the facts in said cause, as well in the court where the said cause is tried, as on the appeal, &c. *Acts of* 1817, *p.* 32.

Desirous of availing themselves of this pro-

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vision, the defendants who, in their answer, had alleged that the testator was not of sound mind, when he made his will, reduced this proposition to writing, requested the judge to sanction it by his signature, in order that it might be submitted to the jury. This was opposed by the plaintiff's counsel; but the judge, being satisfied with the pertinency of the statement or issue, signed and submitted it to the jury. The plaintiff's counsel took his bill of exceptions.

The only question before this court is, did the judge err in allowing this issue to be submitted to the jury, in other words is it a pertinent one?

Our statute provides that no disposition *causa mortis* shall henceforth be made, otherwise than by last will or testament, *Code Civil*, 257, *art.* 81, and to make a donation *inter vivos* or *mortis causa*, one must be of sound mind. *Id.* 208, *art.* 4.

In vain, in order to avoid the fact of the sanity of the testator's mind being submitted to the jury, did the plaintiff's counsel invoke the part of the statute, which provides that, after the death of a person interdicted, the validity of acts done by him or her cannot be contested for cause of insanity, unless the interdiction was pronounced or petitioned for, previous to the death of such person. *Id.* 80, *art.* 16. Admit-

ting this provision to be applicable to *all acts*, without any distinction, and consequently to testaments, it prevents, at most, the introduction of any other proof of the insanity of the testator, than the sentence of the competent judge, or a petition presented to him to procure the interdiction.

If the plaintiff's counsel had thought that this part of the code prevented the introduction of oral evidence of the insanity of the testator, after the jury were sworn, he would have opposed the introduction of such evidence, and if his objections had been overruled, he would have excepted to the opinion of the court. The record shows he did not do so; the conclusion presents itself forcibly to the mind, that he then thought, as I do, that this provision of the code is not applicable to testaments. But, whatever his opinion may have been, he ought to have excepted to the opinion of the court *a quo*, admitting improper testimony. Questions of this kind can be examined in this court upon a bill of exceptions only.

In saying that the plaintiff's counsel ought to have excepted to the introduction of witnesses, if any were introduced, to prove the insanity of the testator, I am supported by the law and practice of this court. It cannot notice any fact which

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does not appear by a statement legally made. It cannot notice a fact mentioned in the opinion of the inferior judge. Nothing, in the record of this case, shows on what kind of proof the jury have pronounced, nor that any piece of evidence offered was objected to.

I might stop here, as to the first ground taken by the opposite counsel; but, I am willing to admit, for argument's sake, that without any opposition having been made thereto below, and although no part of the record shows that any oral evidence was tendered, he may urge, in this court, that such evidence was inadmissible.

However general and indefinite, the provision of the statute relied on by the plaintiff's counsel (*Civ. Code*, 80, *art.* 16.) it is incorrect to say that it extends to all acts, without distinction, even to donations *causa mortis*.

I admit that this provision is an innovation and that before the promulgation of the civil code, interdiction on account of insanity was not known to our laws; hence, I conclude that it is not in the Spanish law, that we are to take a guide in the application of this new provision. We ought rather to seek for information in the work, from which this amendment in our jurisprudence has been drawn, the Napoleon code, from the 504th article of which the article under consideration is literally copied.

If we find that this 504th article is considered by the courts and jurists of France inapplicable to a testament, unless the reasons on which the restriction is grounded appear to us in opposition to the sound rules of interpretation, we will be induced to conclude that the same expressions, literally copied in the corresponding part of our code, ought not to receive a greater extension. What is reasonable and just in France, must be equally so in every other country, on the same principles.

Before I proceed to examine the decisions of the superior courts of France, and the opinions of the ablest lawyers of that country, I must pray the court to observe that another article of our code, cited by the plaintiff's counsel is also, a literal copy of the corresponding one in the *Napoleon Code*. To make a donation *inter vivos* or *causa mortis* one must be of sound mind. *Civil Code*, 108, *art.* 5. To make a donation either *inter vivos*, or *causa mortis* one must be of sound mind. *Code Napoleon*, 901.

Paillet is the first author, to the works of which I am to draw the attention of the court. In his note on the 504th *art.* of the *Napoleon Code*, of which the corresponding article in our code is a literal copy, he observes : the acts of

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a person, who died before the promulgation of the code, may be attacked on the ground of insanity, although no interdiction was provoked before his death. The 901st article which provides that in order to dispose of one's property by donation or testament, one must be of sound mind, has received no restriction from the 504th article, which is applicable only to ordinary acts, and not to donations and testaments. The utmost latitude is left to courts to admit and reject evidence of insanity, in regard to a will or donation. *Cour de Poitiers, May* 27, 1808.

In the proces verbal of the council of state, containing the debates on the project of the code *(vol. 2, p. 137)* we find that the 17th article of the project, in the title *of majority and interdiction*, which is now the same article in the same title, and the 504th of the code, was proposed and adopted, in the same words, and without any difference from the corresponding article in our code.

We find also, *id.* 348, that the disposition, contained in the 901st article, was in the project expressed thus: "in order to make a disposition *in er vivos* or *mortis causâ* one must be of sound mind. these acts are not be attacked on the ground of insanity, except in the case and in the mode prescribed by the 17th article of the title *of majority and interdiction.*"

If the legislators of France had intended that the 17th article of the project, now the 504th of the code, should be applied to donations and wills, as to other acts, it is clear that they would have preserved the second part of this 901st article, which in the project was the 16th of the first chapter, entitled *of the capacity to dispose or receive by donation inter vivos or testament.*

We find in the same volume, *p.* 370, that one of the members of the council, Cambaceres, then second consul, and one of the most enlightened lawyers of France, thought that *this second part presented a disposition too absolute*; that another member, Tronchet, not less celebrated as a jurist, added that *the 17th article of the project* (now the 504th of the code) *to* which reference *is made, is too restricted.* "It allows only the family to plead the insanity of the grantor" says he "when his interdiction was provoked during his life: but the family hoping for the recovery of their chief, are long prevented by such an hope, from provoking his interdiction;" that Cambaceres added "the first part of the article provides for every case. Insanity is a fact, and the law determines how it is to be proven; the second present the inconveniencies of which citizen Tronchet speaks,

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it is unfavorable to legal heirs, and in opposition to the spirit of our legislation, which favors them :" he added afterwards " much latitude is to be given to proof; it ought not to be restricted by conditions which some times totally exclude it. An individual may have preserved a sound mind, till a very short period before the donation or will, and then it becomes impossible to prove his insanity, if the restriction is preserved. The first part contains a plain rule, which suffices : the rest ought to be left to the court."

Emmery, another member, observed that the 17th article of the title, *interdiction*, in the project, the 504th of the code, does not relate to donations or testaments.

We find, by the code itself, that the first part of the article was alone adopted; and the second was rejected, and this according to the observations of Cambaceres; or, as was said by the orators of government, when they presented the work of the council of state to the legislative body : " the will of him who disposes, ought to be certain ; it cannot exist, if he be not of sound mind : it has sufficed to express thus, the general principle, *to make a donation* inter vivos *or a will, one must be of sound mind,* in order to leave to the judge the utmost latitude in its application.

It is then clear that the legislators of France, did not intend that the 504th article of the Napoleon code should extend to donations or wills.

If we except a decision of one of the courts of appeal, soon after the promulgation of the code of Napoleon, all the sovereign courts of France, and principally the court of cassation have consecrated the principle, we have cited from Paillet, viz. that the 504th article, which prohibits an act to be attacked on the ground of the insanity of the maker, does not extend to donations and wills, and that the 901st, which requires that a donor or testator should be of sound mind, is not restrained by the 504th.

In a decree of the court of cassation, of the 22d of November, 1810, that tribunal "considering that the article 504th of the Napoleon code is not applicable to donations *inter vivos*, or testaments, which are *especially* regulated by the 901st article, definitively adopted and promulgated in these words: to make a donation *inter vivos, or a testament*, one must be of sound *mind*, there results, from the generality of the expressions used, that notwithstanding the articles 1341, 1347, 1352. and 1353, of said code, parties are permitted to allege, and courts to receive, proof of facts from which it may result

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that a donor or testator was not of sound mind, when the deed of gift or will was executed, without enquiring whether these facts are or are not evidence of a permanent insanity, rejects, &c." 11 *Syrey*, 75, 1st *part*.

The imperial court of Colmar, in a decree of the 17th of June, 1812, expresses itself thus: "whereas of all the allegations of the appellees, to set aside the will made by Magdalen Joegen, on the 1st of September, 1808, the first and principal one is, that they maintain and offer to prove that before, at the time of and after the execution of the will, the testatrix was in a permanent state of weakness of mind, childhood and even imbecillity; and it is important, before examining the case further, to ascertain the truth of these allegations, which may have a material influence on the cause, and whereas this proof is admissible, although no interdiction was pronounced or provoked against the testatrix, before her death, because, according to the 901st article of the Napoleon code, one must be of sound mind to make a donation *inter vivos*; a fact not of the substance of the act, though essential to its validity. And whereas the article 504, was improperly relied on by the appellants, since the legislature did not intend to extend it to testaments, which are re-

gulated by the article 901; for these reasons without pronouncing on the merits, and with a reservation to the parties of their respective rights, the court allows proof to be made of the alleged insanity, &c."

I do not pretend to place these cases before this court as precedents of binding authority, neither do I contend that the arguments of these tribunals are entitled to any other weight than that which they derive from their conformity to principles, recognised in our courts.

But before we examine the motives which actuated the tribunals of France, let us notice the attempt of the plaintiff's counsel. He contends that the will contains an enunciative clause, that the notary and witnesses have found the testator sick, but of sound mind, memory and understanding, as it appeared to them, and that now to admit parol proof of the contrary, would be to violate a provision of our statute, which prohibits such a proof against or beyond the contents of an act. *Civil Code*, 310. *art.* 242.

In the first of the two cases, which I have just cited, two questions were submitted to the court. Was the testatrix of sound mind, as the instrument mentioned? Did she dictate the will, as is therein expressed, or, as is alleged, was her tongue so swollen that she was unable to

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articulate any sound, which might be understood ?

The legatees relied on the 504th article of the Napoleon code ; and contended that, since the testatrix died *integri status*, and no interdiction was pronounced or provoked, the code forbade any inquiry as to the sanity of her mind ; that this article reached all the acts of the testatrix, and was applicable to the will, unless it was held that a will is not an act.

The heirs replied that the legislator had not intended to extend the article 504th to donations and wills, since it has provided for acts of this kind in a special article—the 901st.

The legatees urged, before the court of cassation, that two notaries having certified in the will that the testatrix was of *sound mind*, memory and understanding, the testimony of these officers, clothed with the confidence of the law, could not be balanced or destroyed by oral evidence, without a violation of the article 1341 of the code Napoleon, which prohibits oral evidence against or beyond the contents of an act.

The attorney general Merlin thought that the word *act* was not necessarily to be extended to donations and last wills ; that the article 504 could not aid in the interpretation of the article 901 ; that such was the manifest intention of the council of state.

He observed that there was an essential difference between the offer of proving that the testatrix was insane, when the will was made, and that of proving that she had not dictated it, since her tongue was so much swollen that she could not articulate a word. The first allegation does not give the formal lie to the act; it does not tend to prove any thing *against* it—the contents of an act, because a notary who enounces in a will that the testator is of sound mind, does not speak affirmatively thereon: he only indicates what appears to him: he does not establish the sanity of the testator's mind—this is foreign to his duties. Whatever he says thereon is out of the substance of the act, and appears only a simple enunciation, without any importance, in the eye of the law: his assertion is no proof and does not prevent the admission of parol evidence. As to the offer of proof that the testatrix did not dictate the will, he considered it directly against the contents of the act, because the declaration of the notary is, in this respect, affirmative and of the substance of the act; his office being to certify that the testator dictates his will.

In every act, says d'Agues-eau, we are to distinguish two species of things, the one, which is of the substance of the act, is the convention

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which it contains, *negocium quod geritur*, the other the capacity, will and disposition of the party. The first, *i. e.* the clauses, the stipulations, the nature of the act, are proven by the act itself: we may add what concerns the exterior solemnity of the act, of this the law neither requires or admits any other proof. *Contra scriptum testimonium, non scriptum testimonium non admittitur.* Not so with regard to the capacity of the party: the act supposes, but does not prove it. The act is not intended to establish this, none of the intervening parties, think of the proof of this fact: they do not question it. The notary, witness of the engagement which is taken, is not charged by the law with being the judge of the capacity of the parties: it suffices that they do not appear to him incapable. This is so true, that though in last wills usage has introduced a clause, in which it is stated that the testator is of *sound mind, memory and understanding*, it is never considered as written proof of mental sanity. The court has often decided that, notwithstanding this clause, the allegation of the testator's insanity is admissible, and without the acts being attacked as false, because, in this respect, the notary steps out of the line of his duty. He is indeed, as instrumentary witness, honored with

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the confidence of the law, depository of the public faith; all this, that he may bear a faithful testimony of what passes between the parties, not to judge of their capacity or wisdom. *d'Aguesseau*, 87, *plaidoyer* 1, *Syrey*, 1*st part*, 73, 75.

To those arguments of d'Agnesseau and Merlin, nothing, that I can say, can add weight. I will only ask the court to remark, that the clause of a will, in which the testator is stated to be of sound memory and understanding, has only been introduced in France by usage; usage has recently only introduced it among us. Neither our former nor our present system of laws make it the duty of the notary or witness to speak of the sanity of a testator's mind. No part of the acts of our legislature requires it. As to the Spanish laws, we would in vain seek in them any thing that would justify the pretention of a notary, to set himself up, either as a judge or an irrecusable witness of the soundness of mind of an individual, who applies to him to receive his will.

The 103d law of the 18th title of the third partida, the only one which treats of a nuncupative will, requires that the testator should dictate and the notary write down his dispositions; that he should himself express the situation of

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his mind; not that this should be done by the notary; not that the notary should report or relate what the testator has said; but that he should write down the will, from beginning to end, causing always the testator to speak in the first person of the indicative present. "Let all those, who these presents shall see, know that I, Stephen Fernandez, being sick of body, but sound of mind, make this my testament, in which I declare my last will. I bequeath, &c."

This law of the partida has not been repealed or modified by any subsequent one. The forms, which are found in Spanish books of practice, are all conformable to this law, particularly *Febrero*, *part* 1, *ch.* 1. § *final.*

These authorities will suffice to shew that the authorities drawn from d'Aguesseau and Merlin, and the decisions of the sovereign courts of France, are to have considerable weight with us.

It does not follow, from the circumstance that a few notaries have lately been pleased to alter the form of receiving last wills, which the law prescribes, and to set down, not the state of mind, in which the testator has declared himself to be, but their own individual opinion of it, that it is either reasonable or legal to contend that when the notary's enunciation, attested by the

witnesses, that the testator is of sound mind, memory and understanding, appears in a will, parol evidence of the contrary cannot be received.

The plaintiff's counsel urges that it cannot be denied that in France, this question has been diversely determined, and the judges have here a greater latitude than there. He ought to have known, that the decisions of the sovereign courts, and principally of that of cassation, are in opposition to the interpretation he gives to the law; an interpretation which does appear to have been admitted but once, in one of the courts of appeals, soon after the promulgation of the code. He ought to have known also, that if judges have any latitude in France, it is only that which the law allows to them: and that there is a court of cassation established for the sole purpose of revoking, annulling, and reversing decisions of courts of original and appellate jurisdiction, which contravene the dispositions of the law. He ought to have known that the decision of this last tribunal, which condemns the principle he contends for, is grounded on a precise text of law, the article 901 of the *Code Napoleon*, of which the corresponding article in our code is a literal copy.

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We are told that courts must decide, not in conformity to anterior decisions, but in conformity to the law. This is surely, a very correct proposition. It ought to govern, where a clear and precise law has been eluded, and instead of taking the law for a guide, a decision has taken place according to that of another tribunal, in a like case. This proposition ought nevertheless to be di-regarded, and we ought to be on our guard against it, where we have to apply a new law, containing dispositions, apparently general, which may render illusory an other disposition, not less textual, but special; then wisdom, prudence, and modesty require that we should avail ourselves of the labours of learned men, in the country from which we derived the new law. Reason tells us they must understand it better than us. If all precedents were to be disregarded, would the legislature have made it the duty of the governor to procure the decisions of our supreme court for the information of inferior tribunals.

Admitting, however, that instead of availing ourselves of the information of the lawyers of France, on a legal disposition for which we are indebted to the wisdom of the French code, it should be our duty to consult Spanish writers only, or the code of that nation, I can only

shew without resorting to other authorities, than those adduced by the plaintiff's counsel, that the jurisprudence of Spain is not less unfavorable to him than that of France.

"All those, who are not prohibited by the laws of this our book, can make a will: those who cannot make it are these, the son, under paternal power, &c. Farther, he who has lost the usage of his mind, while he is in such a situation. *El que fuesse salido de su memoria, non puede facer testamento mientre que fuesse desmemoriado. Part.* 6, 1, 13.

"Likewise, the mad and the insane, *loco y desmemoriado*, cannot make a will, while they are so. But the will is good that was made before the insanity or madness, as well as that which is made during a lucid interval, provided it be perfected during such interval: but if before it be perfected, the phrenzy returns, it is invalid —and thus, in order to annul the will of a madman, who has lucid intervals, it is necessary to prove conclusively, by the notary and instrumentary witnesses, that at the time the will was made, he was mad, and not in a lucid interval." *Febrero, contratos*, 1, 1, *n.* 10.

How can the plaintiff's counsel urge that parol evidence of the testator's insanity cannot be received, when the will contains the enuncia-

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tive clause that the testator was of sound mind? Had it escaped him that the law of the partidas requires, and *Febrero* teaches, that the will ought to contain this clause?

"Men often make their testaments, and a testament ought to be thus written: Know all men, who shall see these presents, that I, Stephen Fernandez, being infirm in body, but *of sound mind*, make this my testament, in which I declare my last will. First, I give to the church, &c. and thus ought the notary write down all the legacies. If, per adventure, the testator desires that it be written down that he disinherits his son, the notary ought to put down the reasons, &c. After which, it ought to be said, at the end: I, Stephen Fernandez, aforesaid, order and require that this my testament, and last will be valid forever: and I desire and order that every testament or bequest, which I may have made before this, be cancelled and invalid; and if any other my last will and testament should thereafter appear made after this, I do will and desire it may not be valid, unless therein mention should especially be made of this, saying that I revoke it, or any part thereof. And the notary ought to say, in what place the will was made, before what witnesses, and the day, month and year.

If usage has introduced in France, the clause, by which the notary certifies the state of mind, in which the testator appeared to be, it is evident that it is by usage also that the clause has been introduced here, as has been already observed. The law cited clearly and precisely shews that it is the testator himself, who ought to declare that he is sound of mind, and the province of the notary and witnesses is only to bear faithful testimony of such a declaration: but not to certify the state of the testator's mind.

If then, the only difference between what happens in France, and what is done here, be that, there the usage which is followed leads to no consequence, but that the one adopted here of late, by the notaries, be a direct violation of a positive law, not abrogated, is it reasonable to say that, in the case before us, oral evidence ought to have been rejected? On what grounds, could these depositions be rejected?

The plaintiff's counsel, when he launched into pompous declamations, on the pretended danger of admitting these depositions, in opposition to the clause in the will, ought to have reflected, that if there was any infraction of the law, the notary alone was guilty of it, in putting in the mouth of the witnesses, what could only

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legally come from that of the testator. Will this wrong of the notary deprive the defendants of the right which, according to Febrero, the law gives them to examine these witnesses, under oath, on the state of the testator's mind. No; this would be substituting the will of man to that of the law.

The authorities drawn from Covarrubias, Castillo, &c. vanish before that drawn from Febrero. Were we without the latter, it is not to be believed that the former would have much weight. Indeed, can it be reasonably urged that there exists no difference between a solemn deposition made under the sanction of religion, in the presence of a magistrate, the organ of the law, and a simple allegation, subscribed by witnesses, whom the plaintiff's counsel admits are often taken at random, and on whom little reliance can be placed?

If there be, in the case under consideration, any apparent contradiction between a clause of the will, and the deposition of its subscribing witnesses, under their oaths, this results from the *fault* of the notary. This fault might occasion the nullity of the will; for it is a violation of the only law, which prescribes the form to be observed by the notary in receiving a will.

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Will it be said, that although the subscribing witnesses may be admitted to depose, their deposition does not suffice alone, and without that of the notary? One word suffices in answer to this—the notary is the plaintiff's counsel, and a particular law of this state forbids counsel being sworn for or against their clients.

It is clear, that notwithstanding the mention made in the will of the sanity of the testator, oral evidence was admissible of the contrary. This is the case, even as to clauses which are of the substance of the will; as those which express that it was dictated by the testater and written by the notary. Since the promulgation of the code, notwithstanding the provision that no parol evidence is to be admitted against or beyond the contents of an act, witnesses have been heard in order to set aside a will in which it was falsely mentioned that these formalities had been accurately fulfilled. *Knight* vs *Smith*, 3 *Martin*, 156. The decision, in this case, is grounded on the ancient laws of the country. "In the will ought to be expressed the place, day, month and year; and the witnesses who were present at its execution, with the name of each one, before whom and the notary: the testator ought to express his intentions clearly and distinctly, so that each of them may hear

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him at the same time, and that *in case of doubt, they may all of them depose, being thereupon interrogated. Febrero, Contratos*, 1, § 19, *n.* 207.

Although I have noticed, and I believe have shown the futility of, all the objections of the plaintiff's counsel, I beg leave to remind the court that the only question before it is that which results from the only bill of exceptions, in this case, taken on the decision of the parish court, in allowing the issue, proposed by the defendants to be submitted to the jury, viz. whether E. A. Avart was of sound mind, at the time of making the last will or testament, upon which the present action is brought?

As to the kind of proof resorted to, in order to satisfy the jury that the testator was not of sound mind, no question is before the court and it cannot judge of the legality of such proof. The plaintiff's counsel had it in his power, by a bill of exceptions, to bring the question before this court; he declined or neglected availing himself of it. It is now too late.

As to the new trial, I contend that the decision of the inferior judge, in refusing to grant it, cannot be appealed from. The grant or denial of a new trial is entirely left by law to the dis-

cretion of the judge. Indeed, in order that the supreme court could take cognizance of the question, it would be necessary that it should have before it all the circumstances, which may have weighed with the inferior tribunal. In the present case, no part of the evidence has been taken down, and if this court were to pass on it, it would have nothing before it, but the affidavit, not of the plaintiff, but of her counsel.

Was this affidavit admissible? Was not the reading of it a violation of the statute, which forbids an attorney to be witness for or against his client? Will it be said that the maxim *nemo testis in propriâ causâ* does not preclude the party himself from testifying, in order to procure a new trial, that he has discovered new evidence, which, with ordinary diligence, he could not obtain before the trial? Let us admit, for argument's sake, that the client and his attorney are, in this respect, as two partners or solidary debtors. Would it suffice that either of the partners or debtors should swear that he has discovered new and material evidence, which, with ordinary diligence, he could not have obtained before. Would it follow from the circumstance of one of the parties not having discovered the evidence until after the trial, that the other was not apprised of its existence.

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In this case, the client may have known, that which her attorney swears he was ignorant of. The law does not make it the duty of the attorney to seek for evidence, it imposes that obligation on the client. The latter, therefore, not the former, ought to swear, in order to obtain a new trial, that he was ignorant of the existence of the newly discovered evidence, and that he neglected none of the means, in his power, to procure it. 2 *Martin's Digest*, 156.

There is only one case in which the party's own affidavit may be dispensed with; when he is absent.

Vainly it will be said that the plaintiff, in the present case, is a slave and cannot bear testimony against a white person. While the law permits her to sue, it impliedly authorises her to do whatever is necessary to obtain a fair decision of her claim.

I have said that, in order that this court might examine the conduct of the parish judge, in pronouncing on the motion for a new trial, it would be necessary that it should be in possession of every fact, that may have influenced his decision. How, otherwise, can it say that he erred, in considering the evidence newly discovered as less strong, less clear, and less positive, than that which had been introduced at the

trial? Can this court, without knowing what evidence was before the jury, determine that it would be outweighed by that which was alleged to have been newly discovered? The parish judge had means to discover the truth, which are not, cannot be placed within the reach of this court. He heard the testimony from the lips of each witness, he noticed his natural or studied mien, his calmness or agitation, his assurance or his timidity.

Admitting, however, for the sake of argument, that this court, notwithstanding all this, may think itself competent to revise the decision of an inferior court, in denying a new trial, let us examine the evidence which is pretended to have been discovered.

Cherbonier, it is said, went to the testator's, about two hours after the will was made, and remained with him a considerable time. He conversed with him and verily believes that, during the whole time, he was of sound mind.

But, let us notice first, what is much stronger. Father Antonio, introduced as a witness by the plaintiff, had informed the jury that, half an hour after the will was signed, he was with the testator, administered spiritual relief to him, and he then appeared calm and of sound mind. Whatever res-

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pect may be due to the testimony of Cherbonier, we doubt that it would have had more weight with the jury, than that of the venerable clergyman.

The question, submitted to the jury, was not whether the testator was of sound mind, *before* or after he made the will, but simply whether he was so *at the time*, he dictated and subscribed it. This they have answered negatively: and it is impossible to imagine that the verdict of the jury would have been different, had it been previously shown, that Cherbonier, or any other person, believed him of sound mind *before* or *after*. Cherbonier proved his *belief*, not the *existence* of this fact.

The plaintiff was enabled to shew that Risteau was with the testator, after he had stabbed himself and *before* the will was made, when Choppin, the testator's brother in law, took from a desk a check which he had given the later, on the preceding day, to enable him to purchase the plaintiff for the purpose of emancipating her.

We are ignorant of, but are willing to believe, all this, because Risteau appears to have told it to the plaintiff's counsel. All that result from it, is that, when Choppin gave the check to his brother in law, he believed him of sound mind, not that he was so, at the time the will was made. If it be

true that the amount of the check was to be appropriated to the purchase of the plaintiff, with a view to emancipate her, the circumstance, of his having inserted in the will a clause which tended to carrry his project into execution, does not establish the fact of his being of sound mind, *when* he made the will.

All that result from this, is that the idea of Marie filled his mind, that his passion for that slave ruled him and was perhaps the cause of his insanity and his death. Is it surprising that a man enamoured in perfect health, should have the object dear to his heart present to his mind in a moment of delirium: and when, in such a situation, he speaks of her, are we to conclude that he is in his perfect senses?

The court will appreciate the gounds, on which the plaintiff's counsel declares himself fully convinced of the goodness of his cause: we confidently wait their decision, relying too much on their justice and learning to apprehend that a mistaken sense of humanity will induce them to disregard the disposition of the law.

De Armas, for the plaintiff. I candidly admit that I incorrectly stated that witnesses were offered to prove the insanity of the testator and that I excepted

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to their introduction. The fact is that, when the issue intended to be submitted to the jury was about to be reduced to writing and before they were sworn, I opposed the submission of it to the jury, as forbidden by the statute, *Code Civ.* 80, *art.* 17. The judge overruled my opposition and I tendered and he signed the bill of exceptions which comes up with the record. A mere reading of this bill is sufficient to shew that I opposed the introduction of any kind of proof whatever, of the fact that the testator was not of sound mind, at the making of the will. In good logic, the whole includes all the parts. So, it is in jurisprudence. *In toto pars continetur. l.* 13 *de reg. juris. In eo quod plus est, semper est et minus.* So it was needless for me to repeat my opposition, when each witness was offered. The court must see by a reference to the article of the code, which I relied on, that it was less to the submission of the issue to the jury, than to the introduction of evidence to support it, that I objected. The bill clearly shews that the defendants had no record, shewing that the interdiction of the testator had either been obtained or provoked. Without this, could they be allowed to attack the will on the score of the testator's insanity? Whether the evidence was written or oral, it was

equally inadmissible. It was prohibited by the part of our statute which forbids that, after the death of an individual, the validity of acts done by him be contested, for cause of insanity, unless his interdiction was pronounced or petitioned for before his death, and that part which forbids that evidence be admitted beyond or against the contents of an act *Civ. Code* 81, *art.* 16 and 311, *art.* 242.

The first of these articles is copied from the 504th of the Napoleon Code, as the article 4, page 209 of our code is copied from the 901st. The articles of our code are, in the classification of the whole work, in the same order, as the corresponding ones of the Napoleon Code. If the principle, which in France, has led courts and jurists to conclude that the article 504, includes donations and wills be true, just and reasonable in all countries, we ought to adopt it, unless that, which has influenced other courts and jurists to adopt a different opinion, appear to us more true, more just or more reasonable. Let us therefore inter into this enquiry, which is to direct the decision of this case.

A number of celebrated jurists have emitted their opinions, before and since the decree of the court of cassation on which the defendants' counsel chiefly relies, and they all conclude that the 504th article

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includes donations and wills. In 8 *Pand. Fr.* 523, we have observations on the 901st article.

According to the 503d article, if the interdiction of the donor or testator has been pronounced, allegation and proof may be received of the existence of the insanity, at the time of the donation or testament. So, according to the 504th, when the interdiction was at least provoked, during the life of the donor or testator. In the contrary case, the proof of insanity must result from the very act which is attacked, otherwise the plea of insanity cannot avail.

It is to be admitted this rule is extremely strict and may give rise to great inconveniencies. It affords, says the sovereign court of Montpellier, great facilities to those who seek to obtain the liberalities of a mad or insane man.

It is nevertheless incontestable that the relations ought to reproach to themselves that they did not provoke the interdiction. Courts, heretofore were very severe, on a plea of insanity and the proof of it was admitted with much difficulty. They objected to relations, as was well observed by senator Tronchet, that they came too late. *Sero accusas mores quos probasti.* The most positive facts was necessary and a sort of notoriety, to induce courts to receive evidence, and it was required to be conclu-

sive to support a decision annulling the instrument.

His serene highness the Chancellor of the empire observed that proof was not to be so restricted as to exclude evidence. The party, said he, may have preserved a sound mind, till a period very near that of the donation or will; and then it becomes impossible to prove the insanity. He concluded it would be best to leave the matter to the courts.

We would cheerfully join in this opinion. It is difficult to establish precise rules, in cases which depend upon facts, and it may be dangerous to hold out facilities to intrigue and bad faith. It seems nevertheless that the silence of the law, in this title, does not allow a deviation from the articles 503 and 504. Some one (probably Emery, in the discussion in the council of state) has said that they do not relate either to donations or testaments; but it suffices to read them, in order to be convinced that they extend to every act whatever.

Delvincourt, in his *Cours du Code Napoléon*, 719, says: the opinion that the 504th article is not applicable to donations or testaments is grounded on two reasons. The one, that if it was, the 901st would be absolutely useless: the other, that in the

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projet du Code a paragraph had been added to the 901st article, which referred to the 504th, and in the discussion this paragraph was suppressed. It seems to me that it may be observed, on the latter reason, that it does not appear that the paragraph was *rejected*, but only *adjourned* till the reconsideration of the 504th article, which was to have taken place, but did not. To contend that a distinction is to be made between acts on an onerous and those on a gratuitous title, and that the 504th article does not extend to the last, appears to me an opinion which cannot be reconciled with the text, which makes no distinction, and with reason, which seems to dictate that it is principally to the latter that the article is applicable, as they are those which heirs have the most interest to avoid and which are consequently to be protected against their avidity.

Masse, in his *Parfait Notaire*, published in Paris in 1813, three years after the decree of the court of cassation, cited by the defendants' counsel, a decree which must have been known to him, not only on account of the important point it decided, but on account of the nature of the action in which it was rendered, as I will shew by and by, observes: there are four kinds of incapacities common to donors and testators. He, who is not of sound

mind, cannot dispose by donation *inter vivos* nor by testament, *Code Nap.* 901, so, an insane person cannot dispose on a gratuitous title; nevertheless, after his death, the disposition cannot be attacked, on this score, if the interdiction of the donor or testator was not pronounced or provoked, before his death, unless the proof of insanity should result from the act which is attacked, as if it contain foolish dispositions.

Bernardi, to whom we are indebted for the greater part of the new edition of Pothier's works in harmony with the Code Napoleon, in his commentary on the laws relating to donations and testaments, says: in order to make a donation *inter vivos* or a testament, one must be of sound mind. This disposition seems at first sight singular. Why should it be in a special manner required that he, who wishes to make a donation or a testament, should be of sound mind? Is not this required from every man who does any act whatever? Are not all contracts entered into, while the sanity of the party's mind is altered, liable to be set aside? In what does consist this sanity of mind, which the law more specially requires in a donor or testator? How are the different shades to be distinguished, which denote a mind perfectly sound? A singularity or od-

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dity in character are not always sufficient to establish the unsoundness of mind. The wills of the greatest men, says d'Aguesseau, would not be safe, if it sufficed, in attacking them, to give some evidence of the oddity or singularity of the testator's mind. *Plaid.* 29.

Sanity of mind, if that expression may be used, is undoubtedly necessary to the donor or testator. By it we mean the state of a mind neither agitated or troubled, master of itself, as far as human passion allow. As in speaking of the body we cannot say that one is sick, unless a strong fever or other violent sickness exist: speaking of the mind, it would be absurd to say that its sanity is lost, when the mind is not agitated by madness or its functions prevented by imbecility.

It cannot be holden that a man is incapacitated from making a disposition of his property because his mind is less settled or weeker than that of an ordinary man, while he preserves that understanding which is required for the conduct of ordinary affairs and the discharge of common duties.

If in order to pronounce on the validity of a will a stricter inquiry was requisite, lawyers alone could not pronounce thereon; the aid of physicians and philosophers would become necessary.

Calange observes that in the project of the *Code Napoleon*, a paragraph was added to the 901st article which provided that these acts should not be attacked, &c. That it was observed it presented a too general proposition; that insanity is a fact, to which the genenal rules of evidence apply; that relations, relying on the return of the party's sanity, delayed to solicit his interdiction; that the testator might have preserved his health of mind until a few moments before his death; that more latitude was to be left to courts, and parol evidence ought to be admitted when there is a beginning of proof in writing.

Are we to conclude, says he, that the 504th article is not applicable to donations and testaments, and that after the death of a donor or testator, the sanity of his mind may be questioned, when his interdiction was not provoked before and no proof of insanity resulted from the deed of gift or testament? The 504th article is imperative, has received no modification, its disposition is general and was made so, with a view to donors and testators chiefly. 12 *Nouveau Denisart*, 668.

The jurists, who have reduced to a regular order, the result of the discussions of the *Napoleon Code* in the council of state, atending to the plan given

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them by the minister, observe on the 901st article, that it contains only one of the plainest and general principles of natural reason and could afford no matter for discussion.

A donor or testator is of right inferred to be of sound mind unless the act itself offers some evidence of the contrary: otherwise the party who endeavours to set aside the disposition will not be attended to, after the death of the donor or testator, whose interdiction he neglected to provoke.

The same principle is found in 2 *Pigeau*, 86.

The 503d article of the *Napoleon Code* proves that acts anterior to the interdiction may be set aside, if the cause of the interdiction notoriously existed at the time such acts were made, and this disposition, evidently extending to donations and testaments, shews that the testament of one who dies in a state of interdiction remains valid, if the cause of the interdiction is not shown to have existed at the time it was made. 2 *Questions transitoires sur le Code Napoléon*, 440.

In support of these respectable and conclusive authorities, I have met with four solemn decisions 3, *Sirey*, p. 273, *part* 2; 5, *ib.* p. 209, *part* 2; 16, *ib.* p. 23[illegible], *part* 2; *Jur. du Code Nap.* vol. 1, p. 305.

In one of these, the heirs who attacked the testa-

ment, contended, that insanity is often produced by a violent paroxism, so that when a person, attending a sick man, avails himself of the temporary alienation of his mind, in a moment of delirium, to obtain a donation or will, it cannot be expected that the interdiction of the donor or testator be provoked, so as to prevent the party enjoying the fruit of his covetousness. The friends of the sick person may be ignorant of the circumstance. Who is the son, who will provoke the interdiction of a parent, because the paroxysm of a fever has momentarily deprived him of the use of his mental faculties?

They took notice that, in the discussion which took place in the council of state, it was asked whether the nullity of a testament, could not be pronounced, on account of the insanity of the testator, when the interdiction of the testator was not provoked, when it was answered (and it will be recollected that the observation was made by Mr. Emmery) that the dispositions of the article 504 were not applicable to testaments. These observations, which the defendants' counsel uses in the present case, did not prevent the court of appeal from declaring that according to the 504th article of the *Napoleon Code*, after the death of an indi-

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vidual, none of his acts can be attacked on the score of his insanity, unless the proof resulted from the act itself.

The defendants' counsel has stated that the principle he contends for, is supported by the most enlightened and the most illustrious jurists of France. He has however cited Merlin alone. For we cannot do him the injustice to imagine that he classes Paillet among these jurists. This writer being only known as the editor of a Code Civil with notes.

The counsel has joined together two notes of Paillet, which are absolutely unconnected in his work. The first is entirely without any bearing on the question before the court, since the date of Avart's testament is posterior to the code. As to the second, I have to observe that the case referred to is the same as that in which the decree of the court of cassation cited was rendered.

I have sought in vain, in the place indicated by the defendants' counsel, what he says he has found, viz: that the second part of the 901st article was *rejected*, and this on the observations made by Cambaceres, or because "the will of him who disposes ought to be certain: and this will cannot even exist, if he be not of sound mind. It has been sufficient to state only the general principle (in order

to make a donation *inter vivos* or a testament one must be of sound mind) in order to leave to judges the utmost latitude, in its application."

I admit, I cannot comprehend how the defendants' counsel has been able to find, in these last expressions, the motive for the rejection of this second part, and I cannot conceive how he could advance that it was rejected, when at the end of the discussion of the 901st article, with which he has favored us, we read, in the two lines which follow the observations of Emmery, that the 504th article relates neither to donations nor testaments, these remarkable words which cannot have escaped the notice of the counsel, "the first part of the article was adopted, the second *adjourned*, till after a new examination of the 504th article."

To show in what point of view the decree of the court of cassation, cited by the defendants' counsel, and the principle on which it is grounded, were looked upon even in France, let me submit to the court the very sound and learned observations of M. Cotelle, L. L. D. and law professor in the faculty of Paris, in his much celebrated work 1, *Cours de droit Français*, p. 320, § 1.

"Of the incapacity relative to the state of mind

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of the donor or testator, and of the condition of being of sound mind.

The interpreters of the code have often fallen into a great inconvenience, that of seing in the code only new dispositions, and of thus detaching them from our ancient jurisprudence, for the purpose of explaining the code by new and particular considerations, which are no where else to be found. It would appear that these interpreters do not perceive that such an isolated mode of proceeding, tends to destroy the progress, which our jurisprudence had already made; that they are retrograding in the science, and plunging into such a course of arbitrary decisions that ages will be requisite to recover the elements of a sound, and above all, a constant and uniform jurisprudence. This should be a subject of reflection especially to those who unite with this pernicious facility, a great fund of legal knowledge. From some of the simple expressions, which *escaped* from those who cooperated in the discussions of the code, maxims have been drawn of which these persons *had no idea whatever*; (*This remark evidently applies to what M. Emery has said in the discussion of the article* 901,) the mere placing of certain legal dispositions, under a title different from that which usually announced the principles ex-

pressed in those dispositions, appears to have favored this system of innovation.

I shall be excused for this reflection, if I find here a just occasion to apply it; it is in the use which is made of the 504th article of the code.

This article only expressed a general rule, known in the ancient jurisprudence, and which served as a corrective of the abuse which might be made of the maxim, written in all our local laws, (*coutumes*) that in order to give or to devise the donor or testator must be of sound mind.

This maxim, reproduced by the article 504, was that at the death of an individual, the acts done by him may be attacked for cause of insanity, only when his interdiction has been legally pronounced or demanded before his decease, unless the proof of the insanity should result from the very act which is attacked.

All the difficulty, which has been raised upon this article, consists in this, that being placed in the chapter concerning interdiction, it has not been repeated in the chapter on donations, where the other maxim forming the article 901 has been placed, to wit: that he who makes a donation or a will must be sound of mind. From hence it has been concluded that the article 504 relates solely to acts

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on an onerous title and not to donations and wills, against which it is pretended that the allegation of insanity ought always to be indistinctly admitted in proof.

This is the doctrine which we find in the treatise on donations and wills, *part* 1, *ch.* 3, § 2. There this disposition is considered as having no relation whatever with the article 901; it is there considered that this disposition of the article 504 applies principally to the ordinary acts of life, such as acts on an onerous title, and to an habitual state of madness very different from that contemplated by the article 901; that if the legislator intended that this article 504 should also relate to gratuitous dispositions, he would have explained himself to that effect in the title on donations and wills, and that he could not have said in a different manner, in that title, that it was necessary to be of sound mind.

That which gives an imposing weight to this doctrine is the support which the author of that work finds in the decree of the court of cassation *of the* 22*d November*, 1810, which he *cites*, (*this is also the decree wherein the defendants' counsel has intrenched himself and where he believes himself to be invincible. Probably, if Grenier, the author to whom Cotelle alludes here, had written*

before the decree, his doctrine would be quite the reverse) which decree rendered upon the conclusions of the attorney general has confirmed almost litteraly his doctrine.

We may even remark the absolute and indefinite terms in which this decree declares, in the motives assigned for the rejection of the appeal, (pourvoi:) *that notwithstanding the article* 1341, 1347, 1352 *and* 1353 *of the code it is permitted to parties to alledge* and to the tribunals to admit them, (*here a specimen of the latitude, the courts in France have or take for themselves*) *to prove all the facts of a nature fit to establish that the author of a donation or of a will was not of sound mind, at the time of making those acts, without distinguishing whether those facts did or did not constitute a permanent state of madness.*

In fine it is further shown that this decree is only the result of the doctrine contained in the new repertory of jurisprudence under the word testament. (*It is to be observed that the volume, containing this doctrine of Merlin, was published, in* 1809, *one year after the judgment of the court of Poitiers.*)

Far it be from me to refuse the homage due to the court of cassation, whether considered as the first of the bodies of sovereign magistracy, to which

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the law itself confides its interests and the care of its interpretation; or the first luminary which shines in the midst of us on all the subjects of our jurisprudence.

I know well the great number of men deeply learned, and religiously attached to the study of reconciling the genius and the spirit of the laws with the great interests which are entrusted to them, by which this tribunal is composed.

I am not less inclined to a great respect for the talents and opinions of the first of magistrates (who are as it were the eye of the law) who has personally left traces so extensive and profound of his progress in the study of jurisprudence.

But if every thing has not been said on this point; if even in the great exactness which this decision might in itself possess it has really gone too far; in a word if some rays of light may yet be employed to confirm that decision or to conduct us in its consequences, I may be permitted to examine the grounds upon which this jurisprudence rests and above all to inquire whether it is not, taken in its full extent, the useless and dangerous subversion of a just, enlightened and reasonable jurisprudence which has hitherto prevailed.

(The author having devoted several pages to the

examination of the principles of the ancient jurisprudence by which France was governed, concludes thus, page 326.)

It appears then that the makers of the code have inserted in it the article 504 only in order to preserve that jurisprudence with which they were familiar, as well as that relative to ordinary acts and on an onerous title, attacked in the same circumstances and for the same causes.

How then comes it to be said that this disposition is restrained to acts on an onerous title? *It is evident that, on the contrary, the acts of liberality have afforded more frequent occasions of puting this point in question.*

The reason drawn from this, that the article 901 states in general terms that it is necessary to be of sound mind without repeating the dispositions of the article 504, is of no weight. For in as much as this exception was already written that was a sufficient reason for not repeating it.

And moreover the article 504 is not relative to that general proposition, but only to the use of attacking the condition of a person who might and ought to be interdicted; and this makes no change in the rule, that to dispose of property it is necessary to be of sound mind.

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This rule was found in the greatest part of the *coutumes*, and it is nothing else but a general rule of law from which has resulted the rule of jurisprudence contained in the article 504.

To conclude, this article is placed there among other dispositions which regulate the condition of persons (*the corresponding article of our code is in like manner placed among the same dispositions;*) it is there in order to be applied *to all acts without distinction* where the condition of the person may be made a ground for contesting the validity of his act."

According to the authorities which I have cited, it is then incorrect to say that in France the intention of the legislator was not that the 504th article of the *Code Napoleon* should extend to donation *causa mortis* or testaments, as it does to ordinary acts. The defendants' counsel urges that, with the exception of a judgment of a court of appeals, shortly after the promulgation of the Code, the decisions of all the sovereign courts of France and particularly that of the court of cassation have sanctioned the principle for which he contends. I have sought with care in the *jurisprudence du Code Civil*, in *Denevers* and *Sirey*, which are the most complete collections of the decisions of the sovereign courts

of France, and I have discovered only the two decrees cited by the defendants' counsel; when I have found four in support of the principle which I contend for, and on which I shall draw the attention of the court hereafter. True it is that three out of those four, are anterior to the decree of the court of cassation and were rendered shortly after the promulgation of the French Code; but to urge that these decisions are not correct, because they were given only a short time subsequent to the decision and promulgation of the code, would be going against what the experience of all ages and countries has constantly taught, to wit: that the less time which has elapsed since a thing took place, the better we are acquainted with it.

But let us fix our attention on the decree of the *Court of Cassation*, of the 22d of Nov. 1810, confirming the judgment of the *Court de Poitiers* of May 27, 1808, on both of which the defendants' counsel relies with so much confidence.

Surprised at finding a decree of the court of cassation, in direct opposition to the doctrine, which had prevailed till then, I have carefully examined all the circumstances of the case in which it was rendered and I find them to be these:

Marie Jacob was the wife of Francis Jalet, a pur

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chaser of national property, of the first and second origin, that is to say of property of the church and of property of emigrants. Her conscience not being perfectly at rest on the score of the legality of these purchases, on the last complementary day of the ninth year, she made her last will before two notaries. She began by devising in full property and for ever the portion which might belong to her, of the property of emigrants, purchased or to be purchased by her husband, to the former proprietors, if they were returned and erased from the list of emigrants, and capable of taking by devise, otherwise to such persons as were legally able to inherit their estates, in the direct or collateral line, who might enter thereon, at her death, and possess the same as such property should be, except the carts, cattle and seeds, which should go to her heirs.

By the last clause she devised to the hospital of incurable patients of Poitiers, the portion which might belong to her of national estates, proceeding from the property of the church.

Now the particular circumstances of this case easily account for a decision so much at variance with the former ones and the doctrine till then universally professed. National property was the subject of the suit and we all know how much that

kind of property kept the French people in alarm. The cause was a popular one. Judges in France have a great latitude of powers, and never did a case more loudly call for an arbitrary decision.

Let us compare this judgment with that of the court of appeals of Paris, of the 26th of May, 1815, 16 *Sirey*, 285, *Part.* 2. Let us consider with what severity of principles the judges in the later case rejected the proof which was offered them of the marked insanity (long before the testament) of a man who had disposed of a considerable part of his property, in favour of strangers, such as old friends, lawyers, his secretary, his valet de chambre and other servants, to the prejudice of his daughters: and let us say whether precedents may be safely sought for, in the decisions of the courts of a country, in which judges may torture the law and bend it at their will.

That no written proof of any kind whatever could be shown of Avart's not being of sound mind during the time he dictated and made his will, is a proposition too clear, too self-evident to be demonstrated. By the very nature of things, no such written proof can possibly exist, unless the will itself, from beginning to end, be a forgery of the notary

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and witnesses, and in this case, it is on the score of forgery that it ought to be attacked.

Parol evidence of the insanity of the testator is then the only one which can have been adduced, and it ought to have been rejected, as prohibited by our statute which forbids the admission of parol evidence beyond or against the contents of an act.

The rule, according to which testimonial proof of the insanity of a testator is admitted in France, is grounded on the principle that as the notary and witnesses attest the *actual*, and not the *habitual* state of the testator's mind, that proof does not tend to contradict the act.

Invoking the same principle, which appears perfectly correct, and adapting it to our practice, would not the testimony contradict a testament made in this state, if while the notary and witnesses have born testimony to the sanity of the testator's mind at the time he made his will, witnesses were heard to declare that he was, at that very time, insane?

In France, they say the notary may not have noticed the insanity of the testator, whom he may have found in a state of apparent sanity, (*and this is what, among us, constitutes a lucid interval*) that the time employed in receiving the will may be too short to enable him to judge of the *habitual* state of the tes-

tator, whose dispositions, whatever may be his situation, may appear perfectly wise; and that, because the notary may have been deceived in supposing the *habitual* state of the testator's mind to be what it appears at the time, courts ought to hear witnesses (*using the very expressions of the decree of the court of cassation relied upon by the defendants' counsel*) in order "to prove the facts which are of a nature to establish that the author of a donation or of a will was not of sound mind, at the epoch those acts were made, without distinguishing whether those facts did or did not constitute *a permanent* state of insanity."

In the case under the consideration of this court, the will contains the attestation of the notary and three witnesses, that the testator was of sound mind. They, alone, could judge of the actual state of his mind, and no subsequent evidence, oral or written, can destroy that which thus results from the instrument. An allegation of insanity would tend to shew that the will, wise in itself, was suggested to the testator, or is a feigned one, which supposes, not an erroneous judgment in the notary, but an actual forgery. For it cannot be conceived that an insane man whilst labouring under the pressure of his disease, might dictate long and complicated dis-

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positions, which bear the stamp of sound reason.

Let us now examine the positive and unabrogated law which the defendants' counsel believes to have found in the Partidas, requiring that the testator should himself express the state of his mind and understanding, and that the notary should relate what the testator has said, and should write the will from beginning to end, making the testator always speak in the first person of the indicative present.

The counsel of the defendants, from its not being made the duty of the notary or witnesses, by the ancient nor the new law to ascertain the state of the testator's mind, draws the consequence that a notary who should set himself up as the irrecusable witness or judge of the soundness of the testator's mind, would in vain seek for any thing in the Spanish law that would justify his pretentions. He says that the usage in which notaries are in this State to attest in a will the sanity of the testator has been but lately established.

The will of Domingo Trujillo, received on the 18th of May 1763, by Joseph Fernandez, an ancient Spanish notary, begins thus, "Be it known that I, D. T. being very sick, but in my entire judment, memory and understanding, &c. and concludes" and I, the notary, do attest that I know the

testator, who, according to appearances, is in his entire judgment and complete memory, &c.

The will of Carlos Cout, received by Almonaster, on the 17th July 1771, contains precisely the same expressions.

So does that of Anna Rafleans, received by the same notary, on the 19th of March 1780.

So does that of Antonio Gonzales, received by Carlos Ximenes, on the 28th of March 1793.

These wills, and a great number of others containing the same attestation by the notaries, are recorded in the office now kept by C. de Armas, a notary public in this city.

Para el escribano lo que no le esta prohibido, se entiende permitido : y lo demas es querer ligarle por obligaciones y penas que las leyes no le imponen. 1 *Febrero*, 417.

It is true that we would look in vain in the Spanish law, for a disposition, imposing on notaries the obligation of attesting the state of the testator's mind; but we have works of Spanish jurists in which they detail the duties of notaries and give forms of the different instruments executed before them.

In the form of a codicil, 1 *Febrero*, 216, the notary attests that the testater is *en su entero juicio*,

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altho' in the form given in the Partidas, no mention be made of this circumstance, either by the notary or testator.

Among the clauses that a notary is to insert in a testament which he receives, there is the following, to wit: "declaracion de la disposicion del testador: esto es que estaba al parecer en capacidad para testar, que de eso debe hacer mencion el escribano y dar fé." 2 *Lisares*, 60.

Carlos Ros, in his work on the duties of notaries vol. 2, 53, gives the following form of a will, "In the name, &c. be it known that, &c. being in perfect health, full judgment, memory, and natural understanding, and with such a disposal of my senses and faculties, that it appears to the notary and witnesses underwritten that I may indubitably dispose of my property and make my testament, which the notary certifies."

The authors, last cited, give other forms in which the like mention is made.

If according to *Partida* 3, 18, 103, which contains the form of a testament, the notary is bound to make the testator speak in the first person, in a will, the rule must be the same for a codicil. Yet we see that altho' the *Partida* 3, 18, 104, has the form of a codicil, in which the testator speaks in

the first person, Febrero, in the form of a codicil which he gives, makes him speak in the third.

Surely, if Febrero had thought that the forms given in the partidas were like those stolen and published by Cnœus Flavius, which were so rigorously to be followed that the least deviation caused the nullity of the act, he should have scrupulously followed them. Let the forms given by Febrero be compared with those in the partidas and we will be convinced how erroneous is the idea that the latter are to be literally followed.

Let us now advert to a French authority of some weight, I mean the work of Favard de l'Anglade, baron of the empire, judge of the court of cassation and member of the legion of honor, who says: "notaries, in order to comply with the requisites of the 901st article, (*this article is identical with the 5th p* 209 *of our code*) ought then, before they receive any act on a gratuitous title, assure themselves of the soundness of the mind and judgment of the party who makes it. They cannot without *prevarication* neglect this, especially when he is sick of body, or of advanced years. This omission might have consequences infinitely disagreable for them. The law does not textually command to mention in the beginning of donations *inter vivos* and tes-

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taments that the donor or testator appeared to them of sound mind and understanding; yet they must not neglect doing so. The necessity of this mention results impliedly from the article 901, which requires that the donor or testator be of sound mind. The object of this disposition is evidently that the notary, before he receives an act of this kind, should ascertain the state of the party's mind and should attest, in the beginning, that he appeared to have the perfect use of his moral and intellectual faculties." *Manuel, &c.* 322.

I think it necessary to repeat what I have said in the beginning of this case, that the single instance in which holds the doctrine of Febrero, that *para anular el testamento del loco que tiene intervalos lucidos es menester probar concluyentemente que lo estaba y no los tenia*, is when the notary has been silent on the state of the testator's mind, either because he was not sure of it, or on any other account. I will refer here to the only form of a will given by Febrero, in which nothing is said by the notary of the state of mind of the testator, and to the will of Carlos Quiroga, received on the 28th of November, 1770 by A. Almonaster, who was in the habit of attesting the state of the testator's mind and who, nevertheless, in this instance, did not do so.

When a notary has attested in a will (and it is the same as to witnesses) that the testator, while he was disposing of his property, appeared to him of sound mind, he cannot afterwards be examined as a witness on that score; because he would confirm what he had already attested, and then his testimony would be useless, or he would deny it, and then he ought not to be heard as *allegans suam turpitudinem.*

The notary, who received Avart's will and who has the honour of exercising the profession of counsellor at law, was penetrated with the truth and the sanctity of these principles. He knew that he could not be heard, as a witness, concerning the will he had thus received. Even, in case he had not been engaged as counsel in support of it, strong in the testimony of his own conscience, jealous of maintaining an unimpeached reputation, he would have taken the same pains to uphold the validity of dispositions, which he has the most certain conviction were dictated to him, by a man in the perfect exercise of his moral and intellectual faculties.

The defendants' counsel has not well understood the law to which he refers, forbidding counsel being sworn in their clients' causes. Let him examine that law, 1 *Martin's Digest*, 504, and let him recollect that in many instances our courts of justice

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have declared, under that law, and that of *Partida* 3, 16, 20, which says: *Bozero non puede ser testigo del pleyto que el oviese comenzado a razonar. Pero si la parte contra quien razonase lo pidiese por testigo, entonce lo podria ser*, that a party is permitted to require the testimony of the opposite party's counsel; and he will then be convinced that the defendants, notwithstanding the circumstance of the notary's being the plaintiff's counsel, had it in their power to make the proof, as required by Febrero;—supposing always that the article 16, p. 80, of our code and the attestation, in the will, by the notary and witnesses, of the testator's being sound of mind, did not, either and both, absolutely oppose such a proof. Let it not be said any more, then, that the notary could not be heard as a witness, because he had permitted himself to be engaged as counsel.

It is asserted by the counsel of the defendants that "since the promulgation of our code, notwithstanding the provision that no parol evidence is to be admitted against or beyond the contents of an act, witnesses have been heard in order to set aside a will in which it was falsely mentioned that formalities of the substance of the will had been accurately complied with," and, in order to give some

weight to this assertion, he refers to the case of *Knight vs. Smith*, 3 *Martin*, 156. This manner of relying on a precedent is quite new to me. I have examined with a scrupulous attention the case cited and found that a last will has been declared void on the two following grounds, to wit: 1. it had not been written by the notary himself as the law requires, and 2. one of the persons mentioned in the body of the instrument as a witness, was not present when the will was dictated, nor when it was read. But I did not find, that the will falsely mentioned that it was written by the notary and that all the witnesses were present, when it was dictated or when it was read. Supposing even, that the will *falsely mentioned* these circumstances, this court having not given any opinion on the point, I do not see how the defendants' counsel could rely on this case to support his opinion, which is not only in direct opposition with the doctrine professed by Merlin, d'Aguesseau and the court of cassation, which he cites, but not supported at all by the passage of Febrero which he quotes. This author, after mentioning the requisites of the witnesses to a will, continues thus: *ante los quales (testigos) y el escribano juntos, ha de manifestar el testador verbal, clara y distintamente* su voluntad, *de suerte que to-*

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dos a un mismo tiempo la *entiendan, y en caso de duda puedan deponer contextes, siendo sobre* ella *interrogados. Ella* most evidently refers to *voluntad.* Is it not clear, then, that what is thus required from the notary and witnesses, is in order that if there be any *doubt* concerning the intention expressed by the testator, his *voluntad*, they may declare *contextes*, (that is to say, each making the same deposition as the others) in order to *explain*, not to *contradict*, that *voluntad* ?

Let us notice the jurisprudence of Spain as it existed here before the adoption of the civil code, with reference to the mode of proof of the insanity of a testator at the time a will was made.

Either the notary and witnesses were silent on this point, or the fact was attested by the notary alone, or by him and the witnesses.

The first case is that to which is applicable Febrero's doctrine, that the testimony of the notary and witnesses ought to be heard.

In the second, if the witnesses deposed against the sanity of the testator, the rule in *Partida* 3, 18, 117, was followed. *Si el (escribano) otorgase que verdad era que escribiera (la carta) y los testigos que fuesen escritos en ella, dixesen que non se acertaron y, quando el pleyto fue puesto, non otorgado*

de las partes asi como es escrito en ella; estonces decimos, que si el escribano es ome de buena fama y fallara en la nota que es escrita en el registro, que acuerda con la carta, que debe ser creido el escribano y no los testigos. This doctrine was sanctioned by this court, 5 *Martin*, 405, *Langlish vs. Schons & al.*

In the third case, the will was of itself evidence of the sanity of the testator's mind.

Though I feel confident that the court will pronounce that the article 16, p. 80 of our code applies to all acts, and that no proof being given of Avart's interdiction having been demanded or obtained before his decease, his will must be maintained, I will add a few observations in answer to the arguments used by the defendants' counsel in order to prove that the new trial was rightly refused.

With as little ground, as he has accused the notary of having violated an unrepealed and unmodified law of the *Partidas*, he charges the plaintiff's counsel with a violation of the statute, which forbids an attorney to be witness for or against his client, by having filed the affidavit on record, in support of the demand of a new trial. He is deficient on the score of logic when he pretends that the plaintiff's counsel, by filing that affidavit, acted as the witness of his

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client. Certainly the principle *nemo est idoneus testis in suâ causâ* is a correct one and applies to the party himself. Now, if that maxim cannot be relied upon to object to the affidavit sworn to by the client, how can it be invoked against that of the counsel? This, I conceive, sufficiently shows how groundless is the new accusation against the plaintiff's counsel.

The statute concerning new trials, cited by the defendants' counsel, does not make it any more a duty to the client to search for evidence than to the attorney, and does not require in the least that a party, applying for a new trial, should swear that he was ignorant of the newly discovered evidence, any more than that he has neglected nothing to procure it. We must not lend to the law a language which it has not made use of. This is the wording of the statute: *whenever new evidence material to the cause shall have been discovered, after the trial, which the party could not by reasonable diligence have discovered before—the court, on the application of the party injured, may grant a new trial.*

These plain expressions of the law show how unlucky the defendants' counsel has been in the choice of the case of partners, as the ground of his argument, pretending that it would not be sufficient that one of them should be within the words and spi-

rit of the statute to obtain a new trial, because it would not follow that the other partner was uninformed of the new evidence. If the partner is a party to the suit, if he be injured by the judgment, and if he can swear to newly discovered vidence, what court of justice would refuse the new trial on the ground that the other partner may have been apprised of this evidence? Because one partner chooses to give up his rights, is it a reason that his copartner should suffer by it? No, there is a maxim of law, which Pothier calls *generalissima regula*, which says: *non debet alteri per alterum iniqua conditio inferri*, l. 74, *ff de reg. jur.* from which flows the doctrine which we see established in l. 39, *ff neg. gest. naturalis enim, simul et civilis ratio suasit, alienam condtionem meliorem quidem etiam ignorantis et inviti nos facere posse; deteriorem non posse.*

As our manner of proceeding in matters of new trial is borrowed from the common law practice, prudence, wisdom and modesty require that we should consult common law decisions rendered by men whom we must suppose better informed than us in that part. In 8 *Johnson* 489, in the case of *Jackson vs. Laird*, we see that: the verdict being found for the plaintiff, a motion is made in behalf of the defendant for a new trial on the ground of new and material evi-

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dence. Cornwell, to whom the defendant had abandoned the defence of the suit, in his affidavit, swore that though Fink was a witness at the trial of the cause, yet he did not know Fink knew or could testify any thing material in the cause, until after the trial. But it appears that the defendant, who was not however present at the trial, knew before the trial what Fink could testify. *Per curiam.* The testimony of Fink is material; it is true that Fink was present at the trial and *that the defendant knew beforehand what he could prove.* But the defendant was not present at the trial and Cornwell, to whom he had abandoned the defense, swears, that he knew nothing of this testimony until after the trial. The motion for a new trial is therefore granted.

Under the *Part.* 3, 5, 4, which, in favour of liberty, not only permits to a slave to appear in court for the recovery of his freedom, but authorises any one, whether a relation to the slave or a stranger, to act in his behalf, though without any mandate to that effect, Marie has entrusted to me the care of prosecuting her rights, she has abandoned to me the defence of her cause. From the moment I accepted of the charge, I became her *personero*, and from the moment the issue was joined, I was authorised by law to act in her name and to do in her

behalf, even in case she should die, all that she could personally do, till the final decision of the suit. *Part.* 3, 5, 23, sanctioned by a decision of this court, 4 *Martin*, 486, *Montreuil vs. Jumonville.*

To the case, which the defendants' counsel boldly maintains is the only one in which the party's own affidavit may be dispensed with, to wit: "when he is absent," I think we can add those of a father, of a husband, of a tutor, of a testamentary executor, of a copartner, of a colitigant, of a *personero*, &c. ?

The defendants' counsel calls into question that this court can take cognizance of the denial of a new trial by an inferior court. This point has been already wisely settled in the case of *Sorrel vs. St. Julien*, 4 *Martin* 508, "The nature of the discretion of the courts below (said the learned and upright judge who delivered the opinion of the court in that case) in granting and denying new trials, is not an arbitrary but a sound, legal and judicial discretion, to be guided by fixed principles and subject to the revision of this court." In an other passage of the same opinion, we read these precious and comforting words: *this court will relieve on the improper denial of a new trial, when thereby the party sustains an irreparable injury.*

That my client has sustained an irreparable in-

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jury, is self-evident. The new trial has been denied to her, contrary to the justice of her cause and the favour which the laws of all civilized nations show to persons suing for freedom, especially our local laws and those of the other states of the Union. (*For examples of the favour shewn by the courts of the sister states to paupers suing for freedom, see in Hudgins vs. Wright*, 1 *Hening and Munford*, 134 and *Isaac vs. Johnson*, 5 *Munford*, 95.) Her cause is one of the most favourable in the eyes, I will not say of humanity, but of strict justice; it embraces the interests of a woman and of a child for whom all the laws grounded, like those which govern us, on the immutable principles of natural equity, show the most tenderness, especially when, as in this case, they sue for freedom, speaking of which, *Part.* 18, 22, 3, says: *todas las leyes la deben ayudar, quando ovieren alguna carrera, ó alguna razon por que lo puedan fazer.* Under this consideration, and this consideration alone, the new trial ought not to have been refused.

NEW authorities being introduced in the reply, the defendants' counsel had leave to answer them, at next term.

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APPEAL from the court of the first district.

The purchaser of the real estate of a minor cannot avail himself of the prescription, *brevi temporis*, if all the legal formalities were not observed in the sale.

8m 619 / 45 862

8m 619 / 52 213

8m 619 / e122 490

Livingston, for the plaintiff. In this case, the facts are that the plaintiff, being a minor then aged of four years, in the year 1792, her guardian Antonio Mendez, purchased a lot of ground with a small house thereon for her benefit, the price of the said lot being a sum of money received for a slave sold by the guardian.

That in the month of January 1806 (the plaintiff then being eighteen years of age) a petition was presented, by P. Pedesclaux, as attorney at law, in the name of the mother of the plaintiff and of the plaintiff herself, to judge Prevost, stating that it was for the interest of the minor that the said lot should be sold and praying leave to sell the same. This petition was never filed, but the judge wrote on the back: "let the prayer be granted the petitioner giving security for the amount of the sale, 10 January 1806, J. B. Prevost."

This petition, in original, is inserted on the notary's register and immediately after follows a sale from the mother (stiling herself *mère naturelle en sa qualité de mère autorisée par le décret du juge annexé*) to the defendant for the sum of four hundred dol-

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lars paid in the presence of the notary. This sale is dated the same day with the order of the judge, 10 January, 1806, and it is admitted that the defendant has been in possession more than ten years after the plaintiff came of age, and, before bringing this suit, the plaintiff always residing in this city.

The law questions on which the decision must depend are: did the conveyance transfer the property to the defendant? if it did not, is it a sufficient foundation to support his plea of prescription?

I. The first question will not admit of much debate. The whole proceeding was irregular.

1. The judge of the superior court could not act in any other manner, than that prescribed by the act organizing the court, which passed in 1805. By that act all petitions were to be filed with the clerk. The delivery of the order to Pedesclaux on a petition never filed in the court, was extra judicial and void.

2. The mother could not act for the minor, then 18 years of age, without showing that she had been appointed curatrix.

3. The attorney could not appear for the minor without a special appointment, as curator *ad litem.*

4. The application to sell being made, as was

said, for the benefit of the minor, she ought to have signed the petition herself, and it appears in evidence that she could write.

5. The order given by the judge was illegal because it did not appear that the minor consented to the sale; because no evidence was offered that it was necessary or useful for her to sell; because there was not even an allegation that the mother was curatrix, and, if the judge had looked at the title of the land petitioned to be sold, he could have found that the minor had a curator who was not the mother; because in the order to sell, it ought to have been expressed that the sale should have been at auction and after an appraisement; because if any security was ordered for the purpose of securing the minor's rights, it should have been directed to be taken before the sale.

6. The sale was wholly illegal: not signed by the curator, and not made in the form prescribed by law.

7. The security directed by the judge's order for the purchase money was never given.

These objections to the sale are supported by the following authorities which I refer to, after stating all the points, because most of them (the authorities) refer to all the points I have made.

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When the mother wishes to act as guardian she must be appointed formally. The form of such appointment, *Part.* 3, 18, 95. Form of the appointment of a guardian *ad litem*, *ibd.* 261.

To prevent the improper alienation of the estates of minors, they are not to be sold *except to pay debts*, and even then, with the order of the judge, publicly at auction, after a notice of thirty days. The form of the sale is set forth, "*in order that the purchaser* may be sure of what he purchases." In this form of sale the reason for selling, to wit; the debt, is recited, the application of the guardian, the exposure at public auction, and the notice of 30 days, the name of the purchaser, the certificate that the money was paid by the purchaser, and that the guardian in the presence of the notary had paid it over to the creditor of the infant in discharge of his debt, are all essential parts of the act, to which must be added, says this wise law, that the judge must certify that the guardian was duly appointed, that the debt which was the cause of selling was due, and also all the other points above enumerated. *ib l.* 69, *n.* 2.

The guardian shall not give, sell, nor alienate, any of the real estate of the minor, unless he do it to pay the debts of the estate, or to marry one of his sisters, or himself, or for some other lawful cause which can-

not be avoided. And then not without the order of the judge. *Part.* 6, 16, 18.

Si vero debita solemnitas non est observata, tunc ipso jure non valuit venditio, neque est opus restitutione. Part. 6, 19, 5, *n.* 3, *ad fin.*

All sales by order of a judge must be at auction. *Part.* 5, *p.* 52, 4. *Febrero* 3, 3, § 1, *n.* 67, 71.

None of the essential requisites for making a good sale having been observed, the conveyance made by the mother in this case was of no effect and could not transfer the property, and it therefore still belongs to the plaintiff. We must then enquire,

II. Whether it is a good foundation for the plea of prescription ?

This, it was agreed in the court below, was a bar in two points of view ; 1st. because minors must apply for restitution within four years ; 2d. that the prescription of ten years *inter presentes* applies to give the defendant a title in this case.

On the first point it is sufficient to observe, that this is not an action for *restitution* which is barred, I acknowledge, by four years after the cause was known. That action lies where the sale of a minor's estate was made, according to the forms of law ; but when his interest was injured in the price

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then, in favour of his age, the law gives him the right of redemption by repaying the price in the action of *restitution*. This action, however, is brought on no such suggestion. We alledge that there was no legal sale, that the property never passed but is still in us and therefore we want no relief by way of restitution, but by revindication of the property. And when the property of a minor has been conveyed without the requisite formalities we find, by express authority, that there is no need of the action of restitution, but that the sale being *ipso jure* void, the minor may at any time revindicate the property.

To this effect is the authority above quoted from the *Partidas*. 4 *Febrero*, *lib.* 3, *c.* 3, § 1, *n.* 67.

When the minor sells without just cause and without the *solemnidades prescriptas por derecho*, the sale is *ipso jure* void and to rescind it *he has no need to ask the aid of restitution*, altho' it may be done to pay his debts, 4 *Febrero* 3, 3, § 1, *n.* 67.

We see what are the *just causes and requisite solemnities* to render the sale valid, *ibd.* 69, 70.

"Y se advierte lo primero que omitiendose las solemnidades expresadas *no necesita el menor implorar el auxilio de la restitucion in integrum, porque quando la ley irrita y annula el contrato cesa el oficio* del juez acerca de ella por lo que puede revocar di-

rectamente la enagenacion del poseedor." *ibd.* 71.

We have then only to enquire, whether the sale be a sufficient foundation for a title by prescription.

If I have succeeded in shewing that the sale to the defendant was deficient in the essential forms, this will be an easy task; for our statute, *Code Civ.* 488. *art.* 70, directs us on this point: "when a title is defective, with respect to form, it cannot become the basis of the ten or of the twenty years prescription."

And again, *art.* 67 and 68, the title must be a just title, and a *just title* is one by virtue of which property may be transferred. Here the title wanted those forms which alone could transfer property.

The title must be a just one: that is such a one as would convey the property, if the vendor was the owner, and the purchaser must have legal cause to believe the vendor to be the owner. Now here the title, so far from being one translative of property, is declared to be *ipso jure* void; if so, no title at all and of course no foundation for a prescription.

Pothier, who lays down the same position, illustrates it by several cases. The institution as an heir of a person incapable of inheriting is not a just title and therefore if the instituted heir ignorant of his incapacity should take possession, yet he could not

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prescribe. *Pothier, traité de la prescription, n.* 85. The same of a legatee incapable of receiving.

A donation between married persons carries the same consequences, *ibd. n.* 87.

If, for example, you purchased from a tutor, an estate belonging to his ward, *without the compliance with any of the formalities, required for the alienation of a minor's estate*, you will not be able to prescribe, and your title will not avail you. Vainly will you say you thought the seller could sell. You ought to have known the law decided the contrary and you cannot fail being classed among purchasers who knew the defect of their titles. *Nouveau Dunod*, 26, 27.

Here all the defects were glaring and were such as the purchaser was bound to notice.

By the title deed for the property which he purchased, it appears that the mother was not the guardian but that A. Mendez was.

The judge ought to have ascertained this point before he gave the order ; but as the purchaser must have looked at the title deed before he paid his money, he must have discovered that, in treating with the mother, he was not treating with the guardian.

If it should be answered to one of the objections I have made, that the purchaser was not bound to

see that the condition for giving security was fulfilled, which the judge imposed in ordering the sale. I reply that, if he wished to secure his purchase, it was his duty to see that all the conditions were complied with. Whenever a man lends money to refit a ship to the master, in a foreign port, he cannot recover unless the money has been thus applied. When a trustee is authorised to sell to fulfil a trust, the purchaser must not only pay his money, but see to the application of it. And in the very case before the court, we see by the forms laid down by the *Partidas* that this is of the essence of the contract, directed to be inserted in it and certified by the notary.

On the whole, I trust I have shown that the title set up by the defendant conveyed to him no property.

That it was so defective as not to be voidable only, but *ipso jure* void.

That of course, it was not necessary to sue for restitution, and that therefore the limitation of that action does not apply.

And that lastly this is not such a title as will support the plea of prescription.

Canonge, for the defendant. The vendee acquired a good title, because the land was sold on a spe-

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cial order of the judge, after a full statement of the circumstances which rendered the sale of the minor's property necessary. The judge imposed no other condition, but that the tutrix should give security for the amount of the price. This must be presumed to have been done, since the contrary is not alleged.

The act of 1805 relates to suits, and speaks of such petitions, by which suits originate, only, and as applications of the nature of that on which the order issued are made at chambers, no record is preserved of the evidence by which the judge is satisfied of the propriety of allowing the prayer of the applicant: his *fiat* is presumptive evidence that the necessary facts, to support the order, were made out to his satisfaction.

The sale was executed in the manner in which it was ordered by the judge.

Finally, the plaintiff, as soon as she came of age, might have brought her suit to annul, the sale or otherwise sue the defendant. This would have enabled him to have his recourse against the plaintiff's mother and to obtain the restitution of the purchase money. More than ten years have elapsed, since this might have been done. The plaintiff must be presumed to have acquiesced in the sale, and is too late in her application to claim the property sold.

MATHEWS, J. delivered the opinion of the court. This suit was instituted by the appellant, who was plaintiff in the court below, to recover a lot of ground, in the city of New-Orleans, as described in the petition. The defendant, in his answer, claims title to the property in dispute by purchase and by prescription.

The facts in the case show that the appellant was the owner of the lot for which she now sues—that in the month of January, 1806: being then eighteen years old, she and her mother, her natural tutrix, applied to a judge of the superior court of the late territorial government, for permission to sell the lot, by a petition, in writing. And that an order was obtained from the judge, authorising the sale, as requested, and requiring security on the part of the seller for the price. The petition and order of the judge are incorporated in the act of sale, made by the mother, as tutrix of her daughter, to the defendant and appellee. Under this sale, he has been more than ten years in possession, since the plaintiff came to the age of majority, and before bringing this suit.

On these facts, two questions of law are raised for the consideration of this court. Did the conveyance transfer the property to the defendant? It

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it did not, is it a title sufficient to support a plea of prescription ?

As to the first of these questions, we are of opinion, with the counsel of the appellant, that the act of sale was so informally and illegally made, as not to convey a valid or indefeasible title to the appellee. Tutors have no right to sell the immoveable property of their wards, unless under particular circumstances and conformably to specific formalities prescribed by law. These are fully laid down in *Partida* 3, 18, 60, which was in full force at the time the sale was made, and were not complied with.

Whether or not the conveyance be a sufficient foundation for the prescription of ten years, is a question of more difficult solution.

To acquire an indefeasible right to property, under the prescriptions of ten and twenty years, a just title, good faith and uninterrupted possession are necessary on the part of the possessor. These are fully explained by different writers on the subject. A sale made in due form, which would be translative of property, if the seller were the real owner, although he be not, if the purchaser be ignorant of that fact, is a title sufficiently just to prescribe under. The good faith requisite for prescrip-

tion is an honest belief by the possessor that he has acquired a title to the property which he possesses : *justa opinio quæsiti dominii.* In the present case, there is no dispute about the manner or uninterruption of the possession.

There is no doubt of the act of sale under consideration being sufficiently formal, had the seller transferred the property as her own, to have given a title to the defendant sufficiently just to prescribe under, if he was ignorant of the fact that the property sold belonged to another person. If the sale had been made by the minor, in *propriâ personâ*, being above the age of fourteen years, it is believed that, according to the 59th law of the *Partida*, above cited, it might be a good foundation for the prescription relied on by the defendant, and he ought to be considered, under that law, as a possessor under a just title and in good faith. But the deed has neither of these forms : it purports to be a sale, made by a tutrix of the property of her ward, and as such is wholly informal and illegal, the requisites of the law cited not having been complied with. The vendee saw most clearly that he was purchasing from one person the property of another, and *qui sciens alienam rem emit pro emptore possidet, licet usu non capiat, ff.* 41, 4, 2.

(East'n District. July, 1824.

FRANÇOISE vs. DELARONDE.

From the order of the judge, it is presumable that the defendant believed that he gained a just and legal title to the lot, under the act of sale, supposing that all the formalities required by law had been complied with. In this he mistook the law: for the manner of sale and forms required by law were not pursued; *et nunquam in usucapionibus, juris error possessori prodest. ff. eod. lib.* 3, 31,

However much the commentators of the Roman law have differed the one from the other, and the same person from himself at different periods, on the subject of mistakes of law, they seem to agree in this, that *juris error* is never a good foundation for acquiring property. 2 *Evan's Pothier*, 409, *d'Aguesseau's dissertation*, 2.

In the opinion of the district court, it is assumed as true that the act of sale, under which the defendant claims a right by prescription, was executed in due form, as required in such cases by law. This is not so. In sales, made by tutors of the real estate of their pupils, it is required by the 60th law of the *Partida* above cited, that in addition to the order of the judge, authorising the sale, the property be advertised during a certain length of time, and that it be sold at auction, &c. all which is to be expressly mentioned in the deed. The title of the defendant

and appellee, being defective in this respect, cannot be the basis of the prescription. *Cod. Civ.* 488, *art.* 70. Possessors do not acquire a right to the property purchased by them, in virtue of the kind of prescription, by which the defendant attempts to make out his title, in the present case, solely in consequence of the real owner not pursuing his rights and making his title known, within the period limited by law. A colourable title and good faith on the part of the possessor (as we have already shown) form the legal basis of a right gained by prescription of the shorter period. In prescribing by a lapse *longi temporis*, wherein no title is necessary, the right is lost to the owner and acquired to the possessor entirely by the latches and acquiescence of the former. The neglect of the plaintiff and appellant, in not claiming the property, within the ten years since she came of age and her acquiescence under the possession of the defendant and appellee, do not, in our opinion, amount to a confirmation of title in the latter, for the reasons above adduced.

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 their opinion ought to

East'n District. *July*, 1820.

FRANÇOISE vs DELARONDE.

have been given below, it is further ordered, adjudged and decreed that the plaintiff and appellant do recover, from the defendant and appellee, the lot of ground, &c. described in the petition, and that the latter pay costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, AUGUST TERM, 1820.

FILHIOL
vs.
JONES & AL.

FILHIOL vs. *JONES & AL.*

Suit may be brought on a note, not negociable, in the name of the payee, for the use of the transferee.

A surety who does not bind himself *in solidum* when there is another surety, is only liable for one half of the debt.

APPEAL from the court of the seventh district.

DERBIGNY, J. delivered the opinion of the court. This suit is brought in the name of the transferor, for the use of the transferee, of a note not negociable. The demand is made against the subscriber of the note, and against one only of two persons who signed it as sureties.

On this two questions arise. Could the transferor sue in his own name? Could he sue one of the sureties, for the whole?

West'n District. *August*, 18..

FILHIOL vs. JONES & AL.

The first question is one of form, rather than of substance. The nominal plaintiff declares that he acts for the benefit of the real party. If he had entitled the suit, Robert H. Sterling, by his agent, John Filhiol, no objection could be made to that mode of proceeding. Instead of that, he calls himself, the plaintiff, for the use of Robert H. Sterling; we do not think that this alteration ought to vitiate the proceedings. Filhiol shows himself to be the agent of the transferor, by presenting the note on which the suit is brought. He had the transferor's authorisation to collect it; whether he collects it amicably, or compels its payment by suit, in his name, for the use of his principal, he is within the line of his powers, as agent. We think that such a technical difficulty ought not to prevail.

With respect to his demand of the whole, against one of two sureties, who have not bound themselves *in solidum* nor renounced the benefit of division, we think that it is irregular and ought to be reduced to the half of the sum claimed.

It is therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed; and that judgment be entered against Russel Jones for the whole amount of the

note, to wit: eleven hundred dollars, with interest since the judicial demand and costs; and that judgment be entered against John Nancarrow, for the half of that sum, and that execution be stayed against him, until the property of Russel Jones shall have been discussed.

West'n District. *August*, 1820.

FILHIOL *vs* JONES & AL.

Thomas for the plaintiff, *Bullard* for the defendants.

HOOTER vs. *TIPPET.*

APPEAL from the court of the sixth district.

When two claimants of the same tract of land have obtained the commissioner's certificates, their respective titles are to be examined, independently of such certificates.

A *requête*, on which no order was made, gives no right.

8m 637 47 580

8m 637 49 1477

DERBIGNY, J. delivered the opinion of the court. Michael Hooter, the plaintiff and appellee in this case, claims a tract of land, of which the defendant and appellant, Stephen Tippet is in possession. He must therefore show that the title to the land is in himself, before he can sue the possessor.

It appears that both parties have obtained, from the commissioners of the land office, a relinquishment of the rights of the U. S. on the land, so that, agreably to the decision of this court in the case of *King vs. Martin*, their previous titles, if they had any, should be weighed independently of these relinquishments. 5 *Martin*, 197.

The only voucher, which the plaintiff exhibits,

West'n District. *August*, 1820.

HOOTER *vs.* TIPPET.

is a petition or *requête*, in which he appears to have applied for the land in dispute in the year 1801, to the intendant of the province of Louisiana. At the foot of that petition is a certificate of the commandant of Rapides, attesting that the applicant is the son of an ancient inhabitant of that post, and that the certificate of the surveyor is written with his own hand. But no order of survey, no decree of any kind is given by the intendant or his representative. The application stands unanswered. Now, supposing the parties to be in the situation in which they were before the relinquishment of the rights of the U. S., would the plaintiff be able to eject the possessor of the land with such a paper, a paper which is the act of the party alone, and bears not the slightest intimation of the grantor's pleasure?

But the plaintiff has obtained a relinquishment of the claim of the U. S. in his favour. And so has the defendant long before him. Without examining whether the defendant had any better title to the land than the plaintiff, we will consider both as equally unaided by any inchoate title, at the time of their application to the board of commissioners; and the situation of the parties will stand thus: either both the certificates are of equal dignity, and then the possessor's condition is the best; or the first in

date must prevail, and then the defendant's title is superior to the other. In both these points of view, we see no reason why the defendant should be disturbed.

The objection that the certificate obtained by the defendant, from the commissioners of the land office, inures to the heirs of Jacob Hooter, because it was granted to the defendant, as purchaser of Jacob Hooter's rights, while that pretended purchase was illegal, cannot avail the plaintiff. Whether he holds legally or not under Jacob Hooter, is not here in question. It is enough for him to show that there exists a title superior to that of the person who attempts to dispossess him.

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

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

West'n District.
August, 1820.

CURTIS
vs.
MURRAY.

CURTIS vs. *MURRAY.*

APPEAL from the court of the sixth district.

The mortgagee cannot proceed against the premises in the hands of a third possessor, till after judgment against the mortgagor.

MATHEWS, J. delivered the opinion of the court. This is a case, in which the appellee, who was plaintiff in the court below, prayed for and obtained an order of seizure and sale of certain mortgaged property, described in this petition and held by the defendant and appellant, by purchase from the mortgagor, as a third possessor. The seizure being ordered, without the creditor having first obtained a judgment against the original debtor and mortgagor, the possessor prayed for an injunction to stay proceedings, which was refused by the court *a quo* and from this refusal, the present appeal was taken.

How far the provisions of the Spanish law, relative to the *via executiva* are abrogated by the *Civil Code*, it is useless in the present case to inquire. The right of a mortgage creditor, whenever the title amounts to a confession of judgment, to proceed in the summary way of seizure and sale, is not to be doubted, as long as the mortgaged property remains in the possession of the original debtor. But, when it is in the hands of a third person,

the proceedings must be by an action of mortgage, in conformity with the rules of the *Code*, which require that the creditor, should before he proceeds against the property, in the hands of the third possessor, obtain a judgment against the original debtor. This rule of proceeding is, we believe, founded on good reason, but whatever may be the reasons which induced it, they are not here to be inquired into. *Civ. Code* 462.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and it is further ordered that the plaintiff and appellee be enjoined from all further proceedings on said order of seizure. *Knight vs. Hall*, 7 *Martin*, 410, *Tessier vs. Hall*, *ibd.* 411.

Baldwin for the plaintiff, the defendant, *in propria personnâ*,

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BRASHEARS vs. *BARRABINO & AL.*

APPEAL from the court of the fifth district.

After the sheriff has struck off property to the last and highest bidder, he is not to set it up again because another bidder claims the bid and offers to give more.

Porter, for the plaintiff. This is a suit brought to annul a pretended sale made by Charpentier, sheriff of St. Mary's, to Barrabino, of a tract of land, lying in said parish, and to have his possession of it quieted and assured.

West'n District. *August*, '81.

BRASHEARS vs. BARRABINO & al.

The history of this case is shortly this. Judgment had been obtained by Desbois's administrators against Brashears, the present plaintiff, execution issued on it: on the day of sale, Brashears attended by his agent and bid for the land; it was striken off to Barrabino, the defendant, under the circumstances found by the jury, and the question to be decided by the court on that finding is, whether a sale by a sheriff, in the mode that this sale was made, is a legal one or not. If it be *legal*, we are divested of the property, if it be not, we must of course recover.

Before the case is examined on its merits, a preliminary point is to be disposed of.

A motion for a new trial was made, on the ground that the verdict was contrary to evidence, and that the jury did not answer, by their verdict, to the fourth fact submitted on the part of the plaintiff.

The first ground taken will not now be insisted on, as *all* the evidence given at the trial was not taken down. The second reason urged in support of the motion is however correct, and the court, it is conceived, must on this point remand the cause, unless the defendants will consent that the verdict be amended.

The fourth fact submitted is in these words. "Was

or was not the bidding at said auction carried on by *secret* signs, on the part of Barrabino, the defendant." To this question the jury answer "the bidding at said auction was carried on *by signs, by Barrabino and Crow.*"

This, at first blush, is no answer to the question. They are asked whether it was not, carried by *secret signs*, on the part of *Barrabino*. They say in reply that it was *by signs, on the part of both*, refusing to say whether they were *secret* or not on the part of the defendant, and by doing so have deprived the plaintiff of all the benefit he would have had in the argument, from shewing a previous and secret understanding, between the sheriff and the purchaser.

They have found too what was not submitted to them: that the bidding on the part of *Crow*, the plaintiff's agent, was by signs. Why they went into this inquiry cannot be conceived. Had the plaintiff supposed that they were about to consider this, he would have been prepared on it, would have called testimony to explain it, would have argued and commented on it; all these advantages he has lost, by the jury travelling out of the limits in which the question was submitted them. This point is surely too plain to require any further argument, and it is again, and with entire confidence, repeated that the

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cause must be remanded or the defendants must consent to have the verdict amended. The whole benefit which the law contemplates parties will derive from this mode of finding facts is lost, if the court will indulge juries in travelling out of the interrogatories propounded to them.

But, to return to the merits: there are two modes of alienating property, one *voluntary*, the other *forced*. The latter is given by law under certain formalities, and these *formalities*, which it prescribes, must be exactly and strictly pursued: otherwise there is no alienation, *Curia Philipica, juicio executivo, part* 2, *tit. Remate, no.* 5, *tit.* 5, *ley* 52. *Reeves vs. Kershard*, 4 *Martin*, 513. *Febrero cinco juicios, lib.* 3, *chap.* 2, § 5, *No.* 352 & 357.

The act of our legislative council (*vide* 2*d Martin's Dig.* 170) directs the property seized under execution to be sold after certain delays, by public sale, and to the highest bidder.

The jury here have found that Barrabino, the defendant, was the highest bidder; but they have also found *that, at the time the sheriff struck it off*, the bid was claimed by Crow, who was agent for the plaintiff.

They have also found that the bidding was car-

ried on by signs on the part of Barrabino and Crow.

And they (the jury) have also found that Crow offered to give 3500 dollars for the land, if the sheriff would put it up again, and that is a custom, in this State, when a bid is disputed to set up the article a second time.

We contend on these facts that the plaintiff is entitled to recover. There is considerable difficulty in ascertaining what formalities are required by *law*, in ordinary actions to *close the contract*, between the parties. The counsel for the plaintiff have been laborious and faithful in their researches and have in vain sought for information on the subject from any book within their reach.

As it respects judicial sales, an examination of our statute, and the ancient law of this country will enable us to show, that the sheriff was bound to set the property up again, when two persons claimed the bid.

The act of the legislative council before cited (2 *Martin, Dig.* 170) provides that all sales shall be between the rising and setting of the sun, says nothing further with respect to the formalities that must be pursued, leaves of course all other provisions of our ancient law untouched and unrepealed.

In the *Curia Philipica, juicio executivo, p.* 2, *tit.*

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Remate, *no.* 4, it is declared that the adjudication shall be made in the ordinary form. But does not state what that form is. In the same work, however, *comercio terrestre*, *lib.* 1, *ch.* 15, *nos.* 27 & 28, *see also Febrero juicio executivo lib.* 3, *ch* § 5, *no.* 327, it is laid down in express terms that when property is to be sold at auction *the day* and *the hour of the day* must be advertised and that until that hour is expired any new bid may be made and must be received.

Here there is a most important and essential formality, which was omitted, no time was designated by the sheriff, he chose his hour for sale, and chose the moment he pleased to finish it. It is not necessary to enlarge upon the scandalous abuses that must ensue, if these officers are not strictly required to obey and pursue this law. No man's property will be safe, against whom an execution issues, if the sheriff without notice can begin a sale, at six o'clock in the morning, or within five minutes of sun set in the evening, and finish it when he chooses. The policy and wisdom of the laws of Spain on this subject are obvious and this honourable court is called upon by every principle of justice and public utility to sanction and enforce them.

The sale made here, we therefore contend, for want of this formality is null and void.

It is null and void, we contend, on an other ground.

The jury have found *that, at the time of striking it off, the bid was claimed by two persons.* Whenever this occurrence takes place at auction, more particularly at a forced one by the operation of law, as will be shown hereafter, it is the duty of the officer selling, as it is the custom throughout the world, to put up the property again, and this from the necessity of the case.

Selling property by auction is in some measure a forced way of disposing of it, even where the owner places it with the auctioneer to be sold. This auctioneer or his agent cries it aloud, at the price which is offered, he strikes it off, when no more can be had for it than the last bidder has announced his willingness to give, and he designates who that last bidder is. No law points out how long he is to wait, in order to ascertain, if any more will be given. In common auctions, he sometimes pauses a longer, sometimes a shorter time, to know if more can be had. To limit the time indeed by legislative enactment, or positive regulation, would be perhaps impossible. But to guard against the abuse of such

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extensive power, the common sense of mankind in all countries has provided a remedy for the safety of both purchaser and vendor. That remedy is, that when the bid is claimed by two persons, the property must be put up again. Whithout this restraint upon auctioneers, both seller and purchaser would be at their mercy, they could dispose of the property at any moment during the *crying* that they thought fit, and favour whom they pleased to the great injury of all interested. This custom of putting the property up again, when the bid is claimed by two persons, the jury have found to exist in this state.

If this is true in ordinary auctions, it applies with ten fold force to those that are commanded by justice to enforce her decrees. The officer is the agent and minister of the law, the property is sold from the necessity of the case, it is directed to be disposed of to the *highest bidder*, or in other words, when it is found *that more cannot be had for it.* What is meant by these words *highest bidder. The highest bidder at any time the officer may chuse to strike it off?* No, the highest bidder that may present himself, until the hour is terminated at which (following the provisions of the Spanish law) he advertised the sale would close, or if he has advertised none, the highest bidder that may offer until the going down

of the sun. What law gives him the privilege of choosing his time of exposing the property to sale, and closing that sale when he pleases? There is none, it is confidently asserted, none, and it would be ruinous to society if he had such a privilege.

But this is not the case, where the sheriff has closed a judicial sale before the time advertised, and another person besides the last bidder comes in and asks the benefit of opening it. The jury have found that, at the time of striking off, the bid was claimed by two persons. Why did he not put it up again? He could not be ignorant of the custom existing in this state, and in all others, on contested bids; no reason can be given, founded in either law or justice, why he did not; and the only way left for us to account for it, is that he wished to favour the purchaser to whom he struck it off.

But this was not a *public sale*, in the sense the law uses the expression. All the authorities in speaking of it, require the utmost publicity that the nature of the thing will admit of. *Partida* 5, *tit.* 5, *ley* 52, *Curia Philipica, jucio, tit. Remate, no.* 2. Here it was carried on by signs, on the part of Barrabino (for that part of the verdict, which alleges the same practice on the part of Crow, must be laid aside, as it was not submitted to the jury) contrary to the

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spirit and object of such a sale. Who, that has frequented auctions, does not know that the character of the person bidding has often great influence on the price of the article exposed; that the emulation, which is excited by two or three persons offering for it, enhances the value; and that a contest of several for an object calls in others? All these advantages are lost to an unfortunate debtor: by permitting an early and previous arrangement with the officer, by which he is calling, in appearance, no man's bid but his own, by sanctioning a course of proceeding which renders *that private*, which in its nature should be *public*, which makes that *secret*, that ought to be *notorious*, and by which one half of the benefits of publicity are lost. In Spain, so important is it considered that the last bid should be exactly known; that if a purchaser offers a price for an article, under an idea that more had been already proposed than what in truth was, he is not responsible for the surplus between the *real bid*, and the erroneous one announced. *Curia Philipica, Com. terrestre lib.* 1, *c* 15, *no.* 31. Will the court sanction a course of proceeding here, so totally hostile to the policy of our law, so well calculated to introduce confusion, and which, in this case, has produced such ruinous consequences to the owner of the property?

But, if the law was otherwise than as we contend for, when the bids are open and public (but which by the way it is not) surely when they are secret, as here, and calculated to produce such mistakes, the sheriff should again have put up the property, when two claimed the bid.

In Spain, the relations of the party, whose property is selling, are preferred to all others: in the same spirit of humanity, the debtor himself should have had the preference. *Curia Philipica, juicio executivo, tit. Remate.* § 22, *no.* 5.

But, to conclude, if the court should not feel inclined to set aside this sale, on the general reasoning already urged, it is believed they cannot avoid doing so from the finding of the jury; the verdict states that it is the custom in this state when a bid is claimed by two persons, that the article should be set up again. Custom, *unwritten law*, *Partida* 1, *tit.* 3, *ley* 4, where positive law is silent, takes place of and has the force of legislative enactment. *Partida id. ley* 6. Our own code has provided that the judge, in the absence of positive provisions, must decide according to natural law and reason or *received usages.* The case is then made as strong as if we shewed an act of our legislature, that whenever property at auction was claimed by two persons as their bid,

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it should be put up again, and on this, and what has been already urged, we confidently look for success.

Brent, for the defendants. By a reference to the record and statement of facts made out in this case, the court will see that the defendant, Barrabino, holds the land, claimed by the petition, *in virtue of a deed* made to him of the said land, by the other defendant, Charpentier, the sheriff of the parish in which the land lays; that said land was sold by said sheriff, in virtue of an execution, to satisfy a debt due by the petitioner; and that, at the sale of the land, the defendant Barrabino *became the purchaser.*

It has been already decided by this court that the deed under which the defendant Barrabino holds is made in due form of law. 5 *Martin*, 190.

In the court below, a judgment was given in favour of the defendants, from which the petitioner has appealed, and now urges that the judgment ought to be reversed, and remanded for a new trial.

I. The petitioner wishes this cause to be remanded, for a new trial, because the *court below* refused the *new* trial, upon the finding of *the fourth fact submitted*, by the jury.

The court will please to observe that Crow was

the *agent, representing the petitioner,* at this auction, and *bid for him.*

I do not conceive how the ingenuity of the gentleman can make it appear that this is not an answer to the fact. The jury is asked, if Barrabino's *bids* for the land were not by *secret* signs? They answer that Barrabino's and Crow's bids were both by *signs.* Now, it appears to me that the answer of the jury finds the *fact* submitted, which is that Barrabino bid by *signs*, but not *secret signs:* nor could they have found differently, for if the signs had been *secret*, how could the witnesses have seen them? Suppose the fact submitted had been whether Barrabino, bid by *words* at the auction, and the jury had answered that he *bid by signs*, would not this answer have *negatived the bidding by words?* And would it not have answered the fact submitted? So it is in the present case: the question asked, if the bids were by *secret signs*, the answer is that they were by *signs.* The jury are not sworn to answer *the facts categorically*, *yes* or *no.* The words of the act are *the jury shall be sworn to decide the question of fact alleged and denied, and their verdict or opinion thereof shall be unanimously given, &c.* Acts of the legislature of 1817, 32, *sct.* 10. So that the province of the jury is, to find *the facts such as*

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they are proved, which they did in this case; that both the *petitioner*, *by his agent Crow*, and the *defendant Barrabino* bid by *signs*, and the not finding the signs to be *secret*, negatives that fact.

But, says the counsel for the petitioner, they found that *Crow bid also by signs*, and *that fact* was not *submitted* to them. If the *fact submitted* was answered, the jury *finding more* than was submitted to them, can be no cause of setting aside the *finding* as to the *fact that was submitted.*

Before the court would regard this case upon *this* ground, it must be satisfied that the answer, as contended for by the petitioner, would be *material* to his cause: if it would not, most certainly the cause will not be remanded upon that ground.

But, as all the facts come up with the *record* and *statement* made out, it will be necessary for me to comment upon them, as the court will look into them and be enabled to ascertain the bearing that *this objection* of the petitioner could have upon the case, and also to ascertain if the *finding* of the jury, *was supported* by the *evidence.*

II. The law regulating sheriff's sales, is to be found in *Martin's Dig.* 170. It is declared that the property shall be advertised for a *certian length*

of time, to be sold on a *certain day* and at a *certain place*. All this it is *proven* and it is also admitted, was done. It is also declared that the sale must be made between the *rising* and the *setting* of the sun. I need only refer the court to the *statement of facts*, to shew that all *these formalities were pursued*, and until the petition shews *they were not*, the court will presume they were.

The petitioner's counsel complains that the *hour of the day* was not mentioned, when the sale was to take place. By a reference to the *statement of facts*, it will be seen that it was, and that the sheriff began to cry the land at the time advertised, which was before twelve o'clock, and that he left the sale *unclosed* for the accommodation of the petitioner's agent, until the evening, and that the *petitioner by his agent then* attended, and bid for the land. If the law does require that the *hour of the day* should be named, it is that the *party interested might know* when the sale should begin, that he might be enabled to attend, to watch his interests. The petitioner, in this case, cannot complain, because *he was present* by his agent, who in person bid for the land and thereby sanctioned the proceedings, and *now*, with bad grace, complains of the want of formality. But all the formalities required were accomplished. There

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is no proof to the contrary. It is only necessary to pursue to form pointed out by the aforesaid statute.

III. What is the testimony as to the fact that *two persons* claimed the same bid and the land *was not put up again*? What is the finding of the jury? The petitioner submitted this fact to the jury, viz: "were there not *two bidders* for the land, at the *same price*, *at the time* the sheriff struck it off to *one* of them, and was not the *bid* claimed by *two* persons." The *fact*, as found by the jury, is "there were *two* bidders, but *not at the same price*, Barrabino (the defendant) being the *highest* and *last* bidder, *at the time* the sheriff *struck it off*." Here the fact is *found* that, when the land *was struck off*, it was to the defendant *Barrabino*, who was the *highest* and *the last bidder*." It is also found "that the bid was claimed by *Crow*," but at the same time, that it was not *his bid*, but Barrabino's, who was *the last* and *highest bidder*. This is a complete answer to this ground taken by the petitioner. Were the doctrines as contended for the petitioner to be recognized, they would be strange indeed, and would amount to this, *two* men *bid* for land at a sheriff's sale, one *bid higher* than the other

and the sheriff strikes off the land to the *highest* bidder, who is also the *last* : but when the land *is struck off*, the *other* repents and claims the bid and says he will have it; *if put up again, he will give more.* Perhaps he might, but the sheriff has already struck off the land, to the *last* and *highest bidder.* It is no longer *under his control*, it belongs to the person to whom it has been struck off and, without *his consent*, it cannot *be put up again.* The sale is complete as soon as it is struck off. The law says: "the sheriff shall sell the land to the *highest bidder.*" 2 *Martin's Dig.* 170. And the jury have said, in their *facts found*, that the defendant Barrabino was the *highest bidder.*

But, says the counsel for the petitioner, the jury have found that when a bid is claimed by *two* persons, *the custom* in this state, at auctions, is to put it up again. I do not consider, this finding, if it were as stated by the counsel, could effect our case. But, the finding of the jury was not to the extent stated. The question asked them was "Is it the custom of auctioneers, in this state, when an article is struck off and *claimed by two persons* at the same time, as *their bid*, to put it up a *second time*?" The answer was "It is customary *with auctioneers*, in this state, when the *bid is disputed*, to put up the

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article a *second time*," see Major Moore's testimony. Here, the jury refer to the only testimony of Moore, to support this finding, and they find the *custom at auctions*. This *finding* of the jury was upon the *testimony of Moore*, who states such to be the proceeding of *auctioneers* in New-Orleans, &c. I am willing to admit it, for argument sake. It is known that, at these *auctions*, the bidding *is so rapid* and *confused*, that the auctioneer himself often does not know *who made the bid*, in so large a crowd; *he hears the same bid*, but knows not the person, and when the article *is struck off*, he often calls out, "*whose bid was it?*" Upon which, if *two claim it*, it is immediately put up, because it is not known who did make the bid. But if the auctioneer *knew that one* of the persons was the *last and highest* bidder, and *all who were present knew the same thing*, the article would not be *put up again*, because a *restless* or *dishonest* man should think proper *to assert that to be*, which all present knew was *not so*. Which was the case here. It is proved that Barrabino was *the last* and *highest bidder*, all the witnesses present, who paid any attention to the sale, state it. The *only one*, who says that Barrabino *was not*, is *Crow himself*, the petitioner's agent, who, to be made a competent witness *received a release* from the petitioner

upon the trial (see record) and who certainly, until then had an interest: in as much, as *he did not do* that which he *agreed to do*, for the petitioner, viz: to buy the land for him, and the *circumstances*, under which *this witness* gave in his testimony, which was *positively contradicted* by several *disinterested witnesses*, must have induced the jury to throw aside his testimony entirely, and to give no credit to it, which. I am satisfied, this court will do also.

The learned counsel intimates, that the sheriff, in this case, wished *to favour the purchaser Barrabino.*

There is not one fact, to justify a suspicion, against that officer, whose integrity and impartiality, in the discharge of his various duties, have obtained him the esteem of all who know him.

Davezac, on the same side. The facts found by the jury establish that tho' there were two bidders at the sale, Crow and Barrabino, that they did not bid the same price: that Barrabino, to whom the land was adjudicated, was the *highest* and *last bidder* and that it is customary, with auctioneers, in this state, when the bid is disputed, to set up the article a second time.

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On the part of the defendants, we now contend, as we did in the inferior court, that no parol evidence ought to have been received. Barrabino presenting an authentic act of sale, which divested the plaintiff of all former title, and no fraud having been alleged or charged against the defendant; "no parol evidence could be admitted against or beyond what is contained in the act." *Civ. Code*, 304, *art.* 252.

The oppressive conduct of the sheriff, as alleged in the petition of the plaintiff, gave him no right to destroy the validity of an authentic act, by the aid of parol evidence. It is not insinuated that Barrabino knew of, or connived at, the pretended oppressions of the sheriff; he appears to have been a bidder acting in good faith, and purchasing, in full confidence, for a fair price, from a public officer, authorised to sell by a mandate from a competent tribunal. Improper conduct on the part of the sheriff (if any had been practised) gave to the plaintiff his right of action for damages against that officer; but could not destroy the authority of the act under which we claim, even if we suppose that the sheriff had acted dishonestly (and no proof exists of his having done so) his act cannot prejudice an innocent purchaser, acting with good faith, which the plaintiff does not even question; but, if the court should

not be with us, on that branch of our argument, we stand equally, certain of a favourable result. Previous, however, to the examination of the main question, it is proper to notice the exception taken by our adversaries. 1 *Bac. ab.* 90, 2 *ac. on the case*, *id.* 741, *exec.*

It is difficult to conceive with what view it can have been taken. The petition alleges on the part of the plaintiff that the defendant, Barrabino, to whom the land, which he claims, was struck off, was not the last and the highest bidder.

The defendants deny all the allegations of the plaintiff and aver that Barrabino, one of them, was the last and the highest bidder.

That was the question of fact and, indeed, the only question to be decided by the jury. It is impossible to imagine by what course of reasoning the plaintiff arrived to the persuasion that this question was one "in which facts and law were mixed and which was besides impertinent and contrary to law."

The act of bidding at a public auction is a fact to be ascertained, when questioned or doubted, by the evidence of witnesses. I know indeed of no law which defines what bidding is, or what shall be considered as bidding; but at any rate the act of bidding is a fact; we may enquire how it was done,

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in what manner, whether by the voice or by sign, but in whatever manner done it is an act, a fact.

Now, for the inpertinence of the question, if I understand well the word inpertinence, it means a thing not belonging or relative to an other. Apply that definition to the present case. The plaintiff states that Barrabino was not the last and highest bidder, at the sale in which the land was struck off to him. The sheriff (one of the defendants) who sold the land, says that Barrabino was, he himself avers it equally. What is the question to be decided? Was Barrabino the highest and last bidder, will undoubtedly be the answer. And this is precisely the question asked to the jury and to which the defendant has excepted, because it was *impertinent* and contrary to law. Contrary to what law? To that which forbids questions of law to be mixed with those of facts? I have already shewn that there is in it nothing of law; that it is purely and totally one of naked facts. To that which orders that all questions submitted shall arise from the pleadings and be pertinent? We have shewn, we trust, both its natural derivation from the very words of the plaintiff's petition, and from those of the defendants' answer, and also, that, so far from not being pertinent, it is the only question in the cause. We deem useless to

add any thing, to this part of the argument for the defendants. The question was proper and pertinent, and the district judge did not err, in suffering it to go to the jury. If he did not err, on what ground can our adversaries expect to prevail before this tribunal? Is it because the jury found that "it is customary with auctioneers, in this state, when the bid is disputed, to set the article a second time?"

Supposing that custom to exist and to be in conformity with the law (for it will hardly be insisted that customs here operate a repeal of positive laws) have they shewn that *there were two bidders, at the same time and for the same price?* The very reverse appears by the finding of the jury. *There were*, they have decided, *two bidders, but not at the same price: Barrabino was the highest and last bidder, when the sheriff struck off the land.* It is true, that the jury found that Crow claimed the bid, but what right had he to do so? It was not his bid; it was that of Barrabino.

Is it because the jury have said that Bazile Crow "did say to the sheriff that if he would put up the land again he would give for it 3500 dollars?"

What advantage can they derive from the finding of that fact, connected, as it must always stand, with that which declares that Crow was not the *last bidder*

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and that Barrabino was? What weigh can the court give, in the decision of this cause, to the tardy repentance of a man who, through his want of decision, had seen the object of his wishes pass in the hands of the decisive and persevering Barrabino? He bid, while Crow was hesitating; he decided, while the other did not yet know his own mind. But like all men uncertain and infirm of purpose, he lamented, when it was too late and when the golden opportunity had been left to pass unimproved. Is a solemn adjudication, by the officer of a court, to be made void by the gossiping tavern talk of a garrulous old man, disappointed and insensed by his sappointment? He said he would give more, if the land was put up again. But, it was sold to the highest bidder, after he had had a full opportunity of being that highest bidder.

We deem that the finding of the jury must stand by itself, neither to be supported, weakened, nor destroyed by the written testimony accompanying it. But, should the court think otherwise, and believe that, when the evidence is sent with the finding to the supreme court, it may be examined, at least to throw additional light on the subject, be it so. We fear not that it should be resorted to, with that view; they will see, the testimony of a witness describing

the crowd assembled at the auction sale, the sheriff walking to and fro in the gallery of the tavern, and then crying for ten minutes the bid, which proved the *last* and the *highest*; looking full in the face of the undecided B. Crow, and crying aloud: "two thousand dollars, Mr. Barrabino's bid." There was the moment, for B. Crow to speak and to come a little nearer to the mark, fixed by him, as the stopping ground: but not a word, not a sign, the land was struck off to Barrabino; then the regrets, the declaration that he would do better, if offered another opportunity. We can easily conceive this on the part of B. Crow; but it is difficult to account, for the belief, entertained by the counsel of the plaintiff, that any thing of that kind can render a sale void.

Porter, in reply. Before I proceed to reply to the arguments of the defendants' counsel, it is proper, tho' perhaps not necessary, to call the attention of the court to the fact that this appeal is taken from a decision of the district court, *on facts found by the jury*. This, of course, precludes an examination of the evidence on which those facts are found, except a motion is made for a new trial. To look into evidence, now would lead to endless confusion, and produce manifest injustice, as *all* the testimony

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was not taken down. The statement, alluded by the defendants' counsel, is one that was made out, before the appeal was taken from the decision of the court, refusing to receive in evidence the deed from Charpentier to Barrabino, and does not embrace that given on the last trial of the cause. If *all* the evidence came up, I should most certainly have moved this court to remand it for a new trial, and must certainly, I think, on such application, have succeeded. Even, as one of the defendants' counsel says, if there was no other evidence than Crow's, it would require more verdicts, than have been given yet, to convince any unbiassed mind that a person, sent to bid by the plaintiff, in order that the property might be saved for himself and family, would have suffered that property to be purchased by another. And that, tho' the bidding was by *signs*, the negative testimony of witnesses that they did not see these signs, should outweigh the positive oath of a respectable man, that he had made the bid, at which the land was struck off. I should not have made these remarks, had they not been forced on me by the defendants' counsel leaving the verdict and going into the evidence. But, I am not surprised that they wished to travel out of it, for it certainly does not authorise a judgment in their favour.

The motion, to remand the cause, must succeed, as the defendants will not consent that the verdict shall be amended. The finding on the fourth fact, submitted on the part of the plaintiff, is most clearly irregular and illegal. It does not answer to the question propounded, and it finds a fact not submitted to them. It is said, how could the jury find the *signs* secret? If they were *secret*, the witnesses could not have seen them. I say they could have found the fact, and without involving any such absurdity as the defendants' counsel suppose. If, for example, a sheriff is seen, at an auction, to rise from time to time, on the price of property, and no by stander can tell where the bid comes from, nor whose it is, until the officer announces it, on closing the sale. I say it is necessarily carried on by secret signs, that is by signs known only to the auctioneer and bidder. It was this fact we wished answered; as it would have gone far, to have shewn the secret understanding between the co-defendants in this suit and what was their intention from the first.

Again, it is said, the jury are not bound to categorically answer yes or no. That depends on how the fact is submitted to them. Let us suppose, by way of illustration, that, on a suit brought to enforce the payment of a promissory note, this fact is sub-

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mitted *was or was not A. B. the defendant forced to sign the note on which this action is brought?* To this they must answer he was, or he was not; and it would amount to no finding to reply, *A. B. signed the note.* Still less would it be correct for them, on this simple interrogatory, to go on and say, *C. D.*, the plaintiff, was also compelled to make his obligation to the defendant. Yet, this is what the jury have done here, in their answer to the fourth fact. I do not see, then, how the court can refuse to send back the cause, so that this fact may be fairly found.

The first objection on the merits of the case is, that no parol evidence can be received to shew that the legal solemnities, required by law, have not been pursued, and in support of it the *Civ. Code* 304, (meaning 310) *art.* 242, has been cited. This law has no application that I can see to this case. It is a (well known) provision, that parties to an act cannot introduce parol evidence to change that act. But, what application this has to sales, made by a public officer, who is authorised to dispose of my property, *provided he does so with certain formalities*, and whose act is attaked, because he has neglected them formalities, I am at a loss to conceive.

Our law says that a judicial sale shall be set aside, if not carried on pursuant to certain solemnities. (See *Partidas* and other authorities cited, in the opening of the cause) many of these solemnities, such as advertising it, selling it at public place in the country, and adjudicating it to the purchaser, when more cannot be had for it, are all, to use a common law term, matters *in pais*. If then, parol evidence cannot be introduced to prove a deviation from them, how can the fact be established? Why never. So that, according to the ideas of the opposite counsel, our jurisprudence would present the curious spectacle of giving a remedy, and refusing all means to establish those facts, on which that remedy is accorded.

They say, we cannot attack this act, unless we allege *fraud*. This is again confounding a party to a public act, with the individual who complains that his property has been sold contrary to law. It is true, that he, who attacks a public act to which he is a party, must allege error, or violence, or fraud, to have it annulled. But besides error, or violence, or fraud, the law says: a sheriff's sale can be set aside for want of legal solemnities. There is no necessity then to allege *fraud*, when the want of these legal solemnities is a good ground for annulling the

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sale. Sheriff's returns, are matter in *pais*, and may be contradicted. 1 *Bibb*, *Pollard vs. Rogers*, 475. The counsel here have taken another ground, that the purchaser is not reprehensible for irregularities in the officer, and have cited to that effect, *Bac. ab.* It is well, he turned his attention to the common law for authority to that purpose. He certainly would have searched a long time, in the laws of this country, before he would have found any such doctrine. I dismiss this idea then by merely refering the court to the authorities, cited in the opening of the argument, as I do not consider it respectful to discuss a subject, which has already received a solemn decision in this court.

Again, it is urged that every thing must be presumed in favour of the sheriff's deed, and that it was preceded by all the necessary solemnities. This I deny. It is for the party, claiming under such title, to make it out. *See, on this point, Williams vs. Peyton's lessee*, 4 *Wheaton*, 77.

It was asserted, on the part of the plaintiff, in the opening of this case, that there are two modes of alienating property, one *voluntary*, the other *forced:* the latter being given by law, after the performance of certain solemnities, without which the sale is void. See authorities before cited.

Now, if a third person claims my property, under the first mode of alienation, he must shew an act of mine disposing of it: my consent will not, *nor cannot be presumed.* If he claims it by the latter, he must shew that the terms and conditions, on which the law says I shall be forcibly deprived of it, have been complied with: otherwise he shews not that which by law stands in place of my consent. Besides, how can the plaintiff prove a negative?

These, I trust, are satisfactory answers to what has fallen from the defendants, on the points made by them. Let us now see, how those contended for by the plaintiff, have been met and answered.

It was contended, that, by the law of Spain, which is yet in force in this country, the sheriff should have advertised the hour, as well as the day on which the property is sold. What is the answer to this? Why, first that the court is bound to presume he did so; second, that, if the court will leave the verdict and look into the evidence they will see he did. This, however, cannot be done, and the counsel is in error, when he states, that the hour of sale was advertised; no such advertisement was shewn, on the trial of the cause: if it had existed, it would have been produced.

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But, admitting for one moment, that it is to be presumed, he did advertise the hour of sale. What follows? Why, that this might be a good answer, if the sale was attacked for that informality alone, but than when, in this case, we prove that he refused to receive an other bid, he must shew a good reason why he did so. Namely, that the time advertised by him had elapsed.

No time then was advertised, at which the sale would close, the sheriff was, of course, bound to receive any bid that might offer, until the going down of the sun. The court is imperatively called on to sanction and enforce this principle, unless they wish to throw into the hands of these officers, powers of the most arbitrary and dangerous kind.

It is contended that, as the plaintiff was present by his agent and bid, consequently, he has waved all illegality in the acts of the sheriff; this is something novel, and to say the least of it, very harsh doctrine. That, because a man sees another illegally disposing of his property and tries to prevent him, therefore he sanctions the proceeding which he wished to defeat. If, indeed, Brashears had succeeded in acquiring the property, it might have been said that his purchase waved the errors, and that having got the land, he could not complain of any irregularities

that preceded his acquisition. But, as he failed in saving himself in that way; as he was defeated in that, by the conduct of the officer; it is more than hard that he should be told, because you bid to acquire the property, you have protected me, in that conduct, by which I illegally deprived you of it.

We now come to the last ground, taken by the plaintiff, *that at the time of striking off the land*, the bid was claimed by two persons, that one of them offered to go 1500 dollars higher, if it was put up again, and that it is a custom at auctions, in this state, when a bid is claimed by two persons, for the auctioneer to expose it again for sale.

To the law cited by the plaintiff, on this branch of the subject, the defendants have said nothing, presuming, I suppose, that, by the mode in which they would present the facts, they could deprive the law of any application to this case.

The first ground taken is, that the sheriff could not put up the property again, because it was struck off to the highest bidder; it was (say they) no longer under the officer's controul; without the purchaser's consent, it could not be exposed again. It would have been more satisfactory to the court, if the counsel had cited some authority for this. The

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sale, he says, is complete as soon as *it is struck off.* This, I do not think at all established, by the quotation from *Martin's Dig.* that the sheriff shall *sell* the land to the highest bidder. For the question still recurs what completes the sale. How long has the highest bidder a right to offer on the property. We contend any time before the going down of the sun, if the officer has not advertised a particular hour; the defendants contend any time the sheriff chooses. It is for this court to say whether they will not require positive law, from the defendants, before they establish a doctrine so injurious to the best interests of society.

May I add that the law never contemplated that the property of unfortunate debtors should be adjudged in the manner it has been done here. Its justice forces the sale; the benevolence of its provisions has taken care that it shall not be sold, while more can be had for it, for that is the meaning of the words *highest bidder*, and the reason why the expression was introduced. If it was the reason, it is difficult to conceive that the sheriff had a right to close the sale at 2000 dollars, when, at the time of stricking it off, two persons claimed the bid, and one offered to go 1500 dollars higher; that is certainly not, *selling it* when no more can be had for it:

but it is *striking it off* and *stricking it off* with a vengeance. *Barrabino, therefore, was not the highest bidder, in the meaning of the law, because the same verdict which finds that fact, finds that another person claimed the bid and offered to go* 1500 *dollars higher, and because the time for receiving bids did not expire until the going down of the sun, unless the sheriff advertised a particular hour, when the sale would close.*

But, how do the counsel reconcile the assertion that the property belongs to the highest bidder; *the moment it is struck off*, with the fact, that it is the custom at auctions, in this state, to put up property again, when two persons claim the bid?

First, they call the attention of the court, that the finding of the jury was on Major Moore's testimony, what that has to do with the question, I cannot perceive: as the act of the legislature 1817, *p.* 34, *sect.* 12, says: that the facts so found *are conclusive on the party.* It is immaterial then by what evidence the jury arrive at this result; more evidence was not *offered*, because more was not necessary, it was only as a matter of form, any testimony was given to the fact, as it was as well known to the jury as it was to every man in the court-house.

They next go into a statement in regard to auc-

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tions at N.-Orleans, to shew the reason of the practice there. If this statement is correct, then the custom would be "that when two persons have bid the same price, for an article, that it should be again put up at auction;" there would not be any necessity of either law or custom for that doctrine. But, the jury have found "that it is customary with auctioneers, in this state, *when the bid is disputed*, to set up the article a second time. And a most beneficial custom it is. The reason it has been so universally introduced, as I stated before was, that it might operate as a check upon auctioneers, in favouring their friends, by striking off the article unexpectedly; as a surety that the object exposed, should not be sold while more could be had for it. That, when two claimed the same bid, the exposing the article once more brought an increased price for it. This was the object of this custom, and without such a restraint public auctions would be a mere farce, and the purchasers, and owners of the property equally the victims of the agent.

Such a custom, it is said, would give dishonest men an advantage. What advantage? That of entering into open and public competition with the other bidders and giving what was conceived the true value. I can see no dishonesty in that. But I can see

gross dishonesty in an agent (ordered to sell property and make the most of it) striking it off, before an other purchaser can declare himself, and refuse to put the property up, tho' he knows that by doing so, a great advance will be had on it.

It is said, the sheriff is a respectable man; this is not the place to argue a question of that kind: but it is quite clear that he might have given stronger proofs of it, than the act which has been attacked, in this cause, and by which he has gone, as far as in his power, to make one man's fortune and ruin another.

MARTIN, J. delivered the opinion of the court. The plaintiff seeks to rescind the sale of a tract of land of his, to one of the defendants, by the sheriff, under an execution, on the ground that the conduct of the latter was oppressive and illegal. That the land was not exposed and sold at public auction, as the law directs, at the time advertised, and was struck to the defendant, altho' he was not the highest bidder, in opposition to the request of another bidder, who offered to bid 1500 dollars more.

The defendants denied all the allegations in the petition.

The following issues were submitted to the jury; the two last by the defendants, the others by the plaintiff.

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1. Has the plaintiff, a title to the land in question, and in what words is it expressed?

2. Were, or were there not two bidders for the land, at the same price, at the time the defendant Charpentier, the sheriff, struck it off to the defendant Barrabino, and was it not claimed by two persons as their bid and who were those persons?

3. Was or was not the plaintiff, by Crow, his agent, one of these bidders?

4. Was not the bidding, at said auction, by *secret* signs, on the part of the defendant Barrabino?

5. Did not Crow, tell the defendant Charpentier, immediately after he struck off the land to Barrabino, that if he would put it up again, he would give 3500 dollars for it?

6. Is it, or is it not the custom of auctioneers, in this state, when an article is struck off and claimed by two persons, as this bid, to put it up a secood time?

7. Was or was not the land struck off to the defendant Barrabino, he being the last and highest bidder?

8. Did or did not the sheriff, in pursuance to said adjudication, execute a deed of sale to him, and if so report the deed by a reference thereto?

The plaintiff objected to the *seventh* issue, as requiring from the jury a general verdict, as including a question of fact and one of law, and not being pertinent. The district judge overruled the objection and a bill of exceptions was taken.

1 The jury, on the first issue, referred to the plaintiff's deed, annexed to the petition, and, as to the others, found that:

2. There were two bidders, *but not at the same price:* the defendant Barrabino being the last and highest, at the time the sheriff struck the land off; the bid was claimed by Barrabino and Crow, who were the bidders.

3. Brashears was a bidder, tho' Crow, his agent.

4. The bidding was carried on *by signs*, by Barrabino and Crow.

5. Crow told the sheriff, if he would put up the land again, he would give 3500 dollars for it.

6. It is customary with auctioneers, in this state, when the bid is disputed, to set up the article a second time.

7. The land was struck off and adjudged to the defendant Barrabino, he being the last and highest bidder.

8. The sheriff, in pursuance of the adjudication, made a deed for said land, which is annexed to the record.

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The plaintiff moved for a new trial on the following grounds.

1. The finding of the *second* issue is not conformable to the question submitted; as it states a material fact, not called for by the question, viz: that Barrabino was the last and highest bidder.

2. The finding of the *second* issue is contrary to evidence in this that it states, that the two bidders *were not* at the same price, at the time the sheriff struck off the land to one of them, and that Barrabino was the last and highest bidder.

3. The finding of the *seventh* issue is contrary to evidence, as it states that Barrabino was the last and highest bidder.

The district judge refused the new trial, and being of opinion "that the law and evidence were in favour of the defendants," gave judgment for them. The plaintiff appealed.

It does not appear to us that there is any force in the objection made by the plaintiff to the submission to the jury of the *seventh* issue, and his counsel does not insist on it, in this court.

No new trial ought ever to be granted because the jury found a fact not submitted to them: the remedy, in such a case, being to disregard the fact.

As, according to the counsel, we have not a statement of facts, we cannot determine whether any part of the finding of the jury be contrary to evidence.

It is stated in argument, that a new trial was prayed for, on account of the insufficiency of the answer of the jury to the *fourth* issue, as the jury do not say whether the signs used by Barrabino, were or were not *secret ones*. Nothing, in the record, shews that the trial was asked, in the district court, on that ground. Altho' we might, if the justice of the case required it, remand the cause for a new trial, notwithstanding the objection was not taken below, it does not appear to us that we ought to do it. Bids are often made at auctions, by a nod, without any impropriety, and the persons present have sufficient notice of a bid, on its being cried out by the sheriff.

The circumstance of Crow claiming the last bid as his own, could not authorise the sheriff to put up the land again, if the claim was groundless, as it appears to have been, since the jury found that Barrabino was the last and highest bidder: and that there were two bidders, at the time the land was struck off, but for different sums.

If Barrabino, as the jury have found, bid *the highest*, the other bidder, admitting it to be Crow, must have bidden *less*.

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If we are to understand the jury to mean that, when a bid is disputed, even without the least ground, the property must be put up again, and the last and highest bidder divested of his right, the custom is a most unreasonable one, and therefore not binding.

There is neither, allegation or proof, of the neglect of the sheriff, in advertising the *time* of sale, in the manner required by law, and if he sold at another time, this must have been shewn by the plaintiff.

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

CANFIELD & AL. vs. *VAUGHAN & AL.*

APPEAL from the court of the fifth district.

If the payee of a note writes on the back, *I guarantee the payment of this note. E MI* this does not make the person to whom he delivers it an endorsee.

Brownson, for the plaintiffs. This suit is brought upon a note of hand, drawn in a negociable form by the defendants, and payable to one Miles, two months after date. The note is dated 23d Sept. 1818. It was endorsed on the 25th Nov. following. At the time the note was given, certain documents were put into the hands of Miles, the original payee, which, if collected, he engaged to apply to the note.

It is admitted that, of these demands, the amount of 274 dollars, 56 cents, was collected before endorsement, and not applied according to contract. But of all this, the endorsers had no notice at the time the note was passed to them.

Upon these facts, the point to be decided, by the court, is whether the plaintiffs have a right to recover, for the whole sum expressed in the note, or whether compensation can be claimed, as against them, of the said $274, 56 cts.

It is conceived that the equity of the case is clearly in favour of the plaintiffs. If Miles has been guilty of a fraud, it was the defendants, not the plaintiffs, who enabled him to commit it. The note was made negociable for the express purpose of being put in circulation. Its very form shews that it was intended to be endorsed. The defendants not only promise to pay to Miles, but *to his order*, thereby virtually engaging to accept any order, which he might write upon the back of it, payable at the time therein expressed. If they had not had full confidence in Miles, they ought to have restrained the transaction. They should not have made the note negociable, or they should have attached to it the receipt. Third persons would then have been duly cautioned, or, if they placed their confidence inju-

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diciously, it would be their act, and they alone ought to suffer.

But, it is thought that the law is not less in favour of the plaintiffs. In a transfer of negociable paper, before due, the assignee is not bound to enquire into any circumstance, existing between the assignee and any of the previous parties, as he will not be affected by them. *Chitty on bills*, 141, 3 *Term Rep.* 82. This is the general doctrine, and it is believed that no book can be found to contravene the principle.

It may, however, be contended, as the note is dated on the 23d of September and payable two months after date, that consequently it fell due on the 23d Nov. two days before the endorsement was made, which was on the 25th. But, we must, however, recollect that our enquiry is not when the two months, the time of credit specified in the note expired, but when it became due. It is contended that it did not become due until the 25th of November, the last of the days of grace allowed for the payment of negociable paper. When can an instrument be said to be due? It seems to me at any moment, when the right to demand payment commences. If this be correct, all the authorities will shew that payment cannot be demanded, until

the last of the days of grace. If the third day of grace happens to be a Sunday, Christmas day, good Friday, upon which no money ought to be paid, the holder ought to present it for payment on the second day of grace, and in case it be not then paid, must treat the bill as dishonored. *In other cases*, a presentment before the third day of grace, *being out of time, would be a mere nullity. Chitty on bills*, 74. See also *Wiffen vs. Roberts*, 1 *Esp. Rep.* 262, *Bayl.* 67.

But, it may be contended, that these days of grace are merely an indulgence, extended by courtesy, to the person bound to make the payment, and therefore, that the note ought to be considered as due in fact, at the expiration of the time stipulated in it. This was indeed originally the case. But, they are now known and recognised both in the civil and common law, or, rather in the law merchant, which is of all countries, as a claim of right. They make as essential a part of the time of credit, as any portion of the time stipulated. Thus "the days of grace, which are allowed to the drawer, are so called, because they were formerly merely gratuitous, and not to be claimed as a right by the person on whom it was incumbent to pay the bill, and were dependant on the inclination of the holder. They still re-

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tain the name of grace, though the custom of merchants, recognized by law, has long reduced them to a certainty and established a right in the acceptor to claim them, in all cases of bills or notes, payable at usance or after date, after sight or after a certain event." *Chitty*, 272, *Pothier*, *Traité du contrat de change* 7, says *ce qu'accorde l'ordonnance, n'est terme de grâce, que de nom, parce que c'est* humanitatis ratione *qu'elle l'a accordé, et pour le distinguer de celui porté par la lettre. Il est réellement terme de droit, puisque c'est la loi qui le donne.*" See also authorities referred to in *Chitty*, *Coleman vs. Sayer*, *Barnard B. R.* 303, *Vin. ab. tit. bills of exchange B.* 9, *Brown vs. Hanaden*, 4 *Term Rep.* 151. The days of grace as allowed in England, and allowed in the United States. *Corp vs. McComb*, 1 *John. Cas.* 328. *Jackson vs. Richard*, 2 *Binn.* 343, *Lewis vs. Ban*, 2 *Binn.* 195, *Bank of North America vs. Petit*, 4 *Dall.* 127, 5 *Binn.* 541.

The right also to days of grace in all cases of negociable paper is recognised by our statutes. 1 *Martin's Dig.* 598, 2, 3.

But, Pothier seems more fully to have decided this case, than any authority in the common law, which the counsel for the plaintiffs has yet been able to find. He says in his *Traité du contrat de change*,

117, *pl.* 176, that, when the bill has been acquitted to the drawer by a separate letter, retaining the bill, and it should afterwards be endorsed, he does not think that the acceptor could object the acquittance against the endorser, who should afterwards present it at the time due for payment. And one reason given is, that it would open a door, by antedating the acquittance, by collusion between the endorsor and acceptor, which it might not be in the power of the endorsee to detect. Besides that the transaction would appear suspicious, because it is the ordinary practice in cancelling such bills, to send them to the drawer, with a receipt at the bottom of them. He says afterwards, *id.* 123, *pl.* 176, in speaking of compensation, that it extinguishes the bill of exchange for part or all, *taking effect from the time it become due.* He says again, *id. pl.* 185, that compensation is equal to a real payment. He says again, *id. pl.* 184, that it cannot take effect, *except from the time the bill become due or after.* He then, *id.* 124, 5, *pl.* 187, propóses the question, is it sufficient for compensation, that the time of payment expressed in the bill, should have elapsed? Must one wait until the term of grace have expired also? And he answers the question by saying that, since the declaration of 1715 has decided that the bearer of the bill cannot be

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compelled to receive the payment of it, before the *tenth day, on which the term of grace expires, it follows, as a consequence, that compensation cannot sooner take effect, for the reasons before mentioned, since the time of grace is a claim of right.*

The defendants might, therefore, undoubtedly have opposed in compensation the amount collected by Miles, before the 25th of November, from the demand in his hands, had he not, before compensation could take effect, passed the note to the plaintiffs for a valuable consideration. But, as the note was endorsed before compensation could take effect, by the rules of law, it is conceived that the defendants' only recourse is upon Miles, whom they have trusted, to whom they have extended their confidence, in whose power they have put it to commit this fraud.

Brent, for the defendants. The note, upon which this suit is brought, was given upon the 23d of September 1818, by the defendants, who paid to the drawee, one Miles, $274, 56 cts. before he endorsed it away, which he did upon the 25th day of November 1818. The note was due *two months* after its date and made payable *to order*.

The defendants resisted the payment of the *full*

amount of the note, for which they were sued, and claimed a deduction for the sum of $274, 56 cents, which were paid to Miles, before he endorsed the note, and the court below was of opinion that they were entitled to it, and allowed it, giving the petitioner's judgment for the sum of $205, 44 cents, with judicial interest from the 26th of November 1818, until paid. The petitioners have appealed.

All the facts come up with the record and the statement, and leave this court to determine whether the judgment of the court below ought to be *reversed* or not.

I admit that the *assignee of negociable paper, before due*, is not bound to enquire into the circumstances existing between the assignor and the drawer.

But I shall shew that the assignee of a negociable note *after it is due*, takes it subject to all the equity and defence that the drawer may be entitled to. *Chitty on bills*, 1 *Dallas*, 441, 2 *Caines*, 369, 4 *Dallas*, 370, 3 *Caines*, 213, 1 *John. Rep.* 319, 1 *Mass Report*, 3 *Ten. Rep*, 80, 1 *Bac. ab.* 399, 1 *Johnson's cases*, 51, § 6, *id.* 331.

Having shewn that the assignee takes the *negotiable paper*, assigned after *it is due*, subject to *any defence* that the drawer may have, I will next shew that *this note* was assigned *after it became due.*

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By a reference to the record, the court will see that this paper is dated upon the 23*d of September* 1818, and made payable *two months after date.* The note of course *was due* upon the 23d of November 1818. *Chitty on bills*, 211, says "*when a bill is due on the 1st of January*, and payable at *one month after date*, the month *expires* on the 1st of February, and also a bill dated on the 28th of January, and payable *one month after date*, the time *expires* on the 28th of February." So, in this case, the note being dated the 23d of September, and made payable *two months after date*, the time *expires* upon the 23d of November, and the note *was then due*, but the law to *favour the drawer*, not the assignee, has given the drawer *three days of grace more.* The principle which governs in this state is *that the negociable paper* to compel *payment from the drawer*, under any circumstances, must be endorsed *before it becomes due:* if *after it becomes due*, the equitable defence of the drawer will be let in: and a note *becomes due* upon *the day stipulated*, the *three days of grace*, are a favour only extended to the drawer, during which the assignee cannot compel *payment* or *protest.* But at *the expiration* of the *two months this note was due*, and *a legal tender* of its amount upon the 23d of November, (which was the expi-

ration of the two months) to the drawee Miles, would have been good, and if he refused to accept it, he could *never have recovered his costs* in a suit brought, for the amount of the note, upon the days of grace being expired. For the note *being due upon the 23d of November*, the drawer had the right, to *discharge it then;* the delay of *three days of grace*, being only a favour extended to him, which if he did not wish to make use of, the assignee or drawee could not. The law gives *the three days of grace*, as a *right* to the drawer, to claim them, *if he think proper*, but he does not, he cannot be compelled. It has nothing to do with the time the *note becomes due*. *Chitty*, 206, *Pothier, traité du contrat de change*, 1, 5, § 2, 3, *no.* 140.

It is clear then, that this note was assigned *after it became due*. For by a reference to the record, it will be seen, that the assignment was made upon *the 25th of November* 1818, and the note became due upon *the 23d of the same month*, and being assigned *after it became due*, the proof of payment of the sum of $274, 56 cts. to the drawee Miles, *before the drawers had any notice of the assignment*, was correctly allowed by the court below, and this court cannot do otherwise than *affirm the judgment*.

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All the authorities, referred to by the counsel for the petitioners, establish the position I have taken, that the days of grace *are a right* only to be *claimed by the drawer*, and as the authority *from Pothier*, which I have referred to says "for the purpose of giving him time to raise the money, to avoid having his note protested, if it be not paid when due," the words of Pothier are "*afin que le tireur, en trouvant de l'argent pendant ce tems, puisse éviter le protêt; c'est pourquoi ce terme de dix jours est appelé un terme de faveur et de grace.*"

Look at the endorsement, the manner in which it is made. It appears the petitioners required the drawee Miles, to specially *guarantee* the payment of the note, this shews that they considered the note *as due at the time it was assigned*, or that they *respected* it had been paid, and ought to have been on their guard. If they did not consider the note as due *when assigned*, why *require* this *special endorsement?* It was because the note *was due* and had lost its *negotiability*, and a common endorsement would only amount the *existence of the debt* and no more. *Civ. Code*, 368, 4 *Dal.* 371, 2 *Caines bases in error*, 303.

Brownson, in reply. Chitty has been quoted to shew that the note was due on the 23d of Novem-

ber. But the defendants' counsel thought, probably, that his duty compelled him only to quote so much as would suit the point, which he had an interest in establishing, and that, garbled extracts would be more in his favour than the law itself. He has therefore given a half sentence which, when completed, I am sure is far from shewing that the note was due on the 23d of November. The author is explaining how the word *month* is understood in regard to bills of exchange, that it means a *calendar*, and not a *lunar* month. He says that "when a bill is dated on the 1st of January and payable one month after date, the month expires on the 1st of February," so far quoted by the defendants' counsel, "and with the days of grace, the bill is payable on the 4th of February, unless that day be a Sunday, and then on the 3d," same sentence in continuation.

The counsel for the defendants has very ingeniously attempted to take the force of the authorities arrayed against him, as to the effect which the days of grace have in postponing the payment of negotiable paper, by saying that they are allowed for the benefit of the drawer only. This way of stating the subject was probably chosen, with a view of drawing off the attention of the court, from the *reason* of the distinction between endorsement *before due*.

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and endorsement *after*. *Lord Kenyon* observes, 3 *Term Rep.* 82, before cited, that to let in the equitable defence, endorsements after due require "the addition of this circumstance, that it appears on the face of the note to have been dishonored, or if knowledge can be brought home to the endorsee, that it had been so." If therefore this note, payable, as appears from the receipt, at the *Vermillon Bridge*, and transferred at New-Orleans, had been endorsed two or three days after the expiration of the days of grace, instead of being endorsed two or three days before, I question very much whether the circumstance would not have explained sufficiently the suspicion, which generally attaches to an endorsement after due. But how strong do they render the case when coupled with the fact of endorsement *before due?* How utterly impossible would it be for any human wisdom to protect itself, against frauds in the transfer of negotiable paper, if circumstances such as exist in this case are not held a sufficient justification for a man's confidence? How completely and certainly would such a decision go to destroy the credit and currency of these instruments, and how ready will the makers be to collude with those, who hold their paper, to give it a false and deceptive credit, if, by such a decision, they may be

sheltered from the losses which they thus occasion ?

But it is said the endorser guarantees the payment of this note. I do not see how suspicion can be attached to this circumstance. What object could the plaintiffs have had in this guarantee? Did it make Miles any farther liable than he would have been without it? Not at all. For it is the right of the endorsee to fill up the blank with any warranty consistent with the nature of the instrument. It is only expressing in words what would otherwise have been tacitly understood. Certainly the plaintiffs, as merchants in the habit of dealing with such kind of paper, must have known that the liability of Miles was not increased by his saying "I guarantee the payment of the within note." If he chose to write that upon it, it could have been no reason for the plaintiffs to refuse taking it. It neither made the note better or worse. It is thought, therefore, that every equitable and legal circumstance is in favour of the plaintiffs.

MARTIN, J. delivered the opinion of the court. The plaintiffs, as endorsees of a promissory note, given by the defendants to Edward Miles, instituted the present suit.

They pleaded the general issue, denied the en-

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dorsement of the note by Miles to the plaintiffs. Farther, that, if the note was endorsed, it was after it had become due, and therefore, the defendants were entitled to set off a sum of money, which was due, them by the original payee of the note E. Miles.

The district court gave judgment, that *the law and evidence being in favour of the plaintiffs*, they recover $205, 44 cents, with interest and costs. They appealed.

The statement of facts admits, that the sum, which the defendants offered to set off, was collected by the payee of the note before its endorsement to the plaintiffs.

The signatures, at the foot of the note, was submitted to be that of the defendants, and that on the back that of the payee.

The words, *pay the contents to Canfield and Hill*, were written on the back of the note, at the time of trial, by permission of the court.

The note bears date of September 23d, 1818, is for the sum of $480, payable two months after date and on the back of it was written, *November 25th*, 1818, *I guarantee the payment of this note, Edward Miles.*

The monies collected by Miles for the defendants, and which he had agreed to credit them for on the

note, amount to $274, 56 cents. This sum added to $205, 44 cents, for which the district court gave judgment, is the amount of the note sued upon.

The plaintiffs' counsel contends that the district judge erred. That the amount of the note was not due at the time of the endorsement, as there was still one day of grace to run, and therefore, the note in their hand, is their absolute property, and they are not bound to admit any equitable claim, which the makers may have against the original payee.

The defendants' counsel says that the note was due, altho' payment of it could not have been compulsorily required till after the expiration of the last *three* days of grace. That it appears that the plaintiffs, knew that the makers had some claim to set up against the note, since they required a *guarantee* from Miles.

The defendants did not appeal: we therefore need not enquire whether judgment ought not to have been given in their favour and the amount of the sum awarded is the only object of our inquiry. Otherwise it would be necessary to examine whether there had been a legal endorsement of the note, as stated in the petition, and whether, when the plaintiffs had been satisfied with the delivery of a note payable to order, with a mere guarantee, they could after-

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wards, even with the leave of the court, add to this guarantee, an endorsement.

The facts of the case are that the original payee delivered this note to the plaintiffs, and agreed to guarantee the payment of it. This certainly did not make them endorsees, so as to enable them to endorse it themselves. It may be taken as evidence of the sale of Miles' claim, evidenced, by the note. For this they might sue, in their own names, stating themselves the vendees of the claim, or in the name of Miles. In either case, either as vendees or agents of Miles, they could recover no more than their vendor or principal. This has been given them.

It is therefore ordered, adjudged and denied that the judgment of the district court be affirmed, at the plaintiffs' costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, SEPTEMBER TERM, 1820.

West'n District. *September* 1820.

MARTINEAU vs HOOPER.

MARTINEAU vs. *HOOPER.*

APPEAL from the court of the sixth district.

If the question be one of fact and the defendant has had the verdicts of two juries, in an action grounded on a tort, the supreme court will not determine it against him, unless the case appear most clearly for the plaintiff.

DERBIGNY, J. delivered the opinion of the court. The defendant, being overseer of the plaintiff's plantation, killed one of the plaintiff's negroes. The present action is brought to recover from him the value of that slave.

The liability of the defendant depends entirely on the circumstances, which have attended the commission of this act. On these, two juries have already pronounced, in his favour: and although the powers of this court extend to the reversal of general verdicts, even when given evidently on matters of fact

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alone, they cannot fail to have their due weight, and ought not to be disturbed, except in cases of manifest misinterpretation of the evidence.

The material facts in the case are these: the negro Harry, whom the defendant killed, was considered by his own master as ungovernable; for the plaintiff told the defendant that he would not go to his plantation, until that negro was subdued: there is evidence that the negro had even gone so far, as to lay his hands on his master. The defendant, being dissatisfied with his work, resolved to have him chastised, and foreseeing that the negro would make resistance, loaded his gun, which he left in the house, to use it, it seems, as necessity might require. He then went to have the negro whipped, and ordered another slave to tie him. Harry, as it was expected, refused to submit, and the defendant, having advanced towards him with a hoe to strike him, was met by Harry, who having also a hoe in his hands, lifted it and began to scuffle with the defendant; one and the other retreating or advancing alternatively. The defendant then threatened to shoot him, and both having dropped their hoes, began to run towards the house, the negro being at first foremost; when, being overtaken by the defendant, within eight or ten steps of the house, he turned aside, and jumping over the

adjoining fence, he endeavoured to effect his escape. The defendant came out of the house with his gun, calling on Harry to stop, being then within thirty-five or forty steps from him; and as he did not stop and was gaining ground, the defendant shot him, at the distance of eighty-five yards, himself being at that moment walking.

From these facts, it results that the slave Harry was in an actual state of rebellion. Now, if we take into consideration how important it was, for the interest of the plaintiff himself and the community at large, that a slave, who had set such an example, should not escape unpunished; if we also make allowance for the state of mind in which the defendant must of necessity have been; if we further attend to the circumstance that he suffered him to get almost out of reach before he shot at him, himself walking at the time; if we believe, from the circumstances of the case, that the defendant acted with the plaintiff's slave, as he would have acted with his own; we will be disposed to consider the whole as an unfortunate occurrence, and to excuse the defendant. Juries of the parish, better acquainted than we can be with the reasons, which made it necessary not to suffer this rebel slave to escape and defy punishment, have thought proper to discharge the defendant from

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any responsibility: we think we should hazard much should we, without the same local information, disturb their verdicts.

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 defendant.

RACHEL vs. *PEARSALL.*

A verbal lease will prevail over a written one of a pertiner date.

APPEAL from the court of the seventh district.

DERBIGNY, J. delivered the opinion of the court. The question in this case is simply whether a written lease of immoveable property shall prevail over a verbal one of anterior date, accompanied with possession.

Paul Pearsall the defendant, occupies a tract of land belonging to J. B. Rachel, leased to him by verbal contract. While he was in possession under this lease, J. B. Rachel entered into a contract of lease, in writing, with Hilaire Rachel for the same land. On Pearsall's refusal to surrender the land to this new lessee, the present action was brought.

The plaintiff contends that leases of landed property cannot be made verbally, and relies on our statute, *Civil Code*, 372, *art.* 8, which says, that "the manner of proving the validity of such contract is agreeable to the rules provided in the title of contracts and conventional obligations in general." The plaintiff understands this to refer to the rules established for the alienation of immoveables, and quotes the 241st article which provides that "every warrant tending to dispose by a gratuitous or incumbered *title* of any immoveable property or slaves, must be reduced to writing, and that, in case the existing of such covenant should be disputed, no parol evidence shall be admitted to prove it." This, however, we think to apply only to the alienation or transfer of property, not to the mere use of it.

The 8th article above quoted expressly says that "leases may be made either by written or verbal contract," and when referring for proof of it to the rules, provided in the title of contracts and conventional obligations in general, must be understood to refer to the rules of proof respecting the amount of the obligation.

That verbal leases of immoveable property can be made is further established by the 52d article of the same title, where speaking of the indemnity due

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to the lessee of a predial estate, who is turned out before the expiration of the lease, it says "if the lease has not been reduced to writting, the purchaser shall not be compelled to give any indemnification."

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.

ROUZEL vs. *M'FARLAND.*

The vendor ought to declare the defects of the thing sold, when he knows them, and it does not suffice that the bill of sale express that the vendee has seen and visited it.

APPEAL from the court of the sixth district.

DERBIGNY, J. delivered the opinion of the court.

Three cases between these parties have been consolidated; in which the only question for our consideration is whether the sale of a boat, afterwards found to be rotten, is liable to be cancelled.

The evidence is that M'Farland sold to Rouzel a boat for the sum of eight hundred dollars, which Rouzel paid him in two notes, for which he is now sued. Shortly after Rouzel loaded her, and set off for Natchitoches, but, on the way, she was found very leaky, and on examination, proved to be so rotten that one of the witnesses says he could run

his finger into the timber in many places. Rouzel afterwards had her repaired in Alexandria, at a considerable expence: it is not shewn whether he succeeded to put her in good condition.

M'Farland's defence is that the defects were apparent and that, in the bill of sale, Rouzel says that he has seen and visited the boat. But it was his duty to declare them; and that he knew them is proved by the evidence. The case is certainly one, which would maintain an action for entire redhibition, were it not that the buyer undertook to repair the boat, and does not shew that he undertook it in vain. As the case now stands, it appears only that he has been at a considerable expence to repair her. What that expence amounted to, is left without explanation, so that we see no ground on which we can attempt to question the correctness of the decision of the district judge, who has granted to Rouzel only a reduction of the price.

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

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

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September, 1820.

CURTIS
vs
KITCHEN.

CURTIS vs. *KITCHEN.*

APPEAL from the court of the sixth district.

A surety, who pays the debt, is subrogated *ipso facto* to the rights of the creditor.

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DERBIGNY, J. delivered the opinion of the court. The plaintiff was surety of James Cannon, for the price of two lots of ground, in the town of Alexandria, bought by Cannon from Lloyd Day. Before that price was paid, Cannon transferred all his rights on the said lots to Benjamin Kitchen, the present defendant, on Kitchen's answering to pay to Lloyd Day's estate the price due for them. Kitchen did not pay, and the representative of Lloyd Day's estate having brought suit against Cannon and Curtis his surety, and obtained judgment against them for principal and interests, Curtis satisfied that judgment, and now demands of Kitchen, the purchaser of the lots, reimbursment of that sum.

Curtis grounds his claim on a subrogation to Lloyd Day's rights, executed in his favour by Edward A. Day, calling himself one of the heirs of Lloyd Day and the attorney in fact of the other heirs. The quality of Edward A. Day is now contested, though it does not appear to have been questioned in the court below. But, whether the express subrogation, by Edward A. Day, be or be not sufficiently proved, we think immaterial to enquire into,

being of opinion that a subrogation by law has taken place in this case, agreeably to the statute, *Civil Code* 290, *art.* 151, which establishes it in favour of those "who being bound with others, or for others, for the payment of a debt, had an interest in discharging it."

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

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

FRIDEAU vs. *FRIDEAU.*

If husband and wife by their marriage contract, give to the survivor the property of the party first dying, provided there be no child born, the donation is revoked by the birth of a child and not revived by his death.

APPEAL from the court of the sixth district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff says that he is a brother and one of the heirs at law of the late Cesar Augustin Frideau, of whom the defendant is the widow, and that he is entitled to his share of the estate left by his brother, notwithstanding the reciprocal donation which his said brother and the present defendant had made to one another, by their marriage contract, of all the property of which either of them might first die possessed; because that donation was to have effect only in case no children should be born of the said

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marriage, and a child was born of it; and that although the child died, before his father, the donation was not thereby revoked.

The general rule, in matters of donations, is that they stand revoked by the birth of a child of the donor, even where no stipulation to that effect has been made; and that after such revocation, the donation cannot revive by the death of the child. *Civil Code* 274, *art.* 74 & 78. An exception to this rule is introduced in favour of donations, made on account of the marriage, by the ancestors of the husband or wife, or by and between the husband or wife. This we understand to apply to cases, where it has not been stipulated, that the donation shall stand revoked by the birth of a child; for where such a condition is annexed to the donation, the exception established by law is done away by the will of the parties. Here the parties have chosen to do that which, in other cases, is done by operation of law alone. It appears to us that the consequence must be the same.

The defendant thinks, that by referring to the custom of Paris, from which it is believed, that the practice of those mutual donations has derived, we will find that, provided there exists no child, at the death of the donor, the donation has its effects. But it must be adverted that it is so observed, under the

custom of Paris, in matters of *don mutuel* or donation of usufruct, not from the interpretation or construction of any law similar to ours, but from the positive provision of the custom itself, which says, that the *don mutuel* shall however take effect, if at the death of the donor there *exists* no child. As we have no such law, we must be governed by the general principles, in matters of donation, and by the expressions in the contract.

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

Bullard for the plaintiff, *Murray* for the defendant.

RIPPEY vs. *DROMGOOLE & AL.*

APPEAL from the court of the sixth district.

A defendant who removes into a parish, buys a house and lives there for three months, without having left any property in the parish he moved from, cannot plead that he is suable in the former parish only, not having yet acquired a domicil in the other

DEREIGNY, J. delivered the opinion of the court. This suit is brought on a note of hand, not negociable, subscribed by the defendant Dromgoole, in favour of Lewis H. Gardner now deceased. It has been transferred to the plaintiff by Gardner's widow, the other defendant, in her own name and in her capacity as tutrix of her children, heirs of her late

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husband: the legality of that transfer is not disputed.

The defence set up by Dromgoole is that he cannot be sued, in the parish of Rapides, because he has not yet acquired any domicil in it, but ought still to be considered as domiciliated in the parish of Natchitoches, which he had left only three months previous to the institution of this suit.

The endorser of a note not negociable, is not suable before the insolvency of the drawer.

The act of 1814 which provides that persons who have a permanent residence in some parish of the state, shall be suable only in that place, is the law on which the defendant Dromgoole relies to support his plea to the jurisdiction of the court. Under that act, therefore, he is bound to shew that he has a permanent residence somewhere. The evidence shews that he has sold his possessions in Natchitoches and moved his family to this parish, and that he has purchased a house and lot in this town of Alexandria, where he was living, since about three months, when this case was tried in the inferior court. The defendant then must choose between having a permanent residence at Alexandria, or having no permanent residence any where; for he surely cannot be considered as residing where he is not, and where he has neither property nor family; neither can he be deemed to have preserved his domicil in Natchitoches, for the domicil is where the party has his prin-

cipal establishment, and it is in proof that he has sold what he possessed in Natchitoches. The forcible consequence is that either the defendant Dromgoole's permanent residence is at Alexandria, and then the suit is brought before the proper tribunal, or that he has no permanent residence in any place, and in that case he may be sued any where.

The defendant having chosen to rely exclusively on his plea to the jurisdiction, (for according to the rules of practice as declared in the case of *Tricou vs. Bayou*, 4 *Martin*, 172, a defendant is bound to include in the same answer all his means of defence) there is no difficulty to pronounce on the merits of the case, and to give judgment against him for the full amount of the note.

As to the liability of the other defendant, Sarah Gardner, it stands upon a very different ground. She is not liable as endorser, because the note is not negociable; and as a simple transferor of an ordinary debt, she is not responsible, unless she has warranted the solvency of the debtor. This she does not here appear to have done; but even if she had, she could not be sued, until the principal debtor be proved to be insolvent.

It is therefore, ordered, adjudged and decreed that

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the judgment of the district court be reversed, and proceeding to give such judgment as ought to have been given below, this court does further adjuge and decree that the appellant do recover from the appellee, William A. Dromgoole, the sum of two thousand dollars, with interest, since the judicial demand and costs; and it is further ordered that judgment be entered for the defendant Sarah Gardner, with costs.

Scott and *Bullard* for the plaintiff, *Thomas* for the defendants.

CALVIT vs. *HAYNES & AL.*

The surety cannot avail himself of the appeal of the principal debtor, his co defendant.

APPEAL from the court of the sixth district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff sues upon a note of hand, subscribed in his favour, by the defendant H. Haynes, for the price of a mulatto woman slave, and signed by the defendant A. J. Davis, as surety. The defendant H. Haynes resists the claim on the ground that the slave by him purchased has redhibitory vices, and the defendant A. J. Davis pleads, as surety, his benefit of discussion. Judgment has been rendered for the plaintiff, without any reservation in favour of the surety. The principal debtor has appealed;

the surety has not, so that he must be considered as having waved his right of discussion.

After due examination of the evidence we do not find any thing in it that can enable us to question the correctness of the decision given by the district judge.

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

Scott and *Brownson* for the plaintiff, *Baldwin* for the defendants.

ARCHINARD vs. *MILLER*.

If the plaintiff's deed calls for all the land between A. and D he is entitled to the land from the point at which A's grant terminates

APPEAL from the court of the sixth district.

DERBIGNY, J. delivered the opinion of the court. This is a contest about limits between two neighbours. Archinard, the appellee, complains that Miller, the appellant, incroaches upon his land; the line between them not being ascertained sufficiently by the testimony, recourse must be had to the other boundaries of their respective tracts, which are not disputed.

Miller holds under Wm. Dupart, who in the year

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1788, obtained an order of survey for twenty arpents front; of those twenty arpents Dupart sold five to the plaintiff's ancestor, so that his title now calls for fifteen. Beginning to survey from his lower boundary, which is admitted, the fifteen appents end at an hackberry stump, which the plaintiff contends is the boundary between them. Now, as the title of the plaintiff calls for all the land between R. E. Curry and Wm. Dupard, it is clear that, at the place where Dupard's grant is satisfied, the plaintiff's land begins.

Upon the whole we are satisfied that the decision of the district judge, which has adjudged to the plaintiff the land in dispute, is perfectly correct.

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

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

SOUBERCASE & WIFE vs. *CALDWELL*

The holder of an order not negotiable, is not bound to give notice to the drawee, so strictly as that of a bill of exchange.

APPEAL from the court of the sixth district.

DERBIGNY, J. delivered the opinion of the court. This suit is brought on an order from the defendant, requiring a person, supposed to be his debtor, to

pay to the plaintiffs a sum of two thousand dollars which the acknowleges to owe to the plaintiffs, in part payment of a larger sum. The order is not negotiable, so that it cannot be considered as a bill of exchange. It fixes no particular time, at which payment was to be demanded, and the defendant has agreed to be responsible for it, if the sum was not already paid by the drawee to the plaintiffs' ancestor. The drawee has refused to pay, and the plaintiffs now demand payment from the drawer.

The objections raised by the defendant, as to the supposed laches of the plaintiffs, in giving him notice of non-payment, are not applicable to a case of this nature. The district court was correct in according judgment against him.

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

Thomas for the plaintiffs, *Bullard* for the defendant.

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September, 1820.

LAUDERDALE vs. GARDNER.

LAUDERDALE
vs.
GARDNER.

LAUDERDALE vs. *GARDNER.*

APPEAL from the court of the sixth district.

It may be legally stipulated that in case a note be not paid on the day mentioned, interest shall be paid from the date.

A widow cannot claim a discharge from the debts of the community, if she does not comply with the requisites of the law.

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellant sues on a promissory note made by Lewis H. Gardner, during his marriage with the defendant, his widow and the natural tutrix of their minor children, in which capacity she represents them as heirs of their father.

The note is dated on the 19th of May 1818, made payable two months thereafter, and bears interest, if not punctually paid at the rate of ten per cent a year, *from the date.* Judgment was given including the interest from the date, until the day of payment, but only against the estate of Lewis H. Gardner deceased; and, on these two grounds it is complained of by the appellant.

Whether the stipulation, in the note for the payment of interest can be considered, in the nature of a penalty or simply as an agreement to pay interest on the condition therein expressed, we cannot see any reason why the promissor should not be bound thereby.

The obligation, arising from such a covenant, can be legally affected, only as arising from an usu-

rious contract. But, as our laws authorise conventional interest at the rate of ten per cent, and as that stipulated for, in the present case does not exceed that amount, we are of opinion that it ought to have been allowed,

The plaintiff and appellant's right to recover against the defendant and appellee as partner and proprietor of one half of the matrimonial acquests and gains, is resisted on the ground of her renunciation, as authorised by law.

To entitle a widow to the benefit of such a renunciation, it is required that she should have the estate regularly inventoried, and that she should not have taken any active concern, in the effects of the community, except such as may be considered as conservatory only. *Civ. Code*, 338.

In the present case, it appears from the evidence that the defendant's husband died on the 12th of August 1819, that the inventory of his estate was not commenced until the 20th of November following, that the defendant did not attempt to renounce the partnership or community of gains, until some time in May 1820, and that, previous to her renunciation, she had taken an active concern in the effects of the community; as a proof of which it is shewn that she transferred, in the purchase of

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a plantation for herself, a note of $2000, belonging to the community.

With this evidence before us, we are of opinion, that the defendant was not at liberty to renounce the community and clear herself from the debts, incurred during the marriage, and that she is liable to the payments of one half of them.

It is therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed that the plaintiff and appellant do recover from the defendant and appellee, the sum of seven hundred dollars, with interest from the 19th of May 1818, until the 25th of March 1820, at the rate of ten per cent a year, on the sum of $1600, and interest at the same rate on $700, from the day last mentioned until paid: and that the amount of this judgment be levied one half of the goods and chattels of her, the said defendant, Sarah Gadner, and the other half of those of the estate of said Lewis H. Gardner deceased, and that the appellee pay the costs of his appeal.

Baldwin for the plaintiff, *Bullard* and *Thomas* for the defendant.

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September. 1820.

TIPPET & AL.
vs
EVERSTON.

TIPPET & AL. vs. *EVERSTON.*

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court.

The vendee of a claimant, who has obtained the commissioner's certificate, cannot be disturbed by another claimant, on the ground that the vendor of the latter had a right of preemption.

The plaintiffs and appellants claim a right of preemption to a tract of land described in the petition, under the land laws of the United States, which accord such a right to settlers of a certain description to the extent of one quarter section, as laid off by the regulations of the government of the United States. The plaintiffs and defendant are vendors of different persons, claiming the benefit of such preemption.

The vendor of the defendant, having complied with certain requisites of the laws cited, obtained a certificate from the register of the land office to that effect. The plaintiffs and appellants complain that this was done, in contravention of their rights and claim the interference of this court, so far as to decree that the land thus acquired by the defendant shall enure to their benefit; or to order a conveyance to them.

Whether this court would interfere to enforce the inchoate rights of settlers on the domain of the U. States and to determine on the preference which is

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TIPPET & AL. *vs.* EVERSTON.

to be given to one or the other of two individuals, contending for a right of pre-emption, while the contest remains between the original settlers, is unnecessary to determine. The defendant is an innocent purchaser, without notice of the claim of the plaintiffs, and ought not to be disturbed in his property and possession on so vague, and uncertain a title.

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

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

MUSE vs. *CURTIS & AL.*

A bill of exceptions needs not be taken to the decision of an inferior court, refusing a new trial in order to have it examined on appeal.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This is an action of trespass, brought by the appellee to recover drawages, for his having been disturbed, by the defendants and appellants, in his possession of a saw mill, and the land on which it is situated, as described in his petition.

They attempt to justify their entry on the premises, by a title in Curtis.

It is clear that a title to property will not justify the proprietor in a forcible entry, and ouster of a legal possessor. But, in the present case, it does not appear that any has been clearly made out by the defendants and appellants.

The case was submitted to a jury, who found one thousand dollars damage for the plaintiff and appellee, which is complained of as excessive: and it is insisted, for the appellants, that, on that account, the judgment ought to be reversed and a new trial granted, or a reduction made in this court of the damages to a just amount.

Whether this court would, in any case, interfere with the verdict of a jury, on account of enormity in damages, is not necessary to decide, as the present case does not appear to us so flagrant, as to require our interposition.

After the verdict and judgment, the defendants moved the district court for a new trial. This motion was grounded on the affidavit of one of them, stating, among other reasons, for obtaining a second trial, the discovery of evidence, which he could not, by ordinary and reasonable diligence, have discovered previous to the trial of the cause. This motion was overruled by the court, and no bill of exceptions was taken: which is contended to be

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unnecessary, as this court is bound to notice it, on the appeal from the final judgment, without having their attention thereto directed by a bill of exceptions.

We are of opinion, that this is correct. But, in the present case, from a strict examination of the affidavit, it is believed that the evidence to which it refers might have been discovered by ordinary and reasonable diligence, and that consequently that there is no error in the refusal of the new trial.

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 defendant.

SOMPEYRAC vs. *ESTRADA.*

If the process of attachment be set aside and a citation have in the mean while been served, the plaintiff is entitled to judgment by default.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. In this case, the plaintiff obtained an attachment against the estate of the defendant, and pending the writ of attachment, proceeded by the ordinary process of a citation, which was served, by leaving a copy with the defendant's wife. The attachment was

quashed by order of the district court, and the plaintiff moved then for judgment by default, in consequence of the service of the citation, which was refused: whereupon he took the present appeal.

We have no doubt of the correctness of the judgment of the court *a quo*, so far as it relates to the question of the attachment: but we believe it erroneous, in refusing to the plaintiff a judgment by default on the service of a citation, which was in all respects regular, independently of the attachment.

It is true the attachment was wrongfully sued out, at a time where the ordinary process of citation could be legally served: but it does not follow, as a necessary consequence that the latter mode of proceeding was irregular and void; as that, which is regular and proper in itself, ought not to be vitiated and annulled by a distinct proceeding, which is found on examination to be illegal and void.

The judge of the district court seems to have founded his opinion, in relation to the irregularity and illegality of the citation, on the belief that the law requires a prayer in the petition for that process, which, on examination, is seen not to be the case. For, according to our construction of the law regulating the practice of courts in civil cases, a plain-

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SOMPEYRAC *vs.* ESTRADA

tiff may obtain a citation of the defendant, without having prayed for it in his petition.

It is therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed that the cause be remanded with desertions to the district judge to proceed on the plaintiff's petition and prncess of citation, as in ordinary cases.

Bullard for the plaintiff, *Mills* for the defendant.

PAVIE & AL. vs. *ESTRADA.*

If the process of attachment be set aside and a citation have in the mean while been served, the plaintiff is entitled to a judgment bv default.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This case being perfectly similar to the preceding one, the same judgment is accordingly given.

Bullard for the plaintiff, *Mills* for the defendant.

CUNEY vs. *NELSON & AL.*

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September, 1820.

CUNEY
vs
NELSON & AL.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This case presents only a dispute as to the proper location of a grant of land to Texada, the grantee from the Spanish government, under whom, as vendees, the defendants and appellees claim.

This case turns on a mere question of fact.

Their right, to be quieted in the possession of the disputed premises, is not contested, on the ground of a superior title in the plaintiff and appellant, as opposed to the grant above cited, should it appear that it had been properly located. This is a question of fact, which depends on the testimony in the case, and has been, after due examination in the district court, decided in favour of the appellees, which decision, in our opinion is correct.

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.

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September 1820.

Cox
vs
Gardner

COX vs. *GARDNER.*

APPEAL from the court of the sixth district.

A wife who does not renounce in due time, to the community, is liable to one half of its debts.

MATHEWS, J. delivered the opinion of the court. In this case the judgment of the district court being against the estate of L. H. Gardner only, it must be reversed for the reasons assigned, in the opinion of this court, in the case of *Landerdale vs. Gardner*, *ante* 716.

It is therefore, ordered, adjudged and decreed that it be annulled, avoided and reversed, and proceeding to give such a judgment, as in our opinion, ought to have been given in the district, we order, adjudge and decree that the plaintiff and defendant do recover from the defendant and appellee the sum of three thousand dollars, with legal interest from the judicial demand, until paid, and that the amount of said judgment be levied one half out of the goods and chattels, &c. of the said defendant and appellee and the other out of the estate of L. H. Gardner, deceased, and that the defendant and appellee pay the costs of this appeal.

Baldwin for the plaintiff, *Bullard* and *Thomas* for the defendant.

CARMICHAEL vs. *BRISLER.*

APPEAL from the court of the seventh district.

The commissioner's certificate is no evidence of title against an individual claiming the land under title or possesion.

MATHEWS, J. delivered the opinion of the court. This is a case in which the plaintiff and appellee sues to recover a certain tract of land, described in the petition.

To support his title, he gave in evidence a plat of survey, made by a person, who states he acted as a surveyor, under the order of the Spanish commandant of the part of Concordia and a grant or permission from said commandant to possess and occupy the land in dispute, agreeably to the order of survey above mentioned, and a certificate of the confirmation of his claim, by the land commissioners of the United States.

The defendant relies on his actual possession and the certificate of these commissionors, confirming his claim.

It is clear that Don Jose Vidal, the Spanish commandant, had no right to grant the land in question, under the regulations of his government, and consequently the plaintiff acquired no title, under his grant. The confirmation of his claim, by the land commissioners, had the effect of perfecting his title against the general government, but leaves it to its original

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CARMICHAEL *vs.* BRISLER

value, when placed in opposition to the claim and title of an individual.

The defendant holds under what is known by the term *settlement* right and the certificate of the commissioners. He is proven to have been in actual possession of the premises in dispute, at the date of the plaintiff's pretended grant, and to have continued so, without any material interruption, until the present time.

We are of opinion that his actual possession, supported by his right of possession, under the certificate of the commissioners is a title, at least equal, if not better than that of the plaintiff, who ought not to recover.

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

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

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DAVIS
vs
GARDNER.

DAVIS vs. *GARDNER.*

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. Believing the defendant and appellee to be liable for one half of the debts contracted by her husband, Lewis H. Gardner, during their marriage, for the reasons adduced in the case of *Lauderdale vs. Cox*, in which judgment was lately rendered, we find it necessary to reverse the judgment of the district court. *Ante*, 716.

A wife who does not renounce in due time to the community, is liable to one half of its debts.

It is therefore, ordered that it be annulled, avoided and reversed, and it is further ordered, adjudged and decreed that the plaintiff and appellant do recover, from the defendant and appellee, the sum of five hundred dollars, with legal interest from the judicial demand, until paid, to be levied one half thereof on the property of said defendant, and the other half on that of the estate of her husband, Lewis H. Gardner, and that the appellee pay the costs of this appeal.

Bullard for the plaintiff, *Thomas* for the defendant.

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MORGAN vs. TOWLES.

MORGAN vs. *TOWLES.*

APPEAL from the court of the fifth district.

If a bill be protested for non-acceptance, and due notice given to the endorser, the latter is not discharged by the neglect of the holder to protest in due time for non-payment.

MARTIN, J. delivered the opinion of the court. The plaintiff sues on a promissory note of the defendant, endorsed by Bartlet & Cox.

Nathaniel Cox, surviving partner of that firm, in a petition of intervention, stated, that the note was not endorsed by himself nor his partner to the plaintiff, but was deposited in the joint names of the plaintiff and the firm, in bank, subject to their joint order, with the blank endorsement of the firm, to meet the payment of a draft endorsed by the firm, in case it should be returned duly protested for non-payment, and regular notice given them: that the bill was returned unpaid, but without any regular notice or protest, whereby the firm was discharged from any liability. Yet the plaintiff, without the knowledge or consent of this intervening party, obtained possession of the note and instituted a suit th reon against its maker, as agent of the holders of the bill, and afterwards an agreement was entered into between the plaintiff and the intervening party, by which the plaintiff promised to discontinue the suit instituted on the note, and institute another against the intervening party, in order to try the

question of his liability as endorser of the bill, and to restore the note, if judgment was not had on the bill, and such a suit having been accordingly brought on the bill, the said Morgan caused it to be discontinued and the present suit brought on the note. The petition concluded with a payer that the intervening party might be admitted as plaintiff, the petition of the present plaintiff dismissed and judgment given against the defendant, in favour of the intervening party.

The district court gave judgment, "the law and evidence being in favour of the plaintiff (Morgan)" and, the intervening party having failed to prove his allegations, that the former recover from the defendant the amount of the bill with costs and interest, and after deducting the amount of the bill, damages and interest, that he pay the balance to the intervening party: by whom and the defendant the costs were equally to be borne.

The intervening party alone appealed.

The statement of facts refers to the depositions taken in the district court, and written documents.

The plaintiff objected to the introduction of any parol evidence to change or vary the condition of the written assignment of the note: the objection being overruled, a bill of exceptions was taken.

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The intervening party offered evidence that the endorsement of the firm, on the back of the note, was originally a blank one, and was filled up with an order to pay especially to the plaintiff, since the transfer, and at a time different from that expressed. This was objected to as useless, the holder having a right to fill up a blank endorsement and the objection sustained. The counsel were distinctly told by the court that, if they had evidence that the note was delivered to the plaintiff's agent, for a special use and a different one had been made of it, the endorsement would not stand in the way. A bill of exceptions was taken.

The documents, which come up from the district court, shew that the bill, endorsed by Bartlet & Cox, was duly protested on the 1st of October 1816, for non-acceptance, and due notice given to them, by the plaintiff, who was the agent of the holders of the bill, and a written demand of security for the payment of the bill, at maturity, made on the 22d of October, and on the same day they made a written offer of the note on which the present suit is brought, provided it was deposited in bank in the joint names of the plaintiff and the firm; which offer was accepted by a note of the plaintiff on the 24th of October. The draft, which

was payable sixty days after sight, was protested for non-payment on the 4th of December 1816, and immediate notice given to Bartlet & Cox. By a note of the intervening party to the plaintiff, which is without a date, the former informed the latter, that, having reason to believe that the bill was paid and disliking that the note should be protested, he desired to have it withdrawn from the bank. By a written agreement, subscribed by the counsel of the present plaintiff, acting for the holders of the bill and of Bartlet & Cox, it was agreed that a suit should be brought against them, as endorsers of the bill, to try the question of their liability, on its merits, and the suit brought upon the note dismissed: the plaintiff retaining the note until the termination of the suit. Such a suit was accordingly brought, was afterwards discontinued and the present suit instituted.

The parol testimony shews that due notice was given to Bartlet & Cox, of the protest of the note for non-acceptance and non-payment.

Two witnesses, introduced by the intervening party, depose that the note, on which the present suit is brought, was given as collateral security for the payment of the bill at maturity, *in case it was duly protested for non-payment, and legal notice*

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given to the endorsers, Bartlet & Cox. One of these witnesses is one of the drawers of the bill, and the other appear to be a clerk of the endorsers. A witness introduced by the plaintiff, his own clerk and the person who acted for him in this business, swears that nothing was said about the protest for non-payment.

The case has been submitted to us without any argument.

The only inquiry, in the determination of this case, is whether the contingency, on which the blank endorsement of Bartlet & Cox vested the plaintiff with the right of receiving or demanding the amount of the note, has happened.

According to the written documents to wit, the letter of Bartlet & Cox in answer to that of Morgan, demanding security, in which they offer the note on which the present suit is brought, without mentioning any thing as to the protest of this bill for non-payment, and the written acceptance of this offer, this contingency has happened, since the bill, the payment of which the note was intended to secure was not paid at its maturity by the drawee, and has not since been paid by any of the makers or endorsers. But, it is contended, that this contingency has not happened: because the bill was

protested for non-payment one day two late, to wit: on the day following the last day of grace, in other words that no regular protest was made.

Placing the case in the point of view most favourable to the appellant, by a waver of the consideration of the admissibility of parol evidence: altho' there are two witnesses who swear that a protest for non-payment was made a condition of the pledge of the note, and one only that no such condition was spoken of, the written proposition of the appellant and the written acceptance of the appellee must make the testimony of this witness to preponderate, especially if we consider that this protest was of no importance to any of the parties.

The bill having been protested *for non-acceptance*, the holders might insist on the immediate payment of it by the drawers and endorsers, and might instantly have comenced their action against them, *Chitty an bills*, 169, without waiting for the expiration of the sixty days, and their right could not be impaired by the neglect of a protest on the last of the days of grace. 3 *East*, 481, 4 *Esp. R.* 268, 2, *Bos. and Pull.* 83, *n. a. Douglas*, 54, *Bull. n. p.* 269, 3 *Johnson*, 202, 3 *Mass. Rep.* 357, 1 *Day*, 11..

In *Wilson & al. vs. Buck & al.* a bill having

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been protested for non-acceptance, and due notice given, was not presented for payment, till some days after the days of grace were expired, yet judgment was given against the endorser; the court holding that the plaintiff's right of suing on the protest for non-acceptance was not merely inchoate, but complete and prefect. 4 *Johnson*, 144; 3 *id.* 205, *in notis*.

It does not appear to us that the district judge erred in refusing to receive evidence of the time at which the blank endorsement was filled up.

We do not examine whether he erred or not in giving judgment for the whole amount of the note in favour of the plaintiff, directing him to pay the overplus, if any to the intervening party, instead of ascertaining the amount due to the former, giving him judgment therefor, and judgment for the balance in favour of the intervening party; because, on calculation, we find that there will be no such balance.

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

Brent for the plaintiff, *Porter* for the intervening party.

PRINCIPAL MATTERS.

SUBROGATION.

1 A partner, who pays partnership debts, is subrogated to the creditor's rights on the joint property. *Rowlet* vs. *Grieve's syndics*, 483

2 A surety, who pays the debt, is *ipso facto* subrogated to the rights of the creditor. *Curtis* vs. *Kitchen*, 706

SURETY.

A surety, who does not bind himself *in solidum* with another surety, is only liable for one half of the debt. *Filhiol* vs. *Jones & al.* 635

See SUBROGATION, 2.

TUTOR.

His liability is not prevented by his neglect to take the oath and gave security. *Bernard & al.* vs. *Vignaud*, 442

See EVIDENCE, 7.

WITNESS.

1 A father in law is an incompetent witness. *Same case*, id.

2 A party does not become a good witness, by depositing a sum of money sufficient to pay the costs to which he may be liable. *Meeker's ass.* vs. *Williamson & al. syndics*, 365

12 The vendee of real property, tho' liable a to an action of mortgage, is personally liable to a personal action on his promise. *Durnford* vs. *Jackson & al.* 59

SET OFF.

A debt is liquidated, so as to be susceptible of being set off, when it appears, that something and how much is due. *Center & al.* vs. *Morse*, 398

SLAVE.

1 The laws of Spain require the presence of five witnesses, to the verbal emancipation of a slave. *Bazzi* vs. *Rose and her child*, 140

2 If an informal emancipation takes place, the master promising to comply with the legal formalities, his rights are not thereby affected, till these formalities be fulfilled *Same case*, id.

3 A record of such emancipation, in this state, does not affect his rights. *Same case*, id.

4 If a slave procures his discharge by *habeas corpus*, the master is not thereby prohibited from establishing his right. *Same case*, id.

5 A master may sue for what is due to his slave. *Livaudais' heirs* vs. *Fon & al.* 161

6 A slave, who has a deed of emancipation, under which she is to be free, at the grantor's death, is a *statubiler*, and children born from her, in the mean while, are slaves. *Catin* vs. *D'Orgenoy's heirs*, 218

See SALE, 6.

disregarded. *Durnford* vs. *Dugruys' syndics & al.* 220

6 A sale will be rescinded, if the services of the slave appear so inconvenient, difficult and interrupted, that it is presumed he would have been bought had they been known so to be. *Blondeau* vs. *Gales*, 313

7 If the vendee refuse to take away the goods, the vendor, after proper notice, may sell them for the account of the former. *Gilly & al.* vs. *Henry*, 402

8 The vendor of moveable goods has a privilege on them, whilst they remain in the possession of the vendee. *Hobson & al.* vs. *Dawson's syndics* 422

9 If an agent sell goods for which he takes notes, tho' the principal afterwards take other notes, payable to himself with an extension of credit them is no novation. *Hobson & al.* vs. *Dufour's syndics*, 422

10 After the sheriff has struck off the property to the last and highest bidder, he is not to set it up again, because another bidder claims the bid and offer to give more. *Brashears* vs. *Barrabino & al.* 641

11 The vendor ought to declare the defects of the thing, when he knew them and it does not suffice that the bill of sale express that the vendee has seen and visited it. *Rousel* vs. *M'Farland*, 704

5 The endorser of a note not negotiable is not suable before the insolvency of the drawer. *Rippey* vs. *Dromgoole & al.* 716

See EVIDENCE, 10, 11.

RENUNCIATION.

1 If the wife do not renounce in due time, &c. she will be bound for one half of the debts of the community. *Lauderdale* vs. *Gardner*, 716

2 Same point. *Cox* vs. *Gardner*, 726

3 Same point. *Davis* vs. *Gardner*, 729

SALE.

1 If cotton be sold, payable in two days, and the vendee instantly procures advances thereon, delivering it to the lender, who ships it, in his own name, the vendor cannot claim it, without refunding the sum loaned and charges. *Erwin & al.* vs. *Torry*, 90

2 Same point. *Rogers et al.* vs. *Torry*, id

3 If a sale be completed, in a country, in which the vendor has no privilege on the thing sold, he acquires none on its being brought here. *Whiston & al.* vs. *Stodder & al. syndics*, 9[illegible]

4 The vendor, who has not delivered the goods cannot maintain an auction for the price. *Robinson* vs. *Jones & al.* 16

5 A bid at a sheriff's sale must be followed by a tender of the money; otherwise it may be

7 Same point. *Pavie & al.* vs. *Estrada*, 724

3 A defendant, who removes to another parish, buys a house and lives there during three months, cannot plead that he is suable in that parish only, not having yet acquired a domicil in the other. *Ripley* vs. *Dromgoole & al.* 709

9 There is no necessity of a case being set forth in various modes or counts, to authorise the admission of proof which supports it in substance. *Gilly & al.* vs. *Henry*, 402

PRESCRIPTION.

The purchaser of the real estate of a minor cannot avail himself of that *brevi temporis*, if the sale was not attended with all the formalities required by law. *Françoise* vs. *Delaronde*, 619

PROMISSORY NOTE.

1 The demand is to be made at the domicil of the maker. *Hennen* vs. *Desbois & al.* 147

2 If the endorser, ignorant that no demand was made, promises to pay, he will be relieved. *Same case*, id.

3 Suit may be brought on a note not negotiable in the name of the payee for the use of the transferee. *Filhiol* vs. *Jones & al.* 635

4 If the payee of a note write on the back that he guarantees the payment of it, this does not make the person to whom he delivers it an endorsee. *Canfield & al.* vs. *Vaughan & al.* 682

PLEDGE.

Delivery is of the essence of the contract of pledge. *Lee & al.* vs. *Bradlee*, 20

PRACTICE.

1 If questions of law be submitted to a jury to be especially found, their finding ought to be disregarded. *Center* vs. *Stockton & al.* 208

2 If an answer to interrogatories be sworn to abroad it ought to appear that the officer had authority by the laws of the country, to administer oaths. *Same case*, id.

3 If the answer do not appear properly sworn to, it needs not be excepted to, as insufficient. *Same case*, id.

4 Pleadings, in this state, consisting only of the petition and answer, pleas *puis darrein continuance*, are not known; but, the party is protected from surprise, and, in case of any new occurrence, allowed time. *Dufour* vs. *Camfranco*, 235

5 On a rule to shew cause, why the order suspending the sale of property, taken on an order of seizure and sale, should not be set aside, the merits cannot be gone into. *Abat* vs. *Poeyfarré*, 433

6 If process of attachment be set aside and a citation be, in the mean while served, the plaintiff is entitled to judgment by default. *Sompeyrac* vs. *Estrada*, 722

2 A requete on which no order was made gives no right. *Same case*, id.

3 The vendee of a claimant, who has obtained the commissioners' certificate cannot be disturbed by another claimant, on the ground that the vendor of the latter had a right of preemption. *Tippet & al.* vs. *Everston*, 719

4 The commissioners' certificate is no evidence of title, against a claimant, under title and possession. *Carmichael* vs. *Brisler*, 727

5 If the plaintiff's deed calls for all the land between A. & D. he is entitled to the land from the point, at which A's land terminates. *Archinard* vs. *Miller*, 713

LEASE.

A verbal one will prevail against another one of a pertiner date. *Rachel* vs. *Pearsal*, 702

MORTGAGE.

A mortgagee cannot proceed against the premises, in the hands of a third possessor, until judgment against the mortgagor. *Curtis* vs. *Murray*, 640

NOTICE.

The holder of an order not negociable is not bound to give notice to the drawee, so strictly as that of a bill of exchange. *Soubercase and wife* vs. *Caldwell*, 714

ty dying first, provided there be no child born, the donation is revoked. *Frideau* vs. *Frideau*, 707

2 A wooman may sue the estate of a man who married her, his first wife being alive, for her services in his house, the use of her furniture, here of her negroes, &c. *Fox* vs. *Dawson's curator*, 94

See RENUNCIATION.

INJUNCTION.

If a sheriff levies an execution on the property of a third person, the sale may be enjoined by the judge of the district in which the seizure was made, altho' the writ issued from another district. *Cavelier* vs. *Turnbull's heirs*, 61

INTEREST.

May be stipulated from the date of a note, in case it be not punctually paid. *Lauderdale* vs. *Gardner*, 716

INTERPRETATION.

When the natural meaning of the words of an act present no ambiguity, no interpretation is necessary. *Waters* vs. *Backus*, 1

LAND.

1 When two claimants of the same tract of land have obtained the commissioners' certificate, their respective titles must be examined without regard thereto. *Hooter* vs. *Tippet*, 637

8 If the plaintiff aver a faithful compliance with his part of the contract and the answer allege generally a violation of it by the defendant, the latter may give a breach of it by the plaintiff in evidence. *Berthemond* vs. *Davis*, 391

9 The evidence must correspond with the allegations. *Victoire & al.* vs. *Moulon*, 400

10 The acknowledgment of the maker of a lost note suffices to prove it. *Lataste* vs. *Gravier*, 316

11 If a note not payable to order, shewn to have been given in payment of goods, be alleged to be mislaid and the defendant does not plead payment, slight evidence of the mislaying will suffice. *Nagel* vs. *Mignot*, 488

12 The assumption of the debt of another must be strictly proven, *Old* vs *Fee & al.* 14

13 The record of the conviction of a slave cannot be given in evidence against his master. *Steel* vs. *Cazeaux*, 318

14 In an action on a lost note the plaintiff is generally holden to strict proof. *Camfrancq* vs. *Dufour's heirs & al.* 144

FACTOR.

Has a lien on the goods of his principal in his hands for the balance of his general account. *Patterson & al.* vs. *M'Gahey*, 486

HUSBAND A WIFE.

1 If a husband and wife by their marriage contract gave to the survivor the property of the par-

2 In an action for a tortious conversion, it has jurisdiction, if the conversion be within the parish, altho' the goods came to the defendant's hands out of it. *Coit* vs. *Jenning*, 166

COHABITATION.

If a man and woman contract to carry business together, their subsequent cohabitation does not affect her rights. *Viens* vs. *Breckle*, 11

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EVIDENCE.

1 The record of a suit cannot be read against one, neither a party nor privy thereto. *Ulzere & al.* vs. *Pocyfarré*, 153

2 Parol evidence is not admissible of decrees of the former government of Louisiana. *Same case*, id.

3 Parol evidence cannot be received against the contents of a deed. *Harrison* vs. *Laverty*, 213

4 Nor of the contents of a bill of lading. *Center* vs. *Torry*, 206

5 Under the general issue, the defendant cannot give another contract in evidence. *Same case*, id.

6 If a party gives part of a conversation in evidence, the other has a right to draw the whole of it out. *Harrison* vs. *Laverty*, 213

7 The judgment obtained by a minor, against his tutor, is evidence of his claim on the tutor's property, sold to a third person. *Bernard & al.* vs. *Vignaud*, 442

PRINCIPAL MATTERS.

BILL OF EXCHANGE.

If it be presented for non-acceptance and due notice given to the endorser, his liability is not affected by the neglect of the holder, to protest for non-payment in due time. *Morgan* vs. *Towles*, 730

CARRIER.

Whether a sale by a common carrier vests the property of the goods? *M'Neil & al.* vs. *Coleman*, 373

CESSION OF GOODS.

1 The debtor's property becomes the common stock of his creditors, in cases of insolvency alone. *Scholefield & al.* as. *Bradlee*, 495

2 A creditor, opposing the homologation of the proceedings, must state especially the grounds of his opposition and is not allowed to allege irregularity generally. *Desbois* vs. *Seghers' syndics*, 67

3 A creditor, who procures a sequestration, which is followed by a cession, has no action for his costs when the measure does not appear to have been advantageous to the mass. *Rion & al.* vs. *Seghers' syndic*, 17

CITY COUT.

1 Its jurisdiction does not extend to contracts or torts originating out of the parish. *Breedlove & al.* vs. *Fletcher*, 69

procure a statement of facts, nor assign errors, *Dussuau & al.* vs. *Dussuau & al.* 164

9 When justice requires, a case is sent back for further proof, *Dufour* vs. *Camfrancq*, 235

10 Same point. *Lawes & al.* vs. *Winter & al.* 170

ATTACHMENT.

1 Property taken on it cannot be mortgaged so as to destroy the lien of the plaintiff. *Harvey* vs. *Grymes & al.* 396

2 When the petition concludes with a prayer for the attachment of a specific debt, nothing else can be seized, *Astor* vs. *Winter*, 171

3 It is sufficient to place the property, in the custody of the law, that it be attached in the hands of the garnishee, *Scholefield & al.* vs. *Bradlee*, 495

See PRACTICE, 6.

BANK.

1 It has no summary relief against the maker of a note not given to be discounted, *U. S. Bank* vs. *Fleckner*, 141

2 An usage, common to all the Banks in New-Orleans, cannot be deemed a legal rule of conduct for any of them. *Same case*, 309

3 No relief can be had against the forfeiture of anterior payments to the State Bank, on failure of posterior ones. *Brandt & al.* vs. *State Bank*, 310

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4 A surety cannot avail himself of the appeal of his principal and codefendant, *Calvit* vs. *Haynes et al.* 712

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