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.

What is FACT to-day, is PRECEDENT to-morrow.

Junius' letters.

VOL. VII.

BEING VOL. IX. OF THIS REPORTER.

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Judge DERBIGNY resigned his seat, in the Supreme Court, on the 15th of December, 1820—and

ALEXANDER PORTER was appointed in his stead, on the 2d of January following.

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, SEPTEMBER TERM, 1820.*

West'n District.
September, 1820.

RICHARDSON
vs.
TERREL.

RICHARDSON vs. *TERREL.*

A plaintiff appellant may give the bond of two individuals for his prosecuting the appeal. It is not necessary that he should give his own.

The party who puts interrogatories is concluded by the answer, unless he disproves it by two witnesses.

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APPEAL from the court of the fifth district.

Brownson, for the plaintiff. This is a suit brought on a note of hand, dated 3d June 1813, for $2833, 33, payable in January 1815, on which there appears endorsed May 28th 1814, $166, 66 2-3, leaving a balance on the note of $2666, 66 2-3, which sum together with ten per cent interest from 1st February 1815, is claimed by the plaintiff in his petition.

The defendant has in his defence filed two notes, one dated 4th June 1813, for $1787, 50 and the

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

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other without date for $160, both payable on demand, making together the sum of $1946, 50.

Supposing that compensation were to be allowed for $1947, 50 against the sum of $2666, 66 2-3, and that the same took effect on the 1st of February 1815, it would leave a balance due by the plaintiff of $717, 16 2-3, exclusive of interest from that time.

Again, supposing the note of $160 should be considered as included in the one of $1787, 50, there would only remain that sum to be allowed in compensation, which would leave a balance due the plaintiff of $879, 16 2-3 exclusive of interest.

The district judge has however given judgment for the sum only of $383, 48 exclusive of interest. From this decision both parties have appealed.

With respect to the note of $160, the plaintiff contends that it has been included in the larger one, and was to be cancelled or given up. The only evidence of this is the oath of the plaintiff himself. He swears unequivocally to the fact. And what gives it some contenance is that the small note bears no date. It was taken it should seem in haste, as a loose memorandum, and from the confidential footing upon which every thing seems to have been transacted, between the parties, at the time, this note may be supposed to have been given, it is easy to believe that the plaintiff would acquiesce in a declaration

by the defendant that he could not for the moment lay his hands upon it, but that he would deliver it up or cancel it, whenever it was found. At any rate, the plaintiff has in substance stated this upon oath, and at the hazard of a prosecution for perjury, if he has stated it falsely, and it seems to me that he is to be believed, unless the contrary be proved. It is hardly to be presumed, that a man would hazard the consequences of perjury, for the paltry sum of $160, or that he would think to originate and fabricate such a tale, without any foundation for it in truth. *Civ. Code*, 316, *art.* 263 & 2 *Mart. Dig.* 160, *section* 9.

But, to examine the pretentions of the defendant: it is said:

1. That the plaintiff has engaged to cancel and give up the note, on which this suit is brought without demanding any thing upon it.

2. That the defendant has contracted to pay interest upon the two notes filed, in the defence. from the date of the largest and that as the note, on which this suit is brought, did not fall due until the 1st of February 1815, compensation did not take effect until that time; that then not only the defendant's two notes are to be compensated, but also the intermediate interest, which occurred upon them, from the date of the largest, up to the time of compensation.

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I. As to the first point, I trust I need not detain the court long to shew the utter futility of the pretention. To prove the facts on which it depends, interrogatories have been put to the plaintiff. The answer thus drawn from him gives an express and explicit negative to all the questions contained in the interrogatories, and not only do not furnish evidence for the defendant, but, must be taken as evidence against him. *Civ. Code*, 316, *art.* 263 & 2 *Mart. Dig.* 160, *section* 9.

It is needless to enquire whether such a contract, as that alleged in the defence, which is in effect that the plaintiff should cancel and give up to the defendant the note on which this suit is brought, at a discount of twenty-five per cent, would be binding upon the parties, admitting it to have been fully proven. For it appears to me that there is no tittle of evidence to support such a contract, not the shadow of a pretence for it. On looking into the letters, from the plaintiff to the defendant, such an idea receives no countenance. It will be seen that, as early as February, before this contemplated arrangement with A. Lewis at Nashville, the plaintiff commenced writing to the defendant, informing him of his necessities for money, that he must make a sacrifice to obtain it, and requesting the defendant to sell his own and the Thruston's bonds for $14500, or cotton at $18 per hundred, thinking that he

could re-sell the cotton for $11 or 12, for ready cash, thus making a sacrifice of one third. But, it seems the exertions of Terrel to sell his own paper, if indeed he ever made any, proved fruitless. The bonds were not sold. In May following, Terrel proposed revisiting the states. It was thought that the note, on which this suit is brought might be negotiated to A. Lewis. Terrel undertakes to effect the negotiation and to facilitate the accomplishment of this object; Richardson authorizes him to sell the note at 25 per cent discount, which would give him $2000 to answer his necessities in the states. But, what does all this prove, but that the plaintiff was as ready to do a favour to the defendant, as it appears, he has been liberal in acknowleging favours received. His object was, not to give Terrel a speculation upon himself, but to raise for him, in an emergency, the money which he wanted at the price of almost any sacrifice. Had Terrel proposed to him, in direct terms, to annul the note at 25 per cent discount, he would have said "if you are my friend, Terrel, you may want this money, and I am willing to consent to any sacrifice to raise it for you, but you cannot wish to speculate upon me in my distress."

But, it seems that in September 1815, the plaintiff writes to the defendant in the states, using the following expressions: "In your last letter you beg

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that I would not part with your first bond to me. I have it yet, and rest assured I will keep it until I deliver it to you, and with heartfelt sorrow it is I know, that you should have been paid what I owe you *long*, *long* before your note became due to me."

Now, if such stipulations and agreements, as the defendant alleges, had ever been entered into, is it probable that the defendant would be found *begging* that the plaintiff would not part with his bond? Would he not have claimed it as a matter of right? And because the plaintiff engaged not to part with it, but deliver it himself to the defendant, does it follow that the defendant intended to give up any of his rights up on it? That he intended no such thing appears clearly from the plaintiff's subsequent letter to Brent, dated a few days later, in which he says "Terrel's first bond I shall hold for him, as I owe him nearly the amount of it." This expression more explicitly declares the intentions of the plaintiff. They were to keep the note for the defendant, it is true, and as it was comparatively speaking nearly paid by the note due from the plaintiff to him, the plantiff was willing to wait until some convenient opportunity would enable them to exchange notes, and then to receive the balance due from Terrel. The defendant felt the advantage of having the note lie in the plaintiff's hands. He knew well, from the strict intimacy that existed,

that the plaintiff would not be urgent in forcing immediate payment; that time would be given to suit his convenience. Accordingly we see that the plaintiff rests quietly, without demanding the balance due him until the spring of 1818, and then for the first time learns the pretentions of the defendant that the note was settled.

I need not urge to the court that the defence set up supposes a *donation;* that a *donation* in the civil law is never presumed, but must be proved, and be executed by authentic act; that receiving it as a contract, it is a *shaving* one, and therefore would be illegal and void. All this becomes wholly unnecessary, because there is not, it appears to me, a tittle of evidence from which to presume the existence of such a contract, much less to prove it, and because it is absolutely disproven by the plaintiff's answers to the interrogaties.

II. As to the second point, I will not say what the plaintiff might have consented to, had the defendant been disposed to settle this business amicably. But, as he has thought proper to dispute every thing, as he has denied that any thing was due, and put the plaintiff upon his legal rights, the rules of law must decide the controversy. If in law he has a right to demand the interest claimed, then surely, I shall not be dissatisfied, if the court awards it to

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him. But, as I am not instructed to consent to it, under existing circumstances, the court will excuse me if I take a little time to show why I think he has not a legal right to demand it.

The defendant alleges that "the plaintiff owed him a large sum of money for cash lent and other services and favours rendered by the respondent to him to the full amount of $1947, 50 with ten per cent interest from the 4th of June 1813, until paid as will appear by the notes, and accounts, filed with this petition and made a part thereof."

The evidence, however, on which rests the claim for interest is contained not in the notes themselves, because they do not legally draw interest, but, on an expression in one of the plaintiff's letters which amounts, says the defendant, to a subsequent promise to pay interest. Before I examine the expression alluded to, I may justly be permitted to complain, that the defendant has never given the plaintiff any legal notice by the pleadings that he intended to rely upon a subsequent promise. He has said that this promise appeared from the notes, and accounts filed with the petition, but not a word about the interest being due by virtue of a subsequent promise. The plaintiff may therefore with justice complain of surprise, when letters not filed with the answer are produced to support such an allegation. He can hardly be supposed to be prepared to contro-

vert by proof of the fact of a subsequent promise when he had no notice that such a thing would be pretended, until the very moment of trial: nay, when he was led to suppose that such a thing would not be pretented, by having his attention called to the notes and documents filed in the suit, as the evidence upon which the claim of interest was founded. And it seems to me that it would be a real hardship for the court to receive these letters, as evidence of a fact, which is totally out of the pleadings, and concerning which one of the parties has consequently never had any opportunity to produce evidence. But, let us examine this evidence partial as it is, and see whether it makes out the claim.

"In making this trade and getting money, I shall directly pay you what I owe you, with good interest."

Does this amount to a contract? I think it does not. The first objection I make to it, as a contract, is that it is not a promise, made with the intention of *obligating* the party promising, which is essential to a contract. A contract is defined to be "une "convention par laquelle les deux parties réciproquement, ou seulement l'une des deux, promettent "et s'engagent envers l'autre à lui donner quelque "chose. J'ai dit promettent et s'engagent, car il n'y "a que les promesses que nous faisons avec l'intention de nous engager, et d'accorder à celui à qui

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" nous les faisons, le droit de nous contraindre à les " accomplir, qui forment un contrat et une convention. Il y a d'autres promesses, que nous faisons de " bonne foi et avec la volonté actuelle de les accomplir, mais sans une intention d'accorder à celui à " qui nous les faisons le droit de nous y contraindre; " ce qui arrive lorsque celui qui promet, déclare en " même tems, qu'il n'entend pas néanmoins s'engager ou lorsque cela résulte des circonstances ou " des qualités de celui qui promet, et de celui à qui " la promesse est faite." Again, "ces promesses " (the kind last mentioned) produisent bien une obligation imparfaite de les accomplir, pourvu qu'il ne " soit survenu aucune cause, laquelle, si elle eut été " prévue, eut empêché de faire la promesse, mais elles " ne forment pas d'engagement, ni par conséquent " de contrat." *Pothier on obligations*, 1, *c.* 1, *sec.* 1, *art.* 1, § 1.

So, in the Spanish law, a contract is defined to be, " otorgamiento que fazen los omes unos con otros, " por palabras, e con entencion de obligarse, acci- " niendose sobre alguna cosa certa, que deven dar " o fazer, unas á otras." 5 *Partida*, *tit.* 11, *l.* 1.

From these authorities, it will be seen that the intention of the party to *obligate* himself *legally* is essential to the contract, that, without such *intention*, the obligation is an imperfect one, and does not amount to a contract. In the present case, I think,

that such *intention* was clearly wanting; that it may fairly be inferred from the circumstances, from the whole tenor of the letter, and from the expressions themselves, that the plaintiff never intended to give the defendant a *legal* right to demand this interest; but that he rather meant to assure the defendant that an act of generosity was designed him, if the trade could be effected. The form of the expression shews this. The plaintiff does not say I will pay you with good interest, but "on making the trade and getting money, I shall pay you with good interest." It is rather an intimation of generosity *intended* than a contract.

Besides, was nothing necessary on the part of the defendant to perfect this contract, supposing it to be one? When a consideration is given for a promise, the consent of both parties is clearly necessary; of one party on account of the promise and of the other party on account of the consideration, and when no consideration is given, when the contract is one of beneficence, and purely gratuitous, then the express consent of the *donor* is made necessary by our *Civil Code*, 220, *art.* 54. If, therefore, it is any thing more than an imperfect engagement, of which I have before spoken, it must be considered as a contract in which there was some thing given or to be given, for some thing received or to be received. Admitting then, for argument sake that

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the expression amounts to a contract, is it any thing more than a conditional one, to pay interest on the happening of certain events? What is the consideration for this promise? Had it no consideration? It is perhaps void then, on that account. If there was a consideration, it must have been the effecting of the trade, which the plaintiff seems to have had so much at heart. Indeed, the very language is that of a conditional promise. "In making the trade and getting money, I shall directly pay you with good interest." Does he promise to pay interest unless the trade is made? Is not the making of the trade in the very language here used a condition precedent, to the performance of what is promised? How then can it be contended that the plaintiff is liable upon this promise, when that condition never was accomplished, when the trade never was effected nor the money obtained? By what law, is this condition to be dispensed with altogether in this contract, and the promise to be converted into an absolute unconditional promise to pay interest. And that too at ten per cent. Because the expression is "good interest." The very vagueness of the expression shews that the plaintiff had not a contract in view. When men enter into contracts, they obligate themselves to some thing more definite and precise, than what is contained in this loose expression to pay, "good interest." What is good in-

terest? The law has said five per cent is good legal interest; that six per cent is good bank interest, and that ten per cent is not good merely, but the best conventional interest. The court has a difficult task indeed to fix the precise meaning of the adjective good, as it relates to the per cent of interest. If we follow the rules of comparison which govern our language, it must mean the lowest interest. There five per cent is good interest as established by law, six per cent is better and ten per cent is the best. But all these difficulties are avoided by giving to the expression the meaning which the writer evidently intended, not a *contract* which might be enforced in a court of justice, but a general and loose assurance, that the plaintiff designed the defendant an act of generosity, if the latter would enable him to exercise it, by effecting the proposed trade; a sort of imperfect engagement which the law calls a pollicitation. *Pothier on obligations*, 1, *c.* 1, *sec.* 1, *art.* 1, § 1 & 2.

Brent, for the defendant. The plaintiff's claims is resisted on two grounds:

1. That the defendant has satisfied the sum claimed, by an agreement made between the petitioner and himself, in 1814.

2. That, if the said sum was not entirely satisfied by said agreement, he is only indebted to the peti-

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tioner in the sum of $383, 43 with ten per cent interest from 1st of February 1815; it being the balance due on said note, after deducting $1947, 50 due to the defendant by the petitioner, with ten per cent interest from the 4th of June 1814 until the 1st of February 1815, when compensation took place, and the interest on $166, 66 paid to the petitioner on the 28th of May 1814.

The court below was of opinion that the defendant could not succeed upon the *first ground*, but that he could upon the *second*, and gave judgment accordingly, in favour of the petitioner, for the said sum of 383 *dollars* 43, *with interest as before statsd.*

The petitioner's counsel has stated that from this judgment *both* the petitioner and defendant have appealed. I beg leave *in part* to correct this statement in the extent it is made. It is true that the defendant did file his petition of appeal, but being anxious to put an end to litigation, he abandoned the appeal and has not thought it proper to take it up, for this appeal does not come up, at the instance of the defendant, but is brought here by the petitioner. The defendant denies that ever he brought up the appeal: it was done alone by the petitioner.

Before I proceed to argue this cause, I must pray the court that the appeal be dismissed, because it has not be regularly taken. The law requires, that the party praying the appeal, should give *good and*

sufficient security, and that the *judge* granting the appeal should *take the security*. 1 *Mart. Dig.* 438.

1. The party (petitioner) has given no security.

2. The security was not taken by the judge.

I. The persons, who have signed the bond filed, are as good as could be required, but the party taking the appeal did not, in the words of the statute, *give* them as security. In order to be a *second* or *security*, there must be a *first* or a principal. In this case the bond *is not signed* by the appellant, nor is he a *party to it;* of course, the persons who signed it cannot be considered as *his sureties*, but as *principals* themselves. Why does the law require that the party should have security ? The answer is direct, that he may be indemnified, and if injured have his recourse against the party, and his security. But I will ask the learned counsel for the petitioner, in what manner a suit could be brought against an appellant and persons signing a bond similar to the one filed in this case ; the appellant could not be sued upon that writing, because *he is no party to it*, and if redress be had at all, against these persons, how could it be obtained ?

But, put reason out of the question, the law expressly declares that "the party must subscribe the appeal bond with his securities ;" for, says the statute, if the appeal be not regularly taken, "the bond,

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by him and his securities subscribed, may be delivered to the opposite party to be put in suit." 1 *Mart. Dig.* 440, 5, IX, about ten lines from bottom and to bottom of the page, and in same book 432, 1, XIX. The very form of the bond is given.

Was such bond given? It was not. I challenge the opposite party to shew it. The only instrument of writing, purporting to be a bond, is one not *signed* or *subscribed by the appellant*, but only by *John Brownson* and *John Muggat*, not as *securities* to the appellant, but only as *principals*, obliging themselves to pay 250 dollars to the defendant, if Sam. Richardson does not succeed in an appeal. *See bond*, which ought to be in record.

If such bond is *not admitted*, or if it does *not appear in the record*, and only the clerk's statement of security being given, a "dimunition of the record is suggested," and it is hoped that the court will order the record to be *completed* by the clerk of the court below.

If then the appellant *has not given security* as required by law, the appeal *must be dismissed* upon this ground.

II. The expressions of the statute allowing, appeals, are "and every judge allowing an appeal, shall take a good and sufficient security." 1 *Mart. Dig.* 438.

It is made the duty of the *judge* to *take* the security. No other person can do it. As well might it be contended that the judge could authorise the clerk or any other person to give *judgment*. The law declares that the judges *shall give judgment*, and can they authorize another person to do it? If so, the law declares that the *judges shall take the security*, and they cannot authorize another person to take it. It is the duty of the *judge alone* to approve the *goodness* and *sufficiency* of the security. It has not been done in this case—See the *petition of appeal*. The order of the judge is that the petitioner *do give security* in a certain sum: it does not appear that the security was *ever taken* by him.

The law contemplates clearly that the security should be *taken by the judge*, and for that purpose requires that the bond with security should be presented with the petition of appeal—Why? That the judge may approve the security. The act, regulating the mode of taking an appeal, leaves the form of proceeding, *the same as it was formerly*, to the late superior court—and the law declares the form of taking an appeal to that court, to be "that the party applying for an appeal, shall file his petition of appeal, together with one sufficient security." 1 *Martin Dig.* 430. The reason of it is that the judge may approve, as I have said before.

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But, should the court be of opinion, that the appeal is regularly before them:

I. In support of my first ground of defence, I will observe that the amount for which this suit is brought is for 2666 dollars 66 2-3 cents, *not due until 1st February* 1815.

It appears by the notes of hand of the petitioner filed in the record that as far back as 4th of June 1813, the petitioner owed the defendant a large sum of money to the amount of 1947 dollars 50 cents, which was for *money lent* as will appear by the *acknowledgment of the petitioner* in his letters to the defendant. In the petitioner's letter dated 1st of February 1814, he says: "I now write you to do what I have very frequently done, which is to ask a favour," and in the same letter, after asking the favour spoken of, he says he wishes to succeed in the *trade* he asks the defendant to make for him, that he might pay the defendant. His words are: "then immediately I will pay you." He also speaks repeatedly of the many favours done him by the defendant and says they will *never be forgotten.* In another part of the same letter, after complaining of his difficulties, the petitioner acknowledges the use he always had of the defendant's money and regrets since he had moved to a distance from the defendant, the want of his *fatherly purse.* His words are: "I

have but very little money to spare in travelling in these days, I assure you, since I have lost your more than fatherly purse to me." Thereby clearly admitting that *the money he owed the defendant*, was for cash advanced to him in 1813, before he left the defendant, whose *liberality*, in supplying his wants, even surpassed the *feelings of a father.*

In another letter of the petitioner, dated March 19th 1814, he repeats the same acknowledgments of favour, and says if the defendant could succeed in making a sale of some property for him, he *would be enabled to pay him*, and that the defendant "should to the end of his days have his gratitude for his godness to him."

In another letter dated 27th September 1815, the petitioner writes to the defendant and says: "In your last letter, you beg I will not part with your first bond to me, I have it yet and rest assured, I will keep it, until I deliver it to you, and with heartfelt sorrow it is, I know, that you should have been paid what I owe you long long before your note became due to me."

I also refer the court to the instrument of writing given by the petitioner, upon the 27th May 1814, to the defendant, which authorizes the defendant to sell the note, upon which this suit is brought, *for about* 2000 *dollars*, or at a discount of 25 *per cent*, which is nearly the same thing. For the amount

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then due on the note, as will be seen by a reference to it, was 2666 dollars 66 2-3, and the discount of 25 per cent, would reduce it to the same thing, and in the petitioner's letter of 17th May 1814, to Alexander Lewis of Nashville Tennessee, he "prays the said Lewis to pay 2000 dollars" to the defendant.

From this statement of the evidence, the court must be satisfied that the petitioner and the defendant *did make the agreement stated* and that the full amount due upon said note, was considered by them both as settled. They will observe that the amount due to the defendant, for *money lent* to the petitioner *from June* 1813, *under circumstances* as detailed in the letters, was nearly 2000 dollars or at least the petitioner so considered it, as he authorized the defendant to sell the note to raise that sum, at a discount of 25 per cent, and also requested Lewis to pay that sum to the defendant—nor was it more than *justice* in the petitioner. The money "had been due to the defendant for a long time," and the note of the defendant would not become due "at the time for almost a year," and the *presumed exchange* which the defendant states was agreed to, if the money was received at Nashville, *was not more than equal*, allowing the defendant interest on his money due by the petitioner "from June 1813 to February 1815," when the defendant's note became due—besides which the defendant is a man *engaged in com-*

merce, and his money would have been *more to him*, than the difference, between the *two* notes. This the petition shews, and, in offering the note to him *due sometime since* for what was *then due*, he only did what an honest man would have done, alive to the *former favours*, rendered by a friend.

That such an arrangement was made, is clear from the petitioner's letter of 27th September 1815, wherein he expressly promises "to keep the note until he delivers it into the hands of the defendant," and expresses "heartfelt sorrow that the defendant had not been paid what he owed him long long before the note became due." If the petitioner had not considered the note as settled in the way contended for by the defendant, he would not have promised to keep and deliver the note into the hands of the defendant. His expressions would have been different, such as, I will keep your *first note* and "deliver into your hands alone," when the *balance is paid.* But why keep this *first note* alone, if *it was not paid?* Why not trade it, as well as the other notes traded to Hall, as stated in the last mentioned letter of the petitioner? Why this great attachment to this note? The reason is obvious. The defendant did not get the money in Nashville, and as agreed between him and the petitioner, *he wrote to the petitioner* that he would take *his first note* in payment of what the petitioner owed him and requested the

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petitioner to keep it for him, and not to pass it to any other person, which the petitioner promised to do in his last mentioned letter of the 27th September 1815, as in record. If such was not the *fact*, why are not the *defendant's letter produced?* No doubt, but the nature of this transaction would be disclosed, and the very keeping of them back, shews that the agreement was as contended for by the defendant. "And as the petitioner had notice by defendant's answer that his (petitioner's) letter would be produced on the trial, he ought to produce defendants." But, says the petitioner's counsel, if such arrangement had been made between the petitioner and defendant, why did the defendant request the petitioner not to pass his *first note*, which is the one on which this suit is brought? The answer is easy. The agreement between the petitioner and defendant was conditional, as will be presumed from what I have shewn before, and was only to take effect, if the money was not received at Nashville, and the defendant had, of course, to write back to the petitioner, to inform him that the money was not received, and to request him not to pass his note as he would take it himself according to agreement, it being the best he could do. For, if he had not *preferred the money* to the exchange, he would have taken the note in Mississippi and not gone on to Nashville to try and get the *same money* for *his*

note. But, money was his object—and it was a loss and injury to him to take the *note in lieu thereof*. Besides which, the petitioner at *that time* owed him more than 2000 dollars, for his two notes, amounting to 1947 dollars 50 cents, and he was entitled by the written promise of the petitioner, contained in his letter dated 19th March 1815, to allow good interest on the same.

Another reason can be given. why the defendant wrote to the petitioner not *to pass his first note*. The defendant had reasons to fear that the petitioner would do it, inasmuch as he had already done it without giving any credit upon it for what he justly owed him, and notwithstanding the agreement they had made, as will appear by the court *referring to said note*, in the record, upon the back of which are *two* assignments at *different times*, to *different persons* of the said note, which the petitioner made and afterwards it appears took the note back. This certainly was enough, if no other reason existed, for the defendant to make the request.

The transcript of the record is filed in this court, and I have never seen it, and this argument is made from the *original paper*, if the clerk has omitted the *two crossed assignments* upon the back of this note, and the fact is denied by the petitioner, "a dimunition of the record is suggested," and I hope this court will apply the remedy.

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The petitioner contends that the *existence* of such an agreement is contradicted by *his answer* to the *interrogatories* proposed by the defendant, and his counsel has cited authorities to show that the *answer* as made by him, must be taken as evidence in his favour. I admit the general principle. But then these answers may be *disproved by other testimony;* by *literal proof;* here the writings, letters and copies disprove. *Civ. Code*, 316, *art.* 263, 2 *Mart. Dig.* 60, *n.* 9.

But, perhaps the counsel for the petitioner may contend that the literal testimony, in this case, is not *positive*—but, I think, it is as *positive* as the nature of this case attended with all its circumstances could admit of. Besides which, presumptive and circumstantial evidence must be taken *where there is no positive*, and often *is stronger than the positive testimony*. The present, I think, is a case of the kind. In *criminal* cases, such is the doctrine and how much stronger ought it to be *here*. *Philips' Ev.* 110, 124, *Index* 14, 1 *East.* 223, 2 *M'Nally E.* 575 to 580.

II. By referring to the record, it will be seen that the defendant held notes of the petitioner, to the amount of 1947 dollars 50 cents; one of the notes is dated 4th June 1813, and the other without date is for only 160 dollars. The petitioner acknowleges his signature to both of these notes, but, says the

small one of 160 dollars, without date, is included in the large one of the 4th June 1813. The *contrary is proved*, by the letters and documents before referred to. In the writing to the defendant of the 17th May 1814, the petitioner authorises Terrel the defendant, to sell *his first note* of 2666 dollars 66 2-3 cents, for a discount of 25 *per cent*—and in his letter of same date to Lewis of Nashville, he requests him if possible, to let Terrel the defendant, have *two thousand dollars*. If the little note of 160 dollars had been paid, why would the petitioner have "impliedly acknowleged in these two writings," that he owed Terrel *about the sum due upon the two notes*, and have given an order for it. It certainly would not—and the small note is as justly due as the large one—and Richardson the petitioner, in his letters, states that he had borrowed *money from Terrel oftener than once*—then taking it for granted that the sum of 1947 dollars 50 cents amount of both notes, was due to the defendant—I will next shew that the petitioner assumed to pay *interest on it* and *at the rates of ten per cent.*

But, before I notice this, I will make one observation, *as to the date of the note of* 160 *dollars*. The court must be presume that it was of an older date than 17th May 1814, when the petitioner acknowleges he owed the defendant about the sum claimed

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by him in his order on Lewis at Nashville, and further, the court will presume that it was given before Richardson left the Attakapas, and whilst Terrel's "fatherly purse was offered to him," as the petitioner calls it, and from his letter of 1st February 1814, it is proved that the petitioner left the Attakapas previous to 1814, and during some time in 1813—so that the note, it is reasonable to suppose, was given about the same time that the large one was, which was in June 1813—and the petitioner states in his answer to the interrogatories, "that it was given before that time"—so that it fixes the time for both notes, to at least the 4th June 1813, from which time the defendant claims ten per cent interest, upon the sum due him—and to support this claim offers, in evidence, the petitioner's letter of the 19th March 1814, in which he says when he disposes of certain property or notes therein mentioned "I shall directly pay you what I owe you with good interest and you shall to the end of my days have my most earnest and best wishes for your great goodness to me" Here is a *positive* and *written assumption* to pay interest, *good interest*. From when? Why, most certainly from the time the money was due on 4th June 1814. For, when a man says I will pay you a certain *sum of money without interest*, he certainly means with interest *from the day due*, and such was the intention of the petitioner, to be gathered from all

his letters; for he often expresses his regret that he had not the money to pay the defendant.

But, says the petitioner's counsel, the expression *good interest* only means *five per cent.* I differ in opinion with him, and in order to ascertain what the petitioner meant by *good interest*, we have only to refer to *his letters*, and to common parlance—when a man says lend me some money and I will pay you *good interest*, or when a debtor says indulge me for a year and I will pay you *good interest*, or when a person says to his friend who has advanced him money in his difficulties and is unable to return it when called for, as soon as I can command money, you shall be immediately *paid with good interest* and my *gratitude* for your frequent favours, most certainly such *man*, such *persons* mean not the *lowest interest* the law gives, but intend to act justly, liberally and to give an interest that would be an inducement, or at least an indemnification for the *favour* or the delay—that such were the intentions of the petitioner is clear from the manner in which he expressed himself, and after the *many favours he had received* from the defendant, I think he asks for this *forced construction* upon what is called *good interest*, with a very ill grace. The interest given for money lent in this state is never less than *ten per cent.*

It is clear then that the petitioner owed the de-

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fendant 1947 dollars 50 cents, with ten per cent interest from the 4th June 1813, until 1st February 1815, when the defendant's note for a larger sum became due, and that according to the laws of this country a *compensation* took place to the amount of the principal and interest due to the said 1st February 1815. *Civ. Code*, 298, *tit. Compensation.*

Upon the 1st February, the principal due to the defendant was 1947 dollars 50 cents and the ten per cent interest on that sum from 4th June 1813, amounted to the sum of 2283 dollars 18 2-3 cents, including ten per cent interest upon the sum of 166 dollars 66 2-3 cents, advanced by the defendant on the note, upon the 28th May 1714, as will appen by a reference to said note—the said sum being credited thereon by the petitioner—and which said sum being justly due to the defendant upon that day, from the petitioner, was deducted from the sum of 2666 dollars 66 2-3 cents, claimed by the petitioner and judgment was given for the sum of 383 dollars 48 cents, the balance due to the petitioner, with ten per cent interest from 1st February 1815, until paid.

The judge, in giving judgment for this sum, was governed by commercial and legal calculations, made in all such cases—he first calculated the interest upon the 166 dollars 62 2-3 cents, advanced by the defendant upon the 28th May 1814, as receipted on

said note by the petitioner, and then the interest due upon the two notes of the petitioner from 4th June 1813 to 1st February 1815, and adding all together struck the balance due to the petitioner for which judgment was given—this, certainly, was *fair*, *just* and *legal*—nor ought the petitioner to complain of it.

The petitioner contends that the judgment ought to be for a greater sum—and that the defendant is only entitled to a deduction of 1787 dollars 50 cents, the amount of the one note, and that *without interest*—after having *read the petitioner's letters*, the court must be satisfied that the petitioner does not act justly by the defendant, after acknowleging his frequent *favours*, *loans*, &c., he wishes to put him off without even allowing *interest*. If any thing could prejudice so enlightened and impartial court, as the present, surely such an *ungenerous attempt* would have its weight. But I turn from it, and will shew, from *written acknowlegements* of the petitioner, that this never was understood by him, and that until this suit was brought, he never conceived that the defendant owed him as *much money* as he *now aks* for, but on the contrary, long *after the note was due* on 16th October 1815, he wrote to Brent, who signed the note with the defendant in the following words: "Terrel's (defendant) first bond I shall hold for him as" "*I owe him nearly the a-*

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mount of it." Here are the *declarations* and *avowals of the petitioner*, after the note had been long due, when no suit appeared to be contemplated that the defendant had *ready paid* the note that the "petitioner himself nearly owed him" the *amount* of the note which is 2666 dollars 66 2-3 cents. After this, how can the petitioner with any face, contend that there is a *large amount* due to him, according to his argument, with the interest due on his note of upwards of 1000 dollars, at the least 717 dollars 16 2-3 cents without ten per cent interest from 1st February 1315? If this sum with ten per cent interest had been due, would the petitioner have written upon 16th October 1815, that there was but a small balance due, that the "amount of the note was nearly paid to him," as he "owed the defendant nearly that sum?" Most certainly not, and this avowal of the petitioner, in the letter of 16th October 1815, shews that he considered the balance due but "a trifling, not more than the judgment rendered," if as much.

This avowal of the petitioner clearly shows that the small note of 160 dollars never was included in the large one, and when united with the order of 2000 dollars on Lewis and other circumstances, must set aside the answer of the petitioner as to this fact.

I deem it unnecessary to answer the *various points*

embraced in the argument of the counsel for the petitioner—I have answered only such as I deem connected with the question before the court. His arguments and authorities as to *donations* have no relation to the present facts in issue—as to the complaint of surprise by the introduction of the letters—he had notice of the letters, for they "are referred in the defendant's answer" with which they *were filed*, as evidence, upon which the defendant relied—even if they were properly received, and good evidence. If they were not, "the petitioner ought to have excepted upon the trial." It is now too late. He himself has attempted to use them as evidence against the defendant.

MARTIN, J. delivered the opinion of the court. This action is brought on a promissory note of the defendant for 2833 dollars 33 cents, dated June 3, 1813 and payable in July 1815. He pleaded the general issue, and further, that he had long satisfied the plaintiff, for the said note—that, long before its execution, the plaintiff owed him 1947 dollars 50 cents, with ten per cent interest from the 4th June 1813, for cash lent and services and favours rendered: referring to two notes of the plaintiff of that date, one for 1787 dollars 50 cents payable on demand, the other for 160 dollars payable on demand, without a date, and written with a pencil, and the plain-

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tiff agreed with him that if the said sum could not be procured from A. Lewis of Nashville, the note, on which the present suit is brought, would be considered as paid and satisfied, and the plaintiff gave him a power to sell said note—which not being able to effect, he wrote he took said note for himself and wrote to the plaintiff to keep it for him.

The notes are annexed to the answer and the plaintiff was called upon to answer on oath.

1. Whether they were not in his hand writing and subscribed by him ?

2. Whether he did not agree with the defendant that, if he could not sell the note sued upon for the sum mentioned in the power, or if the money could not be obtained from A. Lewis, the note would be considered as satisfied and he would keep the sum for the defendant and whether he did not offer to the defendant to exchange the note sued upon for what the plaintiff owed him ?

3. Whether, when he gave power to the defendant to sell the note, he did not consider that the latter might, if he thought proper, take the said note for himself, and consider himself the purchaser and owner of it, on the terms at which he was empowered to sell it: and whether the defendant did not write him, that he had been unable to sell the note and desired that he might keep it for him ?

The power alluded to, in the answer and inter-

rogatories is annexed thereto. By it, the defendant is authorized to sell his bond, payable to the plaintiff, in June 1815, for 2000 dollars and upwards, at 25 per cent discount per annum, and the plaintiff promises to furnish the bond, on application after the sale.

In answer to the interrogatories, the plaintiff says that he presumes the notes and power, annexed to the answer, are in his own hand writing and subscribed by him: as he gave two notes for the sums mentioned in those referred to: the small one having been included in the other, and to be given up on demand or cancelled?

The second interrogatory was answered in the negative; the plaintiff adding that the object of offering the note for discount, was to pay the note of 1787 dollars 50 cents, and the balance was to be received by the plaintiff from the defendants on demand. It was understood the plaintiff was not to part with the defendant's note, but to collect it from him.

The first part of the third interrogatory was answered in the negative; as to the second, the plaintiff declared that the defendant wrote to him from Nashville, June 14, 1814, that the money was not procured and requested him by letter from Brunswick, December 13, 1814, to retain the note in his hands: which two letters, with one from New-York,

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of November 20, 1815, are the only communications received by the plaintiff, from the defendant from the time the power of attorney was given till he was threatened with a suit.

The district court, considering that the law and evidence were in favour of the plaintiff, gave judgment against the defendant for 383 dollars 48 cents, with interest at 10 per cent from February 1, 1815.

The statement of facts consists of the notes referred to in the petition and answer, and of several letters from the parties.

Both parties prayed, obtained and gave bond for an appeal, but the record was brought up, by the plaintiff only; the defendant's counsel disclaiming his appeal.

The defendant prays that the plaintiff's appeal be dismissed, because there was not any bond *given* by the plaintiff or *taken* by the district judge.

The defendant's counsel infers that the bond was taken by the clerk and not by the judge, from the order of the latter, on the petition of appeal, that the appeal be granted on the petitioner giving *security as directed by law.* The record shews that the bond was given, which implies that it was *taken;* and we are to presume, in the absence of any proof of the contrary, that it was taken by the person, whose duty it was to take it.

The law made it the duty of the judge to take

security for the costs, and the appellant is bound to no more. To give security for costs is to secure the payment of costs. This certainly may be done otherwise than by executing a bond with a surety; it may be done by the deposit of a sum of money, by that of bank notes, if there be no doubt of the solvency of the bank. In the present case, it was done by the deposit of a bond, executed by two individuals, the solvability of whom is not disputed, by which they bound themselves to the appellee, in the sum ordered by the district judge, for the performance by the appellant of the decree of this court. Is not this a security for the payment of such costs as this court may decree the appellant to pay? We believe it is. Had the appellant executed the bond, with one of these individuals, the appellee would not complain. Yet his security would be less: as the appellant would not be bound to less nor less effectually; for a promise, to pay what a court will decree one to pay, adds nothing to the obligation.

The defendant declining to be considered as an appellant, we have only to enquire whether too much was not allowed to the plaintiff. This perhaps does not dispense us to inquire whether, as he contends, the plaintiff did not agree that the defendant's note should be considered as satisfied. For, if we were satisfied of that, it would be clear that

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we could not amend the judgment of the district court, so as to allow to the plaintiff a larger sum.

The defendant's note is not denied: we find nothing in the plaintiff's letters, which proves that it was to be considered as paid or satisfied by the defendant's claim on the plaintiff, nor that the plaintiff made any absolute promise to pay interest, or that the contingency, on which he promised to pay interest, happened.

The plaintiff is clearly entitled to the amount of the defendant's note, 2833 dollars 33 cents, from which 166 dollars 33 1-3 cents, which were paid before the note became due, are to be deducted, but without the allowance of any interest. The defendant is further entitled to a credit for 1787 dollars 50 cts. for the amount of the plaintiff's note, on which nothing authorises us to allow him any interest. These two sums make that of 1954 dollars 50 cts. to be deducted from the amount of the defendant's note, which leaves a balance of 879 dollars 17 cents, which the plaintiff is entitled to recover, with interest from the date of the note, at ten per cent a year, as stipulated in the note, till paid.

The defendant having resorted to the plaintiff's conscience to establish the note of 160 dollars, as well as the large one, and the plaintiff having sworn that the amount of this first note was included in that of the other, and that the defendant promised

to cancel or surrender it, the latter must be concluded by the plaintiff's answer, which perhaps derives verisimilitude, from the circumstance of the note being written with a pencil and being without a date.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff recover from the defendant the sum of eight hundred and seventy-nine dollars and seventeen cents. $879 17, with interest at ten per cent per annum, from February 1, 1815, till paid, with costs of suit in both courts.

TURNBULL vs. *CURETON*,
CURETON vs. *TURNBULL*.

APPEAL from the court of the sixth district.

When every thing in an instrument seems right and clear, but the meaning of it is uncertain, the proof of the fact, which may remove the doubt, is admissible.

DERBIGNY, J. delivered the opinion of the court. Judgment had been given in the district court, in the first of these cases, and an appeal from it claimed by the defendant Cureton, when the second suit was instituted by him upon the same matter in dispute. His adverse party, Turnbull, pleaded against it the authority of *res judicata*—and the plea being

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not sustained by the court, the cause was investigated, tried and judged, as if no judgment had ever been rendered on the subject.

The judge was certainly correct, in considering a case pending before the court of appeals, as one which had not acquired the authority of the thing judged; though he was probably mistaken in allowing the same parties to prosecute a second suit, on the same subject, while the first was pending. Both suits, however, being now before us, and the law making it our duty to disregard defects of form, and to attend only to the rights of the parties, we will proceed to investigate these cases together, as cross actions consolidated in one.

The dispute here arises from the difficulty of locating three grants of land, which are of the same date, and the surveys of which were not returned into the land office of the United States for this district, as required by the certificate of the commissioners.

These three grants were formerly united in the hands of one person, Abraham Martin, now deceased, who obtained from the commissioners a separate certificate for each. After Abraham Martin's death, each of these tracts was sold, by the name of the original grantee, so that each purchaser has a right to the quantity of land, mentioned in the certificate of the commissioners, and to the

location which it calls for, as far as that can be ascertained.

Of the three tracts, Turnbull has brought the two upper ones, to wit: Dowd's grant for two hundred arpens, and Garnett's grant for four hundred. Cureton is the purchaser of the lower tract or John Tear's grant of seven hundred and fifty-six arpens. These grants call to bound upon each other, and none of them are limited by any fixed line; nor is there any written evidence that the lower line of the land of Eleonore Nevill, by which Dowd's tract is said to be bounded, is fixed in any particular place. In this deficiency of written proof, to fix the limits of these respective tracts, recourse must be had to parol testimony.

We have been called upon to declare whether parol evidence can be admitted in a case like this, to explain that which is left doubtful in the title—and although the parties do not appear to have excepted to the introduction of the oral testimony, which is spread on record, we have no objection to state it as our opinion that it was properly admitted. A grant, which gives to the party a certain tract of land, said to bind on the land of another person, the situation of which is also uncertain, contains that defect which is known in law by the name of latent ambiguity. It may be explained by parol evidence, so far as to shew what such limits ought

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to be: for, without such explanation, the grant would have no effect. The doctrine upon this subject is that when every thing in an instrument seems right and clear, but the meaning of it is uncertain, the proof of the fact, which may remove the doubt, is admissible. On this matter, we refer to *Peake's Evidence, chap.* 2, *sect.* 5, and to *Philips's Evidence, chap.* 10, *sect.* 1.

To find out the limits, by which these different grants ought to be bounded, we have one fact sufficiently ascertained: which is that the gulley marked on the plat near the cotton gin of Turnbull, was always considered by the original settlers, Tear and Garnett, as their common boundary; in corroboration of which fact, it is also in evidence that Garnett lived four or five arpens above the gulley, and Tear five or six arpens below it. In locating the lands of two adjoining settlers, who obtained grants for the land on which they actually lived, but without a sufficient description of their limits, it would certainly be a safe rule to run a line between them at an equal distance from each settlement. Should this be done here, it would place the line near the very spot, which the witnesses point out, as the boundary understood between the original grantees. We think, therefore, that this is the place, where the line of division between the lands of the present parties ought to be fixed.

The next enquiry is, how shall this line run? It has been the almost invariable practice in this country, in locating grants said to have their front on a water course, to run the lateral lines at right angles with the front, wherever that could be done. So, if there was in this case no evidence concerning the direction of these lines, we would deem it reasonable to order them to be run according to the common practice, which would, we think, bring them very near the direction represented in the plot filed in this record. But, independently of that, one of the witness has positively sworn that the lower line of Eleonor Nevill, now Eleonor Briggs, runs nearly East. That being the boundary between her and Dowd's grant, and Dowd's grant adjoining Garnett's, the direction of their lines must be the same.

As to the manner, in which Cureton may locate his grant of seven hundred and fifty-six arpens, it is a point which, we think, cannot be decided between the present parties. It is enough to say that his upper limit, on bayou Robert, ought to be fixed at the mouth of the gulley, immediately below Turnbull's cotton gin—and that his pretentions, to run his upper line parallel with the back line of Alexander Fulton, are not maintainable—because the grants of Garnett and Dowd, which are described to have a determinate number of arpens in front,

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must be located conformably to that description—and because his own certificate calls not for any particular quantity of land in front, nor for parallel lateral lines, nor for any boundaries, either above or below: but has left the land to be surveyed, it seems, as the locality will permit, in the following words: "forty arpens depth with so much front, as will include the quantity."

It is therefore, ordered, adjudged and decreed that the judgments rendered by the district court in these cases be annulled, avoided and reversed—and this court, proceeding to give such judgment as they think ought to have been given below, do further adjudge and decree that the lower line of Walter Turnbull's land be fixed at the mouth of the gulley, immediately below his cotton gin, running from thence parallel to the upper line of Dowd's grant adjoining the land of Eleonor Biggs—and it is further adjudged and decreed that each party pay his own costs, in both courts.

Johnson and *Wilson* for Turnbull, *Baldwin* for Cureton.

West'n District.
September, 1820.

DONEGAN'S heirs
vs
MARTINEAU & al

DONEGAN'S HEIRS vs. *MARTINEAU & AL.*

APPEAL from the court of the sixth district.

Actual possession of a part, with title to the whole, is possession of the whole.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs claim a tract of land in the possession of the defendants. Their titles derive as follows: In the year 1795, Thomas Thompson petitioned the Spanish government for a tract of ten arpens front on the left side of bayou Bœuf, with the ordinary depth, adjoining below the bayou Robert and bounded above by the domaine. The petition or *requête* was presented to the commandant of Rapides, who certified, at the foot of it, that the land was vacant. One year after, Thomas Thompson sold to Wm. Donegan, the plaintiff's ancestor, such right as he may have acquired under that petition. No further step was ever taken by Thompson or his successor, until the year 1811, when Donegan exhibited his *requête* to the commissioners of the land office and obtained from them a confirmation of his claim, such as it was. Neither Thompson nor Donegan ever were in possession of the land. The title is of the weakest kind, and ought not to prevail, except against no title at all.

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One of the defendants, Roger B. Marshall, pleads title under Frederic Myers, who, as early as 1797, obtained from the Spanish government a complete

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patent for a tract of fifteeen arpens front on both sides of bayou Bœuf.

He further pleads prescription under that title.

The other defendant, Julien Deshautel, alias Lapointe, pleads title under a certificate of the said commissioners, issued in favour of his father, and relies also on prescription.

The titles of these two defendants being altogether unconnected and of different natures, they shall be examined separately.

The patent of Frederic Myers, under whom Marshall asserts his right, is admitted to be a complete and final title. The only thing in dispute between the parties is as to its location. The plaintiffs would have it to begin five arpens, lower down than the defendants place it. In the patent itself there is no reference to any natural object, which can fix the precise spot of the location. Recourse, therefore, must be had to other testimony to ascertain it. To find out the limits, within which the party and those who held under him, possessed this tract, the several acts of sale, by which the property passed from one hand to another, are, no doubt, proper evidence. From them may be seen what the party and his successors considered as the lower part and the higher part of the tract. To fix the places where these different parties settled, oral testimony was also admissible for the reasons adduced in the

case of *Cureton* vs. *Turnbull*. After having taken a view of the whole, there remains no doubt in our minds that the place where T. Thompson lived was upon the lowermost five arpens of the patent, and that the other half of his land below was on Rusty's, grant, for which Wm. Miller Thompson's executor obtained a certificate of confirmation from the land office—that the peach tree marked K is the lower boundary of Rusty's grant of five arpens front—and that Myer's patent begin immediately above these five arpens.

We are satisfied that whether or not there has been any settlement in the upper part of the patent, possession and settlement in the lower part was sufficient. It is surely not necessary to refer to authorities for the purpose of shewing that corporal possession of a part, with title to the whole, is possession of the whole.

So much, therefore, of the present demand, as is directed against the defendant Marshall, must be dismissed.

As to Julien Deshautel's title to the land adjoining Myer's patent above on the left bank of bayou Bœuf, we are bound to say that he has not not made it good.

The certicate of the commissioners, which he exhibit, is founded on a *requête*, in which he petitions for land on the side of the bayou, opposite to his

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settlement—and it having been proved that he was at that time settled on the left bank, his claim calls for land on the right shore. We must therefore decide that the title, which he produces, does not apply to the land now in dispute. Neither do we find his plea of prescription maintainable—first, because his possession without title should have lasted thirty years—and secondly, because the evidence does not even shew any acts which may be considered as amounting to possession.

It is therefore, ordered, adjudged and decreed that the judgment of the district court be reversed—and proceeding to give such judgment as we think ought to have been rendered below—we do further adjude and decree that such part of the claim of the plaintiffs as is directed against the defendant Roger B. Marshall be dismissed—and that the plaintiffs be put in possession only of so much of the land called for by their title as will be found out of the limits of Myer's patent, after that patent shall have been so surveyed as to have its upper limit twenty arpens above the peach tree marked E on plot K filed in the record of this suit—it is further adjudged and decreed that the plaintiffs pay one half of the costs in both courts, and Julien Deshautel the other half.

HICKS & WIFE vs. *MARTIN.*

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September, 1820.

HICKS & WIFE
vs.
MARTIN.

APPEAL from the court of the sixth district.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs, citizens of Tennessee, claim a negro woman slave, named Polly, now in the possession of the defendant, alleging that she is part of the estate left by the late Manson Hardaway of Virginia, of whom Elizabeth Hicks, one of the plaintiffs, is the only child and heir at law—that the said slave, who had been assigned as dower to the widow of the said Hardaway, was, contrary to the provisions of the laws of Virginia, removed from that state by the said widow, who thereby forfeited her right of dower upon her—and that by reason thereof Elizabeth Hicks, as reversioner, has become the absolute owner of that property.

Where one party charges another with a culpable omission or breach of duty, the person who makes the charge is bound to prove it, though it may involve a negative

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The answer of the defendant denies the facts alleged, and further pleads title in himself.

Several questions have been raised in this case, part of which, the view, which we have taken of the subject, precludes the necessity of examining. We will not enquire whether a state can or ought to enforce the laws of another in matters of forfeiture; nor whether, under the laws of Virginia, parol evidence of an assignment of dower on slaves can be deemed sufficient—but taking all that for granted, we will enquire whether enough has been proved

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by the plaintiffs, to establish the forfeiture on which they rely.

By the same laws of Virginia, introduced in evidence by the consent of parties, forfeiture, in a case like this, takes place when the the widow removes the slave, *without the consent of the reversioner.* The removal is proved—but the want of consent is not. Now, although, it be a general rule that the negative is not to be proved, that rule does apply to a case like the present. "Where one party charges another with a culpable decision or breach of duty, the person who claims the damage, is bound to prove it, though it may involve a negative—for, it is one of the first principles of justice, not to presume that a person has acted illegally, till the contrary is proved." *Philips Evidence, chap.* 7, *sect.* 4, and the authorities to which he refers. Here, no attempt has been made to show the *culpable omission*, which alone, could cause the forfeiture, and create the right, on which the petitioners claim. They have been even so cautious not to throw any light on that part of the subject, that they have given no date, nor any other clue, from which the relative situation of Elizabeth Hicks and the widow of Martin Hardaway can be ascertained. Enough, however, is found in the testimony taken in Tennessee, to inform us that the widow of M. Hardaway is no other than the plaintiff Elizabeth Hicks's

own mother, who brought her to Tennessee in the year 1807, shortly after her father's death—and to make it highly presumable that Elizabeth Hicks was then a minor, who had no consent to give or to refuse, but through her mother and guardian, the very person who had that consent to ask.

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.

BERNARD vs. *SHAW & AL.*

APPEAL from the court of the fifth district.

Altho' a deed be void as to the transfer of the vendor's right, it may be resorted to as evidence of the quantity of land, which the apparent vendee, with the consent of the owner took possession of, against a stranger, without any color of title.

Brent, for the plaintiff. This suit is brought to recover the possession of a tract of land consisting of thirty-three arpents front, with ordinary depth, upon both sides of the bayou Têche, in the full enjoyment of which the petitioner is disturbed by the defendants.

Three of the defendants, viz: Joseph Prévost, John Shaw and Bartholemew Castillon, filed their answers and denied the facts in the petition.

At the trial, the defendant Joseph Prévost, came into court in person and acknowleged the right of

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the petitioner, to recover *possession* against him, and judgment was accordingly rendered.

The other defendants, Shaw and Castillon, resisted the claim of the petitioner, and the court below gave judgment in their favour; from which judgment this appeal is taken.

Before I enter into the argument upon the testimony, I will call the attention of the court to the law which must govern this case.

It suffices of a *year's possession*, if it has been peaceable and uninterrupted, to make the possessor be considered as a *just possessor* and *even as a master*, until the true owner makes out his title. *Civil Code*, 478, *art.* 23.

It will be an easy task to shew from the testimony, that the present petitioner was in peaceable possession of the land for more than the time required.

Frederick Pellerin proves that since 1804, to the present day, a period of upwards of 15 *years*, the petitioner has always *peaceably possessed* the land by himself and by his agents *put upon it;* that the petitioner went to France sometime ago, and during his absence, always *possessed it*, by persons whom he put upon it, and that he returned from France the last of 1815, and *since then has lived upon the land.*

Agricole Fusilier, swore that *two* years previous

to October 1819, the petitioner cut a road opposite to where the defendant Castillon's house *now stands* through the woods, and has always used it since, and that the petitioner, "who lives not far from the wood, has always cut and used the wood on the land," where he cut the road, and that the same has always been considered as the petitioner's land.

Here, then is clear positive proof, not only of *possession one year*, but more than 15 years, which must entitle the petitioner to recover the *possession of the land*, if the testimony is not contradicted by the defendants—let us examine their testimony.

Godefroy Verrette was sworn on the part of the defendant. His testimony, so far from destroying the evidence on the part of the petititioner, strengthens it. He states that the defendant never entered on the land until February 1818—that he then cleared away *two thirds only of an arpent* and *began to put up* a cabin, but did not *cover it* or *mud it* or *inclose it*, and that the defendant never *lived there* and *never had put a family there*, never had any *household* or *kitchen furniture there*, and that he never *moved upon the land*, until about *two or three months before he gave his testimony*, which was about the time *this suit was brought*. This witness does not prove that the defendant *never possessed* the land more than *a week* or two before the suit was commenced. He says to be sure that about

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eighteen months, before the present suit commenced, the defendant *trespassed* upon the petitioner's land in February 1818, by making a *little clearing* and *putting up the frame of a house*, but that he *left it* and never *returned to it* or *moved* upon the land, until about *three months before the time he was giving in his testimony*, which was about the time *this suit first commenced.* So that this testimony, so far from *destroying* the *testimony of the petitioner*, *establishes the fact* that the defendant *did not possess the land*, that he *never possessed it a sufficient time*, to contend against the petitioner's possession. The court can consider the entry of the defendant, in none other light than that of a *trespass.* He entered upon the land, remained a month or so, then left it, remained *away more than a year*, and returned only about *the time this suit was commenced*, when he *first shewed* a determination to *take possession of the land:* upon which the petitioner sued him.

Pierre Bonvillain, the other witness, for the defendant, proves nearly the same thing as Verrette, except he says expressly, that the defendant about *two years ago began to put his cabin*, that he *then* put up the *posts* and rafts and *left it*, until about two or three months before he gave his testimony.

The court will see by this testimony, offered by the defendants, that they *never possessed the land*

for *a year*, *peaceably* and *uninterruptedly*, as the law requires—on the contrary, they never possessed with an avowed intention of exercising ownerships, by *residing upon it* or *cultivating it*, until about the time this suit was brought, when they were *immediately sued.* How could the petitioner have acted differently from what he has, to secure his right? He would have done wrong to have sued, when they first entered upon his land: for, they soon left it, and he had every reason to believe never would return; and they left it, as this court will reasonably presume from the opposition of the petitioner to their settling there. After they had left it we see no act of ownership over it. They did not pay taxes for it, they did nothing by which it could be supposed they ever intended to return to it, and as soon as they did, the petitioner, who from the testimony of Frederick Pellerin and Agricole Fusilier, had peaceably and uninterruptedly possessed it since 1804. immediately commenced his suit.

But, again the law is, "if two persons claim the possession of property in dispute," *the one*, who had been in possession of the property for the *space of a year*, *before* the disturbance given him by *the other*, will be maintained therein. *Civ. Code*, 475, *article* 25.

Now, it is proven by the petitioner's witnesses, that he had been *in possession of the land* in dis-

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pute since 1804, and that since 1815, *he had resided upon it*—so that he had possessed it a year, previous to the *disturbance* complained of, and ought to recover it from the defendant.

How ought property to be possessed, in order to entitle the possessor to any kind of prescription? And, is not *a year's possession* under our laws, *a prescription of a year*, and does not the *prescription of a year*, require the same kind of possession as that of *ten years?* It does. What says the law? "Prescription requires a *continued*, *uninterrupted*, *peaceable*, *public* and *unequivocal possession.*" *Civil Code*, 480, *art.* 28.

Here, if the possession was doubtful, the petitioner has the best *probable title*—for it is proven that since 1804, he has been in possession.

To prove this title, the defendant offered in evidence *a bill of sale*, passed before the regular authority of Attakapas, on the 1st of March 1804, by the Chètémacha Indians to the petitioner, for the land now claimed, to shew that since then he had possessed in *good faith* and in virtue of a *just title*, which the court refused to read and *rejected* it, to which a bill of exceptions was taken.

The court, certainly, erred in rejecting the petitioner's deed, under which he had always held, and *possessed the land in good faith*, for *upwards of fifteen years.*

The law says, "a man who becomes possessed of an immoveable estate *fairly* and *honestly* and by *virtue of a just title*, may prescribe for the same, after the *expiration of ten years*, *&c. Civ. Code*, 486, *art.* 67.

"*A just title* is one by virtue of which, property *may* be transferred; *such as a sale*, though such title *may not give a right to the estate.*" *Civ. Code*, 488, *art.* 68.

I will, first, shew that the petitioner, in the words of the law, became possessed of the land, *fairly* and *honestly*, and I will then shew that his title was *a just one:* and if I shew these two things, this court must say that the court below erred and the petitioner will have that justice done *here*, he ought to have received *below.*

I. The petitioner became possessed of the land *fairly* and *honestly*, because he used no fraud in purchasing the same. It was a *fair honest purchase*, by which the *vendors* to whom the land belonged. as will appear by a reference to *Galvez's order*, in the record, *page* 16 & 8, sold the land to the petitioner for a *valuable* and, at *that time*, *high consideration.*

The transaction was a *fair one*, because not *forbidden, at that time*, by any law of the country; but on the contrary such sales were daily made.

This country was possessed by the United States,

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in the *latter part* of 1803. *This sale* was made in the *beginning* of 1804, on the 1st of March, whilst the *laws of Spain* relative to such sales *were in force here*, and *before* the *law of congress*, *prohibiting such sales* by Indians, was *extended* to Louisianana.

By the *laws of Spain*, in force in Louisiana, such sale was legal, and the *laws of Spain remained in force*, until altered by the *laws of Congress*. In the case of *Seville* vs. *Chretien*, 5 *Martin*, 284, (near the middle of the page) this court has decided "that, in case of the cession of any part of the dominions of one sovereign power to another, the inhabitants, of the part ceded, retain their ancient municipal regulations, until they are abrogated by some act of the new sovereign." Then, if such be the principle, and if it was *legal under the Spanish* government to make such sales, it was legal until the Spanish custom or law was *abrogated*, which was *not done* at the date of the sale 1st March 1804. The *first law* of Congress, which extended *any of the laws* of the United States to the *territory* of Orleans, was passed upon the 26th March 1804. *Martin's Dig.* 148, *sec.* 7, § 156, *sec.* 11, subsequent to the date of the petitioner's deed, which was *a fair* and *legal deed when made*, and the petitioner having obtained it *legally*, obtained it *fairly* and *honestly*.

The next part of my argument will be taken up, in shewing this court that the sale to the petitioner *was a just one*, and such as the petitioner is entitled to prescribe under.

II. *A just title*, is described by the law to which I have before referred, to be *one by which property may be transferred*, though *such title may not give a right* to the property. The same definition is given by Pothier. *Pothier's Prescription, n.* 57, 58,

I will then *ask* the court, if the deed from the *Indians* to the petitioner for the land in dispute, is a sale in usual form. *Immaterial whether it transferred the right to the land*, is it not within the *true definition* and *meaning* of what the law defines *just title?* It is admitted in the bill of exceptions in record *p.* 6, that the said deed was for the *very land in dispute*, and I beg the court to refer to it, accompanying the bill of exceptions and see if it is not a *good sale* cloathed with *every formality* and what the law calls a *just title.* If it be so, the court below *erred* in its rejection, and the petitioner can avail himself of the ten years possession in *good faith* under *that title*, so as to recover from the defendants, *who have no title at all to the land.* He, certainly, possessed the land in *good faith;* for the laws of the country approved his *buying it* when

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he did, and he confidently expects that the government of the United States will approve the purchase.

The ground upon which the court below refused the introduction of the deed of March 1804, was that the deed did *not transfer the property* to the petitioner, but that *it yet belonged to the Indians.* With due respect to that court, I think the idea a singular one in an action like the present. If such be the law, the *Indians might take advantage of it*, but most certainly the *defendant cannot.* Such has been the decision of this court in the case of *Martin* vs. *Johnson* and others, 5 *Martin's Rep.* 661, where the court says "The result (of the sale from the Indians being contrary to law) would be that the Indians have not been legally divested of their title, and could perhaps take advantage of it—but until then, the defendants hold in their right, and cannot be disturbed by others." So is the case with the petitioner, he *holds in the right of the Indians* and cannot be disturbed by the defendants.

From a full view of this part of the argument the court must be satisfied that the deed ought to have been received, and if it had that the petitioner would certainly have recovered of the defendants.

It would at least have had this effect to shew that the petitioner, *had the most probable title*, which, would have entitled him to recover the land, from

the defendants according to the law as written in *Civil Code*, 380, *art.* 28.

The petitioner also offered *in evidence* proof of the *payment of taxes to the United States*, and *this state*, and the *parish* in which the land lies, yearly from the *year* 1807 to the trial, to shew that the said land had, during that time, been *taxed as the petitioner's* and *possessed* by him—and the court refused the same, to which a *bill of exceptions* was also taken.

The proof of paying taxes ought to have been received. It shewed the *open*, *continual* and *unequivocal* possession of the petitioner—the possession *animo domini*. It is one of the *many kinds* of testimony admitted to *prove possession*. *Pothier, Prescription, n.* 176.

Brownson for the defendants. In replying to the arguments of the plaintiff's counsel in this case, it is necessary, in the first place, to remark, that with respect to John Shaw, one of the defendants, there is no statement of facts. The gentleman, who was counsel for Castillon and Prevost only, and not for Shaw, as will appear by the answers filed, could not bind the latter to any statement of facts. This objection is material, because, besides the various difficulties to which the plaintiff's pretentions are liable under this statement, it does not certify the

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facts truly as it respects Shaw. Indeed, it was understood, at the trial, that the idea of a judgment against him, was abandoned, and for that reason, no evidence for or against him was taken. This does not perhaps conclusively appear from the transcript. But the court will observe that in the statement of facts, mention is always made of the *defendant*, not of the *defendants*. The reference too, where a pronoun is used, is always in the singular number. Thus *he had not his* family with *him*. But extracts are unnecessary. The court will see the whole statement of facts. If the gentleman signed as attorney for *defendants*, the reply is, that the answer was probably filed, before Joseph Prevost, one of the defendants, consented to confess judgment, and that the answer is itself stiled the "separate answer of Joseph Prevost and Bartholemew Castillon." When afterwards, in signing the statement of facts, the gentleman attaches to his name the expression, "attorney for defendants," he must be presumed to mean attorney for two defendants, whose answer he had filed. Perhaps it may be irregular to state, as it does not appear from the transcript, that John Shaw was made a defendant by mistake, from the resemblance between his name and Jones Shaw who is said to be within the limits claimed by the plaintiff. But if I am incorrect in this suggestion, the plaintiff's counsel can set me

right. The only questions therefore, which are before the court, as it respects John Shaw, are those, which arise out of the rejection of the deed, as evidence, and of the proof of the payment of taxes, or, in other words, those which are connected with the two bills of exceptions. Should these two opinions of the judge below be overruled, it is respectfully suggested, that the only thing the court *can do*, as against Shaw, would be to send the cause back for trial, with orders to receive the evidence offered. But it appears to me that the opinions of the judge can be supported, and that they are sound law. The plaintiff in his petition has called this an *action of possession*. He has not thought proper however, to rely simply upon *possession* without exhibiting his title. The case therefore did not present a mere naked question of *possession*, but a mixed one, of possession and title, and if it clearly appeared from the petitioner's own shewing, that he had no title, the court could not give him the possession, which he asked. The *Civil Code*, 478, *art.* 23 says, in speaking of possession, that "the natural connection, which is between the *possession* and the *property makes the law to presume*, that they are joined in the person of the possessor, and *until it be proved* that the possessor is not the right owner, the law will have him, by the same effect of his possession, to be *considered as such*." This article,

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it is true, generally makes the possessor *presumed* to be the owner, but still it is a *mere presumption*, liable to be corrected by actual proof—and that *presumption*, let it be observed, is only to continue "*until it be proved* that the possessor of such a piece of property, is also the owner of it by virtue of such a title, and if it is found on examination to be no title at all, is not the *presumption* corrected by a more complete and perfect knowlege of the fact? And would the court, after having this knowlege brought home to them, still persist in comitting an injury by putting a person, clearly without title, into possession? Surely not. The case of *Meeker's ass.* vs. *Williamson & al sindics*, 4 *Martin*, 626, has settled this question. "But when the plaintiff puts at issue his right of possessing, as when he alleges that he is owner, and presents his title as the evidence of his possession, the simple fact of possessing is no longer the only question. The defendant is then allowed to dispute the validity of that title, and is maintained in the actual enjoyment of the premises, if the plaintiff fails to make his title good." In this cause the plaintiff has put at issue his title, and offered the rejected deed as evidence of that title and of possession. But the court below, being of opinion that it was neither evidence of title nor possession, refused to admit it, to which opinion the plaintiff excepted. It is

clear that the deed could not be evidence of *possession*, unless at the same time it were evidence of *title*. Possession is divided into two kinds. natural and civil, the one is actual, the other legal. *Possidere corpore* and *possidere jure*. The one is accomplished by entering into actual possession of the whole, the other by taking actual possession of part with intention to possess the whole, which intention is inferable from some *legal* or *apparently legal* title to the whole. It is proper then to enquire, whether the deed in question furnishes such an *apparently legal title* as to be the foundation for civil possession. It will not be pretended, that there was any actual possession, by the plaintiff, of the land where either of the defendants are located, that is, no part of it was ever inclosed, or possessed by any visible act of possession, except the trifling establishment, of which the evidence speaks, and the alleged purchase from the Indians. Had the defendants either of them intruded upon the the actual possession of the plaintiff, had they broken into his inclosure or committed any other violence upon his actual possessions, I will not undertake to say that the court might not have granted some relief. But as they have not done this, the only question is, whether the plaintiff has such a title to the whole tract purchased from the Indians, as to justify the extention of an actual possession of part to a civil

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possession of the whole. I think clearly he has not. This deed purperts to have been executed by one Baptiste, calling himself chief of the Chitimacha Indians. It does not however appear, that the alienation was made with the permission or approbation of either of the Spanish government or of the Chitimachas themselves—both of which it is contended were necessary to the validity of the sale.

It is contended that the Indian tribe itself could not, even in its collective capacity, have alienated this land without the consent of the government, who had at the time dominion of the country. It is said in 5 *Mart. Rep.* 658, that "the king of Spain, in taking possession of his dominions in America, disregarded the rights of the original lords of the soil, and declared himself sovereign of the country." Again it is said, *ibd.* 660, "by the laws of the Indies 6, 1, 27, however, it is recognised that Indians can hold land, as well as other people may, that they can alienate it, with permission of the government." The counsel for the defendants has not the means of refering to the laws here quoted. But from the expression used, it is inferred that the permission of government was essential to give validity to the act of alienation. It seems to have been the policy hitherto pursued by all the civilized nations, who have had Indians located within their jurisdictional limits, to treat them

as persons under tutelage, as persons *inopes concilii*. Thus, the United States appoint agents to regulate commerce between them and the whites, and strictly prohibit all trafic carried on in any other way. By the act of March 30, 1802, *n.* 22, *sect.* 12, *Graydon's Dig.* 231, it is declared, that "no purchase, grant, lease or other conveyance of land, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the U. States, shall be of any validity in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution," and the same section proceeds to make it a misdemeanor in any unauthorised person to attempt to negotiate any treaty for lands with Indians. In the state of New-York, we find the same regulations adopted, with respect to Indians within the limits of that state—And many decisions have taken place there, concerning the effect, which these regulations have upon rights, acquired under sales from them. In 7 *Johnson*, 290, when a patent had been issued to an Indian, "granting and confirming unto him" the lot in question, "to have and to hold unto him, his heirs and assigns as a good and indefeasible estate of inheritance forever," it was decided that the Indian, tho' he held the land in his individual right, and tho' the highest species of estate known to the laws there, had been granted to him, yet that he

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could not alienate without permission of the government. *Judge Kent* remarks, 296, that "the regulations in the act of 1801, all shew the sense of the legislature, that an Indian, in his individual capacity, is, in a great degree, *inops concilii*, and unfit to make contracts, unless with the consent and under the protection of a civil magistrate. The law not only protects Indians from any suit upon their contracts, but it declares specially that all alienations of land by the Brothertown and New Stockbridge Indians are *void*. These are just and human guards against the imposition and frauds, which that unfortunate people have not the power to withstand; *The same provisions (continues the judge) prevail in the Spanish colonies; none of the Indians within the Spanish dominions can dispose of their real property without the intervention of a magistrate*"---In 9 *Johnson's Rep.* 362, where a person, by a written license from the Peace makers of the Stockbridge Indians, granted pursuant to a vote of the nation, entered and cut down trees, of which he made shingles, it was decided that he was a trespasser, and could not therefore recover the shingles against a third person, who had taken and converted them to his own use, and the court, in giving their opinion, observe, " that it was the wise policy of the statute to interdict all individual whites, from any negotiation, or any contract with the Indians, in respect to their lands, or

any interest therein—such a complete and total interdict was indispensible to save the Indians from falling victims to their own weakness, and to the intelligence, and sometimes the cupidity of the whites." I think therefore, I cannot be mistaken in supposing, that a sale of real property from a tribe of Indians, tho' acting in their collective or national capacity, would be a mere nullity without the approbation of the government, within whose jurisdictional limits, they were at the time situated. This court has implied that such approbation would be necessary in saying that the Indians "can alienate with permission of government." *Judge Kent* has said that the same provisions prevail in the Spanish colonies as in the state of New-York—that "none of the Indians, within the *Spanish dominions*, can dispose of their real property without the intervention of a magistrate." We see that the United States have adopted similar regulations, in regard to the Indians, and it is believed, that the English government has not been behind other nations in the same policy—indeed, this sort of control seems necessarily to result from the pretentions, which these nations have assumed—and, tho' *one* object in these regulations has probably been *to protect the Indians against their own weakness*, yet these nations have probably at the same time had *another object* in view, and that is, t o preserve the Indian lands from

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alienation as a property, in which they themselves had an interest. But the opinion of this court is quoted in the case of *Seville* vs. *Chretien*, 5 *Martin*, 284, where it is said "to be an incontrovertible principle of the laws of nations, that in cases of the cession of any part of the dominions of one sovereign power to another, the inhabitants of the part ceded retain their ancient municipal regulations, until they are abrogated by some act of their new sovereign." Admitting this prohibition to sell without the permission of government, to be a municipal regulation, how could the *necessity* for that *permission* cease, on the change of government without some *act*, implying a change of regulations? Was any such change ever made? On the contrary, the act of 26th March 1804, expressly extends the laws of the United States, regulating the intercourse with the Indians, to Louisiana, thereby *confirming* instead of *changing* the ancient regulations on this subject, and requiring among other things the express consent of the government, as an indispensible requisite to the validity of a sale from the Indians. But is it clear, that the right of tutelage over the Indian nations is a municipal regulation? Is it not rather a *political right* than a municipal regulation? Is it not one of those incidents to sovereignty, which necessarily accompanies it, wherever it goes? And if the sovereign power passes

from one nation to another, does not this right pass with it, and vest "*eo instanti*" in the new sovereign? Perhaps the act of congress, extending the laws of the United States to Louisiana, was necessary, so far as to give effect to the regulations prescribing the manner of enforcing them. But, was it necessary for the acquirement of the *right in question?* Did it vest any new *right* in the United States over the Indians? It appears to me that it did not. It appears to me, that as civilized nations have uniformly disregarded the rights of the "original lords of the soil," have uniformly declared themselves sovereigns of the countries, over which they have extended their dominions, have uniformly imposed restraints upon alienations by the Indians, and *assumed* a *right* to grant or withold their approbation of such acts, and have, in most, if not, all cases, declared that such acts shall be considered void without such approbation, it appears to me, that the *right* in *question*, has now grown into a necessary incident of sovereignty, and is recognized in the national law of our times.

But this deed is deemed, if possible, more fatally defective on the second ground; and that is that it does not appear to have been executed with the knowlege or approbation of the Chitimachas themselves. It seems to have been the single act of one famous Baptiste, called an Indian chief. It is he

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alone, that undertakes to sell out the whole possessions of the tribe. It is he alone, who consents to the terms of the sale. It is he alone, who receives the consideration, *if any consideration was given.* All these solemn acts, so important in the humble concerns of an Indian tribe, are confided solely to the wisdom, discussion and honesty of perhaps a drunken savage, who in a fit of intoxication would not scruple to sell his wife and children. It is believed not to be the practice among any of the Indian nations to confer such absolute and despotic powers upon their chiefs. It is thought to be the general custom of these people, even when they are not under the tutelage of some civilized nation, to act in council upon matters of such moment as the alienation of their territory. The plaintiff's counsel has taken much pains to shew, that the transaction was a fair and *bona fide* one. But how does it appear to have been fair? What proofs have been adduced of the fairness of the transaction? Nothing but the deed. And what does the deed prove? Why it proves itself. It proves that such a deed was given, and it proves nothing else. Whether the consideration, expressed in it, was ever given, we know not. Whether the Indian was drunk or sober, when he made his mark, we are equally uninformed. Whether he was wheedled into the measure by constant and repeated solicitation, or whe-

ther he sought the bargain himself, are facts, of which, we are also ignorant. But it is said to be in usual form—so also in all probability would be a deed taken from a lunatic, from a minor under puberty, or from any other person, deemed in law incompetent to make contract. If a tutor, without pursuing the necessary formalities, should attempt to sell the real property of his ward, tho' the deed might be in perfect form in every other respect, yet if the fact, that it was the property of his ward, should appear from the instrument itself, it would forever stamp it with nullity, and no one could prescribe under it, not even in thirty years—so also, it appears from the face of this deed, that a single Indian, without permission of the government, or of the tribe to which he belongs, has attempted to sell the possessions of the tribe. The illegality of the transaction is too glaring not to strike every one on the very production of the deed. It is not surely such a deed, as can lay the foundation of any *real* or *apparent* title. It can not assist prescription. On the contrary, it seems to me, it would stop it. There is no resemblance between this case and the one of *Martin* vs. *Johnson & al.* quoted by the plaintiff's counsel. In that case, a sale had been made by the Indians in their collective capacity, as a tribe, not by an individual Indian. The approbation of the government had been expressly given. There was

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a *bona fide* sale, and nothing was deficient but a matter of form as to the manner of making the sale, that is, it was private, and the laws required that the property of Indians should be sold at auction. But every substantial requisite having been complied with, the rights of the Indians having been duly protected by the government, in the approbation, which they gave to the sale, and the title matured and completed by a certificate from the U. States, the court could not do otherwise than decide, that the mere formal objection, as to the manner in which a sale, so long acquiesced in, had been originally made, should not render totally void proceedings of such high solemnity. The present is however, a very different case. A large tract of land is assigned to a whole tribe of Indians by the government. The commandant is strictly enjoined as appears from the order of Galvez, the governor, to maintain them in possession, and all persons are prohibited from intruding upon them. The petitioner however, in violation of this order, has gone into the land, procured a deed from a single Indian, calling himself chief, without the consent of the tribe, either constructive or real, or the approbation of the government, and now alleges this trespass and intrusion as the foundation of a claim, and pretends that a deed thus obtained communicated to him a title, under which he can prescribe,

It is conceived, that there can be no doubt, that the court below decided correctly, in rejecting the deed.

As to the proof of having paid taxes, it would only have been good to establish civil possession: as there can be no civil possession without title, and the court had rejected the evidence of such a title, the proof offered became irrelevant and unnecessary. I leave this case with the court, feeling confident that the opinions given below will be sustained.

Brent, in reply. I replying to the arguments of the defendants' counsel, I shall be very short, for I do not conceive, that his reasoning has shaken, in the court, the position I have taken.

His statement relative to John Shaw is correct—and I do not know how his name was inserted in the judgment of the court, as the suit was dismissed as against him. I only used his name with Castillon's, as I found them compled together in the judgment.

The defendant says there was no *actual* possession of the land, by the petitioner—by a reference to the statement of facts it will be seen that there was.

The whole argument of the defendant's counsel is built upon the title to the petitioner, from the

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Indians, being *illegal.* I think I have shewn in the *opening* of this case, that, even supposing the title to be *illegal*, it does not affect the petitioner's right to recover, through ten years prescription under a *just title*, and I have only to refer the court to the authority I before quoted to shew that it was a *just title*—and the defendants do not deny it in their argument, for they have not attempted to shew the contrary. If then the title was a *just title*, the petitioner can prescribe under it.

It has been contended that this sale is an *illegal* one, because it was not approved by the government. It is admitted that, until the sale was approved by government, it was an *incomplete* sale, but it is contended, by the petitioner, that the *sale in itself* was a *legal one*, a necessary *step* towards the approbation, and that whether government will *now* approve or *not*, is a question between the government of the United States and the petitioner, but, that the sale being a legal one, *a just title*, the petitioner can prescribe under it against the defendants—nor does the authority referred to by the defendants from *Martin's Reports*, contradict this principle. The supreme court makes a distinction between a *void* and *voidable sale.* In this case. the sale may be voidable, but it certainly was not void. The *laws* and *customs* of Louisiana, *at the time* it was made, *authorised* such sales : for the

act of congress forbidding them was not extended to Louisiana, as I have shewn before, until after *this sale was made*—and this sale being only a voidable sale, (if it be voidable at all) the authority is applicable and it is enbraced in the principles referred to before, as laid down in the case of *Martin* vs. *Johnson & al.* 5 *Martin*, 661.

MARTIN, J. delivered the opinion of the court. The plaintiff stated that he is the owner of a tract of land of thirty-three arpens in front, on both sides of the bayou Têche with the ordinary depth—that he has peaceably and uninterruptedly possessed it for upwards of a year and a day, and ten years before the institution of this suit, with a good and just title, and always paid the taxes therefor: notwithstanding which, a few months back, the defendants have entered on the said land and disturb and molest him in his possession: and, if the court deem it necessary, in this *action for possession*, to exhibit titles, he purchassed the premises, in the year 1804, from the Chitimachas Indians, who, in the following year, confirmed his title—that the land was, before such a sale the property of the said Indians and so recognized by the government of the province of Louisiana. He prayed to be restored to his possession and for general relief.

Shaw pleaded the general issue and that the pos-

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session, set up by the plaintiff, is a trespass against the Chitimachas Indians and the pretended sale is illegal and void.

Prevost and Castillon pleaded the general issue, and that they have a good title to the premises, under a lease from the Chitimachas Indians to J. B. Bourgeois.

At the trial the plaintiff offered in evidence a deed from the Chitimachas, dated March 1st 1804, for the premises, to the plaintiff, for the purpose of proving his possession, the land being a part of the tract mentioned in *Galvez's* order dated September 14, 1777. The court refusing to receive the said deed in evidence, the plaintiff's counsel took his bill of exceptions.

He also offered the receipts of the collectors of taxes for the United States, the state and parish, for the taxes due or the premises from 1807 to 1819, inclusive, to shew that the land had always been considered as his, and to prove possession. The court refusing to receive these receipts in evidence, he took a bill of exceptions.

The court gave judgment that the defendant Prevost having, in open court, acknowleged the right of the plaintiff—the latter recover the land and costs against the former, and, the plaintiff having failed to establish his right of possession against the other

defendants, that there be judgment for the latter. The plaintiff appealed.

The statement of facts shews that the plaintiff gave in evidence an order of governor Galvez of September 14, 1777, forbidding the inhabitants, in any manner, to molest the Chitimachas Indians of Grand Terre, in the establishment which they occupy and ordering the commandant to see that they be not molested and maintain them in the possession of their land.

Fusilier deposed that, two years ago, the plaintiff cut a road through the woods, opposite to the house, in which the defendant Castillon now lives and has ever since used it. That the petitioner, who now lives not far from the road, has always cut and used the wood upon the land, where he cut the road, and which is that which he always claimed as his own and was so considered: the defendant's cabin was on the bank of the bayou Têche, and the road began behind it and about ten arpents from it.

Pellerin deposed that for many years, he believes since 1804, the plaintiff has been considered as the owner and possessor of the land in dispute. That some time in 1805, the plaintiff placed an Indian named Penigou, in a cabin to keep possession of the land for him, which cabin was not more than an arpent, from the place on which the defendant now lives. As well as he recollects, it was several years

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since he saw what he ever told was the defendant's cabin. He believes the defendant never finished it nor lived in it, until within a few months. Penigou died about ten months ago. The plaintiff went to France in 1806 and returned in the latter part of 1815, or the first of 1816, and has ever since lived on the land he bought from the Indians, part of which is the land in dispute.

Verret, on the part of the defendants, deposed that in February 1818, the defendant for the first time went upon the land, made a clearing of two thirds of an arpent in front and one in depth, and began to built a cabin. He placed the posts, raised the roof and lathed it, but did not cover it, nor mud or inclose the house with any thing, nor made any door or windows. The defendant lived at the distance of about ten arpents, and to his knowlege the defendant did not live there. He went often to see them at work and never saw any kitchen or house furniture, and no inclosure or fence were put up. The defendant moved upon the land about two or three months ago, that is into the cabin, which he had began ; he finished it and now lives in it.

Bonvillain deposed that the cabin of Penigou, the Indian, was about ten arpents from the place on which the defendant now lives—that he lives in a cabin, which he began about two years ago, and

which he finished and moved into about two or three months ago. Two years ago the defendant began to build the cabin, put up the posts and rafters and then left it, until he returned about two or three months ago.

It is admitted that the statement of facts does not relate to the defendant Shaw, as it is not subscribed by him nor his attorney, and does not appear to have been made with the consent of either of them, and the plaintiff's counsel admits he considered the suit as dismissed, in regard to this defendant.

The action is clearly a possessory one only, altho' the plaintiff has made a mention of his title. In suffices, therefore, that he should shew a possession for a year and a day, as the defendant has neither any title nor possessession during that time.

This he has done by the testimony of Fusilier and Pellerin, which shews that he took possession of a quantity of land (which includes the premises in dispute) under a deed from a chief of the Chitimachas Indians. Had the witnesses declared that the plaintiff possessed the land, under the oral permission of the owner—this would have sufficed. Now notwithstanding the deed may be void, as to the tranfer of the vendor's right, it may be resorted to as evidence of the quantity of land to which the apparent vendee, with the consent of the owner

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took possession of, against a stranger, without the least color of title.

The title of the Chitimachas Indians must be admitted, since both the plaintiff and defendants claim under it.

It is therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff do recover from the defendant the possession of the premises, with costs in both courts.

WILLIAMS vs. *HALL.*

If a tract of 200 arpents be sold, to begin on the bayou and to run down & back for the quantity, the grantee must have a front on the bayou as with the depth of the tract will make 200 arpents.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This action was commenced to obtain the division of a tract of land, which was held in common by the parties. It is said to contain four hundred arpents, one half of which the defendant holds under a title derived from the grantee, of a date anterior to that of the deed, under which the plaintiff claims the other half. In pursuance to an order of the district court, the land has been surveyed and a plat, representing its figure and limits, has been returned by the surveyor, and comes up with the record.

The deed, under which the defendant claims, calls

for a beginning, at the upper end of the plantation on which the family of the grantee resided. It purports to convey two hundred arpents, to be ascertained by running down the bayou Robert, on which the land is situated, and back for quantity.

We are of opinion that the land, called for by this deed, must in the division of the disputed property, be first satisfied, and the twenty arpents of face, laid off for the defendant accordingly, and the balance of the whole tract of four hundred arpents for the plaintiff.

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 land in dispute, be divided, between the plaintiff and defendant, by beginning on the bayou Robert, at the upper end of the clearing made by Wade, the grantee, and running down the said bayou, a front sufficient to make two hundred arpents, with a depth as delineated in the plat of survey, which comes up with the record, to be assigned to the defendant and appellee and that the balance of said tract of four hundred arpents, be laid off for and assigned to the plaintiff and appellant: and that the costs be divided between the parties.

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

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ROGERS' HEIRS vs. BYNUM.

ROGERS' HEIRS vs. *BYNUM.*

APPEAL from the court of the sixth district.

ROGERS' HEIRS vs. BYNUM.

The defendant cannot be allowed as a set off, a payment made by him for the plaintiff, unless he shews it was made, at the request of the latter

MATHEWS, J. delivered the opinion of the court. The error complained of, in the judgment of the district court, is that a compensation or set off to the amount of five hundred dollars was not allowed to the defendant and appellant.

His right to it depends entirely on the testimony of Josiah S. Johnson, which shews that the defendant paid to this witness five hundred dollars, on account of the plaintiff's ancestor, but does not establish the fact that this payment was made by the ancestor, at the request of the latter. As this circumstance was not made to appear, the district court was correct, in refusing to allow the set off.

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

Scott for the plaintiff, *Wilson* for the defentant.

MUSE vs. *CURTIS.*

When a case is remanded to be proceeded on, after a reversal of the judgment, the district court may act on the verdict theretofore rendered.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff, in this case, had a verdict and judgment—the defendant, on an appeal obtained a re-

versal of the judgment, on the ground that it contained the citation of no law, nor any of the reasons on which it was grounded, 5 *Martin*, 686. Whereupon the case was remanded, with directions to the district judge, to proceed and give judgment, according to the directions of the constitution and law. He did so, in favour of the plaintiff, and the defendant appealed.

His counsel assigns as an error, apparent on the record, that the judgment was given at November term, on a verdict rendered in June preceding, without any new proceedings thereon : whereas, it is contended, a trial *de novo* ought to have taken place, on the return of the case into the district court.

It is urged that a *reversal*, like an *arrest*, of judgment, avoids the verdict, on which it was rendered. We do not think so.

A judgment is arrested, when it appears that the record is so imperfect, that no judgment can be rendered thereon. It is, therefore, clear that, in such a case, the verdict can be of no avail—for it finds facts, on which no judgment can be given. The defect is in some thing *anterior* to the verdict, and *sublato fundamento, cadit opus.* When, on the contrary, the defect is some thing *posterior*, the verdict is not affected thereby, and nothing prevents its being proceeded on after the reversal of the judg-

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ment, if there be no defect in the proceedings anterior to the verdict.

The counsel further relies on a provision of the court law, 2 *Martin's Dig.* 193, *n.* 14, which requires that the district judge should render their judgments, in the shortest possible delay, and they should never leave in suspense any decision in cases tried, when they close a session of their respective courts.

In the present case, the letter of the law has been complied with. The district judge proceeded on to the determination of the cause, according to what appeared to him just and legal. This court has, however, been of opinion that he erred, and reversed his judgment. Hence, the counsel of the defendant and appellant argues that the law cited, forbidding the district judge to leave any case in suspense, on the rise of the court, precludes him from doing any thing therein, afterwards; that, if a cause be not finally disposed of on the adjournment of the court, or if the judge be prevented from proceeding by sickness, or if he die, it is an end and the parties must begin *ab ovo.*

A construction of the act in this manner would be what lord *Coke* calls *maledicta expositio quæ corrodit viscera texti.* The intention of the legislature was clearly the dispatch of business—the speedy termination of suits. This construction leads to the

delay of justice, to the perpetuation of legal contests. We cannot admit it.

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.

VICK vs. *DESHAUTEL.*

APPEAL from the court of the sixth district.

A contract by which one party gives a quantity of cattle and all the land he has, in consideration of the promise of the other that he will support him is valid.

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MATHEWS, J. delivered the opinion of the court. In this case, both parties, being disatisfied with the judgment of the court, appealed.

The plaintiff sets forth in his petition a contract entered into with the defendants, by which he transferred to the latter, all his right and title to a stock of cattle, supposed to amount to one hundred head, and also all title and claim to any land he may have and the defendant, in consideration of this transfer of property, bound himself to support, nourish and maintain the plaintiff. The answer charges that the contract is null and void, and that the defendant failed to perform his part of the contract.

We are of opinion that the contract, entered into by the parties to this suit, is good and valid in law, and as the breach assigned against the defen-

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dant, is not supported by the evidence in the cause, we are of opinion then the plaintiff has not supported his action.

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 there be judgment for the defendant, with costs of suit in both courts.

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

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

The maker of a note cannot avail himself against a fair endorsee, of an equity that would have destroyed the claim of the original payee.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiffs, as endorsees, brought this action on a note of the ancestor of the defendants to James Rogers. The defendant pleaded the general issue and that the note was given in discharge of a judgment, obtained by Rogers, as curator of the estate of A. Phillips, deceased—that the said James Rogers was recognised as heir of Phillips by a judgment of the district court, which has since been reversed, and Thomas Rogers, who was recognised by the supreme court, has brought suit for the amount of the judgment intended to be paid by the note sued upon—so that the defendants, if they

fail in the present suit, will have to pay the same sum twice.

The execution of the note and its endorsement were admitted and the allegations of the answer, out of the plea of the general issue, proven.

There was judgment for the plaintiffs and the defendants appealed.

Altho' the matter pleaded in avoidance of the claim would have affected it, in the hand of the original payee of the note, it cannot do so in the hands of a fair endorsee.

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

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

HAYES vs. *CUNY.*

9m 87
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APPEAL from the court of the sixth district.

When a suit is instituted by a licensed attorney, his want of authority cannot be pleaded in abatement.

Licitation is a mode of dividing estates held in common and may be avoided, like any other contract by the parties thereby.

A will cloathed with all the re-

MATHEWS, J. delivered the opinion of the court. This suit was brought by the plaintiff to recover her portion of the estate of her mother, as co-heir with the dafendant and others. He is sued as executor of the will of the mother of both parties and the plaintiff claims her distributive share of the estate in conformity with, and to the amount of a sale, made by the parish judge, under an agreement

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between John Archinard and the defendant, for the purpose of effecting a division of the estate of C. Archinard and that of his wife, the ancestor of the parties to the present suit.

quisites of the law, can only be avoided by attacking its genuisement.

The answer denies all the allegations of the petition and contains also a plea of abatement to the action, on account of the want of authority in the attorney, who instituted it. Both parties, being dissatisfied with the judgment of the district court, appealed.

As to the plea in abatement, we are of opinion that the court below was correct in disregarding it.

The action is commenced by a counsellor and attorney, regularly admitted and licensed to practise as such, in all courts of justice of this state. He is a sworn officer, bound by his oath as well by the principles of integrity and honour, which ought to characterise the profession of which he is a member to act correctly in its pursuits. Thus situated, it is not to be presumed, that he acted, in the present case, without proper authority. On the contrary, every presumption is in favour of his having pursued a proper course of conduct, unless the contrary should be suggested, by the opposite party, on affidavit. It is true that an attorney of the court may be deceived, by the conduct of others, so as to undertake to represent a person, from whom there is no authority to that effect—and, on a sug-

gestion of an error of this kind, upon affidavit, it would become the duty of the court to ascertain the truth.

The sale made by the parish judge at the request of John Archinard and the defendant, in the present suit (the one representing his deceased mother, as executor to her will, the other as heir to the late C. Archinard) was a cant or licitation between the parties for the purpose of dividing the property, which had been held in common by their ancestors, by which they would perhaps have been bound, had either party insisted on it. At the time that this transaction took place, there was a suit still pending between the parties, relating to their rights to the common property of C. Archinard and his wife, the textatrix of the defendant, in which a decree was rendered by a competent tribunal, directing the whole property of both estates to be sold at auction and pointing the manner, in which the proceeds were to be divided. When this decree was rendered, neither party opposed to it the cant, which had previously taken place, and which seems to have been considered as null and void, by common consent. Cant or licitation is a mode of dividing property held in common by two or more persons and may be avoided by the consent of all those who are interested, in the same manner that any other

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contract or agreement may be avoided, which is entered into by consent of parties.

It is clear that the decree of the late territorial court does not vitually annul the proceedings of the parish judge in the licitation made at the request and by the consent of the parties.

R. E. Cuny, as executor of his mother's will, had a right to act for all the persons who claimed an interest in her succession. By a judgment of the superior court of the late territory, this succession has been sold publicly—which was considered to be necessary and proper, in order to separate it from that of the late C. Archinard, and we are of opinion that the amount produced by the sale, establishes the value of the estate of the testatrix, as it should be divided among her heirs.

Since the appeal, some objections have been made to the validity of Mrs. Archinard's will. It is subscribed by five witnesses, and was proven before the judge of probates by four (a number more than sufficient to render it executory) and has been acted under by the executor, in every thing which relates to its disposition till the present time. Being cloathed with all the formalities required by law, its validity could only be questioned by attacking the genuineness of its execution, which has not been done in due form.

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.

SHIP & AL. vs. *CUNY & AL.*

APPEAL from the court of the sixth district.

A statement of facts, without a date, made *as well as is recollected* and stating that other facts were proven, which the judge considered as immaterial, is not good.

MARTIN, J. delivered the opinion of the court. This appeal was made returnable to October term, but has, by consent, been argued at this. A statement of facts proven on the trial, by the witnesses, comes up with the record, certified by the district judge, without any mention of the time, at which the statement was made, or of the manner, in which it was obtained by the parties. It is clear from the terms, in which it is expressed, that it was under circumstances, which left the judge in doubt as to its fullness and correctness. In the commencement, he uses an expression, unusual in statement of facts, viz: *as well as I can recollect*, and he concludes by saying that there were many other facts proven, which he considered immaterial.

We are of opinion that this cannot be considered as a statement of facts, made in conformity with the provisions of the court law of 1813—and it

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is clearly not a transcript of the testimony taken, as required by the act of 1817.

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

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

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If the parties agree that a statement of facts be made by the judge, and he decline doing so, having forgotten the facts and lost his notes the appellant will be relieved.

If a plea of prescription be received at the trial the part pleading it must be permitted to submit the fact of his possession to the jury.

Whether the plaintiff may be perpetuall enjoined from claiming the premises? Certainly not, when it was not prayed for in the answer.

APPEAL from the court of the fifth district.

Brent, for the plaintiff. The singular circumstance attending this case will considerably shorten the argument. The court will see, by a *statement signed* by the counsel for the petitioner and the defendant, that of the facts and testimony given in this case below, owing *to the circumstance detailed* no *statement* has been made out. It is a hard case upon both the *petitioner* and the *defendant.* But such as it is, we must submit to it, and it rests alone with this court to relieve the petitioner from the *injustice* which results from it. I need not enlarge upon the circumstance, and content myself with referring the court to the *statement* in record.

To say, that this case is *without a remedy*, would

be unjust, and fortunately for the appellant, the case is provided for by the *positive laws* of the state, and, before I trouble the court with my remarks upon the *other points* I intend to make in this cause, I pray that the cause be remanded to the court below for a new trial, because justice requires it. The judge in the court below having omitted to make out *the statement of facts* as agreed upon, and *now* not being able to do so, having *forgotten the said facts* and *lost* his notes.

No *fault* exists with appellant. The statement negatives such an idea—and will this court suffer his rights, his interests to be sacrificed, when it is in their power to relieve him? Without the *facts* in the cause, this court cannot decide. The *facts* from the inattention of the court below *cannot be had*—and shall the petitioner *who is not in fault*, who conceived his rights secured, be deprived of an hearing for his, upon an appeal? I trust not, and that this court will extend him the relief asked, and grant a new trial—no *injury can be done to the appellee*, he is in possession of the property, and if the *evidence* and *facts* and *law* and *justice* are in his favour, he will have the same opportunity of having his case decided, as if the *facts* were *now* before this court. But, reverse the picture, and see the inevitable injury to my client—he is forever hushed. His title to his land gone forever—no re-

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medy, no relief, if this court refuses his motion.

The law says, it is the duty of this court to remand *the cause to an inferior court, from which the appeal is made, whenever it shall appear that justice requires the same.* 2 *Martin's Dig.* 144.

It has been so decided to be the *bounden duty* of this court to remand it, in cases where an injustice might be done. *Sorrell* vs. *St. Julien*, 4 *Martin*, 510.

I will ask this court if, under these circumstances, *justice* does not require that this cause should be remanded, for a new trial.

Leaving this part of my argument, I will shew the court from the *face* of the record and *the bill of exceptions taken* that, upon two other grounds, this cause ought to be remanded.

1. Because the court below erred in refusing the *petitioner* to have the *fact of his possession* of the land for ten years under a good and just title, *submitted to the jury.*

2. Because the court below erred in refusing to grant a new trial upon the affidavits filed of *new discovered evidence.*

I. The court is referred to the bill of exceptions in the record, and also to the plea of *ten years prescription* with just title. This *plea* was filed with the *permission* of the court, after the trial began, upon the discovery of that *fact*, in the course

of the examination of the witnesses—and after it was filed, the petitioner moved the court to permit him to add the fact of the ten years possession for the enquiry of the jury, and to examine witnesses to establish it, which was denied as appears by the bill of *exceptions taken.*

This denial of the court was most certainly contrary to law and justice, or why *permit* the plea of prescription? Why defeat the object of the plea, by refusing the petitioner the right of establishing it? Are not such proceedings absurd?

The law, says the party, may file the plea of prescription at *any stage of the cause. Civ. Code*, 482, *art.* 36.

It is a highly privileged plea, and yet the judge below *would permit the plea to be entered*, but defeated its object by a rejection of the proof of possession, or rather by refusing the petitioner the right of submitting that fact to the jury: the only fact by which the plea could be supported. Will not this court correct the error? Does not *justice* require that for this reason the cause should be remanded? If it does not, I am much mistaken in my ideas of justice.

The court ought to grant a new trial, upon the discovery of *new material evidence* to the cause since the trial. 2 *Martin's Dig.* 156.

If the court below refuses a new trial upon the

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discovery of a *new evidence*, this court will remand the cause. 4 *Martin's*, 508, *Sorrell* vs. *St. Julien.*

The only way of shewing to the court the new evidence discovered is by affidavits—*ib.*

The requisite affidavits were made by the petitioner and a disinterested witness.

The affidavits shew the *newly discovered* evidence *since the trial*, and that the petitioner did *know of it before* and that with *reasonable diligence* he could not have discovered it before, and that the new evidence *is material*, and further states that the new evidence will prove the only fact in dispute in the cause in favour of the petitioner.

It may be necessary here, for me to observe to the court that this is a dispute about the *location* of a tract of land, and that by a *a case agreed* between the parties, there was but *one fact to be established*, which was where "the grosse isle spring" the beginning boundary of the land was in the year

whether at A or B as noted on the plats of survey with the record—if at A, the petitioner was entitled to recover, if at B the defendant was entitled to recover.

After making this statement I will only observe that the affidavits swear positively that the new evidence, will *establish* the beginning boundary, "the grosse isle spring" at A and in favour of the defendant.

I am deprived of shewing to this court the force of the new evidence, from the want of the *statement of facts*, which we have not from the circumstances before detailed, and which more strongly shews the *necessity* and *justice* of remanding this cause upon the first ground: for without the statement of facts, it is impossible that justice can be done.

Porter, for the defendant. The first ground, relied on by the plaintiff, to have this cause remanded is, that of the district judge not having it now in his power to make out a statement of facts, which the counsel on both sides consented he might do. This I consider the same thing as if he had moved to remand it, *because no statement was made out according to law*. The defendant regrets the circumstance very much, but the question here, is who is to suffer by it.

This court from its organisation, down to the last printed report received here of its decisions, have held in a series of cases beginning with that of *Harrison* vs. *Mager*, 3 *Martin*, 397, and ending with *Dennis* vs. *Bayon*, 7 *Martin*, 446—that when there is no statement of facts, bill of exceptions, special verdict, or case certified, according to law the appeal must be dismissed.

What reason prevented the appellants in all these cases from bringing up their appeal in the mode

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pointed out by the acts of the legislature—we cannot gather from the reports—the parties have never attempted to get their appeals maintained by assigning causes *why they had not the statement.* It is reserved for the ingenuity of counsel here to *make the plaintiff's own act*, which places him in a disagreeable situation, the ground for extending him relief.

The act of 1813, 1 *Martin's Dig.* 442, organising this court, provides that the statement of facts may be made out at any time previous to judgment. In the case of *Syndics of Hellis* vs. *Asselvo*, 3 *Martin*, 201—this tribunal, in an elaborate and most able opinion, entered into the reasons that induced this legislative enactment, decided that it must be done in all cases before judgment signed, and that a statement made subsequently, unless by consent of parties is inadmissible.

The act of 1817, *page* 34, *sec.* 13, introduced some change, on this subject in cases "where the facts proved shall appear on the record by the written documents *filed in the same*" that the judge might certify, &c. Under this law, it has been decided in the case of *Franklin* vs. *Kimball's executors*, 5 *Martin*, 666, that in a case under this act the judge might make out a certificate at any time. Because when the facts are established by written documents, the same reason does not exist to in-

hibit the judge from a subsequent statement, as when, twelve months after judgment, he pretends to make out from memory a detail of a mass of parol testimony.

The proper time then for the plaintiff to make out his statement was before judgment—he has not done so. Can he profit by this circumstance? Surely not. The defendant, it is true, agreed that it might be done afterwards—but, as he had no interest in taking up the appeal, he consented, for the convenience of the plaintiff, who, in adopting this course, *necessarily took upon himself the risk of all accidents* that might occur, until the statement was completed. But, by the decision prayed for here, the defendant and appellee runs it seems, all the risks—nay more the parties are not be placed *in the same situation they were after the verdict*, but an important decision is to be made, highly advantageous to the plaintiff, a new trial is to be accorded him—for no other reason, except that he did not bring up the testimony to shew that he might be entitled to it. Can this be justice?

And this brings us to another distinction in this cause. It is not one where this tribunal is called on to exercise its powers by bringing before it facts which, in the *ordinary course of proceeding*, it has a right to revise, as in the case where the court tries both *fact* and *law*, and from whose decision

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on each there is an appeal here. But, it is a case where the facts have been already found by a jury whose decision (see acts of the legislature 1817, *page* 32, *sec.* 13,) is conclusive on the parties, unless *where by law* the parties have a right to a new trial. The difference then is, where the trial is by the court below, this tribunal has in its ordinary jurisdiction the right to revise the facts, and no presumption is created against the party cast by the revision. When by the jury, *a violent presumption* is created of the truth of their finding—and, a much stronger case must be made out, to justify the court interfering in the one case than in the other.

But the defendant and appellee by the decision prayed for, loses the benefit of this principle, and he is to lose every benefit which the law gives him, every presumption which its wisdom and its justice would have accorded him, had the testimony been sent up. Had that testimony came here, he would have been authorised to insist.

1st. That a new trial will not be granted where there is contradictory testimony—even tho' the verdict is against the opinion of the judge, who tried the cause. 3 *Binney*, 317, *Strange*, 1142, *two cases*—1 *Caines*, 24, 1 *Wilson*, 22, 2 *Binney*, 208.

2d. That it will not be granted when the case has

turned on the credibility of witnesses. 7 *Binney*, 495, 3 *Johnson*, 271, 1 *Bibb*, 486, 5 *Martin*, 333.

3d. That it will not be granted unless the verdict is *manifesely* against evidence. *Bacon's ab.* A E 664, *and cases there cited.*

4th. That if the judge below who heard all that was proved—and *saw* and *knew* those who proved it refused to interfere—this court could not—all this he could have insisted on : tho' he would not have been under the necessity of doing so on the evidence. But all this is to be lost to him—and this court is called on to presume. That the verdict of the jury is contrary to evidence. That it is *manifestly* against the weight of evidence. That the testimony was not contradictory. That it did not turn on the credibility of witnesses. That the judge below violated his duty or erred in refusing to grant a new trial. And this is to be presumed against the defendant, *tho' the law presumes the very reverse.* The case then stands thus: if the statement had come up there, there is every probability a new trial would not be granted—but as it has not come up, the motion must be accorded. Was any thing like this ever seriously contended for before, and can this be justice ?

The true legal principle is this :—courts in the exercise of their powers will go as far as possible to prevent any injury that may arise from the omis-

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sion of the parties. They will endeavour to place them in the same situation they were before that omission took place, provided they can legally do so. "But they never will decide an important question connected with the merits of the cause and depending on those merits, merely to enable them to ascertain whether or no the party had a right to that decision." It is this principle which is sought to be violated here. The court is asked to grant a new trial, a most important advantage to the plaintiff, for the purpose of getting up evidence by which they may ultimately know whether or not they were right in according it.

The counsel has cited the act of our legislature and the decision of this court, that it is the bounden duty of the tribunal to remand a cause whenever it shall appear that justice requires it. True, whenever *legal justice* requires it—and whenever the injustice complained of is made apparent by *legal proof:* here the injustice complained of is supposed. How does *it appear* to this court that the jury and judge below did injustice to the plaintiff.

I shall next in order take up the newly discovered evidence: as to that of prescription, there will be little or no difficulty in regard to it.

The counsel has quoted the acts of the legislative council (2 *Martin's Dig.* 156, *sec.* 6,) that the discovery of "*new material evidence*" is a

ground for a new trial. But that act also gives the limitation "which the party could not by *reasonable diligence*" have discovered before. This too is the language of reason as it is of all the authorities on the subject. *Strange*, 691, 1 *Wilson*, 98, 7 *T. R.* 269, 2 *Binney*, 582, *Hardins' Rep.* 342, 1 *Bibb*, 420.

The only questions then are did the plaintiff use due diligence ? And was the evidence material ? Both I think must be answered in the negative.

This suit, as correctly stated by the plaintiffs' counsel, depends alone upon the location of a grant which both parties hold under—their relative position *in it* being changed as it is decided to begin at A or B, as represented on the plat of survey. This was the matter in contest from the time the suit commenced, and that to which the attention of each party has been, or ought to have been anxiously directed from the first. The petition was filed in May 1817 and the cause was tried in Oct. 1819 (see record) there was of course two years and six months for each party to prepare himself on this single point.—

Now, in all this time it was the duty of the plaintiff, who was preparing for the trial of the cause, to have sought for this testimony. The first thing a man would naturally enquire for in a case of this kind, that turned on the location of his grant, who am I

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bounded by—how were those that joined on me located—were there older or younger grants than mine—were they surveyed—have the surveys been returned? All these are proper and material, and necessary enquiries and *such as every diligent man makes.* If they had been made by the plaintiff, he would have had no difficulty in getting this information, while he never heard *of until the evening of the day in which the jury gave in their verdict:* for the papers were all in the land office in Opelousas.—The testimony here was not hid in a corner, *was not in the possession of a private individual, who might have concealed it from him.* It is sworn to be in the surveyor's office: a public office open to every one.—The title which came to his knowlege is also sworn to have been confirmed by the United States; it was there in the register's office at Opelousas which is open to the inspection of all—The first place, which every one examines who has a land suit to try.—He never, it appears, ever looked into the surveyor's office to know how the grant he claimed under was located by the United States, if he had he could not have failed to have found Drake's besides it—for Johnson (see affidavit) swears that it has been returned there by the deputy surveyor. Let it be remarked too that, during all the time that elapsed from the bringing of the suit until its trial, he lived in the next county, where these papers were de-

posited. If this is *reasonable diligence*, to lay the ground of a new trial—it may be simply asserted that the want of it can never be brought home to any man. Another fact, highly illustrative of his diligence: the very witness, who communicated the intelligence to him, is one who surveyed the land by order of the court, (see plat of survey) and who was sworn on the trial before the jury (see Johnston's affidavit.) The court is asked to compare the facts here, with the cases already cited on this branch of the subject, where a new trial has been refused.

But the evidence was not material and could have had no effect on the cause. The dispute between the parties here was respecting the *original location* of an antient Spanish grant, issued in the year 1781. The witness swears that he has seen a Spanish title—*he thinks* an order of survey to one Aaron Drake, for twenty-five arpents lying below A so as to include B. Be it so, and what does that prove? Why nothing, unless we knew that the Spanish government never issued two titles for the same land. Unfortunately, however, this country has had melancholy experience on the contrary. We know that they interfere too often to justify any one in drawing the conclusion that, because one grant commences at a given point, say A, that the other must necessarily be at a different place say B. If such evidence had been introduced, it would only

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have proved the two titles interferred, but it would not have controlled the location of ours, as it is the oldest grant, See Johnson's evidence where he states that Drake's title called to bind on De la Houssaie. On the whole, I cannot see what weight this evidence could have had, supposing it to have been produced on the trial. It is of that kind which is generally furnished, by way of consolation, to the party cast in the suit.

It may be perhaps urged that it would have been useful to the plaintiff in giving more weight to the other evidence produced by him. But new trial, are never granted to let in *cumulative testimony* to a fact disputed at the trial. 8 *Johnson's Rep.* 86. It would be endless, says the court, if every additional circumstance bearing on the fact in litigation was a cause for a new trial.

The counsel states that the affidavits are positive, as to the fact they will establish—but it is the court not the party, that must judge of the materiality of evidence, in applications of this kind. 1 *Caines' Rep.* 24, 2 *ib.* 67.

With respect to remanding on the plea of prescription, the defendant has not the slightest objection if the court is satisfied that on legal principles it has the authority to do so. But in remanding it the defendant insists that, it must be for enquiry *on that fact alone.* If the whole cause is to be re-

examined whenever a party pleads prescription—which he may do at any stage of the cause, it is quite obvious that every litigant can have his case twice tried by keeping back this plea until the other facts are found.

The counsel states that the judge permitted him to file the plea, but refused to let him submit it to the jury, and ask, can any thing be more absurd—and I say that nothing in my opinion can be more correct. A slight examination will prove it. The cause had stood at issue for five terms of the court—the parties came prepared to try the question arising out of the pleadings—a number of witnesses attended at a most ruinous expence—the jury were sworn to try certain facts, (see record) after they were sworn to try the facts, the plaintiff amended his petition by pleading prescription, and then moved to have that fact submitted to the jury. To this the defendant's counsel justly objected that they had not come prepared on that branch of the enquiry—had received no notice of it—had never turned their attention to it, and could not go into the trial of it then. The court decided that the defendant could not be compelled to try the question of prescription on so short notice—that, as the jury were sworn and the trial in part gone into the court could not discharge them—That, if the court had the power, it would not, as it would only have the

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effect of forcing the parties to return at the ensuing term, with all the testimony then hearing on the trial—that this course of proceeding worked no injury to the plaintiff—that an issue could be made up on the amended petition and sent to another jury for trial, and that judgment would be suspended, on the facts then found, until that issue was tried.

There is no doubt then—but the court decided correctly. For *as prescription can be plead at any stage of the cause*, it follows *of necessity that it can be tried at any stage of the cause*, as well after the other facts are found as before. It is the duty of the court to see that this privilege, which the law gives one party, is not used to the injury of the other. It would be monstrous for example to say that if the plaintiff had chosen to file his claim by prescription after the facts were found by the jury—that the whole case would have to be tried again. It would be equally unjust, where he did not amend his petition until after the jury were sworn and had gone into the trial. If a party will delay this plea to so late an hour, all he can expect *is to have it tried.* But he ought not to be allowed to use it as a weapon of annoyance against his adversary, by forcing him to go into the examination without notice, or turning him over to another term on the questions at a ruinous expence—nor ought he to have the privilege of obtaining a re-examination of *all the other*

facts in the cause, merely because it pleased him to present that of prescription too late to be submitted to the jury, who tried the other questions that arose out of the original pleadings.

Why the plaintiff did not think proper to have an issue made up, and this question of prescription tried, before he appealed—it is not for the defendant to say. Whether he has not lost the benefit of it by the course he has thought proper to adopt, is left to the court to decide—the defendant repeats that he is willing, nay, desirous to enter into the enquiry as far as that enquiry can affect the merits of the cause; for he too will rely on prescription. But he regrets the delay, and the expense that must attend it. His poverty rendering him unable to sustain a protracted contest of this kind.

I trust then I have shewn the plaintiff has no right to a *new trial.* If the cause is remanded on the question of prescription, it must be on payment of costs by the plaintiff, as it was his own fault it was not tried before he took the case up.

I shall not travel out of the record—nor say one word of the equity of this case, merits or justice—I wish I was permitted to do so, and shall conclude by submitting it with confidence to the court.

Brent, in reply. The first ground taken in this cause, was to *move* the court *to remand it*, be-

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cause the judge had not made the *statement of facts*, as it had been agreed he should do (see statement in record.)

In replying to this motion, it has been observed that, it amounts to a motion to remand this cause, because "no statement was made according to law."

By a reference to the very numerous cases, from that of *Harrison* vs. *Mager*, 3 *Martin*, 387, down to *Dennis* vs. *Bayon*, 7 *Martin*, 446, where the appeals, for want of statement were dismissed, it will be seen that the appeals were there dismissed, because the appellants *had neglected to make out the statement*, and did *not account for not doing it*. This is a very different case in all its features. *Here* the appellant, as will be seen by reference to the statement on record, was not neglectful of the legal requisites, in proper time. Before judgment signed, he offered to make out the statement of facts, and not being able to agree with the defendant's counsel, it was agreed, by both the parties, "that the judge should make out the statement of facts, at that time or after judgment signed, as he the judge should think proper"—which the judge promised to do. Is this a similar case to any one of those refered to ? And in what respect has the appellant been neglectful, or in the wrong ? He offered to make out the statement of facts, at the proper time—but not being able to

agree with the defendant, at the same time, the judge offered to make out the statement of facts himself, which both the appellant and appellee agreed to—and the appellant, resting upon the agreement, made in good faith, sanctioned in open court, is now told that this case does not differ from ordinary cases, where no statement of facts have been made. If such a doctrine should be contenanced, it might in truth be said "that there was no such thing as justice, and that courts were only snares to entrap the honest."

The counsel for the defendant says that the petitioner ought not to be permitted to take advantage of his own wrong—nor does he ask such thing—he is in no wrong. He proceeded regularly to bring up the testimony in the case, and the defendant, knowing and feeling the justice of his case, now wishes to shut him out of this court by objecting to the cause being remanded—Is this justice?

It has been frequently repeated, that the appellant ought to have had the statement of facts made out, as the law directs, and that he ought to have done it himself. There are three ways pointed out by law, to make out the statement of facts. The parties can do it, or their counsel or the court, if they disagree, see act of 1813. 1 *Martin's Dig.* 442. Here the law declares, that the statement of facts shall be made out, by the judge, if the parties or counsel disagree.

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In the very case before the court, the counsel not agreeing, it was consented that the judge should make out the statement. He has not done it—nor can the parties yet agree upon the facts, and would it not be an injustice to condemn the appellant, when he has shewn that he has been guilty of no omission? If the arguments of the defendant's counsel are to prevail, the greatest injustice will often follow. The party, in whose favour judgment below is rendered, has nothing to do, but to disagree as to the facts with his adversary: and if the judge refuses, or neglects to make out or forgets the facts in the cause, the appeal must be dismissed—Is this justice? No, this court sits here to see that justice shall be done, and wherever, from the proceedings in causes it shall appear that an injustice might result from any act not committed by the neglect of a party in a suit, their bounden duty, in the words of the decision of this court before quoted, is to see that justice be done to all and that the cause be remanded. In this case it is as much the defendant's fault, as the petitioner's, that it was agreed that the judge should make out the statement of facts.

It is said on the part of the defendant that this court ought not to remand for the reason given, because the finding of the jury, and the refusal of the court to grant a new trial, presume in favour of the defendant and that this court would not grant the

motion, if the evidence was before them. I am astonished at such an argument—certainly, the proceedings of the court below presume nothing against the petitioner. It is of the injustice of those proceedings, the petitioner complains: and I do not conceive how proceedings, alleged by the petitioner to be unjust and illegal, can operate against him—The law grants the appeal, without attaching to it any such presumptions, as contended for.—but, if this court is *to presume at all*, it will rather presume in favor of the petitioner: for, if the evidence was in favor of the defendant and his case a good one, why fear another trial? I do not mean to cast any reflection upon the judge below, but it is extraordinary, indeed, that the facts were not made out by him.—I will not say that he omitted it, to *defeat the correction of an error* in his court—I do not believe that such motives actuated him, but yet if presumptions are to have weight, in this case, the petitioner might urge all these things, as presumptions in his favor.

I admit, as stated in the argument of the defendant's counsel, that this court might not have granted a new trial, if the testimony *had been contradictory*; but I contend that, where there was no *contradiction* and *all the evidence* in favor of the petitioner, this court would order a new trial—and this the court might have been satisfied of, in this case, if the *statement of the facts* had been made out, *as agreed upon*.

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It is also observed, that if the judge below, who *saw* and *heard* the testimony, refused the new trial, it is to be presumed that this court would also.—It often happens that, in cases like the present, *where upon an appeal justice can be had*, the court below, *indecisive* as to the opinion it ought to give, prefers to maintain the finding of a jury, to take the responsibility on itself, and at the *same time* that it *decides*, *expresses its doubts*, but reconciles its opinion with a belief, that if wrong, a supreme court will correct it; such may have been the case here; but I must confine myself to the record.

What *inconvenience* or *injustice* to the defendant can result from this cause being remanded? He is in the peaceable *enjoyment* and possession of it, and if his cause is a good and just one, he has nothing to fear. The same testimony will be heard again and if, in his favor, he is certain to succeed, and the petitioner will be compelled to pay all costs, and will be the loser by it.—This is not like a *case of debt*, or where the party, who asks for relief is in *possession*: *here delay and procrastination* are no motives, can be no *object* to the petitioner; for the defendant possesses the property.

On the contrary, if the court will not remand this cause for the reason given, and if the *law*, if the *testimony*, if *justice* are with the petitioner, *where* and how can he ever obtain relief? Never. His fate is sealed,

his rights are gone; his property the reward of his labour and his honesty, the only support of his family, is lost to him forever.—Before this court will do any thing, which might be attended with such *evil* consequences, I call upon it, to pause and reflect well, and, in doing it, I am satisfied they will remand this cause, and have it placed in a situation *that justice may be done.*

Again, I repeat that the judgment of the court below *presumes* nothing in its favor, and if necessary to rebut this idea, I might only refer to the *number of cases, reversed by this court,* by which it would appear, that the presumption is rather the other way.

The defendant's counsel objects to this cause being remanded upon the ground of newly discovered evidence; and as he has taken up this part of the argument, before the second ground taken by me, I will follow him in his argument.

The serious objection, to this part of my argument, is that the petitioner did not use "*reasonable diligence*" to discover the new evidence; I beg the court to observe that neither the *law*, nor the *practice* of any court, requires the diligence to be more than "reasonable diligence"—It does not require that every thing should be done, that might be done to discover the new evidence; it only requires that *reasonable* exertion, which every man gives to his affairs, that ordinary attention to hunting up testimony which

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would shew that he procured all the evidence within the compass of his knowlege, and that he did not keep back any testimony which he knew of, or which, by reasonable exertion, he might have discovered; To judge of the *reasonable diligence*, the court must look at the affidavits and take the facts as they are there sworn to.

The defendant says that *no diligence* was used by the petitioner, that he ought to have looked for the new discovered evidence in the surveyor's office, where it appear., by the affidavit of Johnson, he saw it; now I differ in opinion with the petitioner's counsel; the surveyor's office is not a place to look for such papers; the register's office is the place, and as the petitioner swears that he used "reasonable diligence" to procure all testimony, that might be material to him, the presumption is that he looked into the register's office for all papers that might establish the beginning line of his land. But, how can this court reasonably require that the petitioner should have looked into the surveyor's office for this *new evidence*, when he *swears positively that he knew nothing of it, until after the trial*? The defendant's counsel also observes that the witness, who told the petitioner, was the surveyor who surveyed the land, and sworn upon the trial, and yet it is singular he did not speak of such evidence before? As singular as it may appear, the witness swears he never *named* it to the petitioner, *until after*

the trial; so that the petitioner knew nothing of it. The witness having been sworn, upon the trial, who communicated the discovery of this new evidence, makes no difference. *Jackson vs. Laird*, 8 *Johns. Rep.* 484.

The counsel says the first enquiry ought to have been by the petitioner, by whom he was bounded: and in making this enquiry, he ought to have looked into the surveyor's office. Not so: by a reference to the petitioner's title, or grant under which he claimed, he he is bounded *by no person*, so that from *it*, he obtained no information, he then ought to have applied, at the register's office, which it is presumed he did, where all titles are registered, he finds nothing of it, and in reason it could no be expected that he looked further.

But, says the counsel, the evidence *cannot be material*; I think the contrary. The petitioner and Johnson state, in their *affidavits*, that the *survey* and *the proceedings theron*, will *establish the* "*grosse isle spring*" at A, as contended for by the petitioner; now this court knows, that it was usual, under the Spanish government, when surveys were made, for the *owners* of the adjoining lands to be present, and suppose, in this case, the original grantee, under whom both parties claim had been in person present at the survey, stated in the affidavits, and *had signed the same declaration together, with the other neighbours*

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and the surveyor, that the "grosse isle spring" was at the *spot* marked A, and that was the beginning boundary of his (De la Houssage's) land, from which corner Drake took his beginning, I ask this court, if such evidence would not *have been material*: and yet, we must believe that such was the fact, as Johnson swears, not that the *survey alone*, but that the survey with *the proceedings thereon*, will *establish* the "grosse isle spring" at A. How can it be contended then that this evidence is immaterial?

With respect to the plea of prescription, I do not conceive that the defendant's counsel has said any thing, to shake the position I have taken.

It is contended that the court below did not err, in refusing to submit the *possession of the petitioner as a matter of fact* to the jury; I think I have already shewn that it did.

It is said that the defendant could not be compelled to try the question of prescription, on so short a notice, nor is it contended by me that he was.—If he was not ready, a juror could have been withdrawn, and the case continued for trial to another term; such an indulgence, if asked for, could not have been refused; but none such was claimed; but the defendant ought to have been ready, to put that fact at issue by *his answer*.

As I shewed before, the fact of possession *often comes out upon the trial*; which was the case here,

and it was to meet such a case, that the law permits the plea of prescription to be entered, at any stage of the trial, and *when entered*, with due respect to the opinion of the counsel, I think *it is an exception to the action upon its merits, and in regular proceedings ought to be disposed of first.*

I beg leave to correct the statement of the defendant's counsel, that the court below offered to call another jury to try *the fact of possession.* Such was not the case, nor does it appear from the bill of exceptions; but even if it had, I doubt much if such a proceeding would have been legal. The amended petition could not be considered, but as a part of the original, and the pleas in issue, *the same*, as if originally made up, and the law declares that "*the jury are sworn*" to decide the question of *facts* alleged and denied in the *pleadings*, acts 1817 page 32, sec. 10; before quoted. The *possession for ten years, under just title*, was *a fact alleged* by the petitioner and *denied* by the defendant; and of course *one of the facts* to be decided by the jury. But was ever such proceedings heard of?--As well might it be contended that a *separate jury* could be called to try every *separate fact* at issue, in the cause: for if it can be done to try *one fact*, it can be done to try *one hundred.*

But again, it does not appear that the prescription *was ever tried*, the petitioner claimed the right of

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submitting *the fact of possession* to a jury ; the law gives him that right—it was not allowed in the court below and *judgment was rendered*, without this *fact being found* ; of course, the judgment is illegal and ought to be set aside.

In this case, the defendant cannot complain of the plea of prescription, on the part of the petitioner, taking him *unprepared at the trial*, for the defendant, *in his answer*, alleges that he, the defendant, had *been in possession of the land for ten years under good title* ; which was denied by the petitioner (see second page) so that in fact it was put in issue by the defendant, *who came prepared* to support his plea, and if the petitioner, who was not prepared to prove his possession, until upon trial offered ready to try *that fact*, the defendant cannot complain—and the court certainly erred in not submitting it.

MARTIN, J. delivered the opinion of the court. The object of this suit is the recovery of the possession of a tract of land, from which the plaintiff complains he was wrongfully ousted by the defendant. The latter pleaded the general issue.

At the trial, after the jury were sworn and issues submitted to them, the plaintiff prayed leave to add a plea of prescription, and submit the fact of the alleged posession to the jury. The district court allowed the plea to be entered, but refused to allow the fact of possession to be submitted to the jury ; on which a bill of exceptions was taken.

The jury found the issues for the defendant.

The plaintiff moved for a new trial, on the ground of new and material evidence discovered since, which he could not, by ordinary diligence, have discovered before—and on the ground that the verdict was contrary to evidence. He added to his own affidavit that of one W. Johnson, the person who had informed him of the new evidence.

The new trial was refused, and a bill of exceptions was taken.

The district court gave judgment, that the plaintiff be perpetually enjoined from asserting any claim to the premises and pay costs. The plaintiff appealed.

The parties agreed that a statement of facts should be made by the district judge, who promised to do it. Afterwards, being called upon for it, he answered he had lost his notes, and could make no statement.

It appears to us the district court erred, in perpetually enjoining the plaintiff from asserting any right to the premises. It is not clear that a defendant can obtain such an injunction, and, in the present case, it was not prayed for.

It is not the fault of the plaintiff, that the district judge mislaid his notes and was thus unable to make the statement he had promised, and which it was his duty to make; the plaintiff ought not to suffer from an accident which he could not control.

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If there was any possibility of a statement being made, we would issue a *mandamus*, as we did in the case of *Broussart vs. Trahan's heirs*, 3 *Martin*, 704, in which the district judge neglected to draw a bill of exceptions, which he had engaged to prepare.

With a statement of the evidence before the jury, we could ascertain whether the verdict be contrary thereto and whether the district court erred in refusing the new trial.

It certainly erred, in refusing to allow the possession, alleged in the plea of prescription, to be submitted to the jury.

For these reasons, and as it is not clear that the plaintiff could by ordinary diligence have discovered the evidence, mentioned in his affidavit, we are of opinion he ought to be relieved.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled voided and reversed, and that the case be remanded, for a new trial, with directions to the judge to allow the fact of possession to be submitted, and that the defendant and appellee pay the cost of this appeal.

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APPEAL from the court of the fifth district.

The plaintiffs stated that they are the owners and proprietors of a tract of land, described in the petition, sold in 1780 by V. Lesassier to J. B. Macarty, from whom their ancestor purchased it, the same having been possessed and enjoyed by the plaintiffs and those under whom they claim for thirty years and upwards, and the defendants have, with force and arms, entered on the premises and dispossessed them; they prayed that the defendants might be decreed to deliver and yield possession, pay damages and for general relief.

The defendants pleaded the general issue; alleging their possession for a year and a day, and that of those under whom they claim for thirty years and upwards; that they are the real owners and proprietors of the land, under good titles.

There was judgment for the plaintiffs, and the defendants appealed.

By the statement of facts, the plaintiffs are admitted to be the heirs of N. Prevost, dec'd.

A deed of the widow Lesassier was read on the part of the plaintiffs, in which she declares on oath that, by an instrument under private signature, her said late husband sold to J. B. Macarty (in 1780) with

When an usurper enters on land he acquires possession inch by inch, of the part which he occupies

The possession of one who shews no title, when the extent of it is not shewn to have reached within a mile of the *locus in quo* cannot be considered a possession of it

Feeding cattle and hogs cutting wood, building pens, are not necessarily acts of possession of the land—as clearing land, cultivating it, building houses &c.

The purchase of the vendor's *right* only, and a stipulation, that the price shall not be payable till the title be confirmed, are not necessarily presumptions of fraud

A purchase of land, for the recover of which no suit is commenced, is not the purchase of a *litigious right*.

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express condition of ratifying the sale, a tract of land of 80 arpens in front, on both sides of the bayou Teche, *in* the district of Attakapas, at the place vulgarly called the *chicot noir*, the price of which the said Macarty paid down; that by the said instrument, Lesassier engaged to execute a notarial sale, at the requisition of Macarty; which was not done, owing to the destruction of the titles, which were destroyed in the conflagration of 1794: these titles consisting in a grant to Lesassier, and several deeds of exchange with some Acadians, for a tract of land which Lesassier had on the Vermillion; in consequence of which for herself and her heirs, she confirms the sale &c. This deed is executed before a notary, and bears date of the 12, May 1804,

The plaintiffs next introduced Macarty's deed to their ancestor. Also, a petition from Macarty to the intendant of the province of Louisiana, in which he states that the sale, under private signature, of Lesassier for the land in dispute was mislaid in the office of Pedesclaux, and prays that an inquiry may be made, as to his payment of the taxes thereof.—The intendant's order thereon of July 16, 1803.

The deed of the representatives of J. B. Hebert to the defendants of Jan. 26, 1812.

Certain Spanish proceedings to establish the destruction of Macarty's house, his papers &c. in the conflagration of 1794; Macarty's will.

Boute deposed that in 1776, Lesassier made indigo on the west side of the bayou Teche, at the place where Ursin Prevost now lives, about 34 arpens below N. Loisel's lower line, which is opposite the lower line of the defendants' land, upon the other side of the bayou. He believes Lesassier remained there until Macarty went on the land; but the witness was absent from the country, about this time. On his return, in 1779, he still found Lesassier there. Soon after his return, which he believes was in 1780 or 1781, he thinks Macarty removed on the land by sending a white man, three negro men and a woman, to keep a stock farm. He does not know how long it was kept, perhaps five or six years. Macarty had a field enclosed on the west side, where is cabin was, and cut wood on the opposite. There was no wood on the west side; he made a little *pavure* at the water's edge, on each side of the bayou to cross his oxen and haul wood. He made a bridge over the bayou chicot noir, on the west side of the Teche, and about 35 or 40 arpens from the bayou, behind the land on which he had his stock farm, which has ever been called Macarty's bridge. The land remained unoccupied, from the time Macarty removed his stock farm, until Prevost took possession of it, by putting his son in law N. Loisel, on it, on the west side. Lesassier told the witness he had sold both sides of the bayou. The old inhabitants

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so understood it; Declouet and Sorrel, who are dead, considered the land to belong to Macarty.

Frelot deposed that he has been in the Attakapas for 38 years and lived most of the time, with Boutte. Macarty always claimed the land on both sides of the bayou Teche. When he came to Attakapas, Lesassier was on the land, where he remained one or two years after the arrival of the witness. When he left it, Macarty sent four negroes to keep his stock farm, who remained there four or five years. The land remained without settlement, until Loisel took possession of it, for Prevost. Macarty built a bridge on chicot noir, which was always known by his name. He cut wood on the opposite side, and the witness saw corn growing there one year, in a small uninclosed field, planted by Macarty's negroes. Since he has been in the Attakapas, he has understood Macarty claimed the land on both sides of the bayou, and it was generally understood he owned it.

Carlin deposed he came to the country about forty five years ago. He saw a stock farm of Macarty's on the west side of the bayou, and land cleared on each side and negroes at work. He understood that all on each side, belonged to Macarty.

Pellerin deposed that Loisel arrived on the land, claimed by the plaintiffs, on the west side of the bayou five or six years ago.

Borel at first stated that Loisel and one of the de-

fendants went into possession, about the same time, about five years ago. On the next day, he corrected his testimony, by stating it might be a little sooner.

Decuir, deposed he knew Macarty did all his business and has knowlege of the land claimed, but not of its boundaries. He was once desired by Macarty to measure eighty arpens, on each side of the bayou Teche, at the chicot noir; he did so, on the western bank only, where he found that quantity of land: he did not measure on the eastern bank, because it was covered with wood: he sent the plat to Macarty: he has been an inhabitant of Attakapas for about thirty five years, but does not recollect at what time Macarty came on the land: he recollects to have seen his settlement and stock farm for many years. He does not know that the land belonged to Lesassier and was settled by him: but it is in his knowlege that, for about thirty five or thirty six years, the land in dispute has been considered as the property of Macarty or his heirs. All the old inhabitants of the place told him so; and Sorrel advised the witness to buy it, saying Macarty owned eighty arpens on each side. Under the Spanish government, land was taxed, for public works generally and the premises were so in Macarty's name, having often paid the taxes for Macarty and at his request. Macarty's settlement was on the western side of the Teche.

Judice deposed he has been an inhabitant of the

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Attakapas for thirty nine years and knows the land of Macarty on the bayou Teche, at the chicot noir, but not its boundaries. It belonged to V. Lesassier, but does not know at what period he came on it. The land has been considered as belonging to Macarty for thirty five years past, till the defendants took possession of it. The land was taxed under the Spanish government as Macarty's. V. Lesassier, his wife and the witness arrived together to the Attakapas and Lesassier acquired the land, but his wife disliked the place and Macarty, who was pleased with it, purchased it, in the presence of the witness, who had also been present at the purchase of it by Lesassier. The witness has knowlege that public acts of sale, in both instances, were executed: he believes, but he is not absolutely sure of it, that he subscribed them as a witness. He thinks they were executed before Declouet. On the witness' return from the Mississippi, he saw the enclosures and cabins of Macarty's stock farm, on the western side of the bayou, abandoned—the establishment having been transferred to the Vermillion. He does not positively recollect, but believes Lesassier's purchase of the land was about forty years ago. It is not in the knowlege of the witness how long Macarty occupied the land, but, on his return from the Mississippi, where he was for seven years or thereabout he heard it said that he

had occupied it for three or four years or therabouts.

Delahoussaie deposed that Athanase Hebert, and a person unknown to the witness, came to his father's, and consulted him, as to the suit he was about to institute for the premises, and asked him whether he believed they had a good title thereto ; to which his father answered they had none, and that he, Athanase, was old enough to recollect that the land had been exchanged for another, that on the Vermillion. On which Athanase replied that he was very young, yet he recollected it, and that the family had occupied the tract on the Vermillion, that he would have no suit for the land, and he had declined selling it, knowing that he had no right thereto.

Deblanc deposed that Athanase Hebert told him he did not join in the sale of the land, because he was very young at the time : he well recollected that his father exchanged the land with V. Lesassier, for another on the Vermillion—that he had nothing to do with the present suit, that if Johnson failed he was to pay costs, and if he succeeded, account to Hebert's heirs for one half of the price ; that he, Athanase, had had nothing to do with the suit, for he had heard that his father had said that the exchange was a verbal one, and he would not disturb Macarty's heirs, as his brother had settled the tract on the Vermillion.—

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The witness knew long before he came to the Attakapas (20 years ago) that Macarty owned a tract of eighty arpens on each side of bayou Teche, at the place called chicot noir. One Devesin had been advised to purchase it—he never heard that any person had any claim thereon.—The witness was. Commandant at the Attakapas and the land was taxed as Macarty's. Macarty had a deed from Lesassier, but the witness believes it was destroyed in the conflagration of 1794. V. Lesassier's deed was recorded at the request of Macarty, thro' the witness, in the United States land office.

Berard deposed that to his knowlege Macarty owned and posessed a tract of eighty arpens in front on each side of the bayou Teche, at the chicot noir, and paid taxes therefor. It was for a considerable time back reputed his property ; he cannot tell how long, but a very long time ago. He never heard of any claim from any other person, nor of any adverse possession.—He was syndic as early as 1772, and was in office twenty two years, and as such collected the taxes. He knows that Macarty established a stock farm, but cannot say how long he kept it up.

On his cross examination. the witness declared that he knows that Macarty possessed eighty arpens in front on each side of the bayou Teche, at the chicot noir, because he paid taxes therefor. Land and other property were taxed, and lists were made,

on which every one was inscribed with the amount of the taxes, he was charged with: he knew Macarty had a stock farm, having seen his settlement, negroes and cattle; it was on the west bank.

Porter, for the plaintiffs. It is well known to this court and it is in evidence that, in the year 1794, a fire broke out in New-Orleans, which consumed almost the whole of that city. It was so instantaneous and so rapid in its effects, that Macarty, the ancestor of the immediate vendor of the plaintiffs' ancestor, escaped almost naked, and was not able to save any thing but his life, from the general destruction. All his property, in the city, and papers of every kind, were destroyed: among the latter were necessarily included all his documents and titles for the land he held in the Attakapas. As soon as he had ascertained the extent of the injury he had sustained, he endeavoured to remedy it. The titles, by which he had obtained the premises in question from Lessassier, being under private signature, it became necessary to obtain a formal recognition of their existence. He applied to the widow and representative of Lessassier, who died in the mean while. By a notarial instrument, she recognised the sale, made by her husband to Macarty, of 80 arpens in front on each side of the bayou and confirmed his title. He applied to the intendant in regard to these lands, and mentioned them as his property; in his last will

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is a declaration which, as a part of the *res gesta* in the cause, is material.

The general reputation of the country that Macarty, for upwards of thirty years, before the commencement of the present suit, owned the land is proven by Boute, Frelot, Decuir and Berard and it is proven that such was the belief of Declouet and Sorrel, two old inhabitants of the neighbourhood, now dead. His heirs entertaining that belief, sold it *with warranty*, to the ancestor of the plaintiffs, whose right and those of his vendors were so generally and universally understood, that neither their possession or title would, it is presumed, ever have been called in question, had not the defendants bought up a title or grant calling for the premises, dated so far back as 1777, in favor of one Hebert, who, with his family, has resided in the Attakapas ever since, without ever claiming the premises. In their sale to the defendants, Hebert's heirs stipulate that they are to have nothing to do with *any* suit *against Macarty*, and the vendees take care to stipulate that, unless *they* succeed *at law*, they are not to pay any thing for the land. Under this sale, they entered, at a time when the plaintiffs were already in possession of the tract sold them by Macarty, within the limits of which is that so purchased from Hebert, by the defendants.

The length of time, which has elapsed since many of the transactions, to which we are obliged to refer,

took place, the loose manner of conducting business under the Spanish government, resulting from the confidence and good faith which then prevailed in society, and the difficulty of producing proofs of facts so remote, no doubt inspired the defendants with the hope of holding the land. That they were mistaken, and that, as all others who present themselves in a similar shape in a court of justice, they will meet nothing but mortification and defeat, is confidently expected.

We hope to prevail, 1, because we have been in possession for thirty years, before the defendants' entry.

2. Because we shew possession for ten years and upwards, in good faith, and under a just title.

3. Because, after a possession for such a length of time, the court will presume a surrender of the defendants' title, under the circumstances of the case.

4. Because, the defendants have purchased a *litigious* title and the plaintiffs have a right to be subrogated to their right, on payment of what they have stipulated to pay.

I. The thirty years posession is proved by Boutte, who deposed that Macarty entered into possession in 1780 or 1781 and Lesassier had been in possession for four or five years before. Frelot, Decuir and Carlin establish those facts and Frelot adds that Macarty cleared land and planted corn

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on the eastern side of the bayou, built a bridge and erected a cabin on the western. He remained there four of five years. Decuir states he was ordered by Macarty to survey 80 arpens on each side of the bayou, he did so on the western side; that he paid taxes on the land for Macarty, which also proved by Berard.

In examining and giving an application of these facts, we shall shew what is posession, according to the jurisprudence of our country—what species of possession may be the basis of prescription.

Reference shall be made only to works of approved authority and no point pressed, beyond what is conscientiously believed to be tenable.

Possession may be defined "the detention of a corporal thing, which we hold in our power by ourselves, or another, who holds it for us and in our name." *Pothier, Possession, n.* 1. "There are two principal kinds of possession, the civil and that merely natural" *id. n.* 6. In order that a possession may be reputed to proceed from a just title, and be consequently a civil possession, the possessor ought produce such a title, or shew that the possession has lasted during such length of time, as will give rise to a presumption that such a title intervened.—We will shew elsewhere, what that time ought to be, *Id.* n. 8.

How is possession acquired?

"In order to acquire possession of things, there must be the will of possessing and the apprehension of, it." *Id* 39. *Aspicimus possessionem corpore et animo, neque per se animo, aut per se corpore. ff.* 41, 2, 3.

The proof brings our case within this description. Macarty had the mind and intention to possess, joined to the actual occupation of the land; since he ordered a survey of it on each side of the bayou, cleared and cultivated land on one, and built a cabin and a bridge on the other. As the enquiry, at this stage is merely as to the *quo animo*, with which he possessed, it is unnecessary to state that parol proof is good to establish it. How, indeed, could it be proven in another way?

How is possession, once acquired, retained? "In order to acquire possession of a thing, will alone does not suffice: there must be a corporal apprehension by us, or some one, who apprehends it for us and in our name, as we have seen *supra*. On the contrary, when we have acquired the possession of a thing, the will which we have to possess it suffices alone, to cause us to keep the possession, altho' we do not retain the thing corporally, by ourselves or others, *Id. n.* 55." Possession being once acquired, the possessor retains it afterwards by the single effect of his intention of maintaining himself in it, joined to the right and liberty of using the thing at

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pleasure; whether he avail himself of this liberty, by using the thing, or leave it untouched. Then we possess not only the land, which we cultivate, and of which we take the crops, but all those which we suffer to lay waste without going thereon, provided we do not suffer others to assume the possession, " *Domat*, 3, 7, 2, *art.* 24 *Id.* 3, 7, 1, *art.* 6 *Licet possessio nudo animo adquiri non possit, tamen solo animo retineri potest. C.* 7, 32. 4. *Quemadmodum nulla possessio adquiri, nisi animo et corpore, potest, ita nulla amittitur nisi in quo utrumque in contrarium actum est. ff.* 41, 2, 8. *Quod vulgo dicitur estivorum hybernorumque saltuum non possessiones animo retineri. In exempli causa didici Proculum dicere : nam ex omnibus prædiis ex quibus non hac mente recidimus et amisisse possesionem vellemus idem est. ff.* 43, 16, 25.

Under these authorities, which might be multiplied to any extent, it is clear that the possession of Macarty and of those who claim under him continued down to the time of the defendants' entry, even if we did not shew a single act of ownership, during the interval. Clearly as this point is established, it will, if possible, by further citations, be made more satisfactory to the court.

This will of retaining possession is always supposed, while no well marked contrary will appears. Therefore, even if a person had abandoned the cul-

ture of his land, he would not for this be presumed to have the will of abandoning the possession of it, he would then be presumed to have the will of retaining it, and he would effectually retain it. *Pothier, Prescription, n.* 55, & 56.

But, the plaintiffs here are not under the necessity of resorting to this presumption of law, altho' it would be sufficient for their purpose. So far from any thing appearing in evidence, to raise a presumption that Macarty intended to abandon the property, there exists every kind of proof, short of that which would result from natural possession, that he retained it. Taxes paid, bills of sale received and confirmed, application with regard to titles from the governor, declarations in the last will, every thing shews that, till the moment of his death, he had the intention of retaining his possession.

As it was objected in the district court that possession, in order to be the basis of presumption, must be natural, we shall first dispose of this point.

As prescriptions were established for the public good, in order that the property of things, and other rights be not always uncertain, he who has acquired the presumption has no need of title, and it stands to him in lieu of one. He, who possessed without title, prescribed at Rome, by thirty years, and after that period he could not be disturbed by the owner. *Domat*, 3, 7, 4, *art.* 2.

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An objection was made, in the district court, that there was no proof that we had entered into possession of the whole land. On a point so perfectly elementary and so well understood, it is hardly respectful to quote authorities. "I am presumed to have acquired the possession of the whole estate, as soon as I have entered it and set my foot on it, either by myself or some one for me, without it being necessary that either I, or the person sent by me, should go into all the parts which constitute the estate. *Pothier, Possession*, 4, 1, § 2. *ff.* 41, 2, 3, *n* 1.

But, it was said that we proved this by parol only. If this objection be to prevail, the consequences that follow must be that the prescription of thirty years without title will have to be expunged. For, in no case of the kind, the party, who invokes it, may avail himself of it, unless he proves his possession by parol.—Unless he be permitted by evidence of that kind to shew the *quo animo* he entered and possessed, his right would be restrained to the ground he stood on, or that his house covered. It would be absurd that the law should allow a right and deny every possible means of establishing it.

The right, given to the possessor of thirty years, to claim a title by prescription, is founded on a presumption that he had a title and lost it. "When ever the possession is long enough to cause a just

title to be presumed, it is no longer, properly speaking, by virtue of the prescription that the possessor may flatter himself with a sure victory, but by virtue of the title, which his possession causes to be presumed. 6 *D'Aguesseau*, 629, *Ed.* 1769. The same lapse of time causes it to be presumed the possession proceeds from a just title, the memory of which is lost, and the written act containing the evidence of it *mislaid*, *Pothier*, *Prescription*, *n* 172.

Courts of common law proceed on the same principle and decide on the same idea of a lost title, which they presume. *Cowper*, 102. 1 *Bay*, 30, 10, *Johnson*, 380, 2 *Hayw.* 147 1, *Cooke*, 3, 57. *Peters*, 132, 3 *T. R.* 151, 3, *East*, 294, *Phillips' ev.* 119, 2 *T. R.* 159.

If such be the presumption, and these authorities establish it, if without any kind of proof of title, the law raises one, from other circumstances, will the court refuse proof, on support of that presumption? Was it, in virtue of the prescription of ten years, which requires a just title and good faith, we were now contending for the property—if we had lost that title, we could give evidence of its contents. *Domat*, 3, 7, 4, *art.* 15. The prescription of thirty years is founded *on the very suspicion of lost title*, and yet we are told we cannot introduce any evidence of its contents. If we cannot, what is it but saying that the court may decide upon presumption,

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but shall not fortify that presumption by positive testimony ?

On this ground alone, then the plaintiffs rest with confidence their right to introduce parol proof: particularly, as it has been already shewn that to reject it, would be at once to decide that the prescription of thirty years, without title, could never have any operation. But, there is another principle on which its introduction could be supported: a principle, which is supposed to be common to every civilized nation, a principle which pervades the jurisprudence of all, because it flows from the necessities of human affairs and the obligations which justice and good faith create; it is this, that in matters of ancient date, the strict rules of evidence are relaxed, nay abandoned; because a difficulty exists in nineteen cases out of twenty, amounting nearly to an impossibility to comply with them. Hence it is that deeds, of thirty years standing, prove themselves, without calling the subscribingwitnesses or accounting for their absence, that hearsay evidence is resorted to,&c. *Philips' Ev.* 182, 350. 2, *Fonblanque*, 445.

The civil law books, to which we are able to resort, in this western part of the state, are principally elementary. It is owing to this, that it is out of my power to shew the application of the general principle, which exists in that jurisprudence to the same extent, that I am able to do from the reports in England

and our sister states. The principle, however, being once shewn, the court will no doubt hear with pleasure any thing which shews, how enlightened men, warmed to a sense of public utility and private justice, have applied these doctrines, in various cases, and that more particularly on rules of evidence, as from some cause or other (principally from our laws requiring evidence to be given *viva voce*) the English doctrines, *on that subject*, have become nearly incorporated in our jurisprudence. Such civil law books, to which I can resort, which at all touch on the point, go the full length I contend for.

" When proof is to be made of an ancient fact, and of which there are no written proof, nor living witness, if the fact be such that proof of it ought to be received, as *e. g.* if the question be how long such an estate have been in such a family, or at what time a particular work was constructed &c. evidence is received of what has been heard from persons, who were then living and are now dead." *Domat*, 3, 6, 11, *n*, 14.

Febrero, speaking of parol proof, hearsay evidence, general reputation, and in what cases they are admissible, says, in ancient facts, out of the memory of men, they make full proof : in cases of little importance, and those of difficult proof, when adminicules and other presumptions concur, or in the action *de reintegrando*, in order that the dispossessed may be

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restored to his estate. *Cinco Juicios*, 3, 1, 8, 6, *n.* 374.

The authorities from the common law books are to the same effect, but more minute in their distinctions, because we have more books to trace the application of the general principle.

In that system, parol and hearsay evidence is admitted to prove whether parcel or not, in questions of prescription to prove general reputation, in questions of pedigree, to establish boundaries, how and in what circumstances and to what extent a party entered into possession, what declarations have been made by a party who claims under title, when a possession of thirty years has been continued in the person who wishes to make proof of these declarations. *Fonblanque*, 449. *Philip's evidence*, 182, 2 *Haywood*, 148, *Buller's N. P.* 294.

This point has been discussed, because we deem it important to shew the general reputation of the country and the various acts of ownership exercised on the property. But, as to the extent to which our rights existed, when we went into possession and the animus with which we entered, we have more than parol proof. We have the bill of sale, or act of confirmation of Madam Lesassier, acknowledging that her husband had originally sold eighty arpens in front, on each side of the bayou, and that she made the conveyance, because the former act under private signature was lost.

Now admitting, for a moment, that Lesassier had no right to sell the property—admitting that it does not give a title to the premises, still as the question is, at this moment, not what right Lesassier had, but whether he conveyed any to Macarty or not, it is evidence to that fact. The sale from Lesassier would be so: a recognitive act from his representative, acknowledging the same fact, must have the same force. *Pothier, Obligation n.* 743,

Take then, the presumption arising from the possession, couple it with the declaration of the witnesses, join all to the bill of sale, and who can doubt that Macarty entered into possession of the land, as owner and possessor of eighty arpens front on each side of the bayou?

II. Madam Lesassier's deed to Macarty is of the 12th of May 1804, at a time when he had possession: it recites and confirms her husband's title. It is a just title.

"We call a just title, a contract, or other act, of a nature to transfer property, by the tradition which is made in consequence of it—So, that if the property be not transferred, it is on account of a want of title in the person, who makes the tradition, and not on account of any defect in the title, in consequence of which the tradition is made." *Pothier, Prescription, n.* 57.

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"Those different titles, which have no name, and cause us to acquire the property of things by tradition, which is made to us in consequence of them, when he who makes or consents to the tradition is the owner, are just titles, which, when he is not, give us the right of acquiring those things by usucapion or prescription: usucapion, which is called *usucapio pro se.*" *Id. n.* 76.

Under these authorities the sale of Madam Lesassier is a just title. To make it so, it is not necessary that she should have the property of the thing transferred; for then the party claiming under her would not be under the necessity of pleading prescription; all that is required is, that the title be such, that, should the property have been in her, the sale would have conveyed it to Macarty. From the tenor of the act, it is clear it would.

But, it was objected that we should have shewn her to be the legal representative of her husband, before we could read the deed in evidence. Had it been necessary that could have been easily done: but it was not anticipated such objection would be made, or that, if it made, it could find favor or success. Deeds of this description are always held *prima facie* good, in suits against third parties. If they are permitted to make such an objection, it cannot be seen where it is to stop. In every case where an individual claims property by bill of sale from the heirs

of any person, he will be obliged to shew that the vendors were the heirs, that there were no *other children*, and I suppose, after that they were *not disinherited;* or if the case is that the ancestor inherits and conveys, that to lay ground for reading the deed, you must shew that there were neither descendants nor ascendants alive, at the death of the person from whom the estate was inherited, except the grantor. I have never seen this in practice, nor is it right or just that it should be required: for who knows, if there be other heirs, that they wish to avail themselves of this right, *invito benificium non datur*, *ff.* 50, 17, 69. If they do and contest the act by suit, the question comes fairly to be decided on, and the whole circumstances are gone into. But, how can the validity of a deed be decided on collaterally in a suit between other parties? It savours a little of ridicule for a third party, not only to dispute any right in Lesassier, but also benevolently to take the part of his heirs, to whom he is pleased to give an imaginary existence. The law, it is believed does not sanction such an idea; let it be remembered too that, in this case, every presumption is in favor of the instrument. Macarty would not have trusted the confirmation of his right to such an important piece of property, to the deed of an unauthorised grantor, and, if there were other heirs, they would not have suf-

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fered seventeen years to elapse without asserting their claim. The court has already sanctioned the principle contended for in the case of *Martin* vs. *Hall & al.*

III. The deed of the defendants goes nearly the whole length of establishing my third proposition viz. that a surender of the title of the grantee ought to be presumed.

Its features are remarkable, and nearly every line of it is marked by a curious mixture of avarice and good faith, each of which triumphs in turn. The fairest way, however, of examining the subject, is as if the conveyance was in the ordinary mode—as if it offered no cause of suspicion—and then to ascertain whether the tenor and effect of the act weakens or fortifies the conclusions otherwise flowing from the facts of the case.

It has been already observed that one of the principles, on which the law recognizes the right of he who has possessed for thirty years, is that, after such a length of time it is presumed that the party had a title (even of the most solemn kind) which has been lost by time or accident. Numerous authorities have been cited to that effect (*ante*) and a close examination of them will shew that the courts to whom similar cases have been presented, presume a deed from him who claims the property, in favour of the adverse party who had nothing to shew, but a

long possession. This from two grounds: to quiet possession, and because it is probable that the party surrendered his title, or he would not have suffered so long a time to elapse without asserting it.

Long and undisturbed possession of any right or property affords a presumption that it has had a legal foundation, and rather than to disturb men's possessions, even records have been presumed. *Peake's Ev.* 31.

Where a mortgage deed is produced, if the mortgagor never entered, and no interest has been paid for twenty years, courts have uniformly instructed juries to presume a surrender. 3 *Johnson*, 376; 7 *Id.* 283; 12 *Id.* 394; *Bull. N. P.* 110.

In the case of *Patton* vs. *Hynes*, 1 *Cook*, 357, the Circuit Court of the U. S. decided that, after a peaceable possession of land for twenty years, it may be left to the jury to presume, that there was a deed and that it was registered.

So, where M. died in possession of land, and his son and heir at law succeeded to the possession, and continued therein for eighteen years, it was held that a purchase of the land by the ancestor might be presumed. 10 *Johnson*, 377.

These are ordinary cases, surely not so strong as the present. Heberts' patent is of 1777. Can it be supposed that from that time to 1812, if the land had not been sold to Lesassier (as the witnesses prove)

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he would not, in some mode or manner have taken possession or asserted his right? No tax was ever paid by him, he cannot produce one witness living nor the say so of any man now dead, that during these thirty-five years any right was claimed or any species of ownership on the land exercised. Nor does he attempt to account for the violent presumption thus raised against him, and that too, living within a few miles of the premises. He shews no absence, leaves a silence from thirty to forty years unexplained. Gentlemen may talk of proof by writing and proof by record: but if this be not a full and conclusive proof of a surrender of title, as strong or stronger than either or both of these put together, I must confess I know nothing of what is *evidence:* nor can I conceive what is to make an impression on the human mind, if this does not.

How strongly, too, does the language of Hebert's heirs' sale to the defendants strengthen and fortify this presumption, if indeed it can be strengthened. It presents a curious spectacle of the reluctance, with which they consented to sell that, which they felt they had no right to—of the great doubts and perfect wordly wisdom of the purchasers, who made, as the court will see, a saving bargain, and of the pains which the vendors had, in yielding up their good faith for the *chance* of gaining the purchase money. The act of sale, after stating the parties and

going on to say that the heirs of Hebert sell (not the land) but their right thereto, contains the following clause: "The said conveyance made for and in consideration of 3,500 dollars, payable when the purchasers will be confirmed in the possession of the said tract of land, by the decision of a court of justice, or when the heirs of Macarty will have made an abandonment of their rights and claims to the same. It is well understood among the parties, that all costs arising from the law-suits, with the heirs of Macarty, or any other claimants under Macarty's grant, will be at the risk of the said James Johnson and George Singleton; and if any deed or conveyance shall appear from J. B. Hebert, deceased, for the said tract of land, the present deed and every thing herein shall be null and void, otherwise to remain in full force and virtue, &c."

Now, unless there was something more than common in the circumstances of this case, why adopt such an uncommon mode of making the conveyance, unless they really felt that something might hereafter appear, which they dreaded, and which they hoped, would not perhaps come to light? Why adopt such numerous and severe precautions, and why adopt them all *against Macarty*, and entertain no apprehension from any other source? Any intelligent man can readily give an answer to these queries, and see through the whole transaction. The defendants

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thought it was a *good chance* to get a most valuable piece of property, at one fourth of its real price. In making the experiment, they ran no risk of loss. The vendors evidently yielded with reluctance to the temptation thrown in their way. It is a pity they yielded at all. But, in every line can be traced their doubts, pains and anxieties, at what they were doing. Why did they feel them? Who can have any difficulty in giving an answer?

Does not, then, the language of this deed most strongly fortify the presumption otherwise flowing from length of time, and make this one of the clearest cases that can be imagined of a surrender of a title? Let the court take with it the testimony given in the cause, and how will this point stand? Thirty-six years silence on the part of the vendors—a deed couched in the language already stated, and parol evidence to sustain what is otherwise a violent presumption.

IV. Hebert's heirs sell to the defendants all their rights and pretensions to the land—to be paid for, when the decree of a court of justice confirms them in their right to it; and a clause is added, that the costs arising from the law-suit with the heirs of Macarty, shall be at the vendors' expense. Is this a litigious right?

Of its being so to every common intent there can be little doubt. The deed acknowledges a suit to be

commenced, and provides for its consequences. It is in truth the purchase of a law-suit in express terms. Let us examine whether there be any thing in our law that repels the idea.

" A right is said to be litigious, when there exists a suit or consultation on the same. *Cod. Civ.* 368, *art.* 131. Are these expressions *restrictive*, or merely enunciative? We contend that they are *enunciative:* because one great object of the statute would be defeated, if they were regarded in any other light. The object of this statute, as it is plain to every one, was to cut off temptation to those who make it their business to buy up rights at a low rate, that they may succeed in law—to check litigation of this kind, which all civilized nations abhor, by depriving him, who makes such a purchase, of the means of rendering it a matter of profit. This was no doubt the object of the legislator. What other rule of construction can there be applied to it, but that you must so consider and restrain it, as " to repress the mischief and advance the remedy."—A cardinal rule, never to be departed from by courts of justice in construing remedial laws. Now, the cases in which this provision would have a beneficial tendency must be few indeed, if restrained to suits already commenced, because they are seldom the object of traffic, and for this reason: men, who, do not make *trading in law* their means of livelihood, seldom go into court, til

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after having well considered the nature of their claims and until they are advised that it is such a one as can be supported. After taking this step, they scarcely ever feel inclined to sell under the real value, and contracts for property *pendente lite* are, as is well known, extremely rare. There may be exceptions to what is here asserted, but they are few. On the other hand, it is a great evil to permit men to go round seeking every obsolete claim, hunting out every forgotten or obsolete title, purchasing it for little or nothing, as is the case here, and the instant after they acquire it making it the basis of an expensive and vexatious lawsuit. Independent of the magnitude of this evil, it is one of frequent occurrence, and from its nature calculated to increase to an alarming extent, unless frowned upon and punished whenever the proof of it can be completely made.

There is another consideration, which ought to have considerable weight in the construction of this statute. One of its objects, perhaps the only one, was to prevent litigation. By confining it to *suits commenced*, this object is in a great measure defeated. For, as the suit is begun, before the purchase is made, litigation is not at all checked. The only difference is that it is carried on at the expense of one man, instead of that of another. It is difficult then to conceive that the legislature intended to restrain the provisions of the statute to cases in which the very evil

they wished to eradicate would remain untouched. On the other hand, by applying it to the extent which is here urged, the law is made to reach and destroy the mischief, which the court clearly see the lawgiver had in view.

An objection may be made that this rule of construction would check and embarrass the transfer of property. A little consideration will show that this idea is not tenable. What is contended for here does not reach the case of one buying a piece of property, where one who has an adverse claim may or may not assert his right, or where the vendor would have prosecuted his claim as well as the purchaser. All that is contended for is that it reaches this case. Where positive proof is given that the purchaser is the cause of the litigation, *that he buys a law suit*, and that though those he bought from are willing to sell him the right of action at law, it is clear it is one which they would not exercise themselves. Had the sale been in these words: "we the vendors sell and convey the right of a law suit against Macarty," I suppose no one would contend that it was not a litigious right which the vendees acquired. Yet, let the defendants' deed be examined, even in the most favorable aspect, and it will be seen that in truth they bought nothing else.

In support of this position, the court is referred

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to *Pothier*, *Vente*, *n.* 583. 15, *Jur. du Code Civ.* 328—345.

At Rome, purchasers of litigious rights were held in such abhorence, that the law refused them an action for the thing thus acquired. *Si contra licitum, litis incertum redemisti, interdictæ conventionis tibi fidem impleri frustra petis.* *Code.* 4, 35, 20.

Brent, for the defendants. I contend that 1. the plaintiffs, if they recover, must do so, according to the title which they have set forth, viz: a deed from V. Lesassier, in 1780—this they have failed to prove.

2. The deed of Mad. Lesassier is no evidence of that of V. Lesassier, and ought not to have been received in evidence.

3. The petition states that the premises were sold in 1780 to V. Lesassier, by him to J. B. Macarty, from whose heirs they were purchased by the plaintiffs. Therefore, before they recover they must show, by legal evidence, that the land was sold by V. Lesassier to Macarty. The legal evidence is the best which the nature of the case admits of: in the present case, the production of the original deed from Lesassier. Their omission of doing so leaves them under the imputation of withholding a document, which, if produced, would be evidence against them. *Lucile* vs. *Toustin*, 5 *Martin*, 613.

They urge that this deed was once under private

signature, that it is lost, and consequently they may give evidence of its contents. If this were true, it would not be controverted: but in order to avail themselves of it, the yought to have stated it; as they did not, the court will not permit them to take us by surprise.

But, admitting, that this may be proven without having been pleaded, to the general rule that no such evidence shall be received of the contents of a deed, there is, indeed, an exception, when the deed is lost. *Civ. Code*, 312, *art.* 247. 2, *Pothier*, *Obligations*, *n.* 847 *and* 815. Are the plaintiffs within this exception?

Madam Lesassier's deed furnishes the only evidence on record, that the deed of her husband to Macarty, was under his private signature; but she does not say it was lost in the conflagration of New-Orleans, in 1794. She says that by the said deed her husband bound himself to execute an authentic act on request, which was never done, owing to the destruction of the titles, burnt in the conflagration of 1794: which titles were a grant for a parcel of the land, and deeds of exchange with several Acadians, for the rest.

But the introduction of the deed of Madam Lesassier was opposed, and ought not to have been received. It is true it is sworn to, but, it is a voluntary affidavit, made *ex parte*, and which cannot be used

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against the defendants, as neither them nor any person, under whom they claim, were present, nor have they ever had an opportunity of cross-examining the deponent.

In neither of the other documents do we find any legal proof, that the deed, under the private signature of Lesassier to Macarty, ever existed, nor of its loss, nor of the fortuitous event which occasioned this loss.

The plaintiffs, on this point, are not more fortunate, in their attempt to establish this deed by witnesses. None of them can say any thing positive, with regard to its existence or loss. Deblanc has heard or believes it was lost in the conflagration of New-Orleans, in 1794; but the gentleman does not inform us how he heard of it, or why he believes it—whether he heard it from Macarty, or believes it from the petition of Macarty to the intendant, and the proceedings had thereon.

I lay it down, as an incontestible principle, that, before the contents of an instrument may be proved by witnesses, the court must be satisfied of its former existence, and its loss or destruction. *Civ. Code*, 312, *art.* 147. 2 *Pothier, Obligations, n.* 815. Admitting, however, all this to have been satisfactorily proven, the witnesses who depose, as to the contents of the instrument alleged to have been lost or destroyed, can only be persons who have had it in their hands, and are well acquainted with the handwriting

of him, who executed it, or who had a particular knowlege of the fact or contract of which it was intended to be the proof. It is, therefore, clear that, in the present case, the court cannot listen to the testimony of persons, who declare that they have heard and believe that Lesassier sold the land in dispute to Macarty.

The plaintiffs, however, rely on the deed of Madam Lesassier. This instrument was executed in 1804, and, as is there stated, after Lesassier's death. The introduction of this paper as evidence was opposed, and a bill of exceptions was taken to the opinion of the court, in admitting it.

This instrument contains the declaration on oath of that lady, that a deed under the private signature of Lesassier, her husband, was given in 1780, to Macarty. She swears, indeed, to all the other facts which the plaintiffs allege in support of their title.

Farther, the defendants had a right to resist the introduction of this piece of evidence, on the ground that it took them by surprise, inasmuch as the facts thereby disclosed, were not alleged. The plaintiffs claimed under a deed from Vincent Lesassier to Macarty, in 1780, and a possession of thirty years. These facts were denied and put at issue by the defendants, who also set up a better title. They came prepared with testimony to disprove the facts so al-

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leged by the plaintiffs. Most undoubtedly, then, the introduction of another title, not made in 1780, but in 1804, not executed by Vincent Lesassier, but by Madam Lesassier, his widow, took them by surprise, as nothing in the pleadings could lead them to the belief, that the plaintiffs relied on this latter deed.

Again, Madam Lesassier sells and warrants the premises to Macarty. Admitting, therefore, that her deposition, contained in this deed and sworn to, was regularly taken, in the presence of the defendants, still they could refuse its introduction, as the evidence of an interested person.

Let us now examine this instrument, as a deed conveying a title to the land, not as a deposition of a witness.

It is not shown that Lesassier was dead when it was executed—nor even that the person executing it was his widow—nor whether he died testate or intestate, with or without issue—whether his heirs were of age or minors, single or married women. She mentions, indeed, in the deed, that her husband left heirs, and that she sells and warrants the premises, for herself and them. Of her capacity to do so, we are not informed by her nor by the plaintiffs.

Will it be contended that a community of gains existed between her and her husband, that the land was acquired during her coverture and consequently she had a right to one half of it, and her deed is

good therefore? But from whence is it concluded that the land was purchased during the coverture: we have not been favored with the date of its execution. In admitting this sale of one half of Lesassier's tract to Macarty I would not put my clients' rights in much jeopardy, for it does not appear that the moiety of the widow embraced the premises in dispute. It is rather to be supposed that Macarty considered himself as the purchaser of one half of Lesassier's tract, as he declares in his will that he owns eighty arpens of land, in front, on the river Teche, in the Attakapas, and the parties have agreed, in the statement of facts, that the plaintiffs are not entitled to recover, unless they show a title to eighty arpens on the *east* side of the Teche; and all the testimony fixes Macarty, and the plaintiffs afterwards, on the *west* side, where he had his cattle farm.

The plaintiffs first claim the land under the prescription of thirty years.

In this respect, they cannot avail themselves of the possession of Lesassier; as neither he nor his heirs are shown to have transferred their rights: but could they join Lesassier's possession to their own, I am ready to prove that the defendants and those under whom they claim, have possessed the premises, from the date of the original grant, in 1777, to the present day. They are now, and were when the present suit

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was instituted, the actual possessors of the land. In order to establish this fact, I refer the court to the statement, where it appears, under the hands of the parties, that the defendants went into possession in 1812, and the present suit was not instituted till the 15th of October, 1815. Accordingly, their possession was undisturbed during nearly four years: a sufficient time to cause them to be considered as *legal possessors*. *Civ. Code*, 478, *art.* 22, 24.

In the original grant, in 1777, the Spanish governor certified that J. B. Hebert had been put in possession of the *locus in quo*, and the statement shows the purchase of it by the defendants, from Hebert's heirs.

The actual possessor, when he proves that he has formerly been in possession, shall be presumed also to have been in possession, during the intermediate time, till the contrary be proven. *Civ. Code*, 484, *art.* 142.

Some of the witnesses examined disprove the possession of the defendants, or those under whom they claim, since 1777. They declare that neither the plaintiffs, nor those under whom the claim, were ever actually possessed of the land, and that they always resided on the *opposite* side of the river, at the distance of thirty-four arpens, more than a mile, below a line drawn opposite to, and in continuation of, the defendant's lower line.

One or two witnesses state that Macarty crossed the river to get fire-wood; that he cut it two arpens below the *locus in quo.*

If the defendants, or those under whom they claim, had possessed the land from the year 1777, the date of the original grant, to the year 1815, that of the institution of the suit, a period of thirty-eight years, how can the plaintiffs recover it under the prescription of thirty years (if they have shown it, which we deny) of a spot of ground, on the opposite side of the river, upwards of a mile farther down?

But, the plaintiffs contend that Macarty having made a settlement, and said he owned eighty arpens in front, on each side of the bayou, and it being sworn that such was the report in the neighbourhood, his possession of a small spot, on the west side of the bayou, was a constructive possession of the whole tract, now claimed under him. What an extraordinary doctrine! Suppose that Macarty or Lesassier, when they settled *there*, had declared that they owned the land, on both sides of the Teche, for ten miles, and the witnesses to-day should swear, that *they heard it said*, that either of these gentlemen, or both of them, owned the land for that distance, would the court extend their possession, so as to deprive a man of his land, holden under possession and grant, at the extreme end of the ten miles? Yet this doc-

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trine would so extend it. It is out of all reason, at war with justice, and in opposition to the law.

The plaintiffs' counsel has referred to the *Treatise on Possession*, to support this doctrine. The law there laid down is intended for a very different case. Pothier says, "it is so with regard to him, who acquires an estate, which the former possessor willingly abandons to him." Suppose a title or not, in the former possessor, who before occupied the land, as he possessed it, it is not necessary that he who afterwards acquires it should enter on every part of it: the possession of a part sufficing. But it is necessary, in such a case, that the possession of the whole should once have been in the former possessor, without title: for he cannot transfer more than he possessed. In the present case, if the plaintiffs hold under Lesassier (which is denied) it is proved that he (if he be considered as the former possessor) never possessed the *locus in quo*. If Macarty be considered as such, it is proved that he never possessed it. But, the real, and only former possessor, was J. B. Hebert, with whose consent, or that of his representatives, the plaintiffs never possessed it.

But, it never was understood *generally* in the country that Macarty claimed eighty arpens, on both sides.

It is true that the plaintiffs have introduced *four* witnesses, who, all of them, state themselves Macar-

ty's intimate friends, and swear that they heard him and others say that he owned eighty arpens on each side: but *three* other, old and respectable witnesses, swear they never heard that he owned that quantity of land.

Judice says he was present when Lesassier bought the land at Chicot-noir, and that he bought only thirty or forty arpens, on the west side, and, at the same time he sold to Macarty; that he was a witness to the two sales, both of which were made by *authentic acts*, passed before Declouet. This witness was introduced by the plaintiffs, and he proves that Lesassier's deed to Macarty was an *authentic* one, and therefore not *under private signature*, and for land on the west side of the bayou, only.

Gonsoulin and Dugat say they always heard and understood he owned and claimed eighty arpens on *one* side of the bayou only. It may not be improper to remind the court, that Gonsoulin was the regular surveyor of the Attakapas, under the Spanish government, and had a perfect knowledge of land tracts, in that district.

The testimony of Berard can be of but little avail to the plaintiffs. It appears that this aged gentleman has not a very perfect recollection of the facts he narrates. His deposition was taken twice, and the last time, he states positively the contrary of what he had declared the first.

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The plaintiffs' counsel urges that *four* witnesses deposing in opposition to *three*, the former ought to prevail. This, as a general rule, is cheerfully admitted, but the contrary one must prevail, when the court seeks to ascertain the general belief and understanding of a neighbourhood. But the matter does not rest on parole evidence only.

Macarty, in his last will, declares that he has a tract of land of forty arpens of front, on the bayou Teche, at the place called Chicot-noir. What better proof could be produced? The vendor of the plaintiffs' ancestor, in his last will, which they have read in evidence, declares he owns a tract of *eighty* arpens on the Teche. Had he owned a front of *one hundred and sixty*, or of eighty on both sides, would he have expressed himself thus? The contrary appears in the next line of his will, where he speaks of a tract of eighty arpens, *on both sides* of the Vermillion, which he describes thus: "one of *one hundred and sixty* arpens of front, on the Vermillion, at the place called La Prairie Sorrel."

Let the court take these *written* declarations of Macarty, more certain than the floating, idle report of the neighbourhood, join them to the testimony of Gonsoulin, the surveyor, and that of Judice and Dugat, and the conclusion is irresistible.

The just title which the plaintiffs present as a

basis of the prescription of ten years, is the notarial act executed by Lesassier's widow, in 1804. Within seven years and eight months after its date, according to the statement of facts, the defendants took actual possession of the land in dispute. The plaintiffs have not shown that they possessed under any other just title: for I have clearly demonstrated that there has been *no proof* of any deed from Lesassier to Macarty, in 1780, for a tract of eighty arpens on both sides of the Teche—that the only certain testimony of the existence of a deed, is that of Judice, who swears that he was a subscribing witness to one which was an authentic act, and for eighty arpens on the west side of the bayou only. Why is not this act produced?

But, suppose it had been proven that a deed had been made by V. Lesassier to J. B. Macarty, in 1780, for the land on both sides of the bayou, there is no proof of the *locus in quo* ever having been in the possession of Macarty, his heirs, or the plaintiffs: on the contrary, I have shown that the defendants have been in possession of it since the year 1777, and according to law, are now the actual possessors. *Civ. Code*, 434, *art.* 42. Even supposing that the plaintiffs have, with a just title, been in possession of a part of the land deeded to them, still if the defendants, or those under whom they claim, have, *at the same time*, and in good faith and a just title, pos-

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sessed the *locus in quo*, the plaintiffs' possession could never extend to the land of the defendants. For, it is a clear principle in law and in reason, that two persons, under opposite titles, cannot possess at the same time: and, even if they could, the court would support the possession of him who had the best title.

Here, the plaintiffs show no original title whatever. The defendants show a complete Spanish title and actual possession under it, in 1777, a confirmation of their right by the commissioners of the United States, and actual possession at the time of the institution of the present suit.

The counsel urges that the court will presume a deed from J. B. Hebert, under whom we claim, to the plaintiffs, or those under whom they claim.

The counsel argues as if it was in proof that the defendants land, the *locus in quo*, had been in the possession of the plaintiffs or those under whom they claim, for thirty years before the possession of the defendants commenced. In such a case, the authorities quoted might have some bearing. But it has been proven, that no other person, except the defendants, or those under whom they claim, ever had the possession.

Without examining the cases cited, and to save time, I will make but one observation on them. The

court will perceive from a perusal of the authorities of the plaintiffs, that they relate to cases in which the land is in the possession of, or has been possessed by the party, which is not the fact here.

Remarks have been made on the deed of Hebert's heirs to the defendants, and it is intimated it ought to be viewed with a suspicious eye.

It is in the usual form. The caution of the vendors to avoid a law suit is manifest. Honesty and good faith influenced them. They are honest but ignorant persons. They had understood the land was claimed by Macarty's heirs, under a grant to him, and by purchase from their ancestors: this appears from the deed. When the defendants offered to purchase the land, they informed them that they would gladly sell, but as they understood that Macarty's heirs claimed the land, and they had no knowledge of the nature of the claim, they would not convey, so as to render themselves answerable for any expenses attendant on a law suit: and if Macarty, as was said, had a deed for the land from their father, they would not sell. The defendants proposed a conditional purchase, viz. that the payment of the price should be deferred, till the right of the vendors was established in a court of justice. Their offer was accepted. All this is gathered from the surface of the deed.

It is contended that a deed from J. B. Hebert is to

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be presumed from a clause in the deed which provides for its nullity, should any deed appear from Hebert for the land.

The good faith and honesty, which dictated this clause, show clearly that the vendors did not believe that any such a deed was given. But, as they were young, and there was a possibility of a deed having been executed under the private signiture of their father, they provided for this possible case.

Lastly, we have the definition of a litigious right in our statute. A right is said to be litigious, when there exists a suit and contestation for the same.—*Civ. Code*, 368, *art.* 131: but this does not apply, when the sale has been made to the possessor of the inheritance, subject to the litigious right. *Id. art.* 132.

At the date of this deed, January 26, 1813, no suit existed: the present one having been instituted on the 15th of October, 1815. But the expressions of the code are not *restrictive*, but merely *enunciative.*

If the code had gone no farther than the 130th article, which provides that he, against whom a litigious right has been transferred, may beget himself released, by paying the real price of the transfer, the court might have determined that the term *litigious* right was enunciative. But, in the next article, the

legislature defines what is meant by a litigious right. Should the doctrine contended for, in this case, be correct, there would be no security in purchasing property, to which another man may have a claim although a bad one. The law with respect to litigious rights, as relied upon, has no relation to cases like the present, where a purchase of land is made.— It relates only to cases in which an uncertain right is in litigation, and where a small consideration is paid. Certainly, it never was, nor can it be ever contemplated, that because a person sets up an unfounded right to the land of A, and B purchases it, knowing that a claim is made thereto, B is the purchaser of a litigious right. The recognition of such a principle would avoid a considerable portion of the sales of land in this state.

The statute expressly provides that, where a litigious right is sold to the possessor of the land, subject to it, the vendee shall not be obliged to yield his purchase. *Civ. Code*, 368, *art.* 132. In this case, supposing that the right purchased was a litigious one, the defendants, who purchased it, were the possessors of the land, at the time, and, of course, under the positive presumption of our law, not liable to be compelled to yield it.

To show that the defendants were the possessors, at the time of the purchase, it will suffice to refer

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the court to the date of the deed, which is the 26th of January, 1813, and to the statement of facts, which shows that they had moved upon the land, in the beginning of 1812, and of course had been in possession almost thirteen months, a time sufficiently long to cause them to be considered the legal possessors. *Civ. Code*, 478, *art.* 23.

Farther, admitting the defendants to have really purchased a litigious right, this circumstance could not avail the plaintiffs. For, they have not alleged it, and have not prayed, in any part of the petition, to be allowed any benefit from it.

MARTIN, J. delivered the opinion of the court. The plaintiffs rely on a possession of thirty years—a possession of ten years with a just title—the presumption of the surrender of the title of the original grantee—and a right of being substituted to the right of the defendants, on a suggestion that they purchased a litigious one.

I. The plaintiffs cannot avail themselves of Lesassier's possession. There is not any *legal* evidence of his having transferred any right of his. One of the plaintiffs' witnesses, Judice, deposes that Macarty had an *authentic* title from Lesassier. None is produced, neither is there any legal evidence of the loss or destruction of such a title, nor of its contents,

The plaintiffs' counsel urges that it was a *private* one, and was burnt in the conflagration of Macarty's house, in 1794. The *testimonial* or procedure made by Macarty, after the conflagration, is an *ex parte* proceeding, but as it has been read without objections, has been considered by the court. The conflagration is thereby proved, but not a word is there said of the sale to Lesassier, nor of Lesassier's to Macarty, nor of the original conveyances, though many papers of infinitely less importance are there detailed, with great minuteness. In the petition presented by Macarty to the intendant, in 1803, nine years after the conflagration, the sale from V. Lesassier to Macarty is spoken of as a *private* one, which was mislaid, *extraviado*, in a notary's office, and the original titles for the land, which Macarty says had been delivered to him by Lesassier, are said to have been destroyed in the conflagration of his house. Yet, the original title to the premises, the grant from the Spanish government, does not appear ever to have been out of the possession of the grantee or his successors, and is annexed to the record. Neither is there any *legal* evidence that Lesassier ever possessed any land on the eastern side of the bayou, the side on which is the *locus in quo*, except the declaration of Boutte that Lesassier had told him he had sold to Macarty eighty arpens on each side of the bayou. Judice has sworn he was present when Lesassier purchased the

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land of Chicot-noir, on the *western* side of bayou Teche. Delahoussaye, the Chevalier of that name, and Deblanc, have sworn to conversations, in which Athanase Hebert, the son of J. B. Hebert, the grantee of the *locus in quo*, told them the latter had given the *locus in quo* to Lesassier in exchange for a tract on the Vermillion—but these conversations are of a modern date, were posterior to the purchase of the defendants. Athanase Hebert is not shown to be either dead or absent, and no efforts have been made to procure his attendance in the district court.

We conclude that although the declaration of Lesassier to Boutte, now dead, which was made a great many years ago, at a time when it does not appear to have had any interest to misrepresent, might perhaps be received in a case of prescription and boundaries, yet, as in the present case, it is sworn by a witness that the sale of V. Lesassier to J. B. Macarty was a public one—and the private one spoken of by Macarty is said to have been *mislaid* by Macarty himself, and by him alone, parole evidence cannot be received of the contents of that instrument.

The possession of the *locus in quo* by Macarty is attempted to be established by showing that he had a stock farm on the opposite side of the bayou, and cut wood, made a clearing, and planted corn on the other: that the general reputation and understanding of the neighbourhood was that he owned eighty ar-

pens on each side, and that he was taxed, and paid the impositions accordingly.

1. The stock farm is sworn to have been on the western side, below, and at the distance of more than a mile (34 arpens) from the lower line of the *locus in quo*, which lies on the opposite western side.

It is shown that Macarty cut wood on the eastern side, opposite to the stock farm, and that his negroes one year, planted corn, in an unenclosed field, and that small logs were laid along the margin of the bayou to facilitate the passage across of the oxen which hauled the wood. The stock farm was kept from 5 to 6 years—that is to say from 1780 to 1786, and no actual occupation of any part of the whole tract claimed by Macarty appears to have been taken till 1809 or 1810, when the present plaintiffs made a settlement, on the western side of the bayou, opposite to the *locus in quo*. Is this such a possession in Macarty of the *locus in quo* as may be the basis of the prescription of thirty years?

It is contended that the establishment of the farm, on the western side, the cutting of wood, the clearing and cultivation of land on the eastern, were acts of ownership, exercised by Macarty, over a tract of eighty arpens on each side of the bayou, of which Macarty claimed the property, and the statement of facts shows, that if the plaintiffs are entitled to reco-

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ver eighty arpens, on the eastern side, the *locus in quo* is included therein.

It is true that the possession of an estate is taken by entering on any part of it, and there is not any necessity of the party going into every part—but this is to be intended of a person taking possession of an estate, which the former possessor is willing to abandon to him. *Pothier, Poss. et Pres. n.* And if Macarty was proven to have purchased the tract of eighty arpens on each side of the bayou, which is claimed, from a person who possessed it before the sale, and was willing to abandon it to him, these acts would afford abundant evidence of a taking possession of the whole tract.

But it is different when a usurper enters, *vi et armis*, and drives away the possessor: he acquires possession inch by inch only, of the part of the estate, which he occupies. *Pothier, loco citato.*—*Si cum magna vi ingressus est exercitus, eam tantummodo partem quam intraverit, obtinet, ff. l.* 13 *de acq. poss.*

Is it otherwise as to the intruder who enters without force—or in an homely, but expressive term, a squatter? When a person claims by possession alone, without showing any title, he must show an *adverse* possession by *enclosures*, and his claim will not extend *beyond* such enclosures. Nothing can exclude the right owner from his general possession,

or operate in derogation of his right, but acts of ownership, done by the intruder, which unequivocally shows a claim of title in opposition by an adversary to the rightful owner, and such as necessarily excludes him from enjoying and participating in the advantages derived from the possession. *Harris and M'Henry*, 622. The possession of an integral part of a whole, does not include that of the other parts. So, he who possesses only one half of an estate, susceptible of division, will prescribe as to that half only. *Tantum prescriptum quantum possessum.*—*La Porte, des Prescriptions*, 48.

Macarty's possession, the extent of which is not shown, while it did not reach the lowest line of the *locus in quo*, and does not appear to be within a mile of that line, cannot be considered as the possession of the *locus in quo*, or any part of it.

Neither is it very clear that the possession shown, is of such a *nature* as to be the basis of the prescription of 30 years. Wood was cut, corn planted, all in a small unenclosed field, by Macarty's negroes—according to a witness—another saw wood cut, a clearing, and negroes at work. It is not likely that the last witness speaks of what is deposed by the first. In *Grant* vs. *Wimburne*, the supreme court of North Carolina held that feeding of hogs or cattle, building of hog-pens, cutting wood off the land, may be done so secretly that the neighbourhood may not take no-

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tice of it, and if they should, such facts do not prove an adverse claim, as these are all acts of trespass.—Whereas, when a settlement is made on the land, houses erected, fields cleared and cultivated, and the party openly continues in possession, such acts admit of no other construction than this, that the possessor means to claim the land as his own. 2 *Hayw.* 57.

Neither do these alleged acts of ownership, clearly appear to have been exercised early enough to be evidence of a possession of thirty years. The statement of facts shows the entry of the defendants in the early part of 1812. These acts cannot therefore avail, unless they were exercised in the early part of 1782. The testimony is, that Macarty came on the land on which Lesassier had an indigo farm, viz: on the western side of the bayou, in 1780 or 1781. The time at which he began to cut wood, at which his negroes planted corn in the unenclosed field, &c. is not specified—though, perhaps, as it is sworn there was no wood on the eastern side, the want of that article must have been felt early, and the cutting of wood could not have been delayed long.

Upon the whole, we are of opinion, admitting the alleged acts of ownership, shown to be of such a nature and of so early a date as to avail the plaintiffs, they are unavailable, on account of the *place*—that the occupation of the particular spot on which they were ex-

ercised, cannot be considered as *adverse* to the rights of J. B. Herbert, the owner of the *locus in quo*, distant near a mile. It did not exclude him from enjoying any of the advantages which he did or could derive, as possessor of the *locus in quo*. Prescription takes place only when the owner neglects to claim, when he has it in his power so to do. *Part.* 3, 29, 1. The acts of Macarty were not such as Hebert could have successfully opposed. Surely, while Macarty kept within a mile from the *locus in quo*, Hebert required no legal proceeding on his part to protect his title.

2. The general understanding and reputation in the neighbourhood—the declarations of Declouet and Sorrel, that Macarty was the owner of eighty arpens in front on each side of the bayou, may perhaps be evidence of a title, but are surely not so of his possession.

3. Evidence that Macarty was taxed for the public works and charges of the district, as owner of 80 arpens of front on each side of the bayou, would *prima facie* establish his possession. *Pothier, Poss. Pres.* But this evidence must be *legal*. Now, these taxes were not laid *orally*. We should presume, if the plaintiffs had not proved it, that there were *written documents* establishing them. Berard says lists were made containing the names of each planter

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charged, with the amount of the imposition of each. Does it suffice to say, that under the Spanish government, the public papers in the archives of distant districts, were loosely kept and carelessly preserved, without evidence of the least inquiry or effort to procure a copy of such lists? If so, under the American government, which had lasted twelve years, at the inception of the suit, we know evidence of the assessment of taxes can be easily obtained. We, therefore, conclude, that while the literal *evidence* of the impositions is neither produced or accounted for, *parol* proof cannot avail.

But a written evidence is said to exist in Deblanc's certificate, obtained by Macarty, on his petition to the intendant. This certificate is torn and truncated, has ever been in Macarty's possession, or that of his successors, and is produced by them.—Admitting that we can discover from it, that Macarty owned a quantity of land in the Attakapas, and among others, the eighty arpens in front on each side of the bayou, now claimed, and that it appears by the accounts of Duclosange, the treasurer, *Depositario*, of the district, that he has always, *siempre*, paid the taxes, this certificate, given in 1803, while Deblanc, the commandant of the Attakapas, was accidentally in New-Orleans, cannot be accepted as evidence, that as early as 1782, twenty-one years before, Macarty was imposed for the tract in question,

especially when it is in evidence, that Deblanc did not come to the Attakapas till 1796. We have here the certificate of a certificate—admitting all this to be correct, as the document has not been excepted to, we are of opinion, that the word always, *siempre*, although general enough, is too indefinite, and insufficient to show what must strictly and precisely be proven, an imposition for taxes as early as the beginning of the year 1782.

Payment of taxes is spoken of by Decuir and other witnesses. Admitting that such payment was made, without taking a receipt, and therefore is susceptible of being proven by parol, the precise time is not shown. Decuir says he paid, *at divers times*, at Macarty's request—none of the other witnesses show any precise time of payment.

We conclude, that the possession of the *locus in quo* by Macarty, if shown, is not traced so far back as the beginning of the year 1782—and that therefore a possession of thirty years, before the beginning of the year 1812, is not proven.

II. Madam Lesassier's deed being of the 12th May, 1804, admitting it to be a just title, the possession under it had lasted about eight years only, when it was disturbed by the defendants' entry, in 1812.

III. Strong presumptive evidence that the title

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under which the defendants claim, was surrendered is said to be discoverable in their deed. They purchased not the *land* itself, but their vendor's *right* thereto—the price is the fourth part of the value of the land—it is not payable till the title be confirmed by a decree, or the heirs of Macarty's claim be abandoned—the deed is to be void if a deed from their vendor's ancestor to Macarty makes its appearance—no payment of taxes is shown—no occupation of the land appears from 1777 to 1812—there has been a silence of 36 years.

1. A right or claim may fairly be the *object* of a sale. *Pothier, Vente*, 550.

2. We have no evidence of the value of the *locus in quo* at the time of the sale: but we are shown that the plaintiffs' ancestor purchased the whole tract which they claim, on the 5th of June, 1809, for $20,000. This appears by the deed of sale. The defendants purchased the *locus in quo*, containing the eighth part of the tract, for $3,500, Jan. 6, 1813, thirty-one months after. According to the price paid for the whole tract, the *locus in quo* being the eighth part of it, was worth $2,500, in 1809. Now, without any other evidence, we cannot presume fraud, or that it was purchased below its value, when about three years and a half after, $3,500 were given for it.

3. While, as the plaintiffs' counsel strenuously con-

tends, the general understanding of the neighbourhood was, that the *locus in quo*, the premises sold, made part of a tract owned by Macarty, we cannot consider the precaution taken by the vendees, that the stipulated price, which appears to be the fair and full value of the land, should not be paid, till it appeared that those, who were to receive it, had power to transfer the land. The vendors had a complete patent—it is annexed to the record. Their title, therefore, was indisputable, unless a person appeared to have gained it by possession, or they or their ancestors had done some act to defeat it. Yet, the plaintiffs claimed the land, under a deed from Macarty's heirs. Macarty's claim was the only one to be guarded against: as it did not arise by possession, it must do so by title. This title could only be a deed from Hebert. Surely *nimia precautio fraus*; but it was not an extraordinary precaution to guard against the appearance in evidence of a deed from Hebert to Macarty.

4. Hebert and his heirs had a complete patent, since the year 1777—it had been confirmed by the commissioners of the United States on the 27th of August, 1811. According to the statement, the defendants, who certainly did not claim the land under Macarty, as the plaintiffs, entered on it in 1812, and settled opposite the spot on the other side of the bayou, on which the plaintiffs had their settlement, undisturbed and unopposed by them. The pre-

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sumption is strong, as they did not claim title, they entered under the heirs of Hebert, whose title they purchased on the 26th of January, 1813, and remained undisturbed till the 15th of October, 1815.—Now, if notwithstanding this, the absence of any evidence of any other actual occupation renders their title suspicious, may not equal suspicion be attached to the plaintiffs' title, who never to this day, by themselves or their predecessors, had any actual occupation? After producing the original grant, proving the descent of the estate to their vendors, their deed and the possession of the defendants, was there any necessity that they should prove that those under whom they claim had been charged with the taxes of the district?

We really see no reason to *presume* a surrender of title. Violent, indeed, must be the presumption, which would induce us to do so, against a possessor with a complete chain of titles.

IV. The right purchased by the defendants is said to be a *litigious* one, although no suit was ever instituted for the recovery of the premises.

In the case of *Morgan* vs. *Livingston & al.* 6 *Martin*, the defendants resisted the plaintiff's claim, on the ground that he had purchased a *litigious* right, having purchased from P. Bailly, a lot on the batture, which was at the time of the purchase, claimed by the

defendants, who were in possession of it. This court decided the vendor's was not a litigious right. Yet, in few cases could it be more obvious, that the defendants would not give up their possession without some legal struggle. We cited no authority, being of opinion that the expressions of the statute were too plain to admit of a doubt.

We are not left to ascertain the meaning of the expression *litigious* right, by a reference either to the opinions of commentators or the decissions of courts. The law itself has expressly given us its meaning: "A right is said to be litigious whenever there exists a suit, and *contestation* on the same." *Code Civ.* 361, *art.* 131.

It seems that a suit brought does not *alone* suffice—that it is not enough that there should be a petition, that a copy of it and a citation should be served on the defendant—it is necessary there should be an *answer*—perhaps any plea will not suffice. In the words of the statute, there must be a contestation. Now, if the advancement and progress of the suit to the contestation be essential, how can it be held that the *inception* of the suit is unnecessary?

If authorities be wanted on so plain a point, we refer the student to the commentary of Gregorio Lopez, on the *Part.* 3, 7, 13, who observes that it had been doubted whether the thing be litigious, before the service of the petition, and he concludes that it is

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not so—that it was not before the *partida*, and it has introduced no change. *Febrero de escr. ch.* 7, *n.* 9.

It was so in Rome. *Litigiosa res est de cujus dominii causa movetur inter possessorem et petitorem, judiciaria conventione, vel principi precibus oblatis et judici insinuatis et per eum futuro reo cognitis. C.* 8, 37, 1. *Auth. Litigiosa, Nov.* 112, *c.* 1.

The French text of our code civil is a literal copy of the *art.* 1700 of the code Napoleon, and in the case of *Delaunai* vs. *Delanci*, the court of appeals, in affirming the judgment of the tribunal of Rouen, observed that it was improper to confound a thing liable to litigation, with a litigious one. 11 *Jur. Code Civil*, 451. When the thing ceded is not contested, and is not the subject of a suit, at the time of the cession, the thing is not litigious. 13 *Id.* 49. 13 *Pand. Fr. n.* 119.

We conclude, that, as there was no suit instituted in the present case, at the time the defendants purchased the right of Hebert's heirs, they did not purchase a litigious one.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendants, with costs of suit in both courts.

*** There was no case determined in October or November.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, DECEMBER TERM, 1820.

East'n District.
December, 1820.

MITCHEL vs. *JEWEL.*

MITCHEL
vs.
JEWEL.

APPEAL from the court of the fourth district.

Livingston, for the defendant and appellee, moved to have the appeal dismissed, because the whole testimony was not brought up. He showed that one Filhiol appeared by the record to have been sworn, and yet his deposition was not to be found among those of the other witnesses, which had been takeu down by the clerk, in order that they might serve as a statement of facts.

If the record shows that a number of witnesses were sworn and their depositions taken down, if that of one of them does not appear n the record, the certificate that the whole testimony is contained on the record, will induce a presumption that this witness was not examined, which will be rebuted by the appellee's affidavit that he was.

The counsel observed, that as both the clerk and the district judge had certified that the record con-

East'n District. *December*, 1820.

MITCHEL vs. JEWEL.

tained the whole testimony, the presumption must be that Filhiol, though sworn, was not examined.

Thereupon, the counsel introduced the affidavit of the defendant, showing that Filhiol *was* examined.

On this, *Turner*, for the plaintiff and appellant, moved for and obtained a writ of *certiorari*.

PAULDING vs. *KETTY & AL. SYNDICS.*

If the lessee gives his notes for the rent, and afterwa ds fails, the landlord has a privilege on the goods in the house.

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 rented a house to the defendants' insolvents, for one year, and took their notes for the rent, and before the expiration of the year, the lessees failed—that the amount of the said notes is a privileged claim on the goods, wares and merchandise, in the said house—that neither the insolvents nor the defendants have paid the said debt nor any part thereof.

The defendants pleaded the general issue, and a tender of the house and keys, &c.

The parish court gave judegent for the plaintiff for the amount of the notes, with privilege on the proceeds of the sale of the goods in the house at the time of the surrender. The defendants appealed.

The statement of facts shows, that the notes were given by the defendants' insolvents, to the plaintiff for the rent of the store occupied by them, the property of the plaintiff, for one year, ending on the 31st of November, 1820, and the amount of the notes was demanded of the defendants before the sale of the goods on the premises. On the 1st of July, the defendants tendered the house and key to the plaintiffs, who declined accepting them.

The plaintiff's claim was not affected by the cession made by his debtors. On the contrary, it became thereby payable immediately, although the day of payment agreed upon was not yet arrived. Had not the defendant obtained a stay of proceedings, the plaintiff might instantly have exercised the right of seizing the goods in the house. His not doing so, cannot be considered as a waver of his right of being paid by the sale of the goods. He has been guilty of no laches, and ought, therefore, to be paid by privilege on the goods, which were in the house at the time of the cession, which he was prevented from seizing only by the order for a stay of proceeding.

We cannot see on what grounds it may be contended, that the defendants had a right to put an end to the lease by a tender of the keys, &c.

It is, therefore, ordered, adjudged and decreed, that

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PAULDING vs KETTY & AL. SYNDICTS.

the judgment of the parish court be affirmed with costs.

Hennen for the plaintiffs, *Hawkins* for the defendant.

NOBLE vs. *M'MICKEN.*

APPEAL from the court of the third district.

See *Weeks* vs. *M'Micken*. 7 *Martin*, 54.

MATHEWS, J. delivered the opinion of the court. The material facts of this case are, in every respect, the same, as in that of *Weeks* vs. *M'Micken*. 7 *Martin*, 54. Money received by the defendant's clerk, for the amount of the plaintiffs, afterwards stolen in the defendant's store, and no circumstance shown, which might lessen the defendant's responsibility. Of the correctness of the principle, which we decided on in the former case, we have no reason to doubt. A similar judgment must, accordingly, be rendered in this.

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

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

East'n District.
December 1830.

CANFIELD & AL. *vs.* WALTON'S SYNDICS.

CANFIELD & AL. vs. *WALTON'S SYNDICS.*

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

An appeal lies from the discharge of a rule on syndics to produce their bank-book, &c.

In such a case notice ought to be given to all the syndics.

MATHEWS, J. delivered the opinion of the court. This is a proceeding founded on the 33d and 34th sections of the act of the legislature, passed in 1817, entitled an "act relative to the voluntary surrenders of property, and the disposal of debtors' estates." By the first of these sections, it is enacted, that whenever a creditor shall make a motion, to know whether the syndics have funds in their hands, the said syndics shall be bound to produce their bank-book, or accounts, &c. and, by the second, it is declared that, if they neglect or refuse to produce their bank-book or accounts, when required, a meeting of the creditors may be ordered for the appointment of their syndics, &c.

In the answer on the appeal, it is denied that the decision in this case is such, as to authorise an appeal. Although the judgment of the district court is perhaps not so conclusive, as to prevent the plaintiffs from renewing his motion, and prevent the parish court from again acting on it; yet, from the course this case has taken, under the 34th section of the act, we are of opinion, that the decision is so

East'n District. *December*, 1820.

CANFIELD & AL. vs WALTON'S SYNDICS.

far final, as to require an examination of it, in this court.

Whether, under the act on which these proceedings rest, any rule of practice has been established for carrying its provisions into effect, by the inferior courts, we are not informed. If the practice remains yet to be settled, it is thought, that the rule or order to be obtained against syndics, in cases like the present, ought to be one requiring them to do that which is prescribed by the law, or show cause to the contrary. In other words, it ought to be a rule *nisi*. This mode of proceeding would give a fair opportunity for defence, without causing unnecessary delay.

But, admitting that it was proper to make the order absolute in the first instance, before the syndics can be subjected to the forfeiture and penalty, inflicted by the last session, of the act relied on, we are of opinion, that it ought to appear that regular notice was served on them all; whereas, one of them only was served with the rule or order, according to the sheriff's return, which is contradicted by the oath of the party.

Considering the service of the rule to be irregular and incomplete, it is deemed unnecessary to take into consideration the bill of exceptions taken by the plaintiffs, or to examine the relative weight of the return of the officer, and oath of the party.

It is, therefore, ordered, adjuged and decreed, that the judgment of the parish court [discharging the rule] be affirmed with costs.

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

*** DERBIGNY, J. did not join in any opinion delivered during this term, and resigned his seat, towards the middle of it.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District. *January*, 1821.

EASTERN DISTRICT, JANUARY TERM, 1821.

At the opening of this term, a commission was read, bearing date of the second of January, 1821, by which ALEXANDER PORTER, Junior, was appointed a Judge of this court, with a certificate of his having taken the oaths required by law, for his qualification, whereupon, he took his seat.

WALKER & AL. *vs.* M'MICKEN.

WALKER & AL vs. *M'MICKEN.*

If, after the dissolution of the partnersip, one of the partners endorse a note due them, the endorsee is not bound so strictly to give notice, in case of non-payment, as

APPEAL from the court of the third district.

MATHEWS, J. delivered the opinion of the court. This is suit on a promissory note, brought by the appellees, as endorsees.

It appears from the evidence in the case, that the

note was made payable to a commercial house, the business of which has been conducted under the firm of M'Micken and Ficklin—that it was endorsed by M'Micken to the plaintiffs and appellees, for a valuable consideration, after the dissolution of his partnership with Ficklin.

if the note were regularly endorsed,

According to the law of partnership, it seems to be a settled doctrine, that, after the dissolution of a firm, none of the former partners can transfer, by his endorsement, the negotiable paper which belongs to the partnership, unless under an express authority, given him by the persons jointly concerned with him.

In the present case, it is contended, that such authority was vested in the defendant and appellant, by one of the articles of agreement for the dissolution of the partnership. Authority is there given him to collect all debts due to the firm and to pay such as might be due from it. For this purpose he is put in possession of all the books, notes, &c. of the firm, with power to exchange notes and accounts in the adjustment and settlement of the concerns of the partnership.

Here, it is true, is a power given to transfer or exchange notes, but it is limited to a spe-

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WALKER & AL. *vs.* M'MICKEN.

cific purpose, viz. the final settlement of the partnership affairs; and an endorsement or transfer, made for any other purpose, not being in pursuance of the power vested, is void. It is shewn by a contract between the parties to the present suit (found in the evidence in the cause) that, so far from the note in question having been endorsed or exchanged, in settling the affairs of the late firm, it was given in payment of property purchased by the defendant, for his sole and individual benefit. The transfer was made without authority in the endorser, and ought not to be subjected to the ordinary rules, relating to the demand of payment from the makers of notes and notice to endorsers.

By such an endorsement, the plaintiffs did not acquire a right to pursue the maker for the recovery of the amount of the note in their own names; but, as the endorser received from them its full value, we are of opinion, that he is bound to pay to them the sum therein specified, as on an original contract.

This view of the case, prevents the necessity of an inquiry into the sufficiency of the notice alleged and attempted to be proven by the appellee.

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

Turner for the plaintiffs, *Livermore* for the defendant.

LIVINGSTON vs. *HEERMAN.*

APPLICATION for a *mandamus.*

A party dissatisfied with the opinion of a court, stating his objection at the time, may draw his bill of exceptions afterwards.

A party has a right to demand and have the opinion of the court spread on the record, on any point of law arising in the cause.

PORTER, J. delivered the opinion of the court. By an order of this court, made last July term, a rule was granted that the judge of the district court for the first district, shew cause why a *mandamus* should not issue, directing him to sign certain bills of exceptions annexed to an affidavit made by the counsel of Heerman.

To this rule the judge has made a return, and assigned for cause; that he had refused to sign the bill of exceptions first mentioned in the affidavit of counsel, because it was offered to the decision of the judge on the submitting certain facts to the jury, and had not

* PORTER, J. did not join in this opinion, the case having been argued before he took his seat.

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been tendered until after the jury was sworn.

And that he had refused to permit the reasons offered for a new trial to be filed, because he did not think the grounds set forth admitted of further argument; most of them having been previously argued, and that this refusal was in conformity with the rules of his court.

In the discussion at the bar, which this return has given rise to, a great deal has been said on points not necessary to be decided on. It may be true, that this court has the right on appeal, to disregard impertinent facts which may have been submitted to a jury. It may be also true, that where special facts are to be found, the law has provided no means of taking down the testimony. But the opinion, which the court has formed on this motion, results from views of these subjects quite distinct from these questions, and they are alluded to now, to prevent misconstruction, and to enable us to say that no opinion has been formed respecting them.

It is provided by an act of our legislature, 1 *Martin's Digest*, 594, that "whenever on the trial of any suit in any of the inferior courts of

this state, the party or his counsel shall desire the opinion of the court, on any question of law arising in the course of such trial, it shall *be the duty of the court to give such opinion*, and either party, if dissatisfied with such opinion, *may except thereto*, and the said opinion and exception *shall be entered on record*, with so much of the testimony taken in the said suit as may be necessary to a full understanding of such opinion, and the same on appeal, shall be sent up with the other proceedings in the cause."

The legislature by this provision seems to have anxiously guarded the right of each of the parties to have the opinion of the court *on any question of law*, which during the progress of the cause they may choose to ask it on, and to have secured by an imperative direction, the right to have that opinion, with the exception thereto placed on record. There is, consequently, nothing left us for to enquire, except to ascertain, whether the opinion asked of the court in this case *was on a question of law*. If it was, the act of the legislature must be obeyed.

According to the affidavit of the counsel—he demanded the decision of the court, whether certain *facts*, about to be submitted by

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the plaintiff were pertinent, and he objected they were not. The decision of the court asked for and required by this objection, was most clearly a matter of law; and being so, it was the undoubted right of the party dissatisfied therewith, to have his bill of exceptions signed and spread on the record.

This so clearly results from the statute, that the plaintiff, who opposes this *mandamus*, endeavours to take it out of the rule which governs ordinary cases, by shewing that the defendant did not in truth *except* to these facts, being submitted to the jury—that he only said, *he would except;* that he did not draw out and tender his bill of exceptions, when the court decided on the pertinency of the issues submitted, and that it was too late to do so after the jury was sworn.

On this point the only evidence before the court, is contained in the affidavit of defendant's counsel, which states, that previous to the jury being sworn, he declared he would except to the facts submitted on the part of the plaintiff, and that he would tender a bill of exceptions thereto in form.

The court understand the law to be, that it is sufficient, if the party who is dissatisfied

with the opinion of the court, states his exception at the time the opinion is given; and that he may draw up said exception, put it in form, and present it for the signature of the judge at any time during the trial, and this is conformable to the practice in other countries, where this mode of obtaining relief against the errors of inferior tribunals is adopted and in use.

The question here then is reduced to the simple enquiry, if the party saying he would except, and tender his bill of exceptions, is equivalent to actually excepting. We understand it to mean the same thing, and think the judge ought to have signed the bill that was tendered him.

On the other point, namely, the right to spread on the record the reasons which either party may think proper to allege, as the ground of a new trial, there is as little difficulty as that first directed. This court has already declared in the case of *Sorrell* vs. *S. Julien*, 4 *Martin*, 508, that the refusing to grant a new trial was a proper subject of revision here, and one over which this court ought to exercise a controul. Taking this for granted we cannot, of course, sanction a

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proceeding which would enable the inferior court to withhold from us the means of carrying into effect the appellate jurisdiction of this tribunal. Let the *mandamus* therefore issue.

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

DITMAN vs. *HOTZ.*

An award, in the French language, cannot be homologated.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This is a suit to have a decision of arbitrators homologated. In the petition it is alleged that the parties having had differences respecting the settlement of their accounts, had agreed on a compromise, and had submitted all matters contested between them to the dicision of certain persons therein named. That these arbitrators, and an umpire by them chosen, had made their award, by which they had sentenced the defendant, Hotz, to pay to the plaintiff and appellant the sum of $560; and that the said defendant, though duly notified of said award, had refused therewith to comply. The petition con-

cludes by a prayer, that the court may approve said award, and order it to be put in execution with interest and costs.

To this petition the defendant answered, that the award of said arbitrators ought not to be homologated.

1. Because it ought to contain the reasons and motives of the arbitrators.

2. Because it ought to be clear and precise, and that on the contrary, it is vague, obscure, uncertain and unintelligible.

3. Because it ought to be written in the English language.

4. Because for the same reason it does not appear properly that the arbitrators were sworn as they ought to have been.

The judge before whom the cause was tried, refused to homologate the award, on the ground that it was not drawn up in the language in which the constitution of the United States is written, and by reason that it was not otherwise sufficiently certain.

From this judgment the plaintiff appealed.

The opinion which the court formed on the third objection set forth in the defendant's an-

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swer, renders it unnecessary to examine the other points made in the cause.

The constitution of this state has provided, *art.* 6, *sec.* 15, "That all laws that may be passed by the legislature, and the public records of the state, and the judicial and legislative written proceedings of the same, shall be promulgated, preserved, and conducted in the language in which the constitution of the United States is written."

To ascertain whether the sentence of arbitrators, to which the aid of this court is demanded in order that execution may issue on it, is such an act as comes within the provision just cited; it is necessary to examine what is the nature of the act itself, and next what is the power of the court in relation to it. If it is merely the evidence on which judgment is to be rendered, then it may be written in any language the parties choose to adopt. If on the contrary, it should be found to be a judgment in itself, and over which this court has no controul, except to place it on the record, and order its execution; it will then follow, that it must be drawn up in that language in which our constitution requires judicial proceedings to be preserved and conducted.

Proceeding in the enquiry, we find that nearly every feature presented by a suit at law belongs equally to proceedings carried on before arbitrators, there is common to both modes of litigation, *actor, reus & judex*, the *contestatio litis*, and judgment on the issue joined. Our laws have provided that the persons selected as arbitrators must take an oath to decide correctly all matters submitted to them with integrity and impartiality. That the parties *must declare their pretentions, and prove them* in the same manner as in a court of justice, that arbitrators should determine as judges agreeable to the strictness of the law, *Civil Code*, 442, *art.* 12, 13, 14, and that the party not satisfied with the sentence may take an appeal, *Civil Code*, 444, *art.* 33. The court, whose aid is required to give the award effect, by ordering its execution, is prohibited any re-examination of its merits, and confined to the mere ministerial duty of enforcing the sentence, *Civil Code*, 444, *art.* 32. It is classed among judicial mortgages by a provision of our laws, which declares that *the sentence of arbitrators* gives a mortgage from the day execution is ordered by the judge, *Civil Code*, 454, *art.* 12, and finally, if not reversed on appeal.

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it obtains the authority of *res judicata*, and has, between the parties, the same effect, *Curia Phillipica* 2, *c.* 14. *no.* 28: *Part.* 3, 4, 35.

With the exception then, that the aid of another tribunal is required to give effect to the decision of arbitrators, it is not easy to perceive the difference between their award and the judgment of a court. But whatever may be the proper character of proceedings of this kind, carried on before judges of the parties own choosing, and whether they are "judicial proceedings," or not in the language of the constitution, a question not necessary at this moment to decide, this court is clearly of opinion that whenever one of the parties who may have submitted their cause to arbitrators, applies to courts of justice to have the decision of their arbitrators executed, that with this application at least commences a "judicial proceeding," and that to make the award valid which the party thus presents for homologation, it must be written in that language which the constitution requires, otherwise it would not judicially appear on the records of the court, by virtue of what sentence or judgment execution was ordered.

If indeed, as has been contended, the tribu-

nal to whom application is thus made, could new model the decision of the arbitrators, give judgment in another form, and in other words, then the objection here taken perhaps could not be sustained. But after the most attentive consideration, we have been able to bestow on the subject, we do not see how such a power can be exercised; all that the court can do, is to order that the award be executed, to direct that execution issue on the judgment presented: in making this order, it of course becomes necessary that the judgment which authorises it should be placed on record, and to be so placed, it must be in that language in which is written the constitution of the United States.

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

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

JULIEN vs. *LANGLISH.*

If freedom be given to a slave, under the express condition that he shall serve his present

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The petition states, that Peter Lang-

East'n District. *Jan.* 1821.

JULIEN *vs.* LANGLISH.

master, as before, till he die, and he afterwards refuse to serve him, and attempts to compel him to accept a monthly compensation in lieu of his services,—he cannot claim his freedom after the master's death.

lish, now deceased, being in his life-time the owner of the plaintiff, a black man, emancipated him on the 24th of October, 1814, by a notarial act, after having fulfilled all the formalities which the law requires: the act has a suspensive clause, by which a condition is annexed to the emancipation of the plaintiff, who was thereby bound to continue to serve the said Peter, as before, till his, the said Peter's death, when the plaintiff was fully and without further restriction to enjoy his freedom.

The plaintiff alleges, that in order to comply with this condition, he, ever since, gratefully and exactly as before, served the said Peter, and regularly paid him twenty dollars per month, in conformity with an agreement on that subject made between them, and rendered him other services, when requested, till the 23d of April, 1818. In the course of which year, the said Peter instituted a suit against him, and one B. Schons, in the parish court, to have the aforesaid deed of emancipation annulled; in which suit, the said Peter finally failed, 5 *Martin*, 405. The judgment of the supreme court thereon pronounced, on the 23d of March, 1818, had scarcely become final, when,

on the 8th day of the following month, the said Peter executed what is called a deed of revocation of his deed of emancipation, before a notary, and on the 23d, the plaintiff was, through the agency of several ill-disposed persons, who availing themselves of the old age and infirmities of the said Peter, had prevailed on him to execute the deed of revocation, arrested, and deprived of every article of property, even of his clothes, dragged to jail, and inhumanely whipt: whereupon, in order to prevent the recurrence of such abuse, he resorted to the authority of the law, and instituted a suit against the said Peter, which he was afterwards advised to, and did discontinue.

The petition further charges, that the said Peter, on the 9th of December following, instituted the present defendant his heir, and she now, the said Peter having since died, wrongfully claims and detains the plaintiff as a part of the testator's estate.

The answer states, that the plaintiff is, and has ever been a slave; and is the property of the defendant;—that the pretended deed of emancipation is null and void; that admiting its legality, it cannot avail the defendant.

East'n District. *Jan.* 1821.

JULIEN *vs.* LANGLISH.

being a *donatio mortis causâ*, and having been revoked. The general issue is pleaded.

The district court gave judgment for the plaintiff, being of opinion that "the act of emancipation was executed in due form of law, and the plaintiff acquired by it an absolute and indefeasible right to his freedom, as the person therein mentioned; and between the execution of the act and the death of said Peter, the latter had the same rule and authority over the plaintiff as he had before; but the right of freedom, having once been acquired, could not afterwards be altered or forfeited by any act of the plaintiff or his master—because it is inalienable." The defendant appealed.

The documents which come up with the record, are the acts of emancipation and revocation; the proceedings in the suit brought by Peter Langlish, to have the first act annulled, and in the suit brought against him by the present plaintiff, referred to in the petition.

The deed of emancipation purports, that Peter Langlish, "by these presents, gives freedom to his negro slave, named Julien, 46 years of age, gratuitously, and to remunerate

him for his fidelity and former services, and those he is to render him until his death; which freedom is given, under the express condition, that he shall serve his present master as before till he die; after whose death he is to enjoy it fully, without any opposition or contradiction from any person whatever. Wherefore, *au moyeu de quoi*, he divests himself and parts with all his right of property and actions on the said slave Julien, in order that he may deal, contract, sell, purchase, make a will, and enjoy all the privileges of a freeman, after the grantor's death."

Boisgobert deposed, that Peter Langlish told him, the plaintiff should never serve any other master after his death—that the plaintiff always conducted himself well, and never ran away. It is in the deponent's knowlege, that the plaintiff continued to serve his master faithfully until he was put in prison. About ten years ago, P. Langlish told this deponent, that the plaintiff worked in town, and paid him eighteen dollars per month. The deponent then lived on the bayou, and now lives on the bayou road. P. Langlish lived at the Metairie, about a league and a half from town. The deponent has since been frequently in

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the neighbourhood, and seen the plantiff coming out of his master's plantation with vegetables.

A number of other witnesses testified to the same fact.

The gaoler deposed, that the plaintiff was brought to the gaol, on the 23d of April, 1818, and whipt. This was done, and he was detained on the verbal order of the defendant, by one Valcour, who conducted the plaintiff to gaol. The latter remained there, till released by an order of court, on the 23d of May following.

Dutillet saw the plaintiff when he was going to gaol, and asked him what was the matter: he replied, that his master, who was an old rogue, sent him to gaol and wanted to deprive him of his liberty.

Another witness deposed to the same fact.

Beaulieu deposed, that he knew P. Langlish for twenty-two years—that he enjoyed his mental faculties till his death.

The deed of revocation bears date of the 18th of April, 1818. P. Langlish therein declares, in general terms, that he has "just and valid motives to change his dispositions," and revokes and annuls the act of emancipation.

We are of opinion, that the plaintiff has not proved that he fulfilled the condition on which he was to be free at his master's death, and it is in proof that he did not. He refused to serve him as a slave, and was desirous of compelling him to accept, in lieu of his services, a monthly compensation of eighteen dollars. He brought a suit for this purpose, which he afterwards discontinued. The testimony of Dutillet, and the witness who followed him, shew that he insisted on enjoying his freedom before the death of his master, since he charged him with being an old rogue, who was seeking to deprive him of his freedom.

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 defendant.*

Seghres for the plaintiff, *Mazureau* and *Morel* for the defendant.

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* PORTER, J. did not join in this opinion, the case having been argued before he took his seat.

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GALES' HEIRS
vs.
PENNY.

GALES' HEIRS vs. *PENNY.*

APPEAL from the court of the third district.

If A. promise to B. to do a certain thing and fails, C. cannot maintain an action on this promise, on the ground that the knowledge of this promise induced him to contract with B.

PORTER, J. delivered the opinion of the court. The plaintiffs allege that a suit had been commenced in the third district court, for the parish of East Baton Rouge, by one Lilley, against a certain Thomas C. Stannard. That the defendant was arrested and held to bail. That their father Christopher Gales, now deceased, became his security and signed a bail bond in the usual form. That Lilley prosecuted his suit to final judgment against Stannard, and that not being paid by him, he commenced an action against their ancestor on the bail bond, and received from him the sum of $1300 which has been since paid by his heirs.

They further allege, that one James Penny, the defendant and appellee, and father-in-law to the said Stannard, had craftily, and deceitfully induced their ancestor to sign the said bond, on a promise to save him harmless from all consequences resulting from his engagement; the petition concludes by averring that he, the said Penny, had not fulfilled this engagement, their damage by reason thereof, $1500, and praying judgment for the amount.

There was but one witness introduced in the cause, and his evidence in substance is, "That in the suit of *Lilley* vs. *Stannard*, process was put into his hands against Stannard, and bail required, that a day or two after the arrest, Stannard (who had been suffered to go at large on the witness's responsibility) and captain Penny, the defendant, came into his office together, and that Penny mentioned, that he and captain Gales were to be the securities of Mr. Stannard, the day following was appointed for executing the bond. The witness drew the bond and referred it for signing, inserting the names of the two sureties. Next morning being informed that Penny was about starting to New-Orleans, and apprehending some difficulty, he called on him to sign the bond before he went away; Penny answered that he was in a hurry, that Gales could sign it when he came in, *but did not direct witness to tell Gales to sign the bond, only said he would sign it on his return;* a few hours after Penny was gone, captain Gales came with Stannard, the witness presented him the bail bond, Gales asked where Penny was, he was answered that he had gone to New-Orleans, on learning which Gales refused to sign. But

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ultimately agreed to do so, on being informed by Stannard, and witness, that Penny had agreed to sign the bond; some time after Penny returned from New-Orleans, witness called upon him, and asked him to put his signature to the instrument already signed by Gales. He refused, *does not believe that Penny and Gales ever had any conversation with each other on the subject.* On his cross-examination the witness deposed, that it was three months after Penny's return before he called on him to sign the bond; that he communicated his refusal to Gales immediately; that Stannard remained in Baton Rouge five or six months after Gales was informed of Penny's refusal to become co-security. *There was judgment for defendant, and the plaintiff appealed.*

If the defendant be liable in this case it must be either,

1. Because he fraudulently induced the ancestor of the plaintiff to sign the bond on a promise to save him harmless; or,

2. Because he engaged to become co-surety, and is bound by that engagement to the same extent as if he had actually signed the instrument.

I. There is no evidence that the defen-

dant induced Gales to sign the bond by false representations, or indeed, that he made any representations to him on the subject. The witness proves that Stannard and Penny came to his office, and that the latter observed, that he and Gales were to become securities. But which of them proposed this to the other we cannot learn. It is most probable they both consented to become so at the solicitation of Stannard. The witness declares he does not believe that Penny and Gales had any conversation on the subject. There is nothing in the record therefore which authorises the plaintiffs to recover on this alligation, that their ancestor was deceived and defrauded by the defendant.

II. On the other ground, the evidence is equally defective in supporting the plaintiffs pretentions. On looking into it, we do not see any thing which proves that the defendant ever entered into a contract with the father of the plaintiffs; in regard to becoming co-security for Stannard, that he ever made him a promise, or came under any engagement to him in respect to it. *The promise proved, was to the sheriff, not to Gales*, and the former might perhaps, have maintained an

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action for the non-performance of it. But the plaintiffs cannot; the only ground on which it can be at all alleged, that the plaintiffs have sustained injury by the defendant's promise to the sheriff, is, that in consequence of it, their ancestor was induced to sign the bond, which has since been paid by his representatives. But this is too remote a consideration to form the ground of legal responsibility, and it would be carrying the doctrine on this head, to a most dangerous extent, to say, that because A. has promised B. to do a certain thing, and fail to do it, that C. can maintain an action for the breach of this promise, because a knowledge of that promise was the leading motive that induced him to contract with B.

This opinion renders it unnecessary to examine the other questions raised by the defendant, as to the right of the plaintiffs to bring the suit, and the competence of a single witness to prove the facts on which recovery was demanded.

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

Preston for plaintiffs, *Eustis* for defendant.

BRUNEAU vs. *BRUNEAU'S HEIRS.*

In the Spanish law, as under the civil code, the community of goods between married persons existed, without being stipulated for.

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

MARTIN, J. delivered the opinion of the court. The plaintiff, widow of the defendants' ancestor, claims from them one half of the property acquired during her coverture, and $500, which she alleges were received by her husband (part of her paraphernal estate) or which she brought in marriage.

They resist her claim, on the ground that she produces no marriage contract in support of her pretention to a community of goods, and they deny that their ancestor received any thing as her paraphernal, or dotal property.

The parish court gave judgment for her, and the defendants appealed.

The facts appear by depositions and documents which come up with the record.

These shew, that the plaintiff was married in the year 1791, in the parish of St. James. Some of the witnesses depose, that there was a marriage contract, and one of them, that he heard it from the plaintiff herself. But no

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trace of it appears in the office of the parish judge. At the time of her marriage, she had a claim for $525, for a tract of land which she had sold, the price of which was not yet payable; and, after her marriage, she gave acquittances for $500, in part of it, and it is in evidence, that the defendants' ancestor mentioned his having received that sum.

It is in evidence, that the marriage took place in the parish of St. James, and that the records in the office of the parish judge have been closely examined, and he has sworn that no trace of the plaintiff's contract of marriage is to be found among the papers delivered by the commandant of the parish, who alone acted at that time as a notary in that parish.

I. As the marriage took place while this country was under the dominion of Spain, the laws of that kingdom afford us the only legitimate rule of decision.

Whatever husband and wife acquire or purchase during the marriage, is to be divided among them by halves. *Recop. de Cast.* 5. 9. 2.

The goods which husband and wife acquire during the marriage, whilst they live together, are to be divided between them by halves. in

these kingdoms of Castille: and even when they proceed from a donation made to them by the king or other person; or, if they have purchased them, it matters not whether the purchase was made in the name of either or both, because the time of the purchase is alone to be considered, not the party in whose name it was made; for in this respect, husband and wife are considered as one person; and unless it should appear what are the goods, and their value, which each party brings in marriage, or which had been given to him separately, or which he has inherited during the marriage, all are presumed common. 1 *Febrero Contratos*, 1, 2, *n.* 9.

This part of the Spanish law has been transcribed in one of our statutes. *Civ. Code*, 137, *art.* 64 *and* 67.

The law rendering the wife, by the marriage alone, a sharer of the property acquired by the husband, if this advantage was renounced by a marriage contract, or if any other change was made in the provisions of the law, he ought to produce the contract. It cannot be imputed to the plaintiff, that she does not produce hers, although she is proven to have said that there was one. She claims

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nothing under it: she has made every reasonable effort to procure a copy, if it existed, by a search in the office in which it ought to be.

A wife seldom takes the precaution of preserving a copy of her marriage contract. It is deposited with the notary for the benefit of every person interested therein; and when she places her person and property in the power of a man, a woman seldom keeps her papers from him.

II. Although the receipt for the $500 was signed by the plaintiff alone, it is in evidence from the lips of the defendants' ancestor, that the money came to his hands. This is not contrary to the receipt; for the wife may well, after the receipt of the money, have handed it over instantly to her husband, which is what ordinarily happens. The receipt proves only *rem ipsam*, the *payment* of the money by the debtor, which is the *receipt* by the creditor, although the money may not be directly and instantly paid into his hands.

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

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

ALLAIN vs. *YOUNG.*

APPEAL from the court of the third district.

If a slave of a bad character is pursued on suspicion of felony, attempts to seize a gun, flies, and is killed in the pursuit, the supreme court will not disturb a verdict for the defendant, who killed him.

MATHEWS, J. delivered the opinion of the court. This is a case in which the plaintiff seeks to recover damages to the value of a slave, alleged to have been killed by the defendant.

The case was submitted to a jury, who found for the latter, and from the judgment rendered on the verdict, the former appealed.

The evidence in the case shews property in the appellant, and the killing by the appellee. The only question is, whether the killing took place under circumstances that justify it.

The testimony which comes up with the record is multifarious, but from it we gather the following facts, that the slave was in the habit of going at large without a written permission from his master; that he was of a bad character, and was killed in the defendant's attempt to arrest him, on a suspicion of his having committed a felony, whilst he was endeavouring to effect his escape, having attempted to seize a gun.

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The verdict of the jury is general, and decides both the law and facts of the case, and it is the opinion of a majority of this court, that the verdict and judgment are correct.

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

Eustis for plaintiff, *Turner* for defendant.

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DOANE vs. *FARROW.*

APPEAL from the court of the first district.

Notice of the taking of depositions out of the state is to be given as in case of depositions taken within.

But, it is not necessary that the giving notice should appear by the return of the commissione, it may be proved by affidavit.

The day should be mentioned in the notice.

Notice must be served on the party if present, otherwise on the attorney.

Smith, for the defendant. Certain depositions taken at Mobile, in Alabama, under a commission issued out of the court below, at the instance of the plaintiff, being offered in evidence on the trial, were over-ruled, on the objection of the defendant's counsel, for want of due notice of the execution of the commission: from which decision (amounting to a nonsuit, there being no other evidence) the plaintiff has appealed.

To the return to the commission was annexed, the copy of *a notice*, addressed *to the defendant*, and signed by John Manager, as commis-

sioner, dated, Mobile, *May* 29*th*, 1820, apprising the defendant that the examination of witnesses, on the part of the plaintiff, would be proceeded in at a certain office in Mobile, between the *hours of* 10 *o'clock*, *A. M.*, *and* 5 *o'clock*, *P. M.*, and be continued, by adjournment, from day to day, until finished. *At the foot* of the notice, the defendant is invited to name *one* commissioner. *No day* is named in the notice to which the hours expressed might belong. On the back of the notice is the affidavit of a certain Neife, that he served it on *Col. Harris*, *agent and partner* of the defendant, at the Red Bluffs, on the opposite side of the bay of Mobile, *on the* 1*st of June.* The affidavit is made before J. Manager, as commissioner, on the 1st of June.

On the part of the plaintiff, it is contended that this was a sufficient notice; but, that if not, another notice, specifying the time and place of executing it, had been served by the *counsel* of the plaintiff, on the *counsel* of the defendant, *in New-Orleans*, prior to the issuing of the commission. In proof of this, the affidavit of the plaintiff's counsel was exhibited at the trial. *No such* notice *is certified in the return* to the commission. By this evidence of

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another notice, (even if *testimonial* proof were admissible in lieu of the certificate of the commissioner, and in implied opposition to it of the notice relied on) it does not appear that it even named the commissioner on the part of the plaintiff. A counter affidavit of the defendant's counsel states, that this notice addressed *to him* was refused for the reasons that the place of caption was at a distance, *in another state*; and that the defendant, or his agent, (one of whom probably, and *the other certainly*, because there resident) would be very near the spot, and would be the proper subject of such a notice. It appears too, that the defendant was not a resident of this state: that he was interested in a contract with the government, for building the fortifications on Mobile bay, likely to detain him there for a long period: and that "Col. Harris, his agent and partner," was actually resident with his family at *Red Bluffs*, opposite to Mobile.

In this case, it is contended for the defendant, that the depositions must be rejected. In the first place, because the return to the commission, as a written proof, ought to contain within itself, without any deficiency, the evidence of its own authenticity and regularity.

The right to cross-examine is fundamental, and indispensable to the defendant's being placed on an equal footing with the adverse party; every preliminary proof of the perfect enjoyment of that right ought to appear on the face of the paper exhibiting the evidence, for the party who had obtained the commission. This will be rigorously required, because, emanating from the commissioner himself, at the time, and making a part of the very act of embodying the depositions, it is clearly the best evidence of such facts. Further, this mode of obtaining evidence ought to be thus strictly guarded, both from its manifest liability to abuse, and from the intrinsic imperfection of the nature of the evidence itself. Now, the right to cross-examine cannot, according to good faith, be adequately extended to the adverse party, without a reasonably antecedent notice to him, or to his agent, if known to be resident at, or near the place of caption, and especially, if that be situated in another state. The right to obtain evidence, by commission, at all, being founded, not on its own excellence as a mode, but solely on the equitable regard to the rights of the party obtaining it, which might otherwise be

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infringed, it ought to be exercised with an observance of every thing which equity can require for the rights of the adverse party. The notice therefore, ought, in all cases where the scene of caption is beyond the jurisdiction of the state where the cause is entertained, to be served on the party himself, or his agent, if conveniently practicable: it ought to have convenient certainty, as to the time and place of taking the depositions, and the name of the commissioner, if not already named or agreed on, who is selected to take them. It ought, perhaps, to proceed from the nominated commissioner himself, who certainly can, with the least liability to error, give the information it should contain: at least, before the interrogation of witnesses, proof of such notice ought always to be exhibited to his satisfaction; which proof would then regularly appear along with the other parts of his proceeding in his certified return. To allow these facts to be made out, by other and inferior proof, would often be exposing a party to the strong temptation of seeking witnesses to bolster-up a favourable deposition, obtained perhaps by the omission of somewhat of that perfect fairness which equity would demand

for the adverse party. This reasoning is supported by its analogy to the act of congress, and sundry decisions of the state courts. By the act of congress of 1789, (*Grayson, Tit. Judiciary, sec.* 30, *p.* 248) requiring, that in obtaining evidence by the depositions of distant witnesses, *the notice*, if any to the adverse party, should be *certified by the commissioner in his return.* In the supreme judicial court of Massachusetts, in the case of *Bernes* vs. *Ball, & al. adms.* (1 *Mass. T. R.* 75) a deposition taken under the order of the court was excluded, because it did not appear *by the certificate of the justice* who had taken it, that the adverse party, or his attorney, was notified or present: and the offer of *testimonial* proof of notice, and of the consent of the adverse party, that the deposition might be taken, *ex parte*, in the event of his absence, was rejected. In the court of appeals of Virginia, (2 *Washington*, 75, *Collins*, vs. *Lowrig, & co.*) it was decided, that whether a deposition have been taken, *de bene esse*, or in chief, *notice* must have been given to the adverse party, and must *appear upon the record* to have been given, else it will be erroneous. See too, 1 *Harris & M'Henry*, 172, 3. *Thomas* vs. *Clagget*, where a deposition was

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rejected, because it did not appear that notice had been lodged with the clerk of the county *to be recorded;* although it was proven that notice had been given to the defendant twenty days beforehand, of the day and place: and that the defendant had attended accordingly, and cross-examined; which case, though depending probably on a particular statute, is still an illustration of the strictness that should be observed, in guarding this mode of obtaining evidence. In Pennsylvania, (2 *Sargent & Rawle*, 478, *Hamilton* vs. *M'Guire*) it is decided that notice must be sufficiently antecedent to the taking of the deposition, to afford a *reasonable time* to the adverse party to avail himself of it. In Virginia, (4 *Henry & Munf.* 1, *Coleman, ex.* vs. *Moodie*) it was decided that a notice of the taking of a deposition served *at the domicil* of the adverse party, on *his wife*, during *his absence* from the commonwealth, which *might have been served upon himself*, was not a *reasonable notice*, and the deposition was rejected.

Applying the principles of this reasoning, and these authorities, as a test, in the first place, of the notice certified in the return, it is deemed to be fatally defective; 1st, for *un-*

certainty in having assigned *no day* to which the specified *hour* could belong; and in the next place, assuming the day of the date for that purpose; then, for being unseasonable in being signified to the agent of the defendant, three days *posterior* to the appointed day of executing the commission.

Can the alledged notice of the *counsel* of the plaintiff, to the *counsel* of the defendant *in New-Orleans*, prior to the issuing of the commission of the intention of *another* person, (*not* yet *named*) to take depositions *at Mobile*, supply the defect of a sufficient notice certified in the return?

It is contended on the part of the defendant, that it cannot,

1st. Because the plaintiff has *undertaken*, through his commissioner, to give *personal* notice to the defendant himself, and which has been annexed and *certified in his return* to the commission: shall he not be *concluded* by it? Is it not an implied admission that he relied on *no other notice*, or if he had, that he had abandoned such reliance? does it not show that he was aware of the duty, (especially under these circumstances) of giving personal notice to the defendant himself: that he was

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well aware of the residence of the defendant's "agent and partner," and that, that "agent and partner," (if not the defendant himself, as is believed) was there, almost within call: and further, that he was not ignorant of the importance (to the regularity of his depositions) of making that notice appear in the certified return.

The alleged notice to the *counsel* in New-Orleans, cannot supply the defects of that which was given by the the commissioner, and certified in his return; because, in the second place, the evidence of that notice to the counsel, if otherwise good, could not, upon the principles already contended for, competently appear by the certified return.

In the next place; because in all cases where the party in the cause is *resident out of the jurisdiction of the state* where the cause is entertained, it is *not enough* to give *notice to the attorney at law.* This proposition rests firmly on the basis of the defendant's whole argument; which is, that this mode of obtaining evidence being intrinsically and peculiarly defective, and easily liable to abuse; and a benefit equitably extended to a party, only to avoid the loss of otherwise unattainable evi-

dence, he is bound in resorting to so favourable an aid, to observe towards the opposite party, every thing which equity can require for him. But equity plainly requires, that he should, so far as possible, be afforded the opportunity of effectually cross-examining. Now, when the opposite party resides elsewhere than within the state, it is, especially, not to be presumed, that the attorney *at law* can obtain so intimate a knowledge of all the circumstances relating to the testimony sought, as to be able to cross-examine, with the advantage which a seasonable notice to his client would afford. Equity then exacts, *in such case*, more than notice to the attorney *at law*. The reasonableness of this position is supported by the case of *Cahil*, executor of *Quin* vs. *Pintony*, (4 *Munf.* 371) which directly decides, that, in the absence of the principal from the commonwealth, notice to the attorney *at law* is insufficient. But in the case before the court, not only was the principal not resident in the commonwealth, where the cause is entertained, but *the place* also where the *depositions* were to be taken, *was in another state*, and entirely beyond the sphere of his practice. Since then, as is evident, his professional duties in his own

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courts, forbade the presumption, that he could *personally* comply with the obvious purpose of the notice; to what imaginable end was it signified to him? Let it be remembered, that he was not the attorney, *in fact*, of his client; that, therefore, to have appointed a substitute was beyond his powers; and, as to the agency of transmitting this notice *for the plaintiff*, (if that be in view) and for which he could have no greater facilities than the plaintiff himself, it manifestly does not fall within the circle of his duties as the conductor of a suit at law. It could as well have been addressed through the *post-office*, directly to the defendant himself, or to his agent and partner; or, enclosed with the commission, and by the commissioner transmitted to the defendant, or his agent, in his vicinity. Thus the uncertainty, at least, of this notice, arising from the source of it, would have been somewhat diminished, since the act of the commissioner, forwarding such notice, would have implied, at once, his satisfaction of it and his acceptance of his trust.

But, besides these objections to the alleged notice to the *counsel* of the defendant, it is further answered, that he *declined accepting it;* pointing out the defendant himself, or his

agent, (in the vicinity of the place of caption) as the proper subject of such a notice.

By this refusal, which certainly his professional duty did not forbid; the plaintiff, if, before he could have doubted, was now apprized of what he should do for the exact fulfilment of his duty in this respect; and this, too, in time to have fulfilled it; and not by being subjected to any onerous, or unusual, or circuitous task; but, by the natural, very equitable act of simply giving notice to the defendant himself, or to his agent; well known to the plaintiff as the real party, and with whom, alone, his alleged contract was made; whom, chiefly, he holds liable for its pretended violation; and who, also, was known to be resident almost within hail of the place of caption. Why did the plaintiff observe so careful a silence towards the defendant, especially when so conveniently situated for hearing? Was his colourable notice, annexed to the return, a fulfilment of that perfect good faith which the law exacts from him whom it so equitably aids? Whatever may have been the motive, the effect of this anti-dated, but post-delivered notice, annexed to the return, if good, would be to de-

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prive the defendant of the privilege *expressly reserved* to him, of naming *one* commissioner. The very reservation of this right, apparent on the face of the notice, clearly implies the anticipation of some reciprocal communication between the parties, at the place of caption. It was a right of which the defendant could not regularly be deprived. Commissioners must be appointed, either by the agreement of the parties, or by the order of the court. In this instance the commisioners were not named by the court, nor has the defendant consented to an *ex parte* taking of the depositions. For this cause, also, the depositions have been irregularly taken, and therefore ought to be suppressed.

Livermore, for the plantiff. It appears, in the present cause, that the plaintiff is a citizen of Massachusetts, and the defendant a citizen of Virginia; neither of them having a permanent residence in this state. The defendant having business which required his presence sometimes in New-Orleans, and sometimes in Mobile, was arrested here, and liberated upon bail. Upon the return of the

writ, an answer was filed by his attorney, and a commission taken out, addressed to J. T. Manager, authorising him to take the depositions of witnesses in Mobile. Afterwards the plaintiff's attorney gave notice to the defendant's attorney, that witnesses would be examined at a certain place in Mobile, on the 29th of May, and that the examination would be continued from day to day. The commission was opened on the 29th, but continued, by adjournment, to the 2d of June. On the 29th, the commissioner addressed a written notice to the defendant's partner, the defendant being then in New-Orleans. This notice was served on the 1st of June.

The defendant objects, that he had not due notice of the time of taking these depositions. The notice by the commissioner is said to be too uncertain. Although, we believe, that this was a notice of which the defendant's agent might have availed himself, and ought to have done so; yet as we consider it to have been a work of superogation, and that the former notice given to the defendant's attorney, was amply sufficient to satisfy the requisitions of the law, I shall not dwell upon this notice in Mobile. The uniform practice has

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been, to give notices of this description to the attorney in the cause, and not to the party. If this practice has originated in error, it is important to the bar, that the error should be corrected. If even doubts can exist upon this point of practice, it is desirable that the practice should be settled.

It is contended, that the notice should be given by the commissioner, and not by the party or his attorney; that it should be given to the party and not to his attorney; and that the service of notice should appear by the return to the commission, and cannot be proved by affidavit.

In support of these positions, the gentleman has cited the act of congress of 1789, for organizing the courts of the United States, two cases from Virginia reports, and one from Massachusetts. His other citations do not seem to bear upon the question. The practice of the courts of the United States is that of the common law courts of England. By the strictness of the common law, testimony must be taken in open court, in presence of the jury. The act of congress dispenses with the necessity of this examination, in cases where the witness resides more than one hun-

dred miles from the place of trial, but prescribes certain formalities to be observed in taking depositions; and requires, that the observance of these formalities should appear by the certificate of the judge before whom the testimony is taken. The authority is given only to the judges of certain courts, and the act requires, that the deposition shall be reduced to writing by the judge, or by the witness in his presence, and that this shall also be certified. This certificate might as well be required in this case as the certificate of notice. These are all matters of positive regulation, and furnish no rule for the government of courts which do not derive their authority from the United States. Nor does the admissibility of depositions, as evidence in our courts, depend upon the statutes or laws of Virginia or Massachusetts. In the case cited from 1 *Mass. Rep.*, the provisions of the statutes of that state, respecting depositions, do not appear; but we find, that of three judges, one was in favour of receiving the depositions, and two were against it. The cases cited from the Virginia reports, evidently depend upon the positive regulations of the statute laws of that state. The note of the case of *Cahil*,

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executor of *Quin* vs. *Pintony* is, that "notice of taking depositions is not sufficient if given to the attorney-at-law, in the absence of the principal from the commonwealth, but ought to be given to the agent or attorney in fact; or (if there be none) by publication in the manner prescribed by law." In the other case cited by the defendant's counsel, (*Coleman* vs. *Moody*) it is stated, that the notice was not considered reasonable, because advantage was taken of the temporary absence of the party, and the notice left with his wife, when the adverse party knew of his absence; when he might have given the notice previously, or without prejudice of the trial of the cause, have postponed the taking of the depositions until his return. The most that the gentlemen can make of these cases is, that the legislators of Virginia have taken a different view of the duties and authority of an attorney-at-law, from other legislators. It will be more material to examine our own laws for a solution of this question.

The examination of witnesses in open court, is not a practice known to the ancient laws of this country. In civil law-courts, all testimony is reduced to writing in the form of de-

positions, and is taken before commissioners appointed for that purpose. By the act of April 10, 1805, *ch.* 26, *sec.* 19, (2 *Martin's Dig.* 178) it is provided, that "the examination of all witnesses shall be taken in open court, or before such persons as the court may, in each case, authorise to take the same." In the same section, particular provisions are made for the examination of aged and infirm persons, and of persons about to depart from the territory, and power is given to certain magistrates to take the depositions of such persons, and to compel their attendance, "previous reasonable notice of the time and place of such examination having been given to the opposite party." The same section afterwards provides, that "if the party producing such depositions shall prove by affidavit, that notice was given to the adverse party, the same shall be good evidence." By the act of February, 1813, *ch.* 12, *sec.* 29, it is enacted, that witnesses shall not be compelled to attend any court out of the parish where they reside, and the district courts are authorised to issue commissions to take the depositions of such witnesses; and such depositions, when recorded in the presence of the adverse party, or after timely

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notice given to him, shall be admitted as good evidence on the trial, (2 *Martin's Dig.* 194.) The last statutory provision upon this subject, is contained in the act of January 28, 1817, *sec.* 7. This provides for all cases where evidence may be taken by depositions, that they may be taken before any justice of the peace, or other commissioner, "after due notice given to the opposite party."

Nothing now seems, therefore, to be required by the laws of this state, than that the party shall have reasonable notice of the time and place of examining the witness. It is not required, that the notice shall proceed from the commissioner, and it may as well be given by the party; nor is it required, that the service of notice should be certified by the commissioner, but on the contrary, it may be proved by affidavit. Neither the act of congress, nor the rules established in Virginia and Massachusetts can effect a mere point of practice depending upon our own positive laws. The only question, therefore is, what is notice to the party. Is not notice to the attorney in the cause, notice to the party?

It is a general principle, that notice to an agent is notice to his principal, provided the

notice came to the agent in the course of the business for which he is employed, 3 *Atk.* 646, 13 *Ves. jr.* 120, 2 *Bin.* 574, 609. In *Anderson* vs. *the Highland Turnpike Co.* 16 *Johns.* 86; *Spencer*, C. J., says, that any matter *in pays* which may be done by or to a party, may be done by or to his agent. This is a general rule of law which is peculiar to no one system of jurisprudence, but is common to all, being the dictate of reason. The principle applies with great force to the case of an attorney employed to manage a cause. He is retained for his skill and knowlege, to represent and defend his client in every thing respecting the conducting, prosecuting, or defending of the case. After issue joined, no communication is considered to take place between the opposite parties, but only between the attornies of those parties, and between the attornies and their respective clients. Such we find to be the rule expressly laid down in the *Curia Philipica*, *p.* 1, *sec.* 12, *n.* 11. *Despues de contestada la causa por el procurador, á él se ha de citar para todos los demas autos de ella, y no al señor del pleyto: tanto, que la citacion hecha al señor no vale, ne ser de momento*," &c. Here we find, that after issue joined, all notices in the cause are

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to be served upon the attorney, and not upon the party; yet, in contemplation of law, the service is upon the party, represented by his attorney. We find this construction of notice to a party in a cause given by one of the most enlightened state tribunals in the United States. By the 28th rule of practice of the court of chancery in New-York, it is required, that notice of the examination of witnesses shall be given to the adverse party. *Blake's Chanc. Prac. App.* 7. The form of the notice under this rule, we find in the body of the same book, *p.* 142. The notice is to the solicitor, and not to the plaintiff or defendant. The same course is pursued in the English courts. The notice is given to the attorney or solicitor.

The right of cross-examination is not denied. But by whom is this right to be exercised? when witnesses are examined in court, the cross-examination is not by the plaintiff or defendant, but by the counsel. There is no difference in principle between testimony taken in court, and out of court. The presence of the party is not necessary upon the trial, because he is represented by his attorney. When a cause is alleged for trial, the absence of the

attorney, for an unforseen and necessary cause, would be a good reason for a continuance, although the party might be present in court. The reason is this, that the attorney alone is considered, in law, to have the competent skill and knowlege for managing the cause. If the attorney be able to attend, the absence of his client, from whatever cause, would be no ground for a continuance. The same reasons will apply to the execution of commissions. Let us suppose, that, in the present case, the defendant had left New-Orleans, after the answer filed, and had remained in Mobile, that the plaintiff's attorney had taken a commission, that he had given no notice of it to the defendant's attorney, but had given notice to the defendant himself at Mobile. Would this have been considered sufficient? Would not the defendant have had a right to say, that the attorney whom he had employed here, was most competent to direct the course of examination of witnesses in a cause to be tried here? It cannot, however, be pretended, that there is a necessity of giving notice to the defendant, and to his attorney. The authority cited from the *Curia Philipica*, shows that the notice must be to the attorney.

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It is unnecessary to point out all the inconveniences which would flow from the doctrines of the district court. If this decision is to be maintained, there can be no use in arresting a transient person, unless the whole evidence of the debt be in writing, or can be had from witnesses, whose attendance in court may be compelled. The rule to be settled must be general. If, therefore, a person, having no fixed place of residence, is arrested in New-Orleans, upon a debt contracted in Virginia, or upon a contract made here in the presence only of persons who have left the state, he may be released upon bail, and his creditor will have no security. The defendant may leave the state immediately, and no commission can be executed, because no notice can be served upon him. If, in such a case, the plaintiff and attorney should take a commission, and should give notice to the defendant's attorney, of the time and place of executing it, the latter might say, as is done here, that he could not, or would not attend to it, and that notice must be given to his client. The answer of the court must be, that he has undertaken the management of the cause, that it is his duty to attend to it, that

his authority to act for his client, is presumed to be sufficient, and that the attorney for the opposite party is not bound to look further.

This is the answer which, I presume, the court would give upon the statement made in the counter affidavit of the defendant's attorney. But I conceive that this is not a case in which counter affidavits can be received. When the law allows any matter to be proved by affidavit, there can be no counter affidavit. Upon an affidavit for a continuance, the matters sworn to must be taken to be true, so in all other matters to be proved by affidavit. The affidavit of the defendant's counsel, ought not, therefore, to have been received, and should be disregarded.

The notice was not given before the commission issued, as is stated in the defendant's argument; but was given afterwards, and so appears by the record. The commission was directed to the person who executed it, and nothing judicially appears of the reservation of any right to join another commissioner. However, no point was made upon this in the court below. The only question there decided was, that notice to the attorney was not sufficient. This is conceived to be the only

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question for this court. If the cause be remanded, any other objections to the reading of the depositions will be open to the defendant; and if any new objections are made, the plaintiff should be allowed the opportunity of rebutting them by evidence.

As to the notice given by the commissioner, it was merely an act of his own, and intended for the benefit and satisfaction of the defendant. It was not advised by the plaintiff's attorney, nor can it affect the notice previously given here. On the part of the defendant, the whole course of conduct appears to have been a trick. The witnesses were transient persons, not resident in Mobile, and a hope was entertained that the payment of the debt, justly due by the defendant, might be avoided, if these depositions could be suppressed.

PORTER, J. delivered the opinion of the court. On the trial of this cause in the court below, the plaintiff offered in evidence certain depositions, taken by virtue of a commission directed to one J. Manager, of Mobile. The defendant opposed their introduction, and after argument, the court sustained the objection, and gave judgment as of non-suit in the cause.

The plaintiff filed a bill of exceptions to the opinion, and took an appeal.

The objections now urged to the reading of these depositions are; 1. That the return to the commission, as a written proof, ought to contain within itself, without any deficiency, the evidence of its own authenticity and regularity. That the notice given by the commissioner to the defendant's partner, is defective, in not stating on what day the witness would be examined; and, that the other notice, served on defendant's attorney, should be wholly disregarded; the law requiring it to be given to the party himself.

On this subject, as well as all others where we have the advantage of statutory regulations of our own legislature, it is unnecessary to look into authorities drawn from other and different sources, and it is only when the language of the statute is obscure, or when its provisions are inadequate, or fall short of the case to be acted on, that we can, with propriety, call to our aid, the opinion of other tribunals; or, that we can correctly resort to legal analogies as the basis of our decision.

On examining the first objection made by

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the defendant, we find, that in the different acts passed on the subject of taking depositions, 2 *Martin's Dig.* 178, *n.* 16, & 194, *n.* 10; also, an act to amend the several acts, enacted to organise the courts of this state, *sec.* 7, passed the 28th of January, 1817, it is provided, that the testimony of witnesses may be taken under a commission, and may be read in evidence after previous reasonable notice of the time and place of taking them, being given to the opposite party. And by the first act passed on the subject, permission is not only given to prove the fact of this notice, by evidence, other than the commissioner's return, but a different manner of establishing it, is actually prescribed. The words of the statute are, "If the party producing the deposition shall prove by affidavit, that notice was given to the adverse party," &c. &c. then the said deposition may be read. So far then, from it being indispensable, that the commission shall contain, within itself, proof of the opposite party being duly notified, the expressions are positive, that it shall be proved by other evidence, and in a case where the testimony is taken under this act, there can be no doubt, but proof by affidavit, is the best evidence which can be produced.

It is true, that the provisions of the statute just referred to, extend only to the taking of testimony *de bene esse*, where the witnesses reside within the limits of the state; and that the subsequent acts of our legislature already cited, do not prescribe in what manner service of the notice on the adverse party shall be established, so as to authorise the reading of the depositions taken under them. But as notice is required, it, of course, becomes necessary, that it shall be proved. The question recurs, in what manner; we think in the same manner as when the witnesses reside within the state, and their depositions are taken under the authority of the act whose provisions have been already quoted. It would be, indeed, strange, if we were obliged to have two rules on this subject: that when the witnesses live within the limits of the state, and their testimony is taken under commission, the fact of the opposite party being notified, must appear by affidavit; when taken abroad, by the certificate of the commissioner.

The act of congress cited by defendant's counsel, cannot affect us in forming a conclusion on this subject. It is a particular law, prescribing the practice to be pursued in the

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courts of the United States. It expressly provides, that proof of notice to the adverse party, shall be given by the commissioner. Our own statute says, it shall be made appear by affidavit. We need not ask, reasoning from analogy, which of these laws we are to resort to, or which of their provisions we are called on to adopt and make our own.

The cases to which the court have been referred to, in 2 *Henry & M'Harris*, 172; and 2 *Washington*, 75, have been looked into. The first turns, as it is expressly stated in the report, on a statute of Maryland. The latter was decided on the ground, that the depositions offered on the trial, in the court below, had been objected to, and that it did not appear in the appellate court, from any thing in the record, that notice had been given to the party against whom the depositions were read.

If our statute had not prescribed a rule which we can safely follow, and we were now called on, in the absence of any authority, to establish one, we should feel great reluctance to adopt that pressed on us by the defendant, as correct. If the commissioner, as is contended, should have proof furnished to him before he examines the witnesses, that notice

was given to the opposite party, and that it is then his duty to certify that proof back to this court, this would not be so good evidence of the fact, as the affidavit of a witness who served it. Should it, on the other hand, be required, that the commissioner must give the notice himself, or direct it to be given, this, in many cases, would produce the greatest inconvenience, as the party may live at a great distance from the place where the witnesses reside, and the testimony has to be taken. Nor is there any good reason why this mode should be pursued; the proof can be got as safely and as certainly from those who served the notice, as it can be in the manner contended for. As the party whom it is necessary to notify, must, at all events, have reasonable previous information, when the testimony is to be taken. It cannot, in any way, affect his interests. Why then require particular species of proof, which, without attaining any essential object, would cramp and impede the administration of justice?

We conclude, therefore, that it is not necessary that it should appear by the return of the commissioner, that notice is given to the adverse party; and we are of opinion,

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that the fact may be established, as it has been done in this case, by affidavit.

The next objection taken by the defendant, *viz.* the want of a particular day on which the testimony would be taken, being inserted in the notice received from the commissioner, is correct. There can be no doubt, that a notification, which professes to be given (as the law requires it should be) with the intention of informing the adverse party of the time and place of doing a certain act, and yet fails to state the day on which that act is to be performed, must, on every principle of good sense, as well as law, be considered as defective and illegal.

It now only remains to consider, whether service of notice on the attorney is good, and if it is not, whether the circumstance of the defendant being absent from the state, does not take it out of the ordinary rule.

The plaintiff insists, that such service is good, and independent of the general rule relied on by him, that notice to the agent is notice to the principal, for whatever relates to the business for which that agent is employed, he has cited *Curia Philipica*, *juicio civil*, 1, *sec.* 12, *n.* 11, to prove, that in all cases after issue

joined, notices of the various acts necessary to carry on a cause to final judgment, must be made on the attorney, and not on the party. Whatever may have been the general rule on that subject in Spain, it is not believed, as it will be hereafter shewn, that it extended to the act of giving notice when testimony was to be taken under a commission. But waving that question for the moment, our statutes already cited, have certainly introduced a different regulation here, as in every act passed on the subject, it is required, that notice should be given to the party.

But if the person whom it is thus necessary to notify, leaves the state, or conceals himself, ought not these circumstances, or either of them, authorise service on the attorney? We think they ought. The statute must have a reasonable construction. It certainly was not the intention of the legislature to require notice to the *party*, when, from his own act, it becomes impossible to serve it on him. Nor could it have been their intention, that because it became thus impossible, by reason of his absence, or concealment, that therefore the cause was never to be tried. Yet, this may, and in many cases will be the conse-

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quence, if the act is literally pursued; for it is plain, that if service, in all cases, must be made on the party, then it will be in the power of either plaintiff or defendant, at their pleasure, to prevent the cause in which they are engaged from being terminated, and thus entirely frustrate the ends of justice. A construction, leading to such consequences, should be avoided, if possible. Nothing could induce this court to adopt it, but the will of the legislature unequivocally expressed. In the language of the supreme court of the United States, "When the literal expressions of the law lead to absurd, unjust, or inconvenient consequences, such a construction should be given as to avoid these consequences, if from the whole purview of the law, and giving effect to the words used, it may be fairly done." 2 *Cranch.* 386, 399.

We adopt this construction the more readily in this case, because the general law on this subject in Spain, was the same as that contained in the acts of our legislature, already referred to. When the testimony of witnesses residing out of the jurisdiction of the court who tried the cause, was taken then by virtue of a commission, directed to another judge,

the rule was to cite the opposite party, if absent; however, notice to his attorney was good, *Febrero addicionada*, *par.* 2. *lib.* 3, *cap.* 7, *no.* 326. Our statute only re-enacts the general law, and leaves the exception untouched.

An authority has been read from 4 *Mumford*, to shew that when the principal is absent from the commonwealth, that service on the attorney-at-law is not good, that it ought to be given to the agent or attorney, in fact, or if there is none, by publication in the manner prescribed by law. This is a decision under a particular statute. See *Revised Code*, *Virginia Laws*, *vol.* 2, *p.* 521, *sec.* 21, in a country where the law has provided a remedy by publication, for the absence of the party, the very evil which is one of the principal reasons that induces this court to hold the service on the attorney good. We have already seen what is the practice in Spain, in regard to taking testimony in this way, and we have no doubt, that both reason and authority require us to sanction and enforce it here.

We conclude therefore, that notice to take depositions, must, in all cases, be given to the parties, if they are in the state. And that if they are absent, or cannot, after reasonable

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diligence, be found, that service may be made on the attorney.

Applying this rule to the case now before the court, we find that both plaintiff and defendant are citizens of other and different states, and it has been proved, that at the time notice was given to the attorney, the defendant did not reside in this state, but was in Mobile, state of Alabama. Under these circumstances, we are of opinion that notice was legally and regularly given to the attorney, and that the plaintiff is entitled to derive the same benefit from it, as if served on the defendant himself.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, and that the cause be remanded, with directions to the judge, to receive in evidence, the testimony taken under a commission, directed to John Manager, of Mobile, unless some other legal objection is made to its introduction, besides the want of due and regular notice to the defendant. It is further ordered, adjudged, and decreed, that the appellee pay the costs of this appeal.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, FEBRUARY TERM, 1821.

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He who claims as heir, must prove the death of the ancestor, who is presumed to live till he be one hundred years old.

If it be doubted which of the parties introduced a document below, the supreme court will presume it introduced by him whose interest it was to do so.

When the defendant pleads the general issue and does not set up a title, the plaintiff is not relieved from the necessity of proving a

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The petitioner alleges that she is one of the heirs of the late John Brady, and as such, became entitled, by an amicable partition of the succession of her *deceased father*, to a certain piece of land, situated in the parish of St. Jean the Baptiste, containing ten arpents, or thereabouts, with the ordinary depth.

That at the time of said partition, *viz.* on the 18th day of October, 1805, the petitioner was the wife of John Sassman, and that the property before mentioned, was her para-

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legal title in himself by shewing, that the defendant has a defective one, emanating from the same source as his own.

phernal, or extra dotal effects. That she has never been divested of her right thereto, by her own consent, or by the authority of justice; and that, notwithstanding her right to said property, a certain —— Aimé, and his wife, have entered into possession, and retain the same, which they have refused to deliver to the petitioner, though often requested so to do.

The petition concludes by a prayer, that the property may be adjudged to the plaintiff; that the said Aimé and wife may pay the annual value of the property, from the time they took possession, until the day of filing the petition.

To this the defendants answered, "denying all and singular the allegations contained in this petition, and praying to be dismissed with their costs," &c.

On the issue thus joined, the parties came to trial in the district court; there was judgment for the plaintiff, and the defendants appealed.

The first evidence introduced, on the part of the plantiff, is the document referred to in the petition. By this act, it is stated in sub-

stance, that Madame Angelique Westherer, wife of Brady, had appeared before Achille Trouard, judge of the county of German Coast, and declared, that having obtained, by a decree of the court for said county, in the month of Sep. 1805, permission *to sell the property of her husband, who had disappeared*, she had found it more advantageous to enter into an arrangement with her children, who had a desire to preserve a tract of land belonging to said Brady, and that she had made an agreement with Philip Brady, her son, Auguste Daniel, husband of Marian Brady, and Jean Sassman, who was married to Rosalie Brady, the present plaintiff; that the said land should be partaken between them; that the negroes, and other property, should be sold, and that arbitrators should be named to estimate the land. The act concludes in the usual form of a notarial instrument. It is dated the 18th of October, 1805. On the same day and year, the said Westherer, wife of Brady, again appears before the judge, and declares, that certain arbitrators, herein named, had made a division of the land of said Brady. This division is recited, and the act assigns to Jean Sassman, in his own right, the

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two arpents of land for which this suit is brought. This act is signed by Westherer, wife of Brady, her son, Philip Brady, and Sassman, husband to the present plaintiff. Mention is made, that the other knows not how to write, and the judge signs this act in the same manner he did the first.

The next instrument offered was a sale of the land now claimed, dated 20th of January, 1808; by which it appears, that Sassman sold the land to one Francois Rulle, for $2200. On the 5th of January, 1809, Sassman executed before the judge of the county of German Coast, a receipt, acknowledging that he had been paid by Rulle, the purchase money of said land; and in the same act he discharged the mortgage which he had retained on the premises, for the more perfect assurance of the purchase money of the same.

Several witnesses were examined on the part of the plaintiff, to prove what the premises in dispute would have rented for during the last ten years.

Testimony was taken by the defendants, to prove *by parol*, the consent of the plaintiff to the alienation of the property for which she now sues. The plaintiff objected to its intro-

duction. Whether it be at all necessary to decide on this objection, in the present case, will be hereafter considered.

To enable us to understand, correctly, the effect which the evidence first detailed should have on the rights of the parties, recurrence must be had to the pleadings, in order to ascertain what has been alleged and denied, how much it is necessary to prove, and on whom this burthen of proof is thrown.

In the petition it is stated that the plaintiff *is the heir of one Philip Brady, deceased;* that the land sued for became her's, by a partition between the heirs of said Brady: she does not allege that she ever was in possession of it; but she asserts that her title to it is good, and that Aimè, and wife, illegally keeps possession of it.

The defendants deny all and singular these allegations.

It is a general principle of law, we believe in all countries, as it certainly is in ours, that he, who has the affirmative to maintain, is bound to furnish proof of the fact, which is the foundation of his demand, see *Par.* 3, 13. The application of this principle to suits for land, has established a maxim, that the plain-

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tiff must recover on the strength of his own title, not the weakness of his adversaries.

In this case, the general denial in the answer put the plaintiff on the proof of her title, and to establish the truth of the allegation contained in the petition, *that her ancestor is deceased*, and that she, as his heir, has a right to recover the property sued for, she produces an act passed before a notary, which states, *that her father had disappeared*, and that his children, and heirs, had divided the property which belonged to him. An important question here occurs, whether the plaintiff herself has not produced evidence which prevents her recovering in the present action.

By the laws of this country, at the time the partition already mentioned took place among the heirs of Brady, if an individual disappeared, and no intelligence was had of his fate, he was presumed to live one hundred years, from the date of his birth, unless evidence was furnished to the contrary, by those interested to destroy this presumption, and establish his decease, *Febrero addicionado*, *par.* 2, *lib.* 3, *cap.* 1, *sec.* 7, *no.* 373. *Curia Philipica*, *juicio civil*, *p.* 1, *sec.* 17, *no.* 22, and on failure of that evidence, the heirs whom the law would have

called to his succession, in case of his death, could only take possession of his property as curators, and be authorised to administer it on giving security, (see authorities cited.) In this case then, the plaintiff, instead of proving that she is the heir of John Brady, deceased, and as such, entitled to the land that once belonged to him, has proved something entirely different, namely, that Brady, her ancestor, is yet alive; for that is the conclusion which the law compels us to draw from facts, such as are here proved before us.

If then the plaintiff's father is still alive, or presumed by law to be so, and the plaintiff herself has established the fact which creates that presumption in a suit, wherein she claims property, as his heir, it is impossible she can recover; for she disproves that which is the basis of her demand. The law has pointed out a mode, and an easy and a safe one, by which the presumptive heirs of persons who may have disappeared, can be put in possession of the property they leave behind. This mode the plaintiff and her co-heirs might easily have pursued. In doing so, they would have assured their own rights, and preserved those of the absentee, whose death the law is so far

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from presuming, that it watches over and protects his property for a number of years, in the hope, and expectation that he may again return. The motives which induced the legislator to thus guard the estate of absent persons, or of those who may have disappeared, are obvious, and this court feels that it is important to society that the law on this subject should be strictly and rigidly inforced.

The question now before the court has been very ably examined, in a case reported in *Merlin's Questions de Droit.* There the heirs demanded property in right of a person who had been absent, and not heard of for forty years, and they grounded their demand on the presumption, which this length of time created, of his death. It was, however, clearly shown, that not only did the law refuse to lend itself to such doctrine, but, that on the contrary, it presumed the absentee alive, until the period of 100 years elapsed from his birth, and judgment was accordingly given in favour of those who held the property, which the heirs thus claimed.

The principle here involved, was also well considered in the case of *Hayes* vs. *Berwick*, decided in the late superior court, 2 *Martin*,

138, a case very similar in its principal features to the present. The plaintiffs claimed a tract of land, in right of their ancestor. To establish their title, they proved that their father had left Louisiana twenty years before the inception of the suit, and had not since been heard of. On this evidence the court held, (and we think correctly) that the plaintiffs could not recover, as the law presumed the ancestor still to exist.

In the declaration made by the wife of Brady, before the judge of German Coast, a copy of which is annexed to the plaintiff's petition, and has been already referred to. She states, "that having obtained a decree of the court, authorising her to sell her husband's property, who had disappeared," she came before him to declare that the heirs intended to partake it amicably, &c. It occurred to the court, as a question necessary to be examined, whether the declaration did not furnish evidence, that the heirs might have been authorised to take the steps they did, in relation to their ancestor's estate. We are satisfied, however, that it is not legal and sufficient evidence of the fact, that the bare recital of a decree of a court of justice, in a private instrument, and that too.

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by a person interested in establishing the fact, is not the best evidence, that such a decree was given; a copy of the judgment, not a declaration of the party claiming under it, ought to have been produced.

But the plaintiff insists that the defendants in this suit, have not the right to take advantage of these defects, because she says they claim under the same title she does, and to prove this, refers to the record, where it appears, that Sassman, her husband, sold the premises now claimed, to Francoise Rulle, with whom one of the present defendants, Aimè, was first married. The defendants deny that they rely on this title, or that they set it up in the court below.

On looking into the statement of evidence sent up, we find that it is not stated by whom this document was produced. It follows, in order, the other written testimony offered on the trial by the plaintiff; it precedes the parol proof produced by her, and it is not at all connected on the record with the other evidence of the defendant. This, in itself, creates a strong presumption who introduced it, but a much stronger one arises from the fact, that, without it, the plaintiff would not have

produced any proof on a point indispensable in her cause; the identity of the premises claimed: when, to the defendant it was not necessary, because they did not sit up title in their answer. We are bound, therefore, to presume, that this document was offered on the trial by the party who had an interest in doing so.

Taking this for granted, we are of opinion, that, in a case like this, when the defendant pleads the general issue alone, and does not set up title, the plaintiff cannot be relieved from the necessity of proving a legal title in herself, by shewing that the defendant too has a defective one, which emanates from the same source. How can the court tell that this is the only title by which the defendants hold the premises?

The opinion just delivered, renders it unnecessary to examine if the objection taken to the parol evidence, introduced by the defendant, is well founded or otherwise.

On the whole, we think that the plaintiff has not made out a case which shews that she had a legal title to the premises, and consequently, that the district judge erred in giving judgment against the defendants.

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It is therefore ordered, adjudged, and decreed, that the judgment of the district court, be annulled, avoided and reversed, that there be judgment for the defendants, as in case of a non-suit, and that the plaintiff and appellee pay the cost of this appeal.

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

GORDON & AL. vs. *M'CARTY.*

The delegation by which a debtor gives to the creditor a new debtor, who obliges himself towards such creditor, does not operate a novation, unless the creditor has expressly declared, that he intends to discharge his debtor, who has made the obligation.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiffs sue for the amount of sundry goods sold by them to the defendant, who pleaded the general issue; and that, if any goods were taken for him, in the plaintiffs store, it was understood they were to be, and they were actually, paid for by P. Lanusse, to whom he has reimbursed the amount of them.

Benoit, a witness of the plaintiffs deposed, he was a clerk of theirs in 1819, and was in their store when the defendant, and P. Lanusse, came to buy goods. The defendant, se-

veral times requested, that a separate account might be kept of the goods purchased by him; that, some time after, the witness called on Lanusse for a settlement, and was told the defendant had carried his bill of parcels home; whereupon he made out a new one, but he is not certain whether he included in it the goods purchased by both the defendant and P. Lanusse. The latter gave his own separate note for the whole. The goods mentioned in the petition were sold to the defendant, at the time, and for the price there stated. The goods sold to the defendant, and those sold to Lanusse were debited respectively. Separate accounts, or bills of parcels, were delivered to each of them. The account carried by the witness to Lanusse, included the account of the goods purchased by the defendant, and those purchased by Lanusse. Neither of the plaintiffs knew in what manner that account was made. He was authorised to collect debts due to the plaintiffs, and to give acquittances.

L'Espout was a clerk to Lanusse, when Benoit brought the plaintiffs account for the goods purchased by the defendant and Lanusse. The plaintiffs were credited in La-

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nusse's books for the whole, and the defendant debited for his portion; and afterwards Lanusse gave his note to the plaintiffs for the whole account. The defendant settled with Lanusse, and paid him the amount of his goods, before Lanusse's note to the plaintiffs was protested.

The district court gave judgment for the plaintiffs, and the defendant appealed.

The plaintiffs have proven, that the goods, the price of which they claim, were purchased from them by the defendant, and for his own account. He, therefore, became indebted to them, and is not discharged by the note of Lanusse, which the plaintiffs received.

The delegation by which a debtor gives to the creditor a new debtor, who obliges himself towards such creditor, does not operate a novation, unless the creditor has expressly declared, that he intends to discharge his debtor, who has made the obligation, *Civ. Code*, 296, *art.* 176.

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

Eustis for plaintiffs, *Turner* for defendant.

ALLYN vs. *WRIGHT.*

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Testimony cannot be received to contradict the garnishees' answers to interrogations without making them parties.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. In this case, there is neither statement of facts, bill of exceptions, special verdict, nor certificate of the judge, that the record contains all the matters on which the case was tried in the first instance. But the garnishees insist, that there are sufficient errors appearing in the proceedings, as sent up here, to authorise the court to reverse the judgment given against them.

The errors they allege to be,

1. That by their answer to the interrogatories propounded them, they had shewn that there was not either credits or effects of the absent debtor in their hands; and,

2. That if testimony was introduced to contradict the answers filed by them, they should have had notice of the time when that testimony was to be taken. And, that this notice does not appear to have been given therein.

To authorise judgment against the garnishees, the record must shew, either that their answers to the interrogatories justify it, or that they were legally notified that these answers would be disproved by testimony.

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This cause has taken a singular course, as the persons against whom judgment has been rendered as garnishees, are not those on whom the attachment was served. The correctness of this might be well doubted, if they had not voluntarily come before the court, and made themselves parties to the proceedings carried on against others.

The petition alleges, credits and effects of the absent debtor, within the jurisdiction of the court, and particularly in the hands of R. Dyson and Robertson and Palmer.

The sheriff returns the attachment levied on the goods, credits, effects, &c. of Wright, the debtor, in the hands of Robert Dyson; and Robertson and Palmer.

Robertson and Palmer discharge themselves, by their answer to the interrogatories.

George Dyson, attorney in fact, for Robert Dyson, the person in whose hands the credits and effects of the absent debtor had been attached, swears, that he has nothing belonging to him in his possession; but, that property to the amount of $800 was put into the hands of the late M'Millan and Dyson, by a person named Walker, which he has since understood, belonged to J. Wright; and that there may

be under his controul, of said property, about eight hundred dollars.

Next, M'Millan and Dyson, a co-partnership, already dissolved, appear, by a Mr. Sloane, their attorney in fact, to make an amended answer. He swears, that prior to levying the attachment, the balance in the hands of M'Millan and Dyson, due one Walker, in which he understood Wright, the defendant, had an interest, was already passed to the credit of Robertson and Palmer.

Judgment has been rendered in the district court against M'Millan and Dyson, garnishees of Wright, the absent debtor, and, we think, erroneously. The answer of Sloane, their attorney in fact, shews, that at the time the attachment was levied, they had no property, credits, or effects of the defendant's in their hands, and this want of proof in the answer, cannot be supplied by what is sworn to by George Dyson, who is attorney in fact, for another person, *viz.* Robert Dyson.

If, as is most probable, testimony was received in the court below, to disprove the answer filed, and judgment was given against the garnishee on that testimony, notice to him of the intention to do so, should have

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been given as the law requires; and the fact that it was thus given, ought to appear on record; otherwise, this court would appear to sanction proceedings, by which, persons so situated, might be ruined by *ex parte* examinations.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, and that the cause be remanded for a new trial, with directions to the district judge, not to hear any testimony to contradict the answers filed by the appellants, M'Millan and Dyson, until it shall be made appear by the plaintiff, that reasonable notice has been given them, that testimony would be offered to disprove the facts sworn to in their answers. It is further ordered, adjudged, and decreed, that the plaintiff and appellee pay the costs of this appeal.

Carleton for the plaintiff, *Smith* for the garnishees.

MOLLON & AL. vs. *THOMPSON & AL.*

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Mollon & al. *vs.* Thompson & al.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This case is submitted, on an assignment of errors, alleged to be apparent on the record.

Error in receiving or weighing evidence cannot be assigned as apparent on the record.

The first relates to evidence given in the court *a quo*, by the plaintiffs, in support of their claim. Every thing, which is connected with the facts of a cause, ought to appear in some one of the modes pointed out by the law, for bringing up appeals, so as to authorise an entire re-examination of the case, both as to law and facts. The party to a suit, who requires the reversal of a judgment, on account of a mistake or error in receiving or weighing evidence, by the inferior court, must proceed by a bill of exceptions, and statement of facts, or by having the testimony taken down. Want of evidence to support a judgment, cannot be assigned as error, apparent on the record. The appellants, therefore, fail on the error first assigned.

The second error, which relates to the petition, appears, on examination, wholly untenable; and the third, the solidity of which

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depends entirely on the two first, cannot support them.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs; with an addition of six per cent. for the damages sustained by the appellees, by the frivolous appeal.

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

WALLER vs. *LOUISIANA INSURANCE COMPANY.*

If the copper be taken off a vessel, this being rendered necessary, on account of the injury she had sustained, the insurers cannot avail themselves of this being done without their consent.

Appeal from the court of the first district.

PORTER, J. delivered the opinion of the court.* This suit was commenced on an insurance effected on a pilot-boat at the Balize, called the Eliza Patterson. The petition avers, that by tempestuous weather and heavy gales at sea, the said boat was greatly damaged. That the injuries she thus received, made it necessary she should be repaired. That she was so, at the expence of the peti-

* MARTIN, J. did not join in this opinion, being a stockholder of the company.

tioner, and that these repairs cost the sum of $1386 60 cents, which the defendants refuse to pay.

The answer consists of a general denial of all the allegations contained in the petition.

The following facts were submitted to a jury, on the part of the plaintiff.

1. Was an insurance effected on the schooner Eliza Patterson, on the day of November, 1817, for a period of six months, as stated in the petition?

The jury answer, yes.

2. Was the amount of expence incurred by the plaintiff, for the repairs of his said vessel, afterwards, during the insured period, the sum of $1386 60 cents, as stated in the petition?

The jury answer, yes.

3. Were the repairs made necessary by the perils of the sea, to which she was exposed in the months of January and February, 1818, or from unseaworthiness of the vessel prior to, and at the time of the insurance?

The jury answer, that the vessel was seaworthy at the time of insurance, and the expence incurred were rendered necessary by the perils of the sea.

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4. Does it appear, that during the insured period, she was insufficiently manned, rigged, or found; or, that there was, on the part of the insured, in fact, a want of care or skill in the conduct of the said vessel?

The jury answer, no.

Facts on the part of the defendants.

1. That the said schooner, Eliza Patterson, was not, at the commencement of the voyage, after the voyage began, and during the continuance of the same, sea-worthy.

The jury answer, that she was sea-worthy.

2. That after the insurance, mentioned in the petition, was effected, and before the loss was sustained, the bottom of the said schooner was changed, by taking off her copper, without the leave of the defendants, so as to affect the risk.

The jury answer, to the second question submitted by the defendants, that the copper was taken off, but that there is no evidence that it was taken with or without the leave of the defendants; that the taking off of the copper was rendered necessary after the damage she had sustained at sea. It is the

opinion of the jury, that it did not invalidate the policy.

3. That there was a deviation from the voyage insured.

The jury answer, no.

The district court gave judgment for the plaintiff, and the defendants appealed.

The case is submitted to us without argument, and we think, on the facts found by the jury, that the plaintiff is entitled to recover.

The only defence which the defendants have attempted to maintain, *viz.* a change, without their consent, in the condition of the vessel, after she was insured, by taking the copper off her bottom, has been destroyed by the verdict, which declares, that this change was rendered necessary after the damage she had sustained at sea. We are of opinion, that under these circumstances, the consent of the defendants was not required to authorise the alteration; and it is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

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

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APPEAL from the court of the first district.

After the jury is sworn, it is too late to move that the suit be dismissed; because the plaintiff did not answer the defendant's interrogatories.

The plaintiff may read his answer to supplemental interrogatories, although he failed to answer those originally put.

If the same interrogatory be put in the original and a supplemental answer, and the plaintiff having failed to answer it, with the others in the original answer, does so, with those in the supplemental, the interrogatory will not be taken as admitted, but the answer will be read.

A strong case must be made out to induce the supreme court to remand a case for a new trial, when no application was made for it below.

PORTER, J. delivered the opinion of the court. This action was commenced on a promissory note for $15000, executed at New-York, on the 15th July, 1814, by Marquand and Paulding. This partnership is alleged to consist of two persons, *viz.* Isaac Marquand and Cornelius Paulding; that they carried on business in New-Orleans, under the firm of Cornelius Paulding and Co. and in New-York, under that signed to the note. The sum of $12,317 99 cents, is stated to be due, and judgment is demanded for it.

The note is attached to the petition. There is indorsed on it a credit for $3425 75 cents, and for all the interest that had accrued up to the 21st of January, 1818.

To this petition, Cornelius Paulding, one of the defendants, filed a separate answer, in which he, first, pleads the general issue, and then specially, that he is not indebted, in his private capacity, nor as a partner, with the said Marquand, to the petitioner; that if Marquand was indebted, it must be on his private account, and not as partner. To this

answer, there are subjoined various interrogatories.

Answers to interrogatories received by the mayor of New-York, and accompanied by the certificate of the governor, and the seal of the state, are sufficiently authenticated.

A supplemental answer was afterwards put in by consent, in which it is alleged, that the transaction between Woolsey and Marquand was not a partnership, but a private one, for the use and benefit of the said Marquand; that the note on which this suit is brought, was one of two notes, for the repayment of which, the said Marquand pledged 930 shares of the stock of the Phenix Bank, late New-York Manufacturing Company. That the stock pledged for the re-payment of the note on which this suit is brought, is more than sufficient to pay for the same, and that the defendant never had any knowlege of the loan from Woolsey to Marquand. To this answer several interrogatories are also annexed.

Issues were made up and submitted to a special jury, who found a number of facts. The court gave judgment for the plaintiff, and the defendant appealed.

During the progress of the trial, several bills of exceptions were taken, which will be hereafter noticed.

The defendant and appellant now insists.

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1. That the suit ought to have been dismissed on his application in the court below, because the plaintiff neglected to answer the interrogatories submitted to him.

2. That the cause ought to be sent back for a new trial.

3. That if this is not done, judgment must be rendered for the defendant; and *lastly*, that, if the court decides against him, on all these points, that the judgment must be amended as it respects the interest.

.I The first ground taken by the defendant, is brought before us in the second bill of exceptions, which states, that after the jury had been sworn, the defendant moved to have the petition dismissed, because the plaintiff had failed to reply to the interrogatories annexed to the answer.

We are of opinion, that this application came too late, and that the district judge did not err when he refused to accede to it. If the testimony of the plaintiff was important to the defendant, and was improperly withheld from him, he might have refused to enter into the trial. But having once done so, he had no more right to move to have the cause dis-

missed, because he wanted that testimony, than he would, at that stage of the proceedings, to have obtained a continuance, because he had not within his reach other evidence material to his defence.

II. The next point made by the appellant, that the cause ought to be sent back for a new trial, is endeavoured to be maintained, as well on bills of exceptions, taken to the introduction of testimony, as on the finding of the jury on some of the facts submitted.

The first bill of exceptions states, that on the trial, the judge permitted the plaintiff to read answers to the supplemental interrogatories, although it was objected, that he had failed to reply to those annexed to the original answer; and it is now urged, that these interrogatories formed but one whole, and could not be divided.

If there was any sound objection to the course here pursued, which we are far from admitting, we think, at any rate, the defendant cannot make it. For if error does exist in the proceeding, it commenced with him. If these interrogatories formed but one whole, why were they not put together. and at the

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same time? That which is asked separately, may be surely answered in the same way, and the district judge certainly did not err when he held, that the plaintiff had a right thus to reply to them.

III. Another decision of the district court, complained of, is, that which admitted a witness to state certain admissions of the defendant, as to the sum which he owed the plaintiff. These admissions, it is contended, were made in the hope and prospect of a compromise, and cannot, therefore, be given in evidence. If it appeared to this court, that they had been so made, we should certainly have held with the defendant's counsel, that they could not be received. But we cannot gather from any thing, shewn to us, that this was the fact. We do not know, in truth, that at the time there was any dispute between the parties, as to the amount due; and are, therefore, of opinion, that the evidence was proper to be submitted to the jury.

We are next called on to remand the cause, because the judge charged the jury, that an answer to one interrogatory was virtually an answer to another, if both were the same in substance.

By the bill of exceptions taken to this opinion, it appears that the defendant, having failed to get the cause dismissed, by reason of the interrogatories not being answered, then turned round, and urged, they must be taken as confessed. The judge admitted the correctness of the doctrine, but stated to the jury that when the same question had been put in the second, or supplemental answer, filed by the defendant, the answer to this question destroyed the presumption which the law would otherwise have created, from not replying to the first. In this opinion, which is sound sense, and which violates no technical rule, this court fully coincides.

We now come to the facts submitted, and the answers thereto, which the defendant insists, are found by the jury so defectively, that a new trial is necessary to do justice between the parties.

Before entering on this enquiry, we think proper to state, that we shall always require a strong case to be made out, to induce us to remand a cause for a new trial, when no application to obtain the same relief was made in the court below, and this—first, from a wish to discountenance a course of proceeding,

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which, by permitting the party to apply here, for what he might have obtained in the other court, must necessarily bring with it great delay; and secondly, because we lose the benefit of the opinion, and information of the judge who tried the cause, who saw how it was conducted, and who heard the witnesses. The statute which gives this court the permission to remand for a new trial, "when the justice of the case requires it," meant to confer an authority that would enable us to prevent injustice, in causes so circumstanced, that without this power one could not reach their merit, but left the ordinary application, on common grounds, to the court who tried the cause. This intention of the legislature is manifest, from the provision contained in *Martin's Digest, vol.* 2, *page* 202, which declares, that *a new trial shall not be granted*, unless the motion is made in sufficient time, to enable the court to pronounce on it, during the session at which the trial of the cause is had.

Our attention is first called to the third fact, on the part of the plaintiff, the answer to which, it is alleged, amounts to a general verdict.

The fact submitted, was in these words, "that the stock pledged for the payment of

the above note, has been sold by consent of Cornelius Paulding and Isaac Marquand, and the proceeds credited to the said note, and after crediting the same, and all other payments, the sum paid on said note, amounts to , and no more." *Answer by Jury*, " to $3424 75 cts. on the 21st of January, 1818, interest paid to that date."

It is clear, that this, so far from amounting to a general verdict, which is a conclusion from all the facts and laws in the case, only finds one fact; and that is, the sum paid, for which the defendant is entitled to a credit.

The next objection is, that in the finding of the jury, on the second fact submitted by the defendant, they refer to an account, which account does not exist, and is not to be found in the record.

As the jury have found the fact positively, we do not think that the circumstance of their having added, "according to an account," can, in any respect, vitiate the finding.

The answers to the third and fourth facts, are stated to be given in so incomplete a manner, that the meaning of the jury is not intelligible. We believe, however, that the meaning to be drawn from them is plain, and ad-

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mits but of one interpretation. The jury is asked, in the fourth interrogatory, "were not 930 shares of the stock of the Phenix Bank pledged by Marquand to Woolsey? This they answer in the affirmative. They are next asked in the interrogatory immediately succeeding, "were not 330 shares of the Phenix Bank pledged by Marquand to Woolsey, for securing the payment of the note of hand, to the petition annexed? And on this, they find that there was not 330 shares pledged *in addition* to the 930 aforesaid. This is certainly saying, that the 330 last mentioned, made a part of the 930, and that there was but that number pledged in all.

The finding to the sixth interrogatory, admits of the same explanation.

The answers to the eighth and fourteenth questions, are next alleged to be inconsistent with each other, and that judgment cannot be given on them. There is an apparent, but not a real contradiction here. The eighth fact submitted to the jury is, "did Marquand pay any thing to Woolsey, on account of the monies stated in the petition, to be advanced to Marquand and Paulding? To this, they answer, he did not. The fourteenth, requires them to

say, "if any payment was made on account of the note annexed to the petition, and on this they find that $3424 75 cts. were paid."

Now, although both these facts relate to a demand, arising from the same cause, and that is, the note on which suit is brought, they are still perfectly consistent with each other. For it is true, that the defendant has made a payment on the note. But, as the petition only alleges the balance due, after deducting that payment, it is equally true, that there is no payment *on account of the monies stated in the petition to be advanced.*

The twelfth fact which inquires of the jury, at what time were the 930 shares of Phenix Bank stock, pledged to the plaintiff, by defendant's partner, is answered, "believed to be pledged when the money was loaned," and this finding, it is said also, requires a new trial. "We do not, however, think so, for allowing the defendant to fix any date he pleases for the period when the stock was pledged, it cannot alter the judgment, which the other facts, found in the cause, compel the court to pronounce."

III. *The last point*, made by the defendant

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is, that judgment ought to be given in his favour, because (as is alleged) the plaintiff, not having answered the interrogatories propounded to him, they must therefore be taken as confessed, and the finding of the jury, contrary to such confession, is void.

The answer to these interrogatories was first taken before a notary public, who certified them under the seal of his office. This not being considered sufficient, they were again drawn up, and sworn to before Cadwallader D. Colden, mayor of the city of New-York, who attests the fact under the seal of the mayoralty of the city. To this there is added a certificate of governor Clinton, under the privy seal of the state, that he is mayor, and that full faith and credit is due to his official acts. The bill of exceptions also states, that the plaintiff offered proof of the identity of the seals, and that of the hand writing of the respective signatures already mentioned.

The judge refused to admit these answers so certified, and the plaintiff excepted.

It is now contended, that they were properly rejected, because the mode pointed out by the acts of congress for authenticating records and judicial proceedings of a state, so that

they may be given in evidence in another, has not been pursued in the certificate annexed to them.

The first legislative provision, on this subject, is contained in an act of congress, passed 26th of May, 1790, which provides, "that the acts of the legislature of the several states, shall be authenticated by having the seal of the respective states affixed thereto: that *the records and judicial proceedings of the courts of any state* shall be proved and admitted by the attestation of the clerk.

Now, this is not a record of another state, for the original is sent on here, and no "memorial or remembrance" of it is preserved in the place where it is taken; Is it then *a judicial proceeding of a court of another state?* We think not, nor can it be so considered, unless it is adopted as a principle, that every official act of a single magistrate is one. For surely the administering of an oath to a person presenting himself to swear, to a voluntary affidavit, is not *the judicial proceedings of the court* of another state. It can hardly be called a judicial proceeding of the individual who takes the affidavit, but certainly makes not a part of the proceedings of their courts.

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If any doubt remained, that the act of congress never was intended to embrace such a case as that now before the court, that doubt is completely removed, when we consider the mode of proof required by it, "the attestation of the clerk of the court, with the seal, if there is one, and the certificate of the presiding judge, that it is in due form." We are not acquainted with the laws of any state, in the union, which have provided magistrates, acting in a single and distinct capacity, with a clerk, &c. and the other means of complying with these provisions: hence we conclude, they were not intended to embrace such a case as the present, and unless we were to decide, that answers to interrogatories must, in every instance where the party lives in our sister states, be sworn to before a court so constituted, as to admit of their proceedings being authenticated in the manner pointed out by the act already referred to, we cannot reject all other legal proof of the fact.

It was, however, more particularly urged in argument, that this case came within the provisions of the act of congress, passed 27th March, 1804, supplementary to that suit cited and commented on. The part of that act re-

cessary to be quoted for a correct understanding of the point, now before the court, is, that which innumerates what kind of acts are necessary to be thus proved. Its words are, that "from and after the passing of this act, *all records* and *exemplification of office books*, which are, or may be kept in any public office of a state, not appertaining to a court, shall be proved and admitted in any other court or office, by the keeper of said records or books, and the seal of his office thereto annexed, if there be a seal. &c,"

We deem it unnecessary to enter into any reasoning, to show that this law is not in any way applicable to the case before the court. That which provides alone for the attestation of *records* and *office books*, by the keeper of these records and books, cannot, for a moment, be held to have any relation to an act where the original, instead of being recorded there, is sent on here; and, on the whole, it is evident to the court, that the acts of congress, on this subject were intended to provide for the authentication and proof of those proceedings, which are matters of record in the state from whence they are taken.

We do not wish, however, to be understood

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to say, that had these answers been authenticated, in the mode pointed out by the act of 1804, we should not have held it sufficient, that act having done little more than make a statutory provision of what was already a general rule of evidence. 2 *Cranch*, 238.

It now only remains to consider whether the plaintiff offered legal proof of the answers to these interrogatories being sworn to, and we are all satisfied that he did, and that the evidence should have been received, 3 *Johns. Rep.* 231, 7 *ibid.* 514, 8 *Massachusetts*, 273, *Philips' Evidence*, 319.

Arriving, at last, at the merits of the case, which the ingenuity of counsel has made it so difficult to reach, we find the facts alleged in the petition, on which recovery is demanded, fully made out, and supported by the verdict of the jury, on the facts submitted to them, and the interest given by the court below, has been legally established, according to the principles recognized by this court, in the case of *Boggs* vs. *Reed*, 5 *Martin*, 673.

It is therefore ordered, adjudged and decreed, that the judgment of the district court

be affirmed with costs, and that the defendant and appellant pay the costs of this appeal.

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

PEABODY & AL. vs. *CARROL.*

APPEAL from the court of the first district.

When the sale of a slave is unattended with any real, fictitious, or conventional delivery, he is still liable to be attached for the vendor's debt.

MATHEWS, J. delivered the opinion of the court. In this suit, which originated by attachment, two slaves have been seized as the property of the defendant, and are claimed by A. Hynes, as belonging to him.

In support of his claim, he offers in evidence, a bill of sale from the defendant, the fairness and genuineness of which seems not be disputed; but it does not appear, that the sale was attended with a delivery of the property.

There is a provision in our statute, relating to the tradition or delivery of slaves, which states, that it may take place, either by actual delivery made to the buyer, or by the mere consent of the parties, when the sale mentions, that the thing has been sold and delivered. *Civ. Code*, 350. *art.* 28.

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The bill of sale produced by the claimant, contains no clause expressive of such consent of the parties, as prescribed by the law cited.

It is in evidence, that the slaves were not, at the time of executing the sale, in the actual possession of the vendor; but were on board of a keel-boat then descending the Mississippi, according to the testimony of Green, a witness examined in the cause; and according to the bill of sale, they were hired on board of the steam-boat, Gen. Jackson.

If this sale is to be considered. as a contract, entered into, and completed in the state of Tennessee, which is by no means clear, we have no evidence before us of the *lex loci*, and must, consequently, decide the case in conformity with the laws of the state where the property is found, and the suit commenced. In doing this, there is little difficulty, if we adhere to former decisions, in similar cases, by which it has been established, that before actual delivery of the thing sold, it may be attached by the creditors of the vendor. *Durnford* vs. *Brooke's syndics*, 3 *Martin*, 222, *Mumford* vs. *Norris*, 4 *ib.* 25.

As there has been no delivery of the slaves, either real, fictitious, or conventional, we are

of opinion, that the district court is erroneous in denying them to the claimant.

It is therefore ordered, adjudged, and decreed, that the judgment be annulled, avoided, and reversed; but as there is not sufficient evidence, in the record, to authorise a judgment against the defendant, it is ordered, that the case be remanded, with directions to the judge to proceed therein, as if the property attached did really belong to the absent debtor.

Livermore for plaintiffs, *Preston* for claimant.

KIRKMAN vs. *HAMILTON & AL.*

A factor who has accepted draughts for his principal, has a lien on the goods in his hands, which an attaching creditor cannot defeat.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is a suit by attachment, wherein a quantity of tobacco was seized, in the possession of Jackson, the garnishee, as the property of the defendants. The former claims a lien on the tobacco, and a preference to be paid the sum of $5595 97 cents, out of the proceeds, as creditor of the defendants, on

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account of a bill, or order, drawn by them, for $5000, in favour of B. Williams, and $595 97 cents, on other accounts.

It appears by the evidence in the cause, that the bill was accepted by the garnishee, before the attachment was levied, and was to be paid out of the tobacco, subsequently attached in his hands.

As the plaintiff does not contend against the lien and privilege claimed by the garnishee, to the extent of his own debt, it is only necessary to enquire what effect his acceptance, in favour of Williams, ought to have in opposition to the right claimed by the attaching creditor.

It has already been determined by this court, in several cases, that, before the delivery of the property sold, it is liable to be seized by the creditors of the vendor. *See the preceding case and those there cited.* On the authority of those decisions, the plaintiff's counsel relies, as applicable to the present case.

We are of opinion, that the situation of the claimant, in the case now under consideration, is clearly distinguishable from that of a vendee, who has not obtained the delivery of the

thing sold. The garnishee does not pretend to an absolute and exclusive right of property, as in a sale; his pretensions do not extend to the entire exclusion of the plaintiff's right to attach the tobacco, as would happen in the case of a vendee. He only insists on his privilege and preference, as a possessor of the property of the defendants, who are indebted to him; and, on his just and equitable claim, to be secured for his acceptance.

If he claimed as a purchaser, and shewed a *bona fide* contract of sale, made previous to the levy of the attachment, the plaintiff would fail entirely, for the garnishee was in possession of the property.

Notwithstanding this clear and evident distinction, between the claim of a vendee and that made by the garnishee, in the present case, let us suppose, that it may be somewhat different, to discern any sound reason, why a fair purchaser, who has paid the price of the thing bought, when the sale is unaccompanied by tradition, should be placed in a worse situation than a factor, who claims certain lieus on the property in his possession. To such difficulty and doubt, if they really do exist, it might be answered, that in relation to a sale.

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the rules are positive, clear, and explicit, and laid down by the laws of the state while commercial transactions (purely such) are to be governed by the customs and usages of merchants, or the *lex mercatoria.*

Considering the right and claim of the garnishee, in this case, under the government of the law-merchant, we have not the least doubt of their legality and equity. When the owner of property is justly indebted to his factor or agent, who has the possession of it; or when the latter has accepted the bills of the former; or, in any other manner, has bound himself as principal to a third party, on the faith and credit arising from the property thus possessed by him we are of opinion, that it would be unjust and illegal to prefer the rights of an attaching creditor to those of the factor, whenever the transactions between the principal and agent, are in the usual and free course of trade, 4 *Dallas*, 279, 4 *Mass. Rep.* 258, 263.

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

Livermore for plaintiff, *Maybin* for defendant.

STATE vs. *JUDGE LEWIS.*

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STATE
vs.
JUDGE LEWIS.
An appeal lies from the discharge of a writ of sequestration.

APPLICATION for a *mandamus.*

PORTER, J. delivered the opinion of the court. In this case a writ of sequestration was obtained by Johnson & Ward, against Brandt & Foster, which, on motion of the defendants, the court discharged. An appeal was prayed from this decision, which was refused, and now on a rule served on the judge, requiring him to shew cause why a *mandamus* should not issue, to compel him to allow said appeal as prayed for, he has assigned, as a reason why he did not grant it that there had not yet been rendered any definitive judgment in the cause from which an appeal would lie.

We are of opinion, that this is not a good reason, and that the plaintiffs have a right to have a revision of that judgment here. This court has already decided in several cases, but particularly in that of *Prampin* vs. *Andry*, 4 *Martin*, 315. That, whenever the judgment or decree, in the court below, occasioned *a grievance irreparable*, it was one against which this court ought to relieve, and that such a case was proper for an appeal. Here the order quashing or discharging the writ of se-

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questration, if improperly made, might forever have deprived the plaintiff of obtaining that, which was perhaps the very object that induced him to commence suit. It is clearly therefore, within the principle which the court has established in the case before cited. Let the *mandamus* issue.

STATE vs. *JUDGE LEWIS.*

An appeal lies from the discharge of a person arrested for want of bail.

APPLICATION for a *mandamus.*

This case is similar to that just decided, of Johnson & Ward *vs.* Brandt & Foster, except that there the appeal prayed was from an order, discharging Foster from custody, after he had been arrested, and held in confinement, for want of bail. The judge has assigned the same reason as in the preceding case, that there has not yet been a final judgment; but here, as well as in that which we have this moment acted on, we think an improper discharge of the defendant out of custody, might work an irreperable injury to the plaintiff in the suit, and are of opinion, that in this case also a *mandamus* do issue.

CANFIELD AL vs. *M'LAUGHLIN.*

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CANFIELD&AL
vs.
M'LAUGHLIN.
A factor has a lien, on the property of his principal, in his hands.

APPEAL from the court of the first district.

Hoffman, for the plaintiffs. In this case the plaintiffs have attached a quantity of cotton, which the claimants contend is their property, and was so at the time it was attached. The plaintiffs have obtained a judgment against the defendant, for the amount of their demand, from which there has been as yet, no appeal placed on file in this court; and therefore, the only issue in this case is, whether the claimants or the defendant were the owners of the cotton when attached.

1. There was no delivery of the cotton in dispute, to the claimants, and therefore the right of property was in the defendant, when our attachment was laid.

2. If a delivery to the claimants was made, it did not make them owners of the cotton, inasmuch as they received it as the factors or agents of the defendant.

I. The claimants have filed a bill of lading, as their title to the cotton, making them the consignors and consignees, and which, in the absence of other proof, might be conclusive.

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But the presumption, raised by the bill of lading, is, however, entirely destroyed by the testimony on record. We had a right to explain the bill of lading, and to show that the defendant shipped the cotton, and not the claimants, as mentioned in it. *Maryland Insurance Co.* vs. *Radius*, 6 *Cranch*, 338; *Potter* vs. *Lauring*, 1 *Johns. Rep.* 223. It cannot be pretended the claimants were the owners of the cotton at the time it was put on board the schooner Pearl, for the testimony is positive, that it was the product of defendant's farm, and sent by him to the mouth of Pearl river, to be there shipped, by the first vessel bound to New-Orleans.

It is also in proof, that the defendant is a planter, and the claimants, commission merchants, and that the cotton in question, is part of defendant's crop, sent by him to the claimants, to be by them sold, to pay the debt due them. Rankin, the person in whose charge the cotton was put by the defendant, says, he took the bill of lading on file, but this was not as agent of the claimants, for it was without their knowledge. The claimants do not inform us, in their claim on file, whether they derive their title to the cotton from a sale, a

dation en payement, or as a pledge. In every case, however, a delivery is necessary to transfer the property, according to our laws, *Durnford* vs. *syndics of Brookes*, 3 *Martin*, 226. The claimants are bound to prove the property they claim, belongs to them, *Lee* vs. *Bradlee & al.*, 8 *Martin*, 55. They rely upon the bill of lading as their title to the cotton, which, let us suppose, for the sake of argument, is equivalent to a bill of sale; where is the evidence of a delivery? Will it be contended that a delivery to the carrier was a delivery to the claimants? By the common law, such may be the case when the property is shipped for and on the account and risk of the consignee, 1 *Johns. Rep. p.* 1. But, in this case, the bill of lading is silent as to the risk, it was, therefore, borne by the shipper, to make a delivery to the carrier, or delivery to the consignee, the carrier must be one specially named, and employed by the consignee, and the property shipped at his risk; such is the opinion of justice Buller, in *Ellis* vs. *Hunt*, 3 *Durnford & East*, 468.

Such a delivery to the consignee, as would take away the right of stopping in transit, which the law gives the consignor, is neces-

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sary to transfer property to a vendeee, by our laws. Now, can it be said, that the defendant could not have exercised that right after delivery to the carrier? Let us now enquire, if there was a delivery of the cotton to the claimants, at the basin. Rankin says, Ramsay came to the basin, and told the captain of the schooner, not to unload the cotton, as he had no means of taking it away. Here then, was no delivery, for the cotton was neither seen nor counted by the claimants; neither was there a delivery by consent of parties, *propter magnitudinem ponderis*, for that provision of the law is not applicable, being intended for pillars, and such like things of great weight, *Domat.* 1, 2, 2, *art.* 5. Besides, in the present case, the claimants refused to receive, when the offer to deliver was made by the captain. How can that be a delivery, which has not the effects of a delivery, as between the parties, for if the cotton had been intended as *a dation en payement*, an actual delivery to the claimants, was necessary to put the risk of loss upon them? In the case already cited from 3 *D.* & *E.* 468, the goods were deposited in an inn, where the person to whom they were sent, put his

mark upon them, and the court deemed that a taking into possession; nothing equivalent was done in this case by the claimants, for the marking was such a receipt of the property, as to operate a complete transfer. In *Durnford* vs. *syndics of Brookes*, this court decided, that an actual removal of a part of the goods, comprised in the same bill of parcels, did not operate a delivery of the remainder.

II. But the cotton did not become the property of the claimants, by a delivery to them. The testimony in the case shews, the cotton was sent to the claimants, as factors of the defendant, a *dation causa solutionis*, out of the proceeds thereof. They did not purchase it, for there was no agreement to that effect, nor is there any evidence of an agreement to receive it in payment of a debt. In either case, it was necessary, that the weight and quality of the cotton should have been known to both parties, and that a price should have been agreed upon. Can the court then hesitate one moment, in believing, that the cotton in question, was sent by the defendant, as produce most usually is, to be sold for the best price, by the claimants, and the proceeds

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placed to defendant's credit. The receipt of the cotton, under such circumstances, made the claimants the factors of the defendant, and gave them a lien for a general balance, as decided in *Patterson* vs. *M'Gahie*, 8 *Martin*, 486, but did not make them owners of it. If authority be necessary to establish a principle so plain, we refer the court to *Kinlock & al.* vs. *Craig*, 3 *Durnford & East*, 119, and same case, 786, as decided in the House of Lords. That case is very similar to the one now before the court; for the shipment was not made at the risk of the consignees, and the property was sent to be sold, under like circumstances. Chief Baron Eyre, in delivering the opinion of the judges, says, that the transaction between the parties was as between principal and factor, and not as between vendor and vendee; and, therefore, the consignee could have no property in the cargo. The same principle is also decided in *syndics of Bermudez* vs. *Ibanez & al.*, 3 *Martin*, 39, in which this court say, "a right to be paid out of the proceeds of a sale, far from bearing any resemblance to a right of property in the creditor, implies the very reverse; for it is a right to be exercised against

the property of another. In no instance, could an attaching creditor succeed against his absent debtor, who has sent produce here for sale, if the mere circumstance of the debtor's owing likewise to his factor, should enable the factor to claim it as his property. When produce is sent to a merchant for sale, the freight is, almost, always, paid by him, and thus he becomes the creditor of the planter. But does the property thereby become his, or does even an advance upon it (which is often made) have such an effect? Surely not. Thus, we have shewn, that a delivery of the cotton to the claimants would not have made it their property; and, therefore, the only issue before the court, must be decided in our own favour.

We are far from admitting, however, that the claimants have a lien, as factors, in this case: for an actual possession only can give it. But let us suppose, for a moment, they had such a possession, can this court decree them what they do not ask? Can a judgment be rendered distinct from that prayed for in the petition or claim? Surely no argument can be necessary to shew, that such a doctrine would break down every thing like

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system in jurisprudence. We say, also, it would be contrary to positive law, *Partida*, 3, 22, 16. The court cannot say the cotton is insufficient to pay the debt due the claimants, and that, therefore, we can take nothing by our attachment; for, there is no evidence on record, as to the value of the cotton, and the court cannot look elsewhere for information. It is a question of fact, and should have been proved. Had the claimants asked to be paid, by privilege, as factors of the defendant, the court would have so decreed, upon their shewing they were in possession of the cotton; but a judgment for the thing itself is prayed for. We conclude, by saying; 1. That an actual delivery of the cotton, to the claimants, was necessary to support a claim, either as the vendees or factors of the defendant, and, that no delivery was made. 2. That as factors, the claimants cannot have a judgment for the property itself, and that the court must render a judgment conformably to the issue between the parties.

Eustis, for the claimants. There was a complete delivery of the cotton to the claimants. Rankin received it from the defendant.

with directions, on its arrival at the mouth of Pearl river, to ship it to the claimants; and accordingly did ship it in their name, and to their address. When the bill of lading reached their hands, the cotton was so completely theirs, that they might have effectually resisted the defendant's attempt to give it a different direction. They had, at all events, such special property in it, as enabled them to maintain an action against any person interfering with it, or withholding it from them. The captain of the Pearl was accountable to them, and to them alone; for, in the bill of lading, he had acknowledged them for (as they really were) the shippers and consignees of the cotton.

The claimants were something more than the agents or factors of the defendant. They were creditors, who had stipulated that the crop of the latter should be placed in their hands, in order that, by a sale of it, they might reimburse themselves the advances, which, on his pledged faith of securing them by the possession of the cotton, they had made him.

The principal object of the bailment of the cotton to them was the reimbursement of

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their advances. They were pawnees, with authority to sell.

The defendant could not, by any possible legal means, have regained the possession of his cotton, without securing the cliamants. No sale of his could have affected the rights and possession of the latter. Neither can his creditors, for all they can do is to exercise the right of their debtor on his property.

MARTIN, J. delivered the opinion of the court. The plaintiffs instituted this suit by a process of attachment, which was levied on eighteen bales of cotton, afterwards claimed by Cumming & Ramsay. The former had judgment against the defendant and claimants. The latter appealed.

The fact of the case appear by a bill of lading and depositions, which come up with the record.

According to the bill, twenty-three bales of cotton were shipped by Cumming & Ramsay, and consigned to themselves.

Graves deposed, that in March last, he was employed by the defendants, to take on board of his, the witness's, boat, twenty-three bales of cotton. to be shipped to the mouth of Pearl

river, Graves' landing; and for the freight, he received a draft on the claimants.

Lot deposed, he was present when a quantity of cotton was taken out of Graves' boat, which he commanded; that the cotton had been put on board by the defendant, at his landing, on Pearl river, to be carried to Graves', at the mouth of that stream. The cotton was immediately put on board of the schooner Pearl, consigned to the claimants in New-Orleans.

Peake deposed, that the cotton arrived in New-Orleans on a Saturday, and was not attached, to the best of his recollection, till the following Monday.

Rankin deposed, that the cotton was put under his care by the defendant (when he came down Pearl river, as a passenger on board of Graves' boat) to be shipped to the claimants. When at the mouth of the Pearl river, the deponent directed the cotton to be put on board of the schooner Pearl, and took a bill of lading in the claimants' names, which bill he delivered to them at New-Orleans, on a Saturday, immediately after the arrival of the schooner in the basin. Ramsay ordered the hands, who had began to unload, to stop,

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as he could not get drays till Monday. In the mean while, *viz.* on Saturday, eighteen bales of it, a part of which was on shore, and the rest on board, were attached, in the present suit. The defendant told the deponent, he was indebted to the claimants, and did not know whether the cotton would suffice to pay them, and it was with a view to discharge their claim, that the cotton was shipped.

Lee deposes, that some time in January or February last, he heard the defendant promise to the claimants, to send them the balance of his crop of cotton, being from twenty to thirty bales. He was present when the defendant and claimants settled their accounts, and the former was considerably in arrears; and he has lately understood from him, that he had shipped his cotton to the claimants in payment of his debt, as far as it would go.

Martin deposed, that he is master of the schooner Pearl, and received the cotton, at the mouth of Pearl river, from Rankin, as the property of the claimants, and signed bills of lading accordingly. It was marked with the defendant's mark, and was taken

from on board of Graves' keel-boat, without it being asked whose cotton it was.

Mathews deposed, that he had been the clerk of the claimants for two years past. The bill of lading annexed to the claim, is the one delivered them by Rankin. They had made to the defendant, an advance of $500, in consideration of his shipping his cotton to them. Some time before they had paid a draft of his for $2460, without their having any funds in their hands, and he heard him promise, that, in consideration of this, he would send them his crop of cotton. On the Saturday before the cotton was attached, in the present suit, the deponent went on board of the schooner Pearl, exhibited the bill of lading, and demanded the cotton. When the captain said he could not conveniently deliver it immediately, as it was in the bottom of the hold, but would land it as soon as possible. The deponent returned a short time after, but received the same answer. He is generally acquainted with the mercantile houses in New-Orleans, and believes there is no such firm there as Cumming and Ramsay & Co., and has no doubt the cotton was intended for the claimants.

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Gordon deposed, in the same manner as to the last circumstance in the deposition of the preceding witness.

There cannot be any doubt from the testimony, that Cumming & Ramsay, the claimants, are the persons whom Rankin meant to describe, by the firm of Cumming and Ramsay & Co.

The bill of lading shews, that the cotton was shipped by them. The oral evidence, if it can be of any weight against the written, does not lessen it. Rankin, who was charged by the defendant, the original owner of the cotton, with the care of it, and directed to deliver it to the claimants, shipped it in their name, and they had, before the attachment, ratified his act, by accepting the bill of lading, and demanding the cotton. Their right, therefore, to, or on it, must be the same as if they had shipped it themselves.

It is true, this does not make the cotton their own; for nothing shews that they were any thing more than the factors of the defendant, for the sale of the cotton, although it is in evidence, that the proceeds were intended to discharge a claim of theirs on the defendant. As such, they had a lien on it for their

advances, and the balance of their general account: a lien, which, in our opinion, the attachment could not affect.

It is true, the claimants demand the cotton, not as the factors or agents of the defendant, but in their own right, and as absolute owners of it. Although, the evidence does not establish their right as such, we are of opinion, that, as they have substantially proven their right to hold the property, as factors, and to be paid thereout, judgment may be given in their favour, according to the provision in the *Novissima Recopilacion*, 11, 16, 2.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, and that the cause be remanded, with directions to the judge to ascertain and allow the amount due to the claimants, and it is ordered, that the plaintiff and appellee pay the costs of this appeal.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District. *March*, 1821.

DUSSUAU & AL. *vs.* RILIEUX.

EASTERN DISTRICT, MARCH TERM, 1821.

DUSSUAU & AL. vs. *RILIEUX.*

If the defendant sued on appeal bond, in the court in which it was given, crave oyer, and the copy being tendered to his council and refused, the bond is spread on the record, this will suffice.

Formal imperfections do not prevent the supreme court from proceeding to judgment.

The mere levy of an execution, on the property of a co-debtor, does not skreen that of the other from seizure.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiffs claim $600, and state, that the defendant became surety on an appeal bond, for a debtor of theirs. That the judgment, which was for $500, was affirmed with damages; and, although execution has issued against the principal, and is returned unsatisfied, the defendant refuses to pay, wherefore they demand the aforesaid debt and costs.

The defendant pleads the general issue; that the action cannot be maintained in the form in which it is instituted; that the petition

demands no specific sum, and mentions not the necessary circumstances of time and place. He craved oyer of the bond, and that a copy might be served in lieu.

The plaintiffs annexed a copy of the appeal bond to the replication.

The district court was of opinion, that "the plaintiffs could not maintain their action, under the circumstances of the case, because, they have elected to sue out execution against the defendant, who was surety on the appeal bond, before this action was brought; and by the return on the execution, it appears, that property was seized, sufficient to satisfy the judgment, the sale of which was stayed, by order of court; the property being still in the custody of the sheriff, and liable to be sold, as soon as the order should be discharged. No suit ought to be instituted against the surety, until the said order be disposed of; otherwise two executions of different amounts, but growing out of the same original transaction, might be going on at the same time. This is not like the case of a joint obligation; the present defendant was not a party to the former judgment. The demand against him is not for the same amount, nor is the cause

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of action the same." Whereupon the suit was dismissed, and the plaintiffs appealed.

The statement of facts shews, that the plaintiffs introduced in evidence the *fi. fa.* and the sheriff's return, and the record of the original suit. The execution of the appeal bond, and the signature of the present defendant thereto, were admitted. The costs of the original suit were stated to be $55 37½. It was admitted, that a copy of the appeal bond was offered to the defendant's counsel, who refused to receive it, and said it ought to be served on his client.

When the cause was called for trial, the defendant objected to its being tried, as a copy of the appeal bond had not been served on, nor oyer given him. The court overruled the objection; inasmuch, as the bond was on file in the records of the court, the defendant was not entitled to a copy from the plaintiff, but might see it in the office. Whereupon he took a bill of exceptions.

At the trial, the plaintiffs offered the sheriff as a witness, to prove that he had instructed him to deliver up the negro woman seized at their instance, as they did not mean to con-

test the claim to her, but the court refused to hear him, holding his testimony irrelevant, whereupon they took their bill of exceptions.

The plaintiffs further offered the record of the suit, of *A. Dussuau* vs. *Auguste Chavanne*, her husband, and the testimony of the clerk. to shew that they had been made joint defendants, in the original suit against Ph. Auguste and Albin Dussuau, and that no defence had been made, or answer made by the present plaintiffs in the suit of A. Dussuau, wife of Auguste Chavanne, against her husband. On the refusal of the court to admit this evidence, they took another bill of exceptions.

It appears to us that the district court erred. Nothing in the pleadings shews that any execution had been levied on the property of the original debtor. Admitting that this appear, it cannot avail the present defendant, who bound himself jointly and severally with his principal. The plaintiffs can then exercise all their rights, against all their debtors, till the money be actually made. They may then obtain judgments, sue out executions, and levy them on the respective estates of their

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several debtors, and cumulate their remedies. Nothing can arrest their payment but the actual making of the money. The district court, therefore, erred, in concluding that the mere levy of an execution, on the property of one of the co-debtors, skreens that of the others from being levied upon.

The plaintiffs demand six hundred dollars, due them by the defendant, as surety for their debtors, on an appeal from a judgment for five hundred. The debtors are named, and the defendant is sufficiently informed, that he is sued on the appeal bond of his principals. The record of the suit is referred to; it is stated to have originated in the court of the first district, and to have terminated in this. It is true, no time was stated; but, it was not alleged that there was more than one suit by the plaintiffs, against the original defendants, in which the present defendant was surety on the appeal. From this the latter had an opportunity, which he availed himself, to have the matter put beyond the possibility of a mistake. Further, as the defendant admits that he subscribed the appeal bond, he asks with very ill grace, that the plaintiffs be compelled to institute another suit, in which he could

not have the benefit of any thing, of which he could not avail himself in the present.

Admitting, however, that, in strict propriety, the present petition is, in this respect, imperfect, the imperfection is one of those, which ought not to prevent us from proceeding to judgment, as the rights of the cause and matter in law, appear to require. 1 *Martin's Digest*, 444, *n.* 9, *Sinnet* vs. *Mulhollan*, 3 *Martin*, 398.

As the appeal bond is spread on the record, and comes up with it, we think that the demand of oyer was thereby sufficiently complied with, when the defendant's counsel refused to receive the copy.

By this copy, it appears clearly that the sum of six hundred dollars demanded, is the penalty of the bond, and that the suit is instituted on that instrument.

The imperfection of the petition, as to the want of a specified time, is cured by the spreading of the bond on the record, shewing the particular time on which the judgment was rendered against the original debtor, and the present defendant became their surety on the appeal.

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It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment in favour of the plaintiffs, for the sum of six hundred dollars, the penalty of the bond, which appears to be under the amount of the original judgment, with the costs of the appeal, damages and interest, and that the defendant, and appellee pay costs in both courts.

Hoffman for the plaintiffs, *Carleton* for the defendant.

VIALES' SYNDICS vs. *GARDENIER & AL.*

The appointment of syndics made in the French language, in the proceedings before the notary, is unconstitutional, and not cured by the homologation of the proceedings.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The only question in this case is, whether the plaintiffs are, as they state themselves to be, the syndics of Viales, the answer, denying that they are.

The facts of the case are, that some of the creditors of L. Viales, applied to the parish court, and obtained an order for a meeting of all the creditors. Their proceedings at this

meeting, before the notary, are written partly in the language in which the constitution of the United States is written, and partly in the French. The only part of this which has any relation to the appointment of syndics, is in the latter language. The proceedings, however, are homologated by a judgment of the parish court. But, in this judgment, the proceedings before the notary are not related, nor is any mention made of the appointment of syndics, it being only stated that the proceedings of the creditors before the notary, are homologated.

To homolgate, is *to say the like*, *homos logos similiter dicere.* So that the case cannot be put on a footing more favourable to the plaintiffs, than by considering it, as if the whole proceedings before the notary had been *verbatim et literatim*, transcribed on the judgment.

If that had been the case, we would be bound to consider the part of the judgment written in the French language, as a nullity, and if what is written in that language, in the proceedings before the notary, be disregarded, nothing shews that the plaintiffs were appointed syndics.

It is therefore ordered, adjudged, and de-

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creed, that the judgment of the district court, declaring that the plaintiffs have not shewn that they are the syndics of Viales, be affirmed with costs.

Carleton for the plaintiff, *Morse* for the defendants.

BOLTON & AL. vs. *HARROD & AL.*

APPEAL from the court of the first district.

The holder of a bill payable several days after sight, drawn in New-Orleans on Liverpool, is not guilty of laches, in not forwarding it directly for acceptance, but sending it to New-York for sale.

Hennen, for the plaintiffs. This is an action on a bill of exchange for £2500, drawn in New-Orleans, on the 23d of March, 1819, by J. Bailey, in favour of the defendant, directed to Messrs. Barclay, Salkeld & Co., of Liverpool; payable thirty days after sight, in London. The bill was indorsed in blank, by the defendants, and having been negotiated in New-Orleans, was forwarded, in about a week after its date, by mail, to the present holders; the plaintiffs residing in New-York, where it was received on the 1st of May, 1819, and immediately transmitted to Liverpool. On the 10th of June, the bill was presented in Liverpool, to the drawees for acceptance; which being refused; it was, on the same day.

duly protested for non-acceptance, by a notary public. Notice of the protest for non-acceptance was sent to New-York, and from thence to New-Orleans, where it was given to the defendants, on the 26th of August, 1819. On the 12th of August, 1819, the same bill was protested in London, by a notary public, for non-payment, and notice thereof transmitted, in the same way, and given on the 27th of October, 1819, in New-Orleans, to the defendants.

The defendants contend, that they have been discharged from any liability as indorsers, from the laches of the holder, whose duty, they contend it was, to transmit one set of the bills by the first ship from New-Orleans to Liverpool, for acceptance, and not by the circuitous rout of New-York. Furthermore, the defendants put the plaintiffs to the full proof of all the allegations contained in their petition.

The execution of the bill by the drawer and the first indorsers, the defendants, has been fully established in evidence. The bill was purchased in New-Orleans, some time between the 23d of March and the 1st of April, 1819, by H. Cliffe, and by him trans-

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mitted to New-York, to the present holders, by mail. The exact day when H. Cliffe purchased the bill, does not appear; but it was sent from New-Orleans on the 1st of April. The protests for non-acceptance and non-payment are on file, and form part of the record. The notices thereof were given without delay to the defendants.

The defendants' counsel contends, that the exhibition of the protests for non-acceptance and non-payment, with the seals of the notaries who made them, is not sufficient proof of the protests; and has taken a bill of exceptions to the opinion of the judge *a quo*, who allowed the protests to be read as evidence, without any proof of the signatures of the notaries, or of their seals. Such has been the established practice of all courts, both in England and the United States, as well as in Louisiana, as is fully settled by the following authorities. *Kyd on Bills of Exchange*, (3 London ed.) 270. *Gilbert's Law of Evidence*, 118, 19. *Swift's Bills of Exchange*, 281. *Bayley on Bills*, (London edit. 1799) 119. *Chitty on Bills*, (edit. 1817) 408. *Cunningham on Bills*, 105. 12 *Mod. Rep.* 345. *Maxwell on Bills*, 167, 8. 4 *Martin*, 81. *Caune* vs. *Sagory*. The

counsel for the defendants objects to the notice sent of the protest for non-acceptance and non-payment; and maintains, that a copy of the protests should have been sent with the notices; and, that they should have been sent directly from England to New-Orleans. That his positions on this subject are untenable; and that the regular and legal course was adopted by the plaintiffs, will amply appear from the following authorities. *Maxwell's Bills*, 169. 1 *Espin. Cases*, 511, 12. 1 *Johns. Rep.* 294. 5 *Johns. Rep.* 375. *Chitty*, 236, (edit. 1817.) 5 *Mass.* 167. 2 *Johns. Cas.* 1. The manner of protesting the bill for non-payment, in London, the counsel for the defendants conceives to be irregular. The agents for the holders presented the bill to a notary public, who declares in his protest, that inasmuch as no particular place in London is pointed out where the bill is to be paid; and, as the agents of the holders declare, they have received no funds for the payment of it, therefore he protests, &c. What more could have been done to any purpose, it is not easy to conceive. In the first place, no protest for non-payment, after a protest for non-acceptance, was necessary. The liability of the

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defendants was complete on the protest, for non-acceptance; the protest for non-payment was altogether a work of supererrogation. For the correctness of these positions, I refer to the following authorities. *Chitty*, 373 & 244, 5. 3 *Johns. Rep.* 202, 208. 8 *Martin*, 730.

But the principal difficulty, raised by the counsel of the defendants, is the laches, which they attribute to the holders of the bill, in sending it by the way of New-York to Liverpool, for acceptance; and they insist, that it should have been sent directly to Liverpool, by the first vessel sailing for that port, from New-Orleans. In answer to this, we have shewn, by the testimony of several merchants, that the usual way, of transmitting bills from New-Orleans to Liverpool, is by the Atlantic states, whither they are generally sent from this place for negotiation.

But it is always optional with the holder of a bill, payable a certain number of days after sight, to put it in circulation, without sending it on to the drawee for acceptance; and in this way, the bill may be kept in circulation for a year, before presentment for acceptance. Nor would such delay be considered as laches. *Bayley on Bills* (Lond. ed. 1799.) 60, 1. *Chitty*.

(ed. 1817) 178. *Swift on Bills*, 268. 2 *Hen. Blackstone*, 565, (*Muilman* vs. *D'Eguino.*) 1 *Morre's Index*, 181, *sec.* 9, *n.* 6. 2 *Marshall's Rep.* 454, (*Goupy* vs. *Harden.*) 6 *Taunt.* 305. 7 *Taunt.* 159. *Goupy* vs. *Harden.* 10. *Sirey*, 151. The two above quoted cases, *Muilman* vs. *D'Eguino*, 2 *Hen. Black.* 565. *Goupy* vs. *Harden*, 2 *Marsh.* 454. 7 *Taunt.* 159, are so exactly similar, in the important point decided therein, to the present suit, that if they are considered as correctly decided, there can be no hesitation in the mind of the court in giving judgment for the plaintiffs.

The counsel for the defendants, aware of this, will attempt to shew that the court is to take another rule for their decision, founded on the *Ordinance of Bilboa*, *chap.* 13, *n.* 24. To this I reply, in the first place, that as far as the article of the ordinance applies to this case, it has not been violated by the holders of this bill. But, secondly, these ordinances have never been considered as giving rules for the decisions of our courts. Many parts of them have never been received in this state, as law; and our commercial usages are in direct opposition to many of their provisions. 2 *Martin*, 328. 4 *Martin.* 93, 4. 241, 2. And

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in 8 *Martin*, 426, the provisions of these ordinances were invoked, but the court disregarded them. Moreover, the *lex mercatoria* forms a part of the law of nations, in which they all agree, and which is taken notice of by all. 1 *Black. Comm.* 273. 4 *Black. Comm.* 67. *Heineccii Elementa Jur. Camb. cap.* 1, *sec.* 14. And the attempt which the counsel for the defendants has made to prove, by witnesses, the law; and that the plaintiffs have been guilty of laches, is equally unavailing. For certainly the court will not hear witnesses to prove the *lex mercatoria*, 3 *Burr.* 1669. "The right mean of judging of bills of exchange, is purely by the laudable custom often reiterated over and over, by which mean, the same hath obtained the force of law, and not the bare and single opinion of some half-fledged merchants; for bills of exchange are things of great moment, as to commerce, and are neither to be strained so high, as that a man should not cast his eye on them, but the same shall be taken to be an acceptance; nor, on the other hand, having duly accepted them, they should be rashly and unadvisedly avoided, by the shallow fancy of such nimble-pated shufflers; but they are soberly judged and

governed, as the same hath generally been approved of, and adjudged of in former ages." *Molloy on Bills of Exchange*, 278. It has been shewn above, by the consentaneous decisions of the highest tribunals in England, France, and the United States, what is considered the rule for presenting bills, payable a certain number of days after sight; and that the holders of the bill, in this case, have used all the diligence that could be required, to charge the indorsers, in default, of non-acceptance. The plaintiffs, therefore, look for a confirmation of the judgment of the court below, for the amount of the bill, with damages, at the rate of twenty per cent. on the amount, and interest from the day of the judicial demand, *Bayley*, 91.

One of the bills of exceptions taken by the defendants, remains to be noticed; that of the counsel to the admissibility of the plaintiffs' agent, as a witness, who conceived himself bound, though not surety on record, to pay the costs of the suit, in case it should be lost. Agents have been always admitted as good witnesses, though interested for their commissions; and this is every day's practice. *Phillips' Evid.* 94, 5, 6. *Swift's Evid.* 74, 5. 4 *Mart.*

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81. And where a witness conceives himself under an obligation, when in fact he is not to pay costs, such impression will not invalidate his testimony: he is still a competent witness. *Randal's Peake's Evid.* 163.

Livingston, for the defendants. The plaintiffs ought not to recover in this cause.

1. Because, they are not the owners of the bill. This appears from the testimony of Oldham, who says, that Hughes, Duncan & Co. (or Cliffe, their agent, who remitted the bill to the plaintiffs) were not credited with the bill, or if they were, they were debited with it on its return. Therefore, it is still the property of Hughes, Duncan & Co. The suit ought to have been brought in their name. We may have off-sets against them, which we have had no opportunity of shewing, as this fact was only declared to us on the trial. No man can bring a suit when he has no interest, if that want of interest appears by his own shewing.

2. Because, we have lost the amount by the neglect of the holders. This bill was drawn and endorsed on the 23d day of March; instead of being sent direct to Liverpool for acceptance, it was remitted to New-York,

and from thence sent to its destination. Bills drawn in April, by the same person, on the same house, were sent direct, were accepted and paid, and the drawer, who was examined here, shews, that if the bill in question had been presented before the others, it would, undoubtedly, have been paid. Here then is evidence of laches, because, the bill not only might have arrived, in the direct course, sooner than it did, but bills dated fifteen days after it, did actually arrive before; and instead of presumption of loss, we have actual evidence of it. On the enquiry, within what time bills payable, so many days after sight, ought to be presented, we have this authority, *Kyd*, 118. "All that has been said, on the presentment of bills and notes payable on demand, seems exactly to apply here; that, which might be called an unnecessary delay in the one case, having evidently the same tendency to produce inconvenience or loss to the preceding parties, in the other."

The rule thus referred to is at page 46, and the case on which it is founded, in the four preceding pages. "The best rule, in these cases, seems to be, that drafts payable on demand ought to be carried for payment on the

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very day on which they are received, if from the distance and situation of the parties, that may be conveniently done."

The same rule is laid down in *Chitty*, 132, 133, 134, (Philadelphia edition, 1809.) And, indeed, every reason which requires diligence in giving notice of the dishonour of a bill, applies to the presenting of it for acceptance.

The inconvenience resulting from this obligation, in the course of bills of exchange, which are frequently purchased here, for the purpose of negotiation elsewhere, before acceptance, has been relied on by some of the witnesses, and by the counsel in argument; but there is an easy way of avoiding this, mentioned, I believe, by Mr. Salkeld, on his examination: it is, to remit one of the set of bills immediately after the purchase for acceptance, for the account of the holders of the others of the set, in case they should be negotiated. Whatever may be the opinions of witnesses here, or of the courts in England, France, and some of the other states, on this subject, our law is positive on this point, and express.

By the *Ordinance of Bilboa*, *p.* 98, *art.* 24, this practice is sanctioned in strong terms, and as

it not only accords with convenience, but is analogous to received practice on another branch of the law of bills of exchange, I should presume the court must consider itself bound by this provision; it has been neglected, in this instance, by the holder of the bill, the consequence has been the dishonour of the bill, and the endorser of course ought to be discharged.

3. Because, there was no demand of acceptance. The testimony on this point is, that the notary presented the bill, not to Barclay, Salkeld & Co. upon whom it was drawn, but to Salkeld & Co. who have nothing to do with it.

4. Because, there was no demand for payment.

There is nothing in the bill which indicates, that it is payable in London, but an abbreviation of those words after the direction. Now, if Barclay, Salkeld & Co. who reside at Liverpool, but have an agent for the payment of their bills which they engage to pay in London, if they had accepted the bill, it would have been reasonable to expect, that they would have paid it in London, agreeable to this direction; but as they did not accept.

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it was the duty of the holders to present it at Liverpool for payment. But this is not all, supposing London the proper place for the demand, some demand ought to have been made there on the drawees.

By the testimony of Pritchard, it appears they had an agent there. And from the same testimony, it may be inferred, that the agent of the holders knew this fact. Yet the notary goes no where to present; he makes no enquiry; he receives the assertion of the agent, that the drawees had no compting-house in London, for truth, asserts it in his protest, and completes the whole business without stirring from his compting-house.

Chaplin, in reply. The plaintiffs ought to recover.

1. Because they are the owners of the bill. This appears from the evidence of Oldham, who says, that if the amount of the bill in question, be recovered, it will be for account of the plaintiffs, to whom Hughes, Duncan & Co. are indebted in a balance of account, arising from this and other transactions: it follows, therefore, that if the amount of the bill be recovered by the plaintiffs, for their

own use, and not for the use of Hughes, Duncan & Co., the bill belongs to them.

2. Because there was no neglect on the part of the holders of the bill. It is not necessary to send bills payable a certain number of days after sight, to the place of their destination, until the holder find it convenient. The case of *Muilman* vs. *D'Eguino*, 2 *H. Black.* 565, is conclusive on this point, and the same doctrine was recognized and confirmed in the case of *Goupy & al.* vs. *Harden & al.*, 6 *Taunt.* 305. The French law is still more decisive on this point: In *Sirey, Decis. de la Cour de Cafation*, 10, 151, it was decided by the court, that a bill payable days after sight, might be kept in circulation during five years, without any demand of acceptance on the drawee; see also, *Pothier, Contr. de Change, pl.* 128, *Chitty on Bills*, 178, *et seq. Maxwell on Bills, title Delay, Bayley on Bills*, 59, *Kyd on Bills of Exchange;* "it does not appear, however, that any precise time, within which this presentment must be made, has in any case been ascertained." It did not; but the case of *Muilman* vs. *D'Eguino*, and which was published after *Kyd's Treatise*, expressly shows, that the rule laid down by *Kyd*, and relied on by the defendants, for the pre-

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sentation of bills, payable on demand, does not apply to bills payable after sight.

Were the holder obliged to send it on immediately to the drawee, he would lose his opportunity of having it negotiated here; and the fact of other bills having been paid, this remaining unpaid, proves that the drawer, had, either by neglect or fraud, overdrawn upon the drawees, nor ought the holders suffer for the neglect, much less for the fraud of another. The holder of a bill of exchange, payable days after sight, is never obliged to present it to the drawee for acceptance, except when it is the interest of the drawer that it should be done. The drawer, here, had no interest in getting the bill accepted, because he would not have been liberated by the acceptation, but was always bound until final payment.

3. Because, there was a demand for acceptance. The defendants say the demand was made upon Salkeld & Co. and not on Barclay, Salkeld & Co. By reference to the original protest, we find that the clerk has made an error in transcribing. The original says, the demand was made on Messrs. Barclay, Salkeld & Co., and the record has been cor-

rected agreeably to this, nor is this correction too late, as it may be made any time *pendente lite*, or even after judgment. But the witness, Mr. George Salkeld, *admits*, that the bill was presented for acceptance, ten days after, as he thinks, the two others mentioned in his answer.

4. The defendants say, there was no demand made for payment on the drawees. The bill is expressly made payable in London, without designating any house, or any place in London, where it was payable, and where a demand could have been made. If then, there was no place specified but London, which is a very indefinite direction, how could the notary make a demand? On whom could he make it? On Barclay, Salkeld & Co. of Liverpool? No, for the bill was payable in London, and Messrs. Barclay, Salkeld & Co., of Liverpool, would have told them so. On their agent in London? He knew nothing of him, nor was the bill directed to him. Therefore, the notary was not obliged to make the demand, was not obliged to ask any man who the agent was, as it was not made payable at any agent's.

Livingston, contra. The defendants' coun-

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sel does not think he has a right to reply to any of the arguments or authorities which were contained in the plaintiffs' first address, because, to those he had an opportunity of answering before. But the plaintiffs' has fallen into some inaccuracy of statement, in answer to the 4th objection of the defendants, which he deems it his duty to rectify. He says, to excuse the want of presentation for payment in London, that the holder could not know to whom to present it, that he knew nothing of his agent in London, &c. But by a reference to the testimony of Mr. Pritchard, it will appear that the principal establishment of Messrs. Barclay, Salkeld & Co. was in London, under the firm of Thomas & George Barclay & Co., and that Thomas Wilson & Co. the holders of the bill, well knew the fact.

Chaplin, in reply. In answer tothe observations of the defendant, it will only be necessary to observe that Messrs. T. Wilson & Co. of London, who, as merchants in London. were certainly better acquainted with the city than Mr. R. O. Pritchard of New-Orleans, and who would have known the house in London, had there been any, as Mr. Pritchard de-

clares that Messrs. T. Wilson & Co. had many commercial transactions with the house of T. & G. Barclay & Co. in holding their acceptances. But they declared to the notary, that they requested the protest, because there was no place designated for the payment of the bill. As agents for the plaintiffs, they would have left no means untried to get payment for the bill in question; they would have gone to the house in London, had the bill been made payable there: but from all the circumstances of the transaction, we must conclude, that neither the agents or the notary knew of any house in London, where the bill was made payable; or even suppose they did, they were not bound to present the bill, as the house was not designated. It is not necessary at all to protest it for non-payment, but if it was protested, it was done so duly, as in the case mentioned in 3 *Johnson*, 202, 208.

MATHEWS, J. delivered the opinion of the court. The defendants and appellants are sued as endorsers of a foreign bill of exchange, which was returned from England, protested for non-acceptance, and non-payment.

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They resist the claim on several grounds.

1. That the plaintiffs are not the owners of the bill.

2. That they have been guilty of laches, or culpable of negligence, in having it presented too late to the drawee for acceptance.

3. That they made no demand of payment.

I. The first objection to a recovery, by the plaintiffs and appellees, we are of opinion, is not supported by the evidence in the cause. They are (as nothing appears to the contrary) the holders of the bill under regular endorsements, and must be presumed to be the owners of the bill. The circumstance disclosed by the testimony of Oldham, does not destroy this presumption. Whether they have credited their immediate endorsers, on their books, for its amount, ought not to alter the nature and effect of the right, which they acquired by the written contract of endorsements, established by the custom of merchants, that is to recover the amount of the bill, from the drawers or endorsers, if they have used due diligence.

A recovery against the defendants, in the present suit. will clearly bar any action

brought by Duncan & Co., and the disposition of the proceeds of the bill, when recovered, is not a matter which concerns the defendants.

II. In support of their next objection, the counsel of the defendants and appellants, relies much on the testimony of Salkeld, one of the partners of the commercial house on which the bill was drawn. It is true, that this testimony established the fact, that bills drawn on them, posterior to the one on which the present suit is brought, by the same drawers, were accepted and paid. But it does not follow, as a necessary consequence, that, because the holders of these bills have been more diligent than the plaintiffs and appellees, the latter have been guilty of such laches, as must, according to the custom of merchants, exonerate the drawers from their liability.

On the subject of presenting bills for acceptance, whether payable at sight, or in any other manner, it would seem that there is a general rule, *viz.* that due diligence must be used. What course of conduct by the holder will constitute this species of diligence, per-

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haps, is not reducible to the government of any precise or invariable rule, and was formerly held to be a matter of fact, to be determined by the jury in every case, and is now established to be a question of law. Yet, by this change, little additional certainty is gained, as the precise time, within which a demand must be made for acceptance, is as undetermined as before. According to the opinion of Buller, J., in the case of *Muilman* vs. *D'Eguino*, 2 *H. Bl.* 525, the only certain rule that can be laid down, with regard to bills at sight, or a certain time after, is, that they ought to be put in circulation. If this be done, as was the case with the one on which the present suit is brought, it appears that the time between the periods of drawing and presenting for acceptance, may be very considerable, without any charge of negligence against the holder.

It appears in evidence, in this case, that the most usual course, which bills drawn in New-Orleans on England, take, is to be negotiated in some city of the Atlantic states, and from thence to their final destination. This course of trade does not appear to us, to have any thing unreasonable or unjust, in relation to

any party to a bill, and the precaution, which one of the witnesses states, that he generally takes of transmitting one of the set directly to its place of destination for acceptance, may be useful by increasing the credit of the bill, but argues nothing against the propriety of the steps which are generally taken by holders of such bills.

Upon the whole, we are of opinion, that no laches are attributable to the plaintiffs, in relation to the demand of acceptance on the drawee.

The holder of a bill of exchange, having a right to resort to the drawer and endorsers, immediately on the protest for non-acceptance, and, as it is believed, that this right is not invalidated, by retaining the bill till its maturity, and then demanding payment, we deem it unnecessary to examine the third objection.

As to the bill of exceptions to the admission of the notarial protest, the decision of the court, *a quo*, is clearly correct.

We find on the record, an exception to the competency of the testimony of Dorsey, one of the witnesses introduced by the plaintiffs and appellees, to prove notice to the defen-

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dants of the dishonour of the bill, but as this is sufficiently proven by other witnesses, it is thought unnecessary to decide on the bill of exceptions taken thereupon.

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

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

LABRIE vs. *FILIOL.*

When the owner of land keeps works erected thereon by another, he must pay their value.

APPEAL from the court of the third district.

PORTER, J. delivered the opinion of the court. The plaintiff claims the machinery of a cotton-gin, fixed in a house situate on the land of the defendant, or $300, the value thereof. Damages to the amount of $500, are also alleged to have been sustained by the illegal detention of the object sued for.

The answer states, that the defendant bought the land on which the machinery was erected, without any exception whatever, and prays, that his vendor may be cited, in warranty, to defend his right to it.

The court ordered the vendor to be cited. He appeared, and, in his answer, denied he had ever sold the machinery of said cotton-gin to the defendant, and urged it was not included in the act of sale made by him, for the premises on which it was erected.

The cause was submitted to a jury, who found a verdict for the defendant, from the judgment rendered on which, the plaintiff appealed.

The evidence, taken in the cause, proves, that the machinery in question was placed on the premises by the plaintiff, at a time when he was not owner of the soil.

The *Civ. Code*, 104, *art.* 12, provides, "That when plantations, constructions, and works, have been made by a third person, and out of said person's own materials, the owner of the soil has a right to keep them, or to compel the third person to take away and demolish the same, &c.

If the owner *keeps* the works, he owes the owner of the materials nothing but the reimbursement of their value, and of the price of the workmanship."

It has been proved, that the defendant has kept these works, and that their value is $60.

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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 do recover of the defendant, the sum of $60, with costs of suit in this and the district court.

Dumoulin for the plaintiff, —— for the defendant.

TERREL'S HEIRS vs. *CROPPER.*

An heir cannot set aside his ancestor's deed, on the ground, that it was made in fraud of his creditors.

APPEAL from the court of the fourth district.

MATHEWS, J. delivered the opinion of the court. The object of this suit is to cause to be cancelled and annulled, a deed of sale of certain slaves, named in the petition, executed by R. Terrel, the plaintiffs' ancestor, to N. Cropper, the late husband of the defendant, on an allegation, that it was made in fraud of Terrel's creditors. The plaintiffs had judgment, and the defendant appealed.

In support of this action, and of the correctness of the judgment of the district court, the appellees rely much on the decisions of this court, in the cases of *Lopez* vs. *Greffin's*

executor, 5 *Martin*, 145, and *Croizet's heirs* vs. *Gaudet*, 6 *id.* 524.

In neither of these cases was fraud directly alleged by the plaintiffs, who claimed the interference of this court, to set aside the feigned sale of which they complained. The first was stated to have been made for the purpose of protecting the owner against unjust pursuits, in legal form, which he apprehended would be commenced by his enemies, and supported by false witnesses. The second was stated to be, in reality, a conveyance by the ancestor, in trust, for the benefit of two of his heirs, to the exclusion of the others, under the form of an absolute sale.

The decision of the latter case, which, in its circumstances, is more like the present than the former, is grounded on our law of inheritance, which refuses to ascendants the right of depriving their descendants, or forced heirs, from that portion of their property which it secures to the latter.

The heirs of Croizet appear to have united in their attack on the sale, made by their father, as feigned and fraudulent against them, and, having supported their allegations, were relieved.

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In the present case, the petition contains no allegation, that the sale, which the plaintiffs seek to have annulled, was made in fraud of their rights as heirs; on the contrary, it is alleged, that it was made in fraud of the creditors of their ancestor, by placing his property out of their reach. It is true, they pray that the defendants may be decreed to account with them, but, they do not allege, that the value of the slaves, conveyed to the defendant's husband, is more than equal to the debts of their father, and the amount advanced for him by the pretended vendee, or that they are in any manner deprived of their legitimate portion of his inheritance by the said sale.

The appellees have not brought themselves within the principles of law on which the decisions, in the cases cited, are founded, and we do not believe, that either justice, policy, or law, require that they should be extended to afford relief, in cases more avowedly base and fraudulent than those already adjudged.

Suitors only, who allege injury to themselves, or persons whom they legally represent, by feigned and fraudulent acts, can be listened to in a court of justice, when claiming relief against them.

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As the petition contains no allegation, that the plaintiffs are injured by the sale of which they complain, or that it was made in fraud of their rights, we are of opinion, that the district court erred in sustaining the present suit.

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 defendant, as in a a case of non-suit, and that the plaintiffs and appellee pay costs in both courts.

Meriam and *Workman* for plaintiffs, *Morse* for defendant.

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When the English and French part of a statute differ, if the expressions in the former be clear and unambiguous, the latter is to be disregarded. But, if they leave the meaning of the legislature uncertain, the latter part may be referred to, in order to clear the doubt.

The decision of the supreme

APPEAL from the court of the first district.

PORTER, J.* The plaintiffs allege that they employed the defendant, an attorney and counsellor at law, to commence a suit by attachment, against Thos. H. Fletcher, a citizen of Tennesse, on a claim arising from his endorsement of a protested bill of exchange, drawn by C. Stump, of Nashville, on Stump, Eastland &

* By an act of the legislature, the judges were directed to give *seriatim*, separate and distinct opinions.

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Cox, New-Orleans, for $8200, for which sum, together with the interest and damages, amounting in the whole to $10,500, he, Fletcher was indebted to them. That for a reasonable fee and reward, by them to be paid, the defendant agreed to conduct said suit skilfully, faithfully and diligently. But that, not regarding his previous argreement, he had unfaithfully and negligently, commenced it in the parish court, of the parish of New-Orleans, which had not authority to take cognizance of the same; when he ought to have brought it in the district court, for the first judicial district, which had jurisdiction of the matters and things thereunto appertaining; that the cause of action, on said bill of exchange, arose out of the limits of New-Orleans; that the supreme court of this state had decided long before the commencing of the suit, that the parish court had no jurisdiction of such cases, and that the defendant had due notice thereof.

They further aver, that by reason of the unskilfulness, mismanagement, and gross neglect of said Turner, they have lost their lien on the property attached, and with it the debt aforesaid; have been obliged to stop payment,

court are evidence of what the law is.

It is bound to solve doubtful questions of law and cannot refer them to the legislature.

An attorney and counsellor at law is liable to his client for the mismanagement of the suit, even tho' it be done without fraud.

But not, if through error of judgment, unless the error be very gross.

A judgment is not evidence, against the attorney, of the facts it states.

When proper evidence is not offered, the presumption is, not that the attorney neglected to offer it, but that the client failed to procure it.

and have suffered damage to the amount of twenty thousand dollars, for which sum they pray judgment. *Breedlove & al.* vs. *Fletcher*, 8 *Martin*, 69.

The defendant, in his answer, denied all these allegations; the plaintiffs produced in evidence, the record in the case of *Breedlove & Bradford* vs. *Fletcher*, the case of *Delille* vs. *Gaines*, decided in the supreme court, March, 1817. That of *Dunwoodie* vs. *Johnson*, and *Smith* vs. *Flower*, both decided in the same court, in January term, 1819.

A witness, Lessassier, who proved, that in case the plaintiffs had recovered, he had monies of M'Neil, Fisk & Rutherford, to meet the judgment: that he believed Fletcher, the endorser of the note, is now insolvent; he also detailed conversations as to different compromises, or offers of arrangement made to the plaintiffs after the commencement of the suit, one of which was rejected, because the damages would not be allowed, and the other, because the paper offered in discharge of the protested bill, was regarded by the plaintiffs as too difficult of collection.

N. Chamberlain, a witness for plaintiff, also deposed, that Fletcher was insolvent, and on

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cross-examination, assigned very satisfactory reasons for the assertion.

The plaintiffs also offered to prove the insolvency of the drawers and drawees of the bill. But the court refused to admit the evidence: a bill of exceptions was taken to this opinion.

An extract from the minutes of the supreme court, attesting the admission of the defendant, as an attorney and counsellor at law, closed the evidence on the part of the plaintiffs.

On that of the defendant, records of seventy-seven cases brought in the parish court, were introduced for the purpose of shewing that it was customary to institute suits in that court, on contracts originating out of the parish, since the decision in the suit of *Delille* vs. *Gaines*.

It was admitted, that judge Derbigny dissented from the opinion delivered by the supreme court, in the case of *Breedlove* & *Bradford* vs. *Fletcher*.

The letter from the plaintiffs to the defendant, employing him as attorney, to bring suit against Fletcher, and have his property attached, was also produced. It was dated on Saturday evening, and requested that every thing might be prepared by Monday morning.

To rebut the presumption arising from the practice of bringing suits in the parish court, the plaintiffs examined Isaac F. Preston, Alfred Hennen, and Levi Pierce, attornies, practising in the courts of this city.

The two first named gentlemen severally declared, that from the time the decision of the supreme court, in the case of *Delille* vs. *Gaines*, came to their knowledge. they had considered the parish court not to have jurisdiction in cases originating out of the parish. L. Pierce stated, that his opinion, as to the jurisdiction which he had before doubted, was fixed by the decision in the case of *Dunwoodie* vs. *Johnson*.

The cause on this evidence was submitted to a special jury, who found for the defendant.

The novelty of the present action, the large amount involved in its decision, and the circumstance that the judgment, which has to be pronounced, must eventuate in a total loss to the party cast, has given to this case a degree of interest which rarely occurs from the discussion of mere legal rights.

1. Various grounds of defence have been taken; the first is, that the decisions of the supreme court, in the cases of *Delille* vs. *Gaines*.

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Smith vs. *Flower*, and *Dunwoodie* vs. *Johnson*, were wrong; that notwithstanding the opinions pronounced then, the defendant had a right to disregard them, and bring his action in the parish court of the parish of New-Orleans; and that there was error here in dismissing this case, for want of jurisdiction in that court.

2. That lawyers practising in this state are not under any obligation to notice the opinions which this court may pronounce, and that a difference of opinion between the court and the advocate, cannot make the latter responsible in damages.

3. That, if the jurisdiction of the parish court was doubtful, this tribunal had no authority to decide the question, but should have referred it to the legislature, such being the practice in Spain.

4. That the law cited by the plaintiffs, as to fault and negligence, applies only to attornies; and that gentlemen at our bar, practising both as counsellors and attornies, are not responsible in the latter capacity, because they act under the advice of themselves as counsellors, and they are not responsible as counsellors for errors of judgment, in giving that advice.

5. That the defendant can only be made responsible for fault or negligence; that there was no *fault*, because that implies an act of the will, an intention to do wrong, of which it is not pretended, the defendant can be accused: and that there was no *negligence*, because that consists not in doing a thing incorrectly, but in failing to do it at all.

6. That at most, the defendant only committed an error of judgment, for which he is not responsible. That, in that error he was supported by the opinion and practice of many of his brethren, as the evidence proves, that a learned and able judge, then on the supreme bench, dissented from the decision in the cause of *Breedlove* & *Bradford* vs. *Fletcher*.

And lastly, that the plaintiffs have not produced legal evidence that the cause of action, in the case of *Breedlove* & *Bradford* vs. *Fletcher*, arose out of the parish of New-Orleans.

These points have been all urged with equal confidence and earnestness, by gentlemen of great eminence in their profession, and although an examination of each and every one of them, is perhaps not necessary, in the opinion which I have formed on the whole case; yet, as silence might be deemed an ac-

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quiescence in doctrines, some of which we regard as novel and dangerous, I have considered, that I would be wanting in my duty, if I suffered them to pass by without expressing my unhesitating dissent to them. First, as to the correctness of the decision of this court, in the case of *Breedlove & Bradford* vs. *Fletcher*, 8 *Martin*, 69.

In ordinary cases, I should deem it unnecessary, after a subject has been so frequently agitated, and so often pronounced on, to say any thing more than refer to the decisions of this court, by which the law had been settled. But, as there has been a change in some of the members of this tribunal, since the decision complained of, and as a contrary doctrine has been urged with a zeal which excited attention, it has been thought proper to examine the question again, and with an anxiety to correct the error into which the court might have fallen, if we could be satisfied it was one.

Nothing new has been presented in argument on the point, or, indeed, different from what was urged by the defendant, when counsel for the plaintiffs. After all that was then said, I see no reason to question the opinion.

already pronounced on the subject. It is a matter of surprise, how an act, which, in defining the jurisdiction of the parish court, used these words, "concurrent with that of the court of the first district, in all civil cases, originating in the said parish," ever could be construed to mean cases "originating out of that parish." The language of the act is surely very plain and intelligible, and stands not in need of interpretation. Being thus positive and clear, I do not perceive what aid can be derived, in the enquiry, from the act establishing the district court. Nor by what legal principle, a statute, which is explicit and imperative in its provisions, is to be controled and explained by ambiguous expressions in another. *Civil Code*, 4, *art.* 17.

The whole argument, indeed, resolves into this: That, because an erroneous construction was, perhaps, put on the law establishing the district court, that the same should be, therefore, extended to the parish. Admitting this to be the fact, I do not see the correctness of the reasoning. But I do not admit it, and I feel satisfied, that the jurisdiction of the district court was correctly expounded.

It is a fact, familiar to all persons acquaint-

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ed with the formation of our present judiciary system, that the district courts, established by the act of 1813, were intended to take the place of the superior court of the territorial government, each to exercise within their respective limits, the same powers, and have the same jurisdiction that it enjoyed throughout the state. The intention of the legislature, on this head, has never been questioned. To have limited the authority of the court, as contended for by defendant, would have done violence to the will and intention of the law-maker, and in doing so, to have violated a cardinal rule in the construction of statutes. *Civil Code*, 4, *art.* 18.

Again, if that construction had been adopted, the court should have been led to the singular and most inconvenient result, that the legislature did not intend, and had, in fact, failed to provide any tribunal for the trial of causes which did not originate within the limits of each of our district courts. This would have been in opposition to another fundamental rule, that prohibits us from expounding a statute in such a way, as to lead to absurd and inconvenient consequences.

These reasons, I think, fully justify the uni-

versal understanding of the bar and the bench, through the state, for the last eight years, in the jurisdiction of the district courts. But do any of these reasons apply to the parish court, so as to authorise a deviation from the positive expression of the law which creates it? Certainly not. On the contrary, the intention of the legislature (as well from the language used in defining its powers, as from the provision for the payment of the judge's salary) was manifested, to make it a tribunal of limited jurisdiction; and yet, if we adopted the construction of the defendant's counsel, it would have unlimited jurisdiction. Because, they say, the words "jurisdiction, concurrent with the court of the first district, in all cases originating in the parish, must be understood, all cases that may be brought in that court."

If the reasoning is not satisfactory, I may add to it, the key furnished to us of the intention of the legislature, by the French part of those acts establishing the two courts. That which creates the district, gives it jurisdiction of all the civil actions, "*qui pourront se presenter*," that which defines the powers of the parish, restrains them to all civil cases, "*qui*

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prendront naissance dans les limites de la dite paroise; much was said, that according to the constitution, the English text was the law, and that we must follow it. This is, no doubt, true; and whenever the expressions in the English and French parts of the act differ, the latter must yield, or in other words, be disregarded. But when the law, as written in the language of the constitution, is doubtful, surely the sense in which the members of our legislature, who speak the French language, understood it, may be safely called to our assistance, to explain what is uncertain. They form a large and respectable portion of our legislature; frequently a majority of it. Many of them speak well, and understand perfectly, both languages; and the sense in which such men pass a law, is certainly a valuable means of ascertaining the understanding in which the whole body enact it; one which I do not feel myself at liberty to disregard.

I conclude, therefore, that the parish court had not jurisdiction of cases arising out of the parish of New-Orleans, and that, therefore, the first ground of defence fails.

The next objection, that the lawyers prac-

tising in this state, are not under any necessity of noticing the judgments given by the supreme court, has, certainly, the merit of novelty, to justify an examination of its correctness.

In support of this position, a great deal of time was occupied in shewing, that the decisions were not law; that nothing could be properly called so, but those acts passed by that branch of our government, in whom the power of legislation is vested by the constitution. This is true, and we never before supposed that they were so considered. But as we are obliged, by our duty, to decide on every question that is brought before us, and, as many of these questions turn on ascertaining the true meaning of the law-maker, when the expressions used are ambiguous, whether that ambiguity be considered in relation to the language used in the act, or the applicability of the provision to particular cases; I had supposed it not doubted, that the decisions of this tribunal, were to be regarded as the interpretation of the legislative will; as an exposition of its meaning and intention. And that, until the legislative authority, by subsequent acts, chose to make different pro-

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visions on the subject, that it is an acquiescence on their part, that the court fairly understood their meaning, and wisely and faithfully expounded it. There is, also, a variety of questions presented for decision, where positive law is silent, and where recourse must be had to legal analogies, to arrive at truth. Is not the decisions which this court makes, amid the frequent conflicting opinions of foreign jurists, to be received as determining which doctrine is in force here? We are told not; that recourse must be had to the law itself, and that law is found where, in some obscure commentator, who lived, perhaps, some centuries ago, and who is quoted, triumphantly, as better evidence of what is a a rule of action for the people of Louisiana, than the decisions of men, who, whatever in other respects, be their abilities, have, at least, the advantage of using the knowledge and the learning that latter times has produced—who enjoy the light of the age in which they live, and who have the aid of able counsel, discussing every subject on which they are called to pronounce an opinion.

This, then, is the fair extent to which the authority of the decisions of this tribunal may

be carried. They are evidence of what the law is, under such circumstances, as has been just stated, and as it is the duty of the court to see that they are correct, and that they are uniform; so, also, is it important, that society should know, that we feel ourselves bound by them, unless we are clearly, and beyond doubt, satisfied that they are contrary to law or the constitution, and that we never can consider it a proper discharge of duty, in any member of the bar, who pursues his profession, with an avowed determination to disregard them.

It is no answer to this reasoning, to say that the law is different from the decision of the court, for that is begging the question, and taking for granted, the very point which the court has otherwise decided.

On this view of the subject, I need not examine the difference between the authority to which decisions under our law are entitled, and those of the courts in England; many of the latter, as was truly stated, turn on the common law, many of them, however, grow out of the expressions used in their statutes, and are given in expounding them. Cases of the latter description are delivered under cir-

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cumstances similar to those in which this court pronounces here, and have, in that country, the same weight which I have just stated, the decisions of this tribunal should enjoy in this.

Nor do I find, that the opinion or practice of other countries is different on this head. In France, where the science of jurisprudence has been carried to great perfection, the decisions of their courts of last resort, are referred to, by the most eminent writers on the laws of that country, by *D'Aguesseau*, by *Denisart*, by *Merlin*, by *Paillet*, by *Duguien*. by *Pothier*, by the jurists who have published a late edition of the last mentioned author's works.

Since the enactment of the different codes under the reign of Napoleon, an immense number of the reports of the decisions of their court of cassation, and other tribunals of appeal, have been collected and published with the utmost care, see *Jurisprudence, du Code Civil*, 22 *vols.*, *Sirey, Recueil general des Lois et des Arrets*, 16 *vols.*, *Journal des audiences de la Cour de cassation*, 14 *vols.*, by *Denevers*. If, as contended here, decisions of courts, under the civil law, were only evidence of

the *law* between the parties litigating, why all this care in collecting and preserving them, and does not the simple fact of their publication, their rapid and extensive circulation, and the frequent reference to them, completely answer all that we have heard on this subject?

In Spain also, the decisions of their courts are quoted, to the same purpose, *Febrero addicionando*, *pa.* 2, *lib.* 3, *cap.* 3, *sec.* 2, *n.* 178, and many other passages in that author's works.

Nor is there any assumption of power in giving the decisions of this court the authority just spoken of. The tribunals of the last resort, in every state of the union, hold the same doctrine, each in relation to their own judgments. They are acquiesced in, without objection, by the citizens of those states; men not unacquainted with their rights, or slow to perceive or check any usurpation of them. Congress appropriates annually, a sum of money, to ensure a publication of the decisions of the supreme court of the federal government; and here in Louisiana, the representatives of the people have expressed the same sense of their utility, by ordering the purchase of

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the decisions of this court, and directing their distribution through the state.

I confess, therefore, that I have been unable to feel the force of what has been said in the argument of this cause, respecting the impropriety of considering the decisions of the court as any thing more than declaring the law between the parties. They, who in their zeal for their client, so eloquently urge this doctrine, would do well to reflect to what it leads. That its tendency is not to take power from this court, but to give it. That if we were under no obligation to follow that which we had decided ourselves, or what was declared law by our predecessors; we would possess an authority dangerous to the citizen, and in the exercise of which, this tribunal would become at once feared and hated.

I conclude, therefore, that the second ground of defence fails.

The third ground of defence, which denies our right to decide in doubtful cases, and requires us to refer them to the legislature, is easily disposed of. Under our constitution and law, we have no such authority, and. instead of referring doubtful cases, I

think they are the very class of causes that it is most necessary we should decide.

The fourth, which contends for an exemption from all liability, because the defendant acted both as attorney and counsellor, is equally untenable. Persons may increase their responsibility by acting in a two-fold capacity, but cannot diminish it.

The fifth point made is, that fault or negligence can alone charge the defendant; that neither is proved here, as the first means an intention to do wrong, and the second a total neglect to perform an act, not performing it erroneously.

By the *Partida*, 3, 5, 26. *sec.* 26. attornies are made responsible for fraud and fault. If we construe the word fault, as insisted on by the defendant, it would be synonimous with fraud; for if the intention must combine with the act in doing wrong, then the agent acts fraudulently. We presume, therefore, that something else is intended; but it is unnecessary to decide that, as our statute, 1 *Martin's Dig.* 528, has made attornies responsible for any neglect, by which their clients may suffer damage.

I think, that neglect may exist as well in

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the careless manner of doing an act, as in not doing it. This is the meaning attached to the word, by the best philologists. It is the ordinary sense in which it is understood by mankind. We evidence our neglect by not doing what we are required to execute. We exhibit the same quality when we do it without paying attention to the ordinary means by which it can be correctly performed.

This ground of defence also fails.

It is still, however, insisted, that the act complained of, was nothing more than a mere error of judgment, and we have given to this point as serious consideration as we are able to bestow on any subject.

From the moment the cause was opened in argument, we were all of opinion that attornies are not responsible for an error in judgment.

But the doubt was, whether more had not been proved here.

Whether, after the repeated judgments of this court, on the subject of the jurisdiction of the parish court, there was a necessity for at all *exercising the judgment* in selecting a tribunal.

That, admitting the decisions of this tribu-

nal to be neither law, or evidence of law, still, as they were evidence of the opinion on this subject, of those who had to pronounce on the cause, in the last resort. Whether it was ordinary diligence to bring an action in a court whose authority they had decided against, when there was another tribunal open, whose jurisdiction was not disputed.

Whether ordinary diligence might not have enabled the defendant to become acquainted with these decisions, and whether not knowing them, was not ordinary neglect.

But these considerations have been outweighed by reasons, which may be fairly urged on behalf of the defendant.

The decisions in the cases of *Smith* vs. *Flower*, and *Dunwoodie* vs. *Johnson*, 6 *Martin*, 9 and 12, had not been published at the time the suit of *Breedlove* & *Bradford* vs. *Fletcher*, was commenced, and all that can be required of any gentleman of the bar, is, that he should make himself acquainted with the decisions after publication.

That in *Delille* vs. *Gaines*, it is true, had been printed long before the suit was brought; but the point, as it respects the jurisdiction,

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was not decided there: it is only said, that the authority of the parish court, to take cognizance of the case, might be doubted.

What was said in that case, it is evident, did not settle the question. It was not so considered. It appears not to have been noticed by many members of the bar; as it has been proved, that a number of gentlemen still continued to bring suits of a similar description in that court.

If that decision be left out of view, the jurisdiction was doubtful, and one, regarding which, men might fairly differ in opinion. Nay, with that decision, and after this court had intimated in the case of *Smith* vs. *Flower*, the same view of the question, and in that of *Dunwoodie* vs. *Johnson*, expressly decided it; a learned judge, then on the bench, dissented from the opinion of the majority, and held, that the defendant had properly brought the action.

No man is supposed to know any branch of the law perfectly, particularly when called on to act at once, and without time for reflection. The knowledge which we use the utmost industry to acquire, is often forgotten at the moment when most needed. The

science is a most extensive and difficult one. Cases frequently occur, when learned men differ, after the greatest pains is taken to arrive at a correct result. No one, therefore, would dare to pursue the profession, if he was held responsible for the consequences of a casual failure of his memory, or a mistaken course of reasoning.

I do not wish to be understood to say, that cases may not arise, in which ignorance of the common and plain principles of the law and practice in our courts, or negligence in not properly using the knowlege the party possesses, will not make an attorney responsible. But here the parish court decided it had jurisdiction.

A learned judge of this court, which is composed only of three individuals, held, that that opinion was right.

Many members of the bar, and some of them gentlemen of much experience, pursued the same course. Under such circumstances, to make the defendant pay damages for error, is carrying the doctrine of responsibility further than, we think, the law will authorise, or than justice demands.

But even admitting all this to be doubtful, still the plaintiffs must fail on

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The last point made the defect of evidence, to prove that the contract on which the defendant brought this suit, did originate out of the limits of New-Orleans.

This is the very gist of the action; and the petition accordingly contains an averment, that the cause of action upon which the attachment was brought, did not originate within the limits of the parish and city of New-Orleans, but at Nashville, in the state of Tennessee. This is attempted to be proved by a record in the case of *Breedlove* & *Bradford* vs. *Fletcher*, in which this court decided, that the parish court had not jurisdiction of the cause, because the indorsement on the bill of exchange was made at Nashville, in the state of Tennessee.

It is a general principle of jurisprudence, that judgments are only evidence between the parties to the cause, or those who claim in the same right.

"*Sæpe constitutum est res inter alios judicatas aliis non præjudicare*," *lib.* 6, 3 *de Re. jud.*

"*Guisade cosa es e derecha que el juyzio que fuere dado contra alguno, non enfesca a otra.*" *Part* 3, *tit.* 22, *ley* 20. And in England the same doctrine is established. *Phillips' Evidence*, 522.

This is the general rule, and it is founded on obvious principles of justice.

There are cases which form an exception to it; these cases are well collected in a note to a treatise by Evans, on the authority of *Res judicata*, *Evans' Pothier*, *vol.* 2, 350. To them may be added, these decisions on deeds containing covenants of warranty and on bonds of indemnity, cited by the plaintiffs' counsel.

There is still another exception, when the decree of the court is used, for the mere purpose of establishing the fact of such judgment having been given, or as the supreme court of the United States express it, where it is not introduced *per se*, as binding on the the rights of other parties, but as a fact in tracing title, or constituting a part of the muniments of an estate.

The judgment introduced here is evidence, that in the case of *Breedlove* & *Bradford* vs. *Fletcher*, the supreme court decided, that the cause be dismissed for want of jurisdiction in the parish court. Because, that is a naked fact in itself, but that judgment is not evidence against third persons, of the truth of the facts, on which the court, in that case, came to that conclusion; as to them it is *res inter alios acta*.

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and *non constat*, that they could not have proved these facts to be otherwise.

The cases cited by the plaintiffs' counsel, are on covenants of warranty, contained in deeds for land, or on bonds of indemnity. They have been carefully examined. They are decided as exceptions to the general rule. Now, as that rule is a most salutary one, it might be sufficient to say, that these exceptions ought not to be increased, unless positive authority require it. But this case is clearly distinguishable in principle.

In these cited, the court holds, that the judgment given against the party to be indemnified, is evidence against the party indemnifying. But in no case is the doctrine pushed so far as to declare, that it is not only evidence against the party by whom the bond of indemnity, or deed with covenant of warranty was given, but also, evidence that these deeds were made and executed by him.

Let us assimilate the case of the present defendant to those cited.

If the suit here, was brought on a written engagement of the defendant's, that he would warrant the success of the plaintiffs in their former suit against *Breedlove* & *Bradford*.

the judgment of the court would be merely evidence, that they did not succeed in the cause; not evidence that the defendant entered into the contract of warranty; that would have to be proved by the production of the contract itself.

In this case, the allegation is negligence, which stands in place of the express contract just supposed. The judgment is no more evidence of that fact, nor of the facts which would justify the accusation, than it would be that he entered into the bond of indemnity in the other case.

In the case of *Green* vs. *New River Company*, 4 *Term. Rep.* 590; the court of king's bench decided, that a verdict obtained in an action against a person for the negligence of his servant, is evidence in a subsequent action by the master against the servant, of the amount recovered, but not evidence of the negligence. The same principle is declared to be law, in the latest and best treatise we have on the rule of evidence. *Phillips on Evidence*. 229.

The plaintiffs contend, that the admission of the record made it evidence to every purpose. The law is otherwise, when a paper is introduced, which is legal evidence of one fact, and

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not legal evidence of another, it can never be presumed that it was read in evidence, to establish any thing, which, by law, could not be proved by it. This court has already decided this point, in the case of *Lartigue* vs. *Baldwin*, 5 *Martin*, 496, nor is there any thing contained in the opinion delivered in *Durnford* vs. *Jackson*, 8 *Martin*, 58, which at all shakes or affects that decision.

Nor is there more weight in the objection, that if the defendant was not liable for sueing in a court which could not entertain the cause, he is responsible for negligence, in not giving proof that his case arose within the limits of the parish of New-Orleans. Because, the negligence, alleged in the petition, is for having brought a cause of a particular kind, in the parish court, and to that alone was the defendant bound to direct his defence; because, when proper evidence is not produced on the trial, the presumption is not that the lawyer neglected to offer, but that the client failed to furnish it.

It may, therefore, fairly be concluded, that there is not evidence before the court to justify the allegation, that the cause of action on which the suit was originally brought, did

arise out of the parish of New-Orleans, and, of course, the plaintiffs are not entitled to recover in the present action.

The judgment of the district court ought therefore to be affirmed with costs.

MARTIN, J. I concur in this opinion for the reasons adduced.

MATHEWS, J. I concur likewise.

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

Livermore and *Duncan* for plaintiffs, *Mazureau* and *Livingston* for defendant.

LABARRE vs. *FRY'S BAIL.*

APPEAL from the court of the first district.

In proceeding by motion against the bail, he has a right to demand, that the facts be found by a jury.

PORTER, J. In a suit commenced by the present plaintiff, against the commercial house of J. & P. Fry. Jacob Fry was arrested, and the present defendant, Durnford, became his bail.

Judgment was obtained on the original suit, for the sum of $2024 40 cts., with interest and costs, on which a *fieri facias* was issued, and returned by the sheriff. "no property found."

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A *capias ad satisfaciendum* was next taken out, and the defendant could not be found.

The plaintiff proceeded to recover by motion, of the defendant, the amount of the judgment, interest and costs, recovered by him in the original action; and to the notice given by him to that effect, the defendant appeared and filed an answer, stating various objections to the recovery, *denying that he ever became bail for the said Fry, as alleged*, and praying, that the fact be enquired of by the country.

When the motion was about to be heard, the defendant requested that a jury might be empannelled, agreeably to the prayer in his written answer. The court refused to do so, and a bill of exceptions has been taken to that opinion.

To ascertain whether or not the decision of the judge was correct on this point, it is first necessary to examine, what is the real character of this proceeding against bail. The defendant insists, that it is in its nature an original action, and that he is entitled to the same privileges on the trial of it, as if suit had been commenced by petition.

The position I take to be correct, and well founded. It has every feature of an ori-

ginal suit, except, that it is carried on by written notice of a motion, instead of the ordinary petition. Proof is required of the obligation on which judgment is sought, in the same manner, as the common case of a promissory note. Judgment is given for the first time on the proof, and an appeal lies from it to this court.

There is no doubt, but a party may be as seriously and fatally injured, by an incorrect conclusion on the facts which grow out of an application of the kind, as in any other case of civil suit that can be supposed. If an investigation by a jury is important to the citizen, in any cause, it is necessary to him here, and nothing but positive law should induce, or could authorise any court in this state, to refuse either of the parties this privilege.

That positive law does not, in my opinion, exist. The statute is silent in the manner how the facts shall be tried; there is nothing in the act which denies the right of having such cases investigated by the country; and if this court should deny it, it would be tantamount to saying, that in this state a man could be deprived of the trial by jury, whenever it pleased the opposite party to allege he had become bail for a third person.

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Independent of this reasoning, I consider the principle, involved in this case, to have been already decided in that of *Meeker's ass.* vs. *Williamson's ass.*, 7 *Martin*, 314.

I am, therefore, of opinion, that the judgment of the district court be annulled, avoided, and reversed, and that this cause be remanded, with direction to the judge to proceed therein, and to allow the party a trial by jury, and that the plaintiff and appellee pay the costs of this appeal.

MARTIN, J. I concur in this opinion for the reasons adduced.

MATHEWS, J. I concur likewise.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, and the cause be remanded, with directions to the judge to proceed therein, and to allow to the defendant the benefit of a trial by jury, and that the plaintiff and appellee pay the costs of this appeal.

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

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March, 1821.

HERRIES
vs.
CANFIELD
& AL.

HERRIES vs. *CANFIELD & AL.*

APPEAL from the court of the first district.

PORTER, J. Gillespie, Scoles & Co. having proposed entering into a contract with the plaintiff, she alleges, that not having confidence in their ability to pay, she refused to credit them, unless they would give good and sufficient security for the payment. That Canfield, Hill & Co., (the defendants and appellants) wrote her, that Gillespie, Scoles & Co. were in good credit, and would, no doubt, pay the debt when it should become due, and that they would be responsible for the said debt, if it was not so paid. That Gillespie, Scoles & Co. acknowledged the said debt of $501 50 cents, to be due by a certain promissory note; that they have not paid it, and that the defendants, by their promise, are bound so to do.

If a person recommending his friend as trustworthy, says the debt will be paid, and if not, he will be responsible, a recovery may be had against him on his friend's note, posterior to the promise.

The surety wishing to avail himself of the plea of discussion, must point out property.

The answer admitted, that the letter, alluded to in the petition, had been written, but denied all the other allegations therein contained. It also contained the plea, that discussion must be had of the property of the principal debtors, before further proceedings could be had against them as surety.

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The evidence in the cause, consisted of a letter of the defendants to plaintiff, in the following words:

New-Orleans, June 12, 1819.

"We state to Mrs. Herries, that we are sell-
"ing goods to Messrs. Gillespie, Scoles & Co.
"on a credit, without endorsers, and that we
"believe them safe and good, and have no he-
"sitation in saying, that the debt will be paid
"as soon as due; but if they should not, we
"will be responsible.

(Signed) "CANFIELD & HILL."

The note of Gillespie, Scoles & Co. *viz.*

"On or before the 1st day of February,
"1820, we promise to pay Mrs. T. J. Herries,
"the sum of five hundred and one dollars fifty
"cents, good and lawful money of the United
"States, for value received.

(Signed) "GILLESPIE, SCOLES & Co."

"*New-Orleans, June* 14, 1819."

And the evidence of a single witness, who proved the execution of the note, and that Gillespie, Scoles & Co., lived in St. Francisville, at the time the note was given, that they kept a store there, but does not know whether they still continue so to do, and that they were considered in good circumstances.

There was, also, a protest of a notary-public, made on the 9th of February, 1819, shewing a demand on the makers for payment and refusal by them.

By the plaintiff it is insisted, that this is an original contract on the part of the defendants, and that they are bound *in solido*, with the principal debtors.

It is urged on the other side, that if at all liable, they are nothing but sureties. That recovery cannot be had against them, because it has not been shewn, that the debt on which the suit is brought, is that for which they engaged to be responsible; and that the principal debtors have property sufficient to pay this note, and that it should be previously discussed.

This is not an obligation *in solido*, but an ordinary contract of suretyship; the former is never presumed, *Civil Code*, 178, *art.* 102, and this letter does not express it.

It is, however urged, that there is not evidence, that this is the same debt which the defendants contracted to become surety for, and this, in truth, is the only question which presents any difficulty in the cause.

The letter of the defendants, dated the 12th of June, states, that they are selling goods to

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Gillespie, Scoles & Co., on a credit; that they have no hesitation in saying to Mrs. Herries, the debt will be paid, but if it is not, they, the defendants, will be responsible. The note of Gillespie, Scoles & Co., to the plaintiff, shews a debt contracted two days after the date of this letter.

The promise of guarantee given by the defendants, was of *the debt* which Gillespie, Scoles & Co., were to contract, the note shews *a debt* contracted with the person to whom the letter was directed. This, I think sufficient. If the promise had been to pay for what goods they might purchase—shewing that goods were sold to them, immediately afterwards, is all the proof that the law would have required, or, perhaps, that the nature of the case is susceptible of. Here, the promise is to pay a debt, and a debt is shewn to be contracted. The cases, in my mind, cannot be distinguished.

Obliged to decide on questions of fact, as well as law, we cannot exact, and if we did, we could not, in all cases, obtain positive and direct proof of every fact which is litigated before us. We must, therefore, draw fair and reasonable inferences from the testimony

presented; and, applying that rule to the evidence given in this cause, my mind is satisfied, that this is the debt for which the defendants promised to be responsible.

The plea of discussion is not maintained by the proof. It is not sufficient to allege that there is property; there must be evidence establishing its existence. The witness, examined to this point, goes no further than to swear, that he believes Gillespie, Scoles & Co. live in St. Francisville; that they once kept a store there, but does not know whether they still continue to do so. This is not pointing out property for discussion, in the language of the *Civil Code*, 430, *art.* 9. 6 *Martin*, 560, *Delazerry* vs. *Blanque's syndics*. It is not even proving that the defendants had any property in the state.

On the whole, I am of opinion, that the judgment of the district court be affirmed with costs.

MARTIN, J. concurred.

MATHEWS, J. I am of the same opinion.

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

Smith for plaintiff, *Hoffman* for defendants.

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CLAVIER *vs.* HIS CREDITORS

CLAVIER vs. *HIS CREDITORS.*

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

Three fourths of the creditors in number and amount, must concur in the grant of a respite.

PORTER, J. The petitioner Clavier prayed a *respite* might be granted him by his creditors, and that the period of two and three years should be allowed him, to discharge the debts which he owed.

On this petition the parish judge granted an order, that the creditors should assemble at the office of a notary public, to deliberate on the affairs of the petitioner.

This meeting took place on the 31st of August, at which appeared six creditors, four of whom consented that a respite should be accorded, and the other two refused.

The parish judge homologated their proceedings, and an appeal has been taken by one of the creditors from this judgment, who now assigns for error, that three-fourths of the creditors in number and amount, have not assented to the prayer of the petitioner.

The process verbal of the proceedings, shew that there was not three-fourths of the creditors in number and amount; the objection is therefore fatal, as the law requires both. *Civil Code*, 438, *art.* 3.

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CLAVIER vs. HIS CREDITORS

I am, therefore, of opinion, that the judgment of the parish court, homologating the proceedings had before the notary, be annulled, avoided and reversed, and that the petitioning debtor, pay the costs of this appeal, and those occasioned by this application in the court below.

MARTIN, J. concurred.

MATHEWS, J. I concur with the opinion pronounced.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court, be annulled, avoided, and reversed, and that the petitioning debtor pay costs in both courts.

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

HALL vs. *FARROW'S BAIL.*

Proceedings against bail need not pursue the form of a new action. Notice by the attorney is good

APPEAL from the court of the first district.

PORTER, J. The defendant having become bail for Farrow, in the suit of *Hall* vs. *Farrow*, and the *fi. fa.* and *ca. sa.*, which were issued on the judgment rendered in that case, being returned on the one, that "no property," and on

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HALL *vs.* FARROW'S BAIL.

the other, that the person of the debtor could not be found;—the plaintiff in the original suit, proceeded to enforce the recovery from the defendant, and for that purpose, gave notice by his attorney, that he would move the district court, before which the cause was tried in the first instance; to give judgment against him as bail, the condition of the bail bond being broken.

This notice was served on the defendant, and the court below gave judgment against him for the amount recovered in the suit of *Hall* vs. *Farrow*, with interest, the costs in that suit, and the costs of the motion. From that judgment the defendant has appealed, and now insists that it should be reversed, for the following reasons:

That the proceedings on a bail bond partake of the nature of a new action, and should pursue its form.

That notice should be given by the plaintiff himself, and not by his attorney.

And that the notice served on him, has not sufficient certainty.

I do not think these objections solid.

It is true, the proceedings on a bail bond partake of the nature of a new action; but

it does not follow, that the form of proceedings should be the same in both cases.

The act of the legislature, 1 *Martin's Digest*, 484, which prescribes the practice, directs that "the court shall, on motion, give judgment thereon, against the security, for the amount of any judgment, or decree rendered against the defendant, he the said security, having ten days previous notice, in writing, of such intended motion."

Ten days notice of a motion in court, which the act here prescribes, is certainly something quite different from filing a petition, as in an ordinary case. And it is enough, that a party, in matters of form, pursues the very letter of the law.

The signature of the attorney to the notice, was in my opinion, as good as that of the plaintiff himself. The right of moving against bail given by the act of the legislature, is the same thing in effect, as commencing a new suit, though the form is different; and I am unable to distinguish between the authority of an attorney, to sign a petition, and do that which is objected to here.

There was sufficient certainty in the notice. It informed the defendant of the judgment

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against the principal, its amount, the interest on it, &c., that a *fi. fa.* and *ca. sa.* had both issued without effect, and that by reason thereof, the condition of his bond, as bail, was broken. This was all that was material for him to know, and enough to put him on his defence.

I am therefore of opinion, that the judgment of the district court be affirmed with costs.

MARTIN, J. I concur in this opinion for the reasons adduced.

MATHEWS, J. So do I.

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

Pierce for plaintiff, *Smith* for defendant.

SERE vs. *ARMITAGE & AL.*

A justice and constable, who proceed in a case after a prohibition, and a person who aids the constable, are trespassers.

A void authority will not justify a trespass though the party acting under it is in good faith.

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

PORTER, J. The petition alleges, that the defendants abused, ill-treated, assaulted, and falsely imprisoned the plaintiff, to his damage two thousand dollars.

The defendants plead separately.

Armitage denying generally, the allegations contained in the petition, and Hayne's adding to the same defence, the further special matter, that what he did in the premises was done by him as constable, in virtue of a legal writ of *capias ad satisfaciendum*, issued by Samuel Brownjohn, justice of the peace of the upper banlieu, of the city of New-Orleans.

If there are several defendants, and they plead separately, they may have the cause tried separately, but if they go to trial jointly, and suffer a verdict to be given against them, they cannot afterwards object to it as error.

The testimony taken established the fact of the arrest; and that Armitage was actively assisting the officer, Henry.

The defendants offered in evidence, an execution issued by the justice of the peace, Brownjohn, dated 10th of July, 1819, directed to Henry, or any other constable, ordering that Seré be taken and committed to prison, until the judgment, in the case of *Armitage* vs. *Seré*, was satisfied by him. Also, another *capias ad satisfaciendum*, issued by the same justice to the same officer, dated 21st of July, 1819, directing him to seize and commit Seré to prison. On this last execution, there is a return of the constable, "received the within, in full, 22d of July, 1819."

Brownjohn was admitted to be a justice of the peace, duly commissioned for the upper banlieu, of the city of New-Orleans.

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The plaintiff produced in evidence, a record from the district court, shewing, that on the 30th day of June, 1819, he had obtained from that court, a prohibition, enjoining the said S. Brownjohn, and his constables, from any further proceedings in this case. The order granting this prohibition, was not rescinded or discharged, until the 21st of July following.

The cause was submitted to a jury, who found for the plaintiffs, damages $500. There was judgment accordingly, and from it this appeal has been taken.

It appearing, by evidence, that the execution under which this officer acted, was issued after a prohibition had gone to the magistrate and constables, inhibiting all further proceedings in this case, I am of opinion, that the magistrate and his officers who disobeyed it, were trespassers. *Jacob's Law Dict. vol.* 5, *p.* 318. 3 *Black. Com.* 112, 113. Under this view of the subject, it becomes unnecessary to examine the question raised, as to the jurisdiction of the justice of the peace, and it only remains to consider,

If Armitage, to whom the prohibition did

not issue, can be made responsible to the same extent as the officer.

If the verdict assessing damages jointly, when the parties plead separately, vitiates the proceedings.

On the first point, as Armitage had not any authority to assist in the execution of the writ, except in aiding the officer to whom it was directed, he cannot claim exemption from liability to a greater extent than that officer can; it would justify all kinds of excesses, were it held, that a party could be protected in the commission of an injury, by setting up the authority of another who had no right to give it.

As to the irregularity of the verdict, I understand the law to be; that the defendants having plead separately, might, if they had judged it advantageous, had their cause tried separately, 4 *Mass.* 419. 1 *John.* 290. 11 *Coke*, 5. But having submitted, without objection, to let the jury pass on them together, *and taken their chance of a verdict in that way*, it is now too late for either of them to insist that the case should be examined over again.

On looking into the evidence, I cannot see

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any thing which would justify an interference with the verdict. Cases of tort, where damages are assessed, fall peculiarly within the province of a jury, and courts should never disturb their finding, unless a very strong case of injustice is clearly made out.

I am therefore of opinion, that the judgment of the parish court be affirmed with costs.

MARTIN, J. concurred.

MATHEWS, J. I am of the same opinion.

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

Denis for the plaintiff, *Preston* for the defendants.

LOUISIANA BANK vs. *BANK UNITED STATES.*

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Possession is *prima facie* evidence of property, in a bank note.

APPEAL from the court of the first district.

PORTER, J. The bank of Louisiana sued that of the United States, on a post note, for $1000, payable to Harman, cashier of the Louisiana bank, and endorsed by him in blank.

The answer states, that one John W. Handley, had alleged, that the note on which the suit was brought, had been lost to him by a late robbery of the mail, and that he had

cautioned the defendants not to pay it to any other person but him.

They further plead, that the question of property in the note, is now at issue, in the suit of *Handley* vs. *the Louisiana bank*.

By consent, the evidence taken in that case has been made part of the record in this, and considered as testimony in this cause.

It shews clearly the loss of the note, and that it was the property of Handley at the time it was taken out of the mail. But it is not so satisfactory, as to the time when it came into the possession of the Louisiana bank; and the conclusions which may be drawn from it, have been much controverted and debated in the argument.

There is one thing, however certain, that it does not prove, that the Louisiana bank received the note in question, in bad faith, and with a knowledge that it was stolen; and this proof, I think, is essential to enable the defendants to succeed in the defence they have set up.

The law stated in the latest and most esteemed work, on bills of exchange, makes it the duty of the holder of a note, other than a bank note, payable to bearer, to prove that

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he came by it *bona fide* and for a valuable consideration, *Chitty on Bills*, 87.

But in respect to bank notes, a different system has been established, and it is held, that the person in possession of a security of that description, is not under the necessity of proving, in the first instance, how he acquired it. But that it behoves he who objects to the payment, to establish the facts on which that payment is refused. *Chitty on Bills*. 393. 13 *East*. 130. 2 *Campb. sec.* 5, also note to 13 *East*, 130.

The rule contained in these decisions, although not positive law here, is one which I consider equitable and just, and useful in its application, in a country where bank notes form so large a part of the circulating medium.

For these reasons, and for those contained in the opinion of the presiding judge of the court, which I have read, and in which I concur, I am of opinion that the judgment of the district court be affirmed with costs.

MARTIN, J. We would look in vain, in the laws of Spain, for the principles that are to direct us in the transfer of bank paper. Great Britain and the United States are, perhaps, the only countries in which it forms the great-

est part of the circulating medium, and in which questions, like that now under consideration, present themselves.

Since the establishment of banks in Louisiana, their notes have circulated like the specie which they represent, as generally and freely as in Great Britain and the United States; and this has insensibly introduced so much of the laws, usage, or practice of those countries, as is necessary to regulate the mode in which the affairs of these institutions are transacted, and the circulation and transfer of their notes; perhaps, rendered obsolete, so much of our former laws as is absolutely inconsistent therewith.

Hence, even if that part of the ordinance of *Bilbao*, which regulates blank endorsements, appeared to have been in force before the establishment of our banks as by far the greatest part of the paper discounted by them, is endorsed in blank; our courts would perhaps, *readily* recognise the property of a bank, in a note discounted by it, without the endorsement having been filled.

I therefore think, that the district court did not err in giving judgment for the plaintiffs, although they did not shew from whom.

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when, or in what manner they became possessed of the note of the defendant bank. The circulation of such paper would be very much obstructed indeed, if a bank, who receives it, was bound to provide itself with evidence of having fairly come by it.

I think we ought to affirm the judgment.

MATHEWS, J. This suit is prosecuted on a note of the bank of the United States, made payable to order, and endorsed in blank. The evidence in the case leaves no doubt of its having been stolen from the mail, on its way from Natchez to New-Orleans, and it is not shewn by the plaintiffs that they received it in good faith, and for a valuable consideration.

If this be necessary in regard to bank notes, as it is perhaps in ordinary notes, or bills payable to bearer, and may possibly be also to those endorsed in blank, the plaintiffs have not supported their case.

But it is believed, that even admitting that the burden of proof, as to good faith, and consideration in ordinary commercial bills and notes, lies on the holder, an exception is adopted in law, in case of bank notes.

The facility with which they pass from

hand to hand, the circumstance of their not being esteemed like bills of exchange, as mere securities of debt, but treated as money in the ordinary course and transaction of business, by the general consent of mankind, (as observed in the case of *Miller* vs. *Rain*, 1 *Burr.* 457) shews, that they may, with propriety be placed on a footing, different in some respects, from that of ordinary bills and notes. Possession is *prima facie* evidence of property in them, and the holder is entitled to all the benefits resulting from a rightful ownership, until the contrary be made apparent.

Testing the judgment of the district court by these rules, and the evidence in the cause, I am unable to discover any error in it.

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

Moreau for the plaintiffs, *Duncan* for the defants.

BADNAL vs. *MOORE & AL.*

Credits assigned are liable to attachment for the debts of the transferer, before notice to the debtors.

APPEAL from the court of the first district.

PORTER, J. The main, and indeed the only question to be decided in this cause, is the effect of a deed of assignment and trust, made

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by the principal debtors in Philadelphia, as against the rights of the attaching creditor.

It has been settled, by a series of decisions in this court, that there must be delivery of the thing sold, as well as a contract of sale, to enable the vendee to resist, with success, the claim of a creditor, who may levy an attachment on it; and that, whether the parties contracted out of this state or within its limits.

The same principle must govern the cession of a debt, as our statute provides, that the transferee is only possessed as it regards third persons, after notice has been given to the debtor of the transfer having taken place." *Civ. Code*, 368, *art.* 122.

Applying this law to the case before the court, there is no evidence that the debtor was notified anterior to the levying of the attachment of the transfer made in Pennsylvania; consequently, as to third persons, no transfer was made.

This opinion being founded on the supposition, that the deed of trust was regularly proved, and that the assignment was legal, according to the laws of Pennsylvania, it becomes, of course, unnecessary to examine the bill of exceptions taken to the opinion of the court, refusing time to prove these facts.

I am therefore of opinion, that the judgment of the district court be affirmed with costs.

MARTIN, J. This case turns on a question which cannot be distinguished from that in those of *Durnford* vs. *Brooke's syndics*, 3 *Martin*, 322. *Norris* vs. *Mumford*, 4. *id.* 20. *Ramsay* vs. *Stephenson*, 5 *id.* 23. *Fiske* vs. *Chandler*, 7 *id.* 24, and others. After so many decisions, it is not worth our while to consider the question anew.

I think the judgment must be affirmed.

MATHEWS, J. This case comes up upon two bills of exceptions, and an assignment of errors.

The first bill is, to the opinion of the court, *a quo*, on its refusal, to grant *a dedimus potestatine*, to take testimony in Philadelphia, to substantiate the facts alleged by the claimants in three petitions. The second is, on the rejection of the notarial copy of a deed of trust, said to have been executed by the defendants to the claimants, for purposes therein specified, and by which the debt due to the former, by the garnishee, was ceded to the latter.

I am of opinion, that the district judge act-

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ed correctly in both instances. It must now be considered a settled matter, that property, although sold by a debtor, is liable to attachment for the benefit of his creditors, before tradition, or delivery, if it be within the jurisdictional limits of the state, at the time of the sale, or other species of transfer.

The sale or cession of credits, is strictly analagous to that of other property; and is not complete and effectual to transfer absolutely the rights of the creditor, till the debtor receives notice from the person to whom they are ceded, *Pothier*, *Vente*, *n.* 556.

In the present case, it is not pretended that the garnishee had any notice of the deed of trust, on which the claimants rely; or had, in any manner, become responsible to them, at the time of levying the attachment and summoning him to answer.

Nothing of the kind is alleged in the petition of intervention, and from the date of the deed, (a copy of which is annexed) compared with the date of the attachment, it is almost impossible that notice could have reached the garnishee, supposing it to have been sent immediately from Philadelphia, when the contract was made between the defendants and claimants.

Allowing this contract to be *bona fide* between the parties, and in accordance with the laws of Pennsylvania, without notice to the garnishees, it cannot benefit the claimants, and it would have been an unnecessary waste of time and increase of expence to have granted the commission.

The counsel of the appellants having admitted in argument, that the notarial copy of the deed, unaccompanied by any other proof to support it, is not good evidence, it is needless to examine the second bill of exceptions.

The assignment of errors relates, principally to the evidence in the cause, and the manner of taking it; a matter more properly the subject of a bill of exceptions.

The garnishee having, in his answer, acknowledged himself a debtor to the defendants, or, that he held funds belonging to them, I am not able to discover any error in the proceedings or judgment of the district court.

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

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LARCHE vs. *JACKSON.*

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

The party who succeeds on the question of title in a land suit, is still bound to pay damages for his illegal and forcible entry.

Hennen, for the plaintiff. The appellant instituted her suit against John Mitchell, to recover possession of seven and half inches of ground, front on Dorsiere lane, with the depth of 121 feet, part of a lot of ground, 68 feet front, and 121 depth; which she alleges to be her property, and of which she avers that she has been in possession for twenty years. She also prays, that a brick wall, which has been placed on the said seven and half inches of land, by the said John Mitchell, may be demolished at his expence, and that he may pay her $500 for her damages. Mitchell answers, that by law, he is authorised to build a partition wall on the plaintiff's lot, to the extent of seven and half inches, which he is about to do, for Alexander Jackson, the owner of the adjoining lot. After the cause had been tried on these pleadings, and some months after the *contestatio litis*, A. Jackson was vouched by Mitchell to defend the suit. Jackson avers, first, that he is the proprietor of the said seven and half inches of ground—and if he is

not, still he is authorised to build a partition wall on them. M. Larche answers A. Jackson, and avers, that he is not the proprietor of the adjoining lot, nor of any part of it, and calls upon him to produce his titles, if any he has.

The plaintiff, by the evidence, established satisfactorily to this court, on the appeal brought heretofore by Mitchell, that she was in lawful possession of the seven and half inches of ground; and obtained a confirmation of the judgment, which gave her damages against him for the trespass.

The question for the decision of the court, on the present appeal, is, whether A. Jackson has a right to build on the petitioner's lot, or whether the wall must be demolished at his expence, and the petitioner be restored to the possession of the seven and half inches of ground?

The petitioner has proved, most conclusively, by the survey, and by the different witnesses, that for many years she has been in possession of the seven and half inches of ground. This honorable court has already pronounced on this point, in the appeal brought by J. Mitchell, affirming the judgment of damages against him, for his trespass. She has

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also produced the title, under which she claims.

A. Jackson, on the contrary, has produced no title of any kind, though required so to do; nor does he prove any possession of the adjoining lot. The petitioner in her answer to the claim set up by Jackson, avers, that he is not the owner of the lot of ground, on which he has undertaken to build, nor is he, under any circumstances, entitled to build on the seven and half inches of her lot.

To entitle Jackson to the *servitude* of building a partition wall of seven and half inches, on the lot of the petitioner, he must certainly shew, that he is the proprietor of the adjoining lot; particularly, as he is called upon to produce his titles, and as it is averred, that he has none, and is not the proprietor of the adjoining lot. The *Civil Code*, 133, *sec.* 1, clearly considers such *servitude* as due only to the proprietor of the adjoining lot, for none other can exercise such right. The wall is to become the common property of the adjoining proprietors. A lessee, or usurper, cannot claim or exercise such right; if he should, the true owner may regain the possession, disavow the act, and throw down the wall, which

the adjoining proprietor considered as his joint property. In this case, Jackson wishes to compel the petitioner to submit to this risk, when he produces no evidence whatsoever to shew that he is owner of the lot. Before this honorable court will thus jeopardise the rights of individuals, it assuredly will require some evidence of title. The present judgment cannot prejudice the rightful owner of the lot of ground which Jackson has usurped. His rights must remain untouched; and whenever he shall regain his lawful possession, he will be at liberty to demolish the wall, which the usurper built on his lot, without his consent, *Civil Code*, 105, *art.* 12.

Should it be said, that the petitioner has more ground inclosed in her lot than her title calls for, no argument could be deduced from it favourable to Jackson, even if he proved himself the owner of the adjoining lot, and that he had less than his title called for, it would be no reason to obtain from the petitioner any part of the lot in her possession. "*In agris ad mensuram datis, non sequitur argumentum, ut quod alius plus habet, si mihi desit, restituere vicinus cogatur*, 3 *Mulleri Prompt.*

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216. *Fines*, *n.* 7. So in the city of New-Orleans, the lots having 18 feet more than called for by title, will not lose any part of the 18 feet in favour of the adjoining lots. 2 *Martin's Rep.*, *Riviere* vs. *Spencer*.

The petitioner was in quiet possession of the 7½ inches of ground. Neither A. Jackson, nor any one else, had a right to disturb her in that possession; nor was she bound to give any reason for her possession. *Possideo quia possideo*, would always be a sufficient answer to the claims of all the world, until a better title should be produced against her, *Civil Code*, 479, *arts.* 23, 24. 5 *Martin's Rep.* 662. 6 *Febrero*, 105, *n.* 248. 3 *Part.* 2, 28. *Hoppius*, 979. *n.* 1, *in Instit.* 4, 15, 4. *Pothier Propriété. n.* 307. 324. *Domat*, *liv.* 3, *tit.* 6, *sec.* 4, §1. *Idem*, 3, *tit.* 7, *sec.* 1, §15, 17. In this possession, the plaintiff was disturbed by J. Mitchell, by order of A. Jackson. Unless Jackson can justify by some better title, than this act of violence, the plaintiff must be restored to her lost possession. 9 *Merlin*, 410, *n.* 3. Nay, if Jackson had any title, by his violent proceedings, he has lost it.

Part. 7, 10, 1 & 10. *Novis. Recop. lib.* 11, 34. 1 & 2. 2 *Sala*, 286, *n.* 27, 28. *Villadiego*,

431. And what is it that Jackson alleges in his defence? Any title, sale, or possession? Nothing like it; not even a colour of title is pretended. Without giving the least intimation of his intentions, either to the petitioner or to her tenant in possession, Jackson and his agents, entered upon the lot of the petitioner, threw down her inclosures and buildings, and placed the wall on her lot. Supposing Jackson had an indisputable right in law, to build his partition wall $7\frac{1}{2}$ inches on the lot of the petitioner, yet, assuredly, he had no right to take the administration of justice in his own hands, without notice to his adversary.

Supposing further, that Jackson had produced title to shew his ownership of the adjoining lot, has he any right to build this partition wall? The petitioner built first on her lot; she left an entry between her house and the adjoining lot, which would become useless to her, if diminished $7\frac{1}{2}$ inches. The article of the *Civil Code*, 133, *art.* 23, on which Jackson relies, contemplates, that both lots should be vacant, or not built on, as well as that they should not be inclosed in walls. If either of the conditions be wanting, no such

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servitude can be claimed. But had the legislature any authority to impose such servitude? Can the property of an individual be taken from him for private purposes, without any previous compensation? If the legislature has authority to say, that $7\frac{1}{2}$ inches of my ground may be taken by my neighbour for his benefit, there will be no security that I shall not lose the remainder. By the ancient laws of Louisiana, *Fuero Real*, *liv.* 3, *tit.* 4, *chap.* 5, no such servitude was admitted. Every individual was protected in the exclusive enjoyment of his soil. By the treaty of cession, *art.* 3, as well as by the constitution of the United States, amendments, *art.* 5, the right to private property is held inviolable. Could a legislature then, constitutionally invade this right?

The form of the present action is objected to by the defendant, and he insists that it is neither a petitory nor a possessory action, but solely an action of trespass. Fortunately for us, we have no forms of actions; our statute requires us only to set forth our facts, and conclude with a prayer for relief, adapted to the case. The petitioner concludes with a prayer. that the wall erected

on her ground, may be demolished at the expence of J. Mitchell; and in her answer to Jackson, that she may be maintained in her possession. She also prays, for all other and further relief which the nature of the case may require. Under the pleadings, this honourable court may order the wall to be demolished, and the petitioner to be maintained in the possession of the lot.

We think she has shewn enough, to obtain such a decree from this honourable court, though the judge *a quo* has pronounced nothing relative to this part of the petition.

It is of great importance to the petitioner, to have a judgment which will finally put an end to the controversy with the defendant, so as to leave no room for other suits. This can be done in no other way than by supplying what the judge *a quo* has omitted; that is, to pronounce on the prayer to demolish the wall. If the defendant, Jackson, has shewn no title, as we contend, to build this wall on the petitioner's lot, it must be demolished at his expence. If this honourable court shall, however, be of opinion, that the defendant, Jackson, had a right to build a partition wall, as he contends, then let it be declared a com-

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mon wall, and let the petitioner have the benefit of it.

In whatever way the court shall determine, this appeal has been correctly brought, and the defendant must pay the costs.

Livermore, for the defendant. The petitioner states, that she is the owner of a lot of ground in Dorsiere-lane, of sixty-eight feet front, by virtue of an act of sale, referred to; that there was, and is, a large brick house on said lot, and that she has been in possession of said lot for more than twenty years; that a large frame building on the adjoining lot, has been demolished, and that a brick building is about to be erected on the adjoining lot, by Alexander Jackson, who was then absent; and, that the undertaker, Mitchell, has entered upon her lot, and cut down her gate, and certain out-buildings, and left her property exposed. That said Mitchell has placed the wall of Jackson's building, about seven or eight inches on her lot, although commanded not to do so; that she built first on her lot, and when the adjoining lot was vacant, and left merely a sufficient entry, and that she is not satisfied with the wall. Where-

fore she prays an injunction, and that Mitchell be cited, and for damages against him, and that the wall may be demolished.

An injunction issued, Mitchell was cited, and he appeared and answered—1. Denying the trespass—2. Stating that he was employed to build a house for Jackson, and that, supposing the seven inches to belong to the petitioner, he had a right to place half the wall on her land—3. A general denial of the allegations contained in the petition.

Jackson was not cited; but, upon his return, Mitchell prayed, that he might be made defendant, which was granted, and he appeared and anwered—1. That the allegations in the petition were untrue—2. Denying the title of the petitioner—3. Claiming the right to erect a partition wall, in case the seven inches should appear to belong to the petitioner.

To this answer the petitioner replied, that her action was possessory, and did not put the right of property in issue—2. Denies Jackson's title, and claims possession for twenty years.

The court dissolved the injunction, and gave judgment for the petitioner, against Mitchell, for five dollars, damages and costs.

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From this judgment, dissolving the injunction, the petitioner has appealed.

The plaintiff's counsel seems to find some difficulty in giving a name to her action: and from the course of his argument, and from the authorities adduced, it would seem to be doubtful in his mind, whether this be the action *communi dividundo*, or *finium regundorum*, or one of the interdicts, either *uti possidetis*, *unde vi*, *de adipiscenda possessione*, or *de recuperanda possessione*. In point of form, however, it is neither of these, but a common law action of trespass. She does not pray for any division of property, for any fixing of boundaries, nor that the possession may be adjudged to be hers. The petition alleges property in, and possession of a lot of sixty-eight feet, and that the defendant had entered upon the lot aforesaid, and cut down a gate and certain out-buildings thereon. This the defendant denies. He denies the trespass, and all the allegations in the petition. It was then incumbent upon the plaintiff, to prove her case, as she had stated it. Instead of which, her own evidence shews, that the alleged trespass was not committed upon the lot, which she

claimed as owner and possesssor, and that the wall complained of, does not approach within two feet of her land. Is not this a sufficient answer to her petition? And, upon this appearing, could the defendant be required to produce a title? The possession, stated in her petition, is the same as that proved. It is a possession of the city-hotel, which is on the west end of her lot. Could she have been allowed to prove any different possession, or to have made out in evidence, a possession, or right of possession, of two feet of land not claimed in her petition? It is now pretended in argument, that a possession of one year, of the seven inches, part of the land on which the wall stands, has been shewn in evidence. If this has been shewn, and if the court should be of opinion that the plaintiff has given evidence of possession of seventy feet, instead of sixty-eight, the evidence then does not correspond with the allegations, and must be rejected.

But, I contend, that the plaintiff has proved no possession, different from her title. She has proved possession of the city-hotel, and the law presumes her to have possessed it according to her title. If she claims more,

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she is bound to make out her claim by evidence. The burthen of proof is upon her, and she has not shewn possession beyond her boundary. It appears there was a gate, and a gate post formerly; but it does not appear by whom the gate and gate post had been placed there, nor to whom they belonged. It seems, that when the gate was open, no part of it was on the plaintiff's lot, and that, when shut, it enclosed a part of her lot, and a part of the lot adjoining.

It is however, contended, that in this action the burthen of proof is no more upon one party than the other, and for this the counsel cites, *D.* 10, 1, 10, and *Inst.* 4, 15, 7. But this is not the interpretation which is put upon the texts cited. The interdicts *uti possidetis*, and *unde vi*, are indeed styled *duplicia*, but this only means that either party may sustain the character of plaintiff or defendant. But he is the plaintiff who brings the suit, *D.* 5, 1, 13, *de jud.*; see also the commentaries of *Vinnius* and *Huberus*, upon the section of the institutes above cited, *Vinnius* says "*Eum tamen actoris partes obtinere in his interdictis plerique censent, qui prior ad judicium provocavit, idque non tantum quoad litis ordinationem, sed etiam quoad litis defini-*

tionem : ac proinde non probante eo, qui provocavit, reum absolvi." The interdicts *recuperandæ vel adipiscendæ possessionis*, are always styled *simplicia*, *Cujac. obs. lib.* 4, *c.* 11.

Another point made by the plaintiff is, that the defendant Mitchell has admitted the seven inches of land to belong to her. To this I object—1. That his admission cannot prejudice Jackson—2. That the admission cannot extend beyond the allegations in the petition, and that the allegations of title and possession are determined by the survey—3. That Mitchell must be presumed to have made the admission in ignorance of the rights of the real parties in controversy—4. That he has made these several defences. and may rely upon either to defeat the writ. If his several pleas are inconsistent. the plaintiff should have moved, that he make his election by which to abide.

If, however, the court should be opinion, that the possession, or title of the parties to the ground in question, is put in issue upon this petition, and that the plaintiff has fully proved possession, still I think there can be no question as to the right of building a party wall, under the regulations prescribed by the

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Civil Code. This party wall need not be eighteen inches in thickness. It cannot exceed eighteen inches, and it is merely necessary that it should be sufficient. This sufficiency is fully proved by *Pilie.* It is contended, that, as the plaintiff had built a brick-house on the west end of her lot, and had there placed half the wall on Mr. Paulding's lot, the person building afterwards on the lot adjoining her eastern boundary, shall not place half his wall on her lot, because she had built first. The intention of the law is, however, that every lot may be divided by a party wall, and the only exception is, where the lot is surrounded with walls.

The last point which I shall make, is upon the appeal. The petitioner calls this a possessory action, and disclaims any intention of putting her title in issue. Certainly, if the action be petitory, she has not supported it; for the survey shews, the land not to be within her title, and she cannot claim title under a possession of ten or twenty years, because the possession would not be in good faith and with just title. We must then suppose it to be possessory, although she does not pray that the possession should be decreed to be

hers, nor that it should be acquired to her; nor that it should be restored to her. But, we will suppose the general prayer to be sufficient, and that the parish court had decreed upon the possession, which it has not. Still there could be no appeal, because the judgment is not final between the parties, and the enquiry is not of that nature, which the law considers irreparable. For the judgment upon an interdict, decides nothing more than which party shall be the plaintiff and which the defendant, in a petitory action. The advantage of possession is merely, that the possessor shall be presumed owner; but this presumption will yield before proof of title. Upon this point, the authorities are express and positive. *Sala, lib.* 3, *tit.* 11, *n.* 11. *Salgado de reg. protect. p.* 3, *c.* 12, *n.* 30, 34. *Gomez ad l. Tauri*, 45, *n.* 194, and the reason is given by *Gomez*, "*quia talis sententia parit modicum praejudicium, cum de facili potest reparari in judicio proprietatis.*" But in this case, the decree is merely a decree dissolving an injunction, which is not final upon any thing, and from which no appeal lies. *Young* vs. *Grundy*, 6 *Cranch.* 51.

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PORTER, J. The petition alleges property in the plaintiff, of a certain lot of ground, situated in this city, on Dorsier-lane; and that a certain J. Mitchell, had entered upon the premises, and cut down and destroyed the gate thereon, belonging to the petitioner, to her damage of $500. It is further alleged, that the defendant, acting under the orders of one A. Jackson, had commenced building a brick wall on a lot adjoining, and had placed a part of the said wall, on the lot before mentioned, although expressly forbidden, and warned not to do so. An injunction is prayed for, prohibiting the said Mitchell, from proceeding any further in the erection of the wall, and judgment is asked for the damages already mentioned.

The judge granted the injunction.

The defendant answered, denying the facts and allegations, and setting up special matter in defence. This answer was afterwards withdrawn and a supplemental one filed, vouching A. Jackson, as the owner of the lot, and the person interested in the defence of the suit.

A. Jackson, the person thus cited, in warranty, appeared, and filed an answer, which

contained the general issue, that he was the owner of the lot, and had been in possession of it for ten years. But that if it should be decreed to be the property of the petitioner, still, he had a right of placing half a wall there, not more than 18 inches thick.

Testimony, both oral and written, was taken down on the trial of the cause, which, from the manner the cause comes up, it is unnecessary to set forth at length.

The court gave judgment, dismissing the injunction, but decreeing, that the defendant pay $5, and costs of suit, for the trespass.

From this decision, the defendant appealed, and alleges, that it is inconsistent in dissolving the injunction, and yet decreeing him to pay damages and costs.

It has been already decided by this court, in the case of *White* vs. *Well's executors*, 5 *Martin*, 652, that the party who succeeds on the question of title, in a suit for land, may yet be obliged to pay damages, for an illegal and forcible entry on it.

That decision proceeded on the principle that men should not be permitted to do justice to themselves, by an act of violence; and from a wish to enforce that principle of our

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law, which guards and protects possession until title is shewn and proved.

I am of opinion, that the doctrine laid down there, was sound and correct, and applicable to this case.

The evidence supports the conclusion which the parish judge drew from it, and I think the judgment rendered below, should be affirmed with costs.

MARTIN, J. I concur in this opinion.

MATHEWS, J. I do also.

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

GENERAL RULE.

Whenever a case is to be argued in writing, the plaintiff's attorney shall deliver to the defendants, a copy of his argument, who shall be bound to return it in ten days with his answer, and the plaintiff in ten days after receiving the same, shall deliver the whole, with his reply, to the clerk of the court, or to one of the judges, and if in such reply he shall quote new authorities, he shall be bound to furnish the de-

fendant's attorney with a note of said authorities, and of the points to which he thinks they apply; and that there may be no altercation relative to the time of delivering the copies of such arguments. It is ordered that no evidence thereof shall be received, but the acknowledgement of the delivery under the hand of the party to whom the argument was given, or if refused, an affidavit of that fact.

And it is further ordered, That if any party shall delay to deliver his argument within the time above limited, the other may deliver his notes to the court, who will then proceed to examine and decide the case.

Provided, That in all cases, the court may, under special circumstances, enlarge the time for the delivery and the return of arguments, if such enlargement be applied for before the expiration of the time herein limited.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District. *April*, 1821.

WOOLSEY *vs.* PAULDING.

Former judgment confirmed.

EASTERN DISTRICT, APRIL TERM, 1821.

WOOLSEY vs. *PAULDING*, *ante* 295.

Hennen, on an application for a rehearing. The plaintiff claims the sum of $12,317 99 cents, as the balance of a note of hand made by Marquand and Paulding, in the city of New-York, on the 15th of July, 1814, payable sixty days after date, to his order. The note was originally, for the sum of $15,000, but several payments had been made on it prior to the institution of the suit; and the jury declare in their verdict, that all the payments made thereon, " amount to the sum of $3,424 75 cents;" which, consequently, leaves a balance due on said note, of $11,575 25 cents.

instead of the balance claimed of $12,317 99 cents. In no part of their verdict, have the jury found, that the note carries interest, or, that the interest is due on it; nor have they any where in their verdict, which is special, found that any other sum is due the plaintiff, than the balance of $11,575 25 cents. Both interest and costs are claimed, but the jury have accorded neither. These most important facts, it is presumed, must have escaped the attention of the court, when it condemned the appellant to pay, in addition to the said balance of $11,575 25 cents, settled by the jury, to the amount of the note remaining due, the further amount of interest on said balance, at the rate of 7 per cent. per annum, from the 21st of Jan. 1818, until final payment; that is, 21 per cent, or nearly one-fourth of the whole balance found by the jury to be due; and also the costs of the suit, amounting to upwards of $200 more.

That the court is not authorised to add, so materially, to the verdict of the jury, is clearly shown from the best authorities in the law, both in England and in the United States.

"When a verdict is found, (says a book of standard authority) there can be nothing add-

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ed to it, or taken from it, but as it is found, so the court must judge of it;" and whatever is found in a verdict, whereupon the court can give any judgment, must be positively found, not ambiguously, for if the jury doubt, the court can never resolve the matter of fact," *Trials per pais*, (5th edit. 1718) 287, *id.* (9th edit.) 340. "The court are confined to the facts found in a special verdict," 2 *Yeates' Rep.* 543. "On a special verdict, the court cannot intend any thing which is not found," *Caines' Rep.* 60. "A special verdict must find the facts distinctly" 4 *Yeates' Rep.* 54.

In short, it is believed, that this court will recognise the general principle; and as the jury pronounce their verdict, so the court must render their judgment; without diminution or addition. Hardly a law book can be opened, that does not support these positions. Moreover, "a verdict must be sufficient in matter and form, be the same special or general; and therefore, the jury must find damages and costs where the same ought to be found," *Trials per pais*, 288, (9th edit.) The jury are to assess damages and costs, *ib.* 295, 296. *Wood's Institute*, 600. 2 *Keb.* 488. And if a verdict does not find damages and costs·

it is imperfect; but the omission shall be aided by a release of them, 5 *Comyn's Dig.* 506. Interest on bills of exchange, promissory notes of hand, &c. has always been found, where it is intended to be given by the jury, under the title of damages. Interest was never yet, in any case that has been reported, added to the amount of a verdict of a jury, where they did not find it due. See among a thousand authorities which might be produced, the following; *Caine* and *Coleman's Cases*, 65. 4 *Johnson's Rep.* 183. 12 *Johnson's Rep.* 17. 6 *Mass. Rep.* 157. 2 *Reports South Carolina*, 68. 5 *Mumford*, 25. 4 *Yeates' Rep.* 47. 1 *Yeates' Rep.* 1, 55. 1 *Dall. Rep.* 440, (costs.) 2 *Dall. Rep.* 92, 252, 6. The statute of the state is in strict conformity with the above legal positions. By the act of the legislature, 1817, *page* 32, *sec.* 10; the parties in a cause, are to submit for the finding of the jury, a written statement of the facts set forth in the petition and answer, and the jury are bound to give thereon a special verdict, which, when recorded, "shall 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, and the

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said court shall render judgment." Now, interest, in this case, is claimed by the plaintiff, and denied on the part of the defendant, to be due: whether interest then is due, and at what rate, is clearly a question of fact for the finding of the jury. The plaintiff claims interest, without, however, specifying at what rate, or agreeable to what laws; "interest and costs," generally. It was incumbent, however, on the plaintiff, as the court, in their judgment admits, to prove, that interest was due by the laws of New-York, where the contract was made; and also to prove the rate of interest allowed in that state. The court, in the opinion delivered in this case, refer to the judgment of the court in the case of *Bogg* vs. *Reed*, 5 *Martin*, 673. The correctness of the principle of law contained in that case, is not now called in question; on the contrary, it is invoked. The laws of other states must be proven before the judges in every case, in which it is proper they should influence their opinion. This is precisely what is asked for in this case. This court is bound to render judgment on the facts found by the special verdict; nothing can be added to it; for it is conclusive, as to

the facts in the cause. Now, have the laws of the state of New-York been found in any part of this special verdict? Can the court derive any information from the special verdict? Can the court derive any information from the special verdict rendered in this case, to influence their opinion on the subject of the laws of the state of New-York? Where can it be shewn from the special verdict, that interest at the rate of seven per cent, per annum, is allowed by the laws of New-York, in a demand like the present?

The fate of the present application may be safely rested on this simple query: Have the jury found, that interest, at the rate of seven per cent, per annum, is due the plaintiff. If it can be shewn that they have, such interest must be allowed; on the contrary, if the verdict gives no interest, none should, or can, be allowed on any principle of law.

But furthermore, the plaintiff, in the written statement furnished by him for the finding of the jury, does not claim any interest on his demand. There is nothing in this statement which gives the remotest intimation of such claim. Nothing is said about the laws of New-York; when, or on what claims those

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laws allow interest; or at what rate. How was it then to be expected, that the jury should find that, about which the parties had submitted nothing to them? If the plaintiff neglected to submit this important fact of interest to the jury, he must pay for his inadvertence. The present case is one of peculiar hardship on the appellant. A dishonest partner in New-York, contracting a secret debt, of more than $45,000, a long time concealed, most industriously, from his injured partner, the villainy practised on him; at last, on this trial, exhibits himself united with a treacherous agent to support the demand of the plaintiff: and without a blush, both agent and partner have surrendered to the plaintiff, the confidential communications of the defendant; communications which more strikingly shew his integrity, while they seal the infamy of their characters. Not the slightest imputation of fraud is intended to be made against the plaintiff; yet, in a cause like the present, peculiarly hard on the defendant, the court will not feel any disposition to aid the plaintiff an *iota* beyond the strict bounds of law. The law which condemns the defendant to the payment of any part of this

debt, is hard; the plaintiff then cannot ask from the indulgence of the court, any further relief than what the strict technical rules of law will allow. Had the defendant relied only on such rules, he would have merited, in this case, the support of the court. But he invokes the principles, decisions, and laws, which are the very basis where reposes the security of the citizen, both for his property and for his life, which are secure no longer when the verdict of a jury is not considered as inviolable.

Livingston, for the plaintiff. This application is confined to a single suggestion, that the court erred in giving interest on the ballance ascertained to be due on the note, because the jury have not found either that interest was due, nor have they fixed the rate of interest. The principle assumed, that the judgment of this court must be rendered exactly as the jury pronounced their verdict, is not believed to be strictly correct in special verdicts; *under our act*, it is obviously unfounded, for there the jury find nothing but naked facts, from which the court draw the proper inference. If then, it were true, that,

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"as the jury pronounce their verdict, so the court must render their judgment," as the defendant's counsel assert, we should have no result whatever; the judgment would be exactly what the jury found; if they found that the defendant executed the note, the judgment could only, according to the defendant's rule, affirm that fact, without drawing the inference that he was bound to pay. The court therefore must, in their judgment, *go further than the verdict;* they must do more than merely affirm the facts, they must, in considering them, draw every legal consequence, and infer every fact necessarily implied by those that are found. The doctrines contained in the authority quoted by the defendant's counsel, *that as the verdict is found*, so the court must judge *of it*, does not go the length of defendant's rule, which would restrict the judgment of the court, to a simple repetition of the verdict. In the case he has quoted, 2 *Yeates'*, 544, we find it laid down from the high authority of *Croke*, that, if the jury, in a special verdict in ejectment, submit a particular point to the court, they *will intend every thing, that is necessary to their giving their judgment.* In 1 *Dallas*, 134, Chief J. *Shippen* cites the case of *Galbraith* &

Scott, where a verdict was given for the plaintiff, for one half of the premises, saying nothing of the other, and the court amended it by adding, "and for the rest, we find for the defendant," though there was nothing to amend by; merely (says the authority) because it *was implied in the verdict.*

The case quoted from 1 *Caines*, 64, is a strong exemplification of the danger of trusting to general *dicta*, which fall from judges in delivering their opinions, and repeating them as maxims, when our attention to the circumstances of the case, would shew that it formed an exception to the general rule laid down.

The court there, it is true, say, that they "can intend nothing, but what is found by the verdict." But in that very decision it will be found that they *intended* a great deal that was *not found;* not any thing, certainly contrary to the finding, but much that was only matter of inference. The verdict finds, that the vessel in question, sailed on a voyage from Hispaniola to St. Thomas. The court declare, without any finding, that St. Thomas' is a *Dutch* island; the jury found a passport in *hæc verba.* the court determine, that it is customary for vessels to protect themselves by such papers:

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the verdict says nothing of a state of war, the judgment is wholly founded on that fact.— And the inviolability of a verdict is so far from being established, in the manner stated in the defendant's petition, that there are numerous instances, in which it has been amended. some times from the judge's notes, some times from mere intendment, 2 *Johns.* 442, 283. 2 *Johns. cases* 17. 1 *Caines*, 381, and even on the affidavit of the attorney. 1 *Caines*, 394.

Here, however, we want no amendment, no change of the verdict, nothing but the exercise of that sound discretion, in drawing legal inferences from the facts found, and establishing as fact, that which is *necessarily implied* by the verdict.

On the point under discussion, the jury have found, in answer to the second fact, stated by the plaintiff, that the note was signed by the defendant's partner, for money advanced to the firm, by the plaintiff. On the third fact, they find that the interest was paid on the note up to 21st of January, 1818.

The note, here referred to, is the one on which the action is brought, which is annexed to, and forms a part of the petition; now. in this finding, we have full proof of the

two points in which the verdict is supposed to be defective; *expressly*, that interest was payable, and by *necessary implication*, at what rate; an express stipulation is endorsed on the note, signed by the drawer, that it shall bear interest from the time it fell due, and by calculating the sum due for interest on the capital of the note, at 7 per cent, on the 23d of February, 1815, it will be found to correspond with the sum of $453 75 cents, on that day, received and declared by the indorsement to be in full, for interest to that time.

Will it be said that the jury have found the note, but not the stipulation to pay interest? This cannot, even with plausibility, be contended, for by finding the note, they find all the stipulations it contains on the part of the drawer, and the endorsement, agreeing to pay interest, is as much a part of the note, as is the promise to pay the principal contained in the body of it. They have further affirmed this; in answer to the first question submitted by the defendant, he asks "by whom was the note of hand *annexed to the petition*, written and subscribed?" They answer, "Marquand & Paulding—by J. Marquand;" here the note is identified to be the one annexed to the pe-

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tition, and they declare that the writing and subscription is that of the defendant's firm. Did the jury mean to make a distinction between the writing and subscription of the note, and of the promise to pay interest? Is it not, on the contrary, a direct finding of both? But if not a direct finding, is it not a much more direct inference, than any which, in the cases cited, courts have thought themselves at liberty to make?

Equally strong is the conviction, relative to the *rate of interest* arising from the other endorsement, and from the answers of the jury to the second and fifth queries of the defendant. They say that the monies advanced and paid by the plaintiff, amounted to $45,542 50 cents, *according to the account*, and that *the dividends, stated in the account, are presumed to be correct.*

The account, here referred to, is to be found in the record; it begins with the note of $30,000, and the one now sued on $15000, making together, the sum found by the jury to be *a demand according to account.*

It is further identified, to be the account referred to, by the coincidence of its containing the account of the dividends, which they find

to be correct, and as it is the only account produced, it must necessarily be presumed to be the one intended. Let us here guard the court against a groundless intimation, made on the hearing, that this account only appeared in the answers of the plaintiff, which were not received as evidence, and which, therefore, the jury would have had no right to refer to; on the contrary, it is a document marked *C.*, which, by the record, the court will find, was introduced by the plaintiff.

Now, in this account, we find, not only that interest is charged on the capital, and credited on the different payments, but the court will, by taking the trouble to make a fair calculation, find that this interest was always calculated at seven per cent, and it ends in the same result with that, which, in two or three parts of the verdict, is found by the jury; viz. that on the 21st of January, 1818, there remained due on the note, this sum of $11,575 25 cents. But it also expressly asserts, in the concluding remarks, that this balance is to bear interest from the 21st of January, 1818; and, as this account is signed by the agent of the defendant, so far then, from any violence being done to the verdict.

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by the allowance of interest, it appears to me, that a sentence which deprived us of it, would have been at direct variance with the finding of the jury, both express and implied.

The defendant's counsel employs a fallacy in argument, which, though it cannot escape the attention of the court, it is yet my duty to detect. He says, courts never give interest where it is not found by the jury. Here he is mistaken; in fact, courts always give interest from the judicial demand; because it is directed by law, whenever the jury have found that a debt existed. But the fallacy of the argument lies, in applying to a judgment rendered as this was, upon facts found, the authorities and principles of the common law, relative to general verdicts. There generally (though, as we have seen, with many exceptions) the courts give judgment for the very sum found by the jury; their duty extends in those cases, no further than to carry that verdict into effect. But on a finding of facts, under our law, the case is different. The jury only find the materials on which the court are to give such decision as will render justice to the parties; they draw all necessary inferences of fact; they apply the principles

of law. The facts found by the jury are the evidence, and, if I may so express myself, it is the court which gives the verdict: according to that evidence, it is true; but drawing every necessary inference from it, which reason and justice require.

Negligence is imputed to the plaintiff, in not submitting this fact of interest to the jury; but he submitted the note. The note carried interest, not indeed, on its face, but its back, and without a distinction, that would bear the appearance of a play upon words, rather than a legal argument. The fact submitted and found is sufficient to justify the judgment of the court.

The defendant has travelled out of the record, in order to state circumstances, which he supposes, will raise a case of peculiar hardship for equitable relief. The harsh terms of villainy and fraud, are used without mercy, and, I think, without reason or evidence. It is true, they are not applied to the plaintiff personally, but are very liberally bestowed on the transaction which forms the basis of his demand. It is not the duty of the plaintiff's counsel, and certainly is not their intention to recriminate. A few obser-

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vations, however, may be necessary to shew, that we do not acknowledge any such case of equity as is here set up.

First, as to the secrecy of the transaction, we have evidence under the defendant's hand, that he was informed of it. In his letter of the 10th of December, 1817, to be found on the record, he admits, that this transaction was not placed on some schedule that Marquand had furnished him; yet he says, " I have understood from him (Marquand) that Wm. W. Woolsey held stock of Marquand & Paulding, as collateral security for some of Marquand's transactions. Now, when did he understand this? Certainly, not any short time previous to the writing of the letter; for, in another part of it, he says, " he (Marquand) does not write to me, except in one instance, a few days since, merely recommending me to pay Milnerbull's note." The strong probability, therefore, is that he heard of this transaction at the time it took place,though he was not as fully informed on the subject as he could have wished. What reason Paulding has to complain of the villainy, as he calls it, of his agent, we are ignorant of; but if it is to form any feature in his case, to our prejudice,

we should ask some further evidence of it, than we have been able to discover from that exhibited to the jury. The charge of treachery is one which is rather oddly made; "the partner and agent have most basely given up letters of the defendant, which shew his integrity, but seal the infamy of their own characters." Now, if this be treachery, it is treachery to themselves and each other, but surely none to the man whose integrity they establish; and instead of making it a ground of complaint, the defendant should admire the rare self-devotion of his partner and friend, who, at the expence of their own characters, disinterestedly support the integrity of his. But to speak seriously, can Paulding wonder, when he endeavours to throw so large a partnership debt on the shoulders of Marquand; that he should furnish the proof under Paulding's hand, that it was a joint one. When Paulding, after due deliberation, in the third answer, on record, does not scruple, explicitly, to deny that any partnership ever existed between them, after having generally denied it in his former answers; can he wonder, I say, that Marquand, as well from motives of honesty to the plaintiff, as to

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serve himself, should give the evidence of the falsity of these allegations. And it is very much doubted, whether the court will perceive any marvellous title to favour, in the conduct of a partner, who, thrice upon record, denies the existence of a partnership, which is fully confessed in his letters; who makes that partnership a question to be tried by a jury, and then complains of treachery, and raves about villainy and fraud, because his letters were produced which proved the falsity of his plea.

Again, what can be the equity of exonerating the defendant from the whole or any part of a debt, which the defendant directs his own agent to settle; which the agent liquidates, and which he, himself, afterwards, explicitly acknowledges to be just, and never thought of denying, until, perhaps, it was suggested, that it might be difficult for the plaintiff to obtain proof of the partnership, and that, at any rate, by the aid of such obstacles and exceptions, as have been named in this cause, the payment might, at least be delayed.

Hennen, for the defendant. The plaintiff's counsel admits, what is incontrovertible, that

the jury have not found any interest due to the plaintiff; an unliquidated demand of $12,317, 93 cents, has been reduced by the verdict, to the sum of $11,575, 25 cents. And, on this latter sum, the balance found by the jury, to be really due, the plaintiff contends he is entitled to interest, at the rate of 7 per cent, per annum, from the 21st January 1818, until final payment: not because any part of the verdict authorises such judgment, *but because, on the back of the note sued on, there exists a memorandum, purporting to be signed by Marquand & Paulding, to pay interest on the note, from the day it became due, until final payment.* Now, to this, there is a very plain answer; the jury have found by their verdict, to which the parties must be rigidly confined, that Marquand & Paulding signed the note; and they have found no more. The defendant C. Paulding, among other things that he has denied, to the grievous displeasure of the plaintiff, denies that this engagement to pay interest, written on the back of the note, was written, or signed by himself only, Marquand & Paulding, or by the consent, or approbation of either of them. The signature, "Marquand & Paulding," at the bottom of said engagement, may have been

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put on the back of the note by the plaintiff himself, under whose control it has always remained; or it may have been so put by some other person. It is however certain, that no attempt has been made by the plaintiff, who now finds so much use for the benefit of this memorandum, to shew that it was made by Marquand & Paulding; no opportunity has been offered to Marquand & Paulding, of shewing by whom this officious act was done, for it has never been charged upon them; and the jury, which laboriously solved above twenty questions in the case, submitted by the respective parties, has kept a profound silence on this head. The court, therefore, must adhere to an ancient law maxim (heretofore sanctioned, 7 *Martin's Rep.* 30.) *De non apparentibus, et non existentibus eadem est lex;* and then the whole superstructure of the plaintiff's argument is left without a basis. But, furthermore, this is a most important contract, now attempted to be enforced against one of the defendants, who assuredly never knew any thing of the transaction, out of which it originated, until called upon to pay a sum of $50,000, and upwards; a contract too, which to him in the present stage of the case, if enforced, will

make a difference of about $4,000; and that too, without any evidence against him, but such as is drawn by ingenious deduction from gratuitous conjectures. Surely the supreme court of the state of Louisiana, will not, on such grounds, deprive a citizen of $4,000, to enrich the overloaded coffers of a stranger. This court has repeatedly said, that it will deliberate long, and weigh well before it will pronounce against the fortunes of its fellow citizens. With an equal determination to do right, will this honourable court, I am confident, and with greater pleasure, recall a sentence which condemns a suitor to pay $4,000, without the requisite legal evidence.

The rule which requires the plaintiff to make out his case, by legal evidence, is not a new, nor a hard rule; for he comes, or ought to come, prepared to establish, satisfactorily, his allegations; and if not prepared, he can always withdraw his claim, until he obtains the requisite proof. Not so the defendant, he is at the mercy of the plaintiff. If he commits an error, he is without remedy. And hence, the propriety of holding inviolate the rule, which condemns the defendant, to no more than what the plaintiff unequivocally proves

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upon him, and acquits him, whenever doubt or want of proof, leaves the scales of justice even.

It is granted, that every fair and legitimate conclusion, which can be drawn from a special verdict, is to be used by the court when about to render judgment, under the 10*th sec.* of the act of 1817, (page 32.) Yet, the facts found must be conclusive between the parties, and the court can no more add to them, than contradict them; especially on such an allegation, on the part of the plaintiff, as that interest to the amount of $4,000, is due by the defendant, who, on his part, expressly denies it. If the verdict of the jury decides nothing on the interest, can the court? If the jury has not found the stipulation to pay interest, can the court determine that it was written, or signed by Marquand & Paulding, or either of them? The authorities quoted, decidedly determine the negative; and the statute adds, the court shall render judgment, on the verdict, as recorded; which is to be conclusive between the parties. It may then be fairly concluded, that the court has nothing in the verdict on which to condemn the defendant, to pay interest, on a demand liquidated only by the verdict.

If the above conclusion is correct, there is no necessity to enquire into the rate of interest to be allowed. I would remark however, on the attempt made by the plaintiff's counsel, to establish the rate of interest, by reference to an account filed among the proceedings, that if this account is to be taken *in toto*, as a part of the verdict, that all the objections urged to the court, on the argument of the cause, by the defendant, are completely supported. So much was the plaintiff's counsel aware of this, that at that time, the reference to the account was considered as surplusage in the verdict, and as such, rejected by the court. That account will prove, that interest upon interest, has been exacted; that the stock pledged for payment of the note now sued on, is more than sufficient to pay it; and that consequently, the defendant owes the plaintiff nothing; and finally, it will establish a continual contradiction to almost every finding in the special verdict.

Should the court, however, as the plaintiff's counsel correctly states, consider the special verdict, as evidence in the cause, from which no departure is to be made; a decision must be drawn from it, entirely conformable to the

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argument which I have the honor to urge for the defendant. On the verdict he relies; and by it alone, he prays to be judged.

MARTIN, J. The importance of this case, and the earnestness with which it is pressed on us, have induced us to adduce the reason on which we deem it unnecessary to grant a rehearing.

It is certainly true, that the verdict of a jury, in the present case, being on special issues, is conclusive on us, and that we cannot add any thing thereto; but this must be understood as to matters of fact; we must declare the law arising out of the facts found.

The verdict before us is not a special one, but the finding of special issues.

The suit is grounded on a note, a copy of which is annexed to the petition. On the back of the note are several endorsements; the first of which purports to be signed by Marquand & Paulding, and the other by the defendant. Marquand & Paulding promise to pay interest on the note from the time it became due, and Woolsey acknowledges partial payment of the principal and the interest. The defendant pleaded the general

issue, and the jury found, that the note was written and subscribed by Marquand, for Marquand and Paulding.

We have been of opinion, that on this finding, it was our duty to allow interest on the note, at seven per cent, and this part of our judgment we have been requested to re-examine.

We have heard the counsel of the parties.

The jury having found, that the note was written by Marquand, we must conclude, that they found that he wrote every thing on the note, which purports to be written by him. For every thing which a man writes in the margin, or on the back of his note, makes part of it, and extends or restrains his promise. It is true, proof of the writing the note is not proof of the writing the endorsement, so as to satisfy a jury; because the party who produces it must account for every thing which appears to have been added thereto; but when a note is denied, and the jury find it written by the party, the conclusion is, that he wrote the whole of it. For if any thing material be added to it, it is no longer the party's note, and the jury ought to say, he did not write it.

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In the present case, this receives additional strength, from the circumstance of the jury having calculated interest on the note, in order to ascertain the sum remaining due, after the deduction of partial payments endorsed thereon. They find an account *correct*, in which interest is charged. This furnishes also, the means of ascertaining the rate of interest, which appears to be seven per cent. Although the record contains no direct evidence, that this is the legal rate of interest in New-York, where the note was made; the finding of the jury informs us, that it is the rate which they allowed.

Upon the whole, we have no solid ground to disturb our judgment.

LECESNE vs. *COTTIN.*

Seven months are not too long a period, for the counsel of an absent debtor, residing in France, to obtain information, as to the witnesses to be examined.

APPEAL from the court of the first district.

PORTER, J. The plaintiff and appellee commenced this suit by attachment, on an obligation made at Paris, in the year 1804, by J. B. Cottin, deceased; the defendant, who is his father, and a resident of France, became, by the death of the said J. B. Cottin, heir to

two-thirds of his property. And judgment was demanded, that he be condemned to pay the same proportion of the note, on which this suit is brought.

The attachment was levied on credits and effects in the hands of garnishees.

The case was tried on its merits, and there was judgment for the plaintiff, from which this appeal has been taken.

The proceedings in this cause, so far as they are necessary, to be stated for a correct understanding of the opinion, which the court has formed, were as follows:—

The petition was filed on the 30th of March, 1820, and the attachment served on the 1st of April, and returned the 6th of the same month: the day after, the counsel for defendant made a motion, that time be given him, to the 11th instant, to file an answer.

On the 13th of May, the same gentleman was appointed by the court, to defend the rights of the absent debtor; on the 26th, on motion, a delay of six months, was given to file an answer; on the 1st of July following, that order was rescinded; on the 21st of that month, on the application of the plaintiff's counsel, another attorney of the court was

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joined in the defence. The cause stood over, until the 6th of December, when an answer was put in. On the same day, the counsel for defendant made affidavit, that the testimony of witnesses residing in France, was material to the defence, and on this affidavit, applied for a commission, which was refused by the court. To this refusal the defendant excepted.

On the 29th of January, the cause was tried, and there was judgment for the plaintiff.

The period which elapsed from the 13th of May, (the date of the appointment of an attorney) to the 6th of December, when the answer was put in, and the commission applied for, was not, in my opinion, less time than was necessary to enable an agent here, to write to his client in Paris, get information, as to the nature of his defence, file his answer, and prepare to take the testimony.

It was necessary, that the attorney should correspond with his client, and obtain from him a proper knowledge of the facts, before he replied to the petition; until he obtained this knowledge, he could not know who were the witnesses, he could not judge of their materiality, nor lay the grounds of applying for

a commission, by making the proper affidavit.

In this case, supposing the attorney to have written the very day he was appointed, to have found a conveyance the next; and that his client had been equally fortunate and diligent, it would probably have taken four months to have received an answer. But, when we consider the attention which counsel are able to bestow on cases of this kind, consistent with their other duties; the uncertainty of this conveyance, and the necessity probably, in which, the defendant found himself, of obtaining information from others, respecting a transaction of so old a date; I do not think the time taken here, was unreasonable, or that the court should have refused the commission prayed for.

I understand it to be law, as it is certainly the safest practice, that whenever the propriety of granting a continuance to a defendant, is doubtful, that the court should accord it. If any error is committed on that side, the consequence is but delay to the plaintiff; if, on the other, a mistake might produce great injury, perhaps ruin to a party defending himself against an unjust demand.

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This rule, which I think salutary, is particularly applicable to cases of attachment, when the party sued is a non-resident of the state. It often happens, that the counsel, appointed to defend him, can do nothing more than make a nominal defence: at best, it is trying him who is absent, and under such circumstances, justice should be slow and circumspect, before she condemns.

I am therefore of opinion, that the judgment of the district court be annulled, avoided and reversed, and that this cause be remanded for a new trial, with instruction to the judge *a quo*, to grant the commission prayed for, and that the plaintiff and appellee pay the costs of this appeal.

MARTIN, J. I concur in this opinion.

MATHEWS, J. I do also.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the cause be remanded for a new trial, with direction to the judge to allow the commission, and it is ordered, that the plaintiff and appellee pay costs.

Seghers for the plaintiff; *Morel* and *Denis* for the defendant.

ALLEN vs. *LIOTEAU.*

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When judgment is taken by default, the verdict cannot be for the defendant, altho' no damage be proven.

APPEAL from the court of the first district.

PORTER, J. In this case, no answer being put in, judgment by default was taken, and a jury being called to assess the damages, the judge charged them; "that they ought to find for the defendant, inasmuch as the plaintiff did not prove any special damage, that although the defendant had not complied with the contract, yet, the jury ought to find for him, as no damages had been proved to have been sustained by the plaintiff." The case comes up on a bill of exceptions, to this opinion, the jury having found for the defendant.

The plaintiff having alleged a contract of lease, non-performance by defendant, and damages in consequence thereof; his not answering these allegations, was, in my opinion, an admission of them. 2 *Martin*, *Dig.* 152, *Curia Philipica*, *Contestacion*, *no.* 2. And I think the judge below erred, when, notwithstanding this admission, he charged the jury that they ought to find for the defendant. If no damages had been proved, other than these admitted by the pleadings, a nominal sum should have

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been given. But to instruct the jury to find none, is to instruct them to find contrary to what appears on the record.

I am therefore of opinion, that the judgment of the district court, be annulled, avoided and reversed, and that this case be remanded for an assessment of damages, with directions to the judge not to charge the jury, that they ought to find for the defendant, because special damage was not proved; and not to charge them, that although the defendant had not complied with the contract, there should be a verdict for him, as no damage had been proved to have been sustained, and that the defendant and appellee pay the costs of this appeal.

MARTIN, J. I concur in this opinion.

MATHEWS, J. I do also.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the cause be remanded, with directions to the judge, not to charge the jury, that they ought to find for the defendant, because no special damage was proved, nor that, although

the defendant has not complied with his contract, there should be a verdict for him, no damages having been proved. The cost of the appeal to be borne by the defendant and appellee.

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

IN THE CASE OF JULIA PIERCE.

The sale of a minor's property must be made at the place, where the family meeting have decided it is most advantageous it should be sold.

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

PORTER, J. The question to be decided in this case, is, whether the court of probates can order a tract of land, belonging to a minor, to be sold in any other parish but that in which it is situated.

The record shews, that both tutor and minor reside in this city, and that the property is in the parish of Feliciana.

A meeting of the family, at which the under tutor assisted, was held according to law, and the result of their deliberations was, that the interest of the minor, required that the property should be sold in New-Orleans, at nine and eighteen months credit.

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By our law, the judge, where the minor resides, is alone invested with authority to order a sale of this description, but, it is silent where that sale shall take place: as it has left the subject unlegislated on, the best course we can adopt, is to follow the advice of the family meeting, given on oath, that it is for the interest of the minor it should be sold in New-Orleans.

I am therefore of opinion, that the order of the court of probates be set aside and reversed, and that the register of wills do proceed to make sale of the property according to law.

MARTIN, J. I concur in this opinion.

It is therefore ordered, adjudged, and decreed, that the judgment of the court of probates, be annulled, avoided and reversed, and that the register of wills, of the parish of New-Orleans, proceed to the sale of the land, according to the recommendation of the family meeting.*

* MATHEWS, J. did not sit in this case.

FINLAY & AL. vs. KIRKLAND.

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APPEAL from the court of the third district.

PORTER, J. The plaintiffs claim the amount of sundry goods, furnished to the defendant, according to an account annexed to the petition.

He pleaded the general issue, and, that he was not liable, because the account had been created by William Kirkland, a person not of age, and, for whom he was not responsible.

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

The testimony given on the trial, comes up with the record, and there are four bills of exceptions.

The first is to the admission of the clerk of the plaintiffs. It does not appear to me that the court erred in admitting him to testify. There is no rule of evidence better understood, than that which establishes, that persons standing in his situation, are competent witnesses. *Phil. Evid.* 99.

The second is, to the introduction of an account, because it was not added up, and because it gave in items, what was stated in the petition, as a general balance. It ap-

A clerk may be a witness for his employer.

An account ought to be received in evidence, although, it be not added up, and give in items, what is stated in the petition, as a general balance.

A witness may be asked whether the defendant was, or was not in the habit of paying for goods taken up by his children, before the time when those, the payment of which is claimed, are charged.

The affidavit of a witness, now dead, made in the absence of the opposite party, cannot be read.

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pears to me, that the objection, if of any value, was to the insufficiency of the evidence, and not to its legality.

The third is to the following question, being allowed to be put to a witness, "was not the defendant in the habit of paying accounts contracted by his children, in the stores at St. Francisville, previous to the time, when the goods charged were delivering." This objection was on the ground, that it had no bearing on the matter in issue; but was evidence, if evidence at all, of matters between other parties. It perhaps had not any very material bearing, as to the point on which the parties were at issue; but the objection, I think, lay to its effect, when received, and not its introduction.

The fourth, was to the admission of the affidavit of C. Tutle, who was proved to have been deceased at the time it was offered in evidence. As this affidavit was made *ex parte*, and the defendant had no opportunity to examine the witness, it is my opinion that the district judge erred in suffering it to go to the jury.

I am therefore of opinion, that the judgment of the district court, be annulled, avoided

reversed, and that this cause be remanded for a new trial, with directions to the judge not to receive in evidence the affidavit of C. Tutle, and that the plaintiffs and appellees pay the costs of this appeal.

MARTIN, J. I concur with this opinion.

It is therefore ordered, adjudged, and decreed, that the judgment be annulled, avoided and reversed, and that the case be remanded, with direction to the judge, not to admit the affidavit of Tutle, in evidence, and it is ordered that the plaintiffs pay the costs of this appeal.*

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

ABAT vs. *RION.*

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

The maker of a note may prove its execution.

Parol evidence of the written notice of the protest of a note to the endorser, may be received, although no call was made

PORTER, J. This action was brought by the plaintiff and appellee, against the appellant, endorser of a promissory note. The cause was submitted to a jury, and the facts found

* MATHEWS, J. did not sit in this case.

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by them, fully authorise the judgment, and will require the confirmation of it here; unless some error has been committed by the opinions of the court during the trial, on those points, to which bills of exceptions have been taken.

on him to produce it.

A blank endorsement gives a right of action to the holder of a note.

Notice given by the bank, of a protest, ensures to the benefit of the prior endorsers.

The first is, to the decision of the judge, admitting the maker of the note to prove its execution. On this objection there is no difficulty, as the witness was equally responsible to both plaintiff and defendant; and as that responsibility could be neither increased or diminished by the event of the suit, I have not a doubt of his competency. *Phillips' Evidence*, 54, 55, 108. It has been made a question, whether it was not necessary, in all cases, to call him who signed the instrument to prove the hand-writing, on the ground, that his testimony was the best evidence the nature of the case was susceptible of. *Phillips' Evidence*, 70. But I do not remember to have, ever before, seen it doubted; that if he was not the best possible witness to the fact, he was, at least, as good as any other.

The fact found by the jury, being those on which the court has formed its judgment, it

is unnecessary to examine the correctness of the decision of the court, ordering the evidence, given at the trial, to be reduced to writing.

The third bill of exceptions, goes to the admission of the notary public, to give parol evidence of the written notice of protest, when the defendant had not been notified to produce it on the trial.

This objection is bottomed on the elementary principle, which requires, that the best evidence the nature of the case admits of, shall be produced. And which refuses to a party permission to give secondary evidence of a written document, on the ground of its being in possession of his adversary; until he has shewn, that by giving notice to that adversary to produce it, he has used every exertion in his power, that the best evidence might be had.

This is, no doubt, the rule. But the same good sense which established it, has also furnished the exception: that in cases, where, from the nature of the proceedings, the party must know, that the contents of a written instrument in his possession, will come in question, it is not necessary to give him notice to

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produce it. *Phillips' Evidence*, (edit. 1820) 389; and case of *Wood* vs. *Strickland*, 2 *Merivale*, 464, in note.

Applying the exception to the case now under consideration, we find, that the plaintiff in the petition, charged the defendant with having received notice of the protest of this note; and from the nature of the proceedings, it was well known to him, that recovery could not be had, unless that notice was proved on the trial. As he was perfectly aware, that it must come in question, he could not have been surprised at the attempt to prove it; and holding the highest evidence of the fact in his possession, he should have had it there, to correct the parol testimony if it was untrue. This court has carried this doctrine still further in the case of *Stockdale* vs. *Escaut*, 5 *Martin*, 567. But my opinion is confined to the cause now before us, where the defendant knew, that proving the contents of the paper, in his possession, was the very gist of the action. So circumstanced, I think the inferior evidence was correctly received, and that the defendant cannot complain of surprise.

I am the more confirmed in this opinion, for I find, on a close attention to the law.

that in opposition to the authorities cited by defendant's counsel, the latter decisions in that country, from which the rule was taken, establish a different principle; and permit secondary evidence of a written notice of the protest of a bill of exchange, without calling on the party in whose hands it is, to produce it. *Chitty on Bills*, (edit. 1819) 103. *Alkland* vs. *Pearce*, 2 *Campbell*, 601.

The objection taken to the endorsement, not being in full, cannot be sustained; it has been already decided by this court in the case of *Allard* vs. *Ganusheau*, 4 *Martin*, 662, that a blank endorsement vests the holder with a right of action against all the preceding parties; see also, *Chitty on Bills*, (edit. 1819) 121, 125.

It only remains to consider, if the notice given by the Planter's Bank, of the protest, enures to the benefit of the prior endorsers; and I am of opinion, that it does. The verdict finds they were the holders of the bill, and the weight of authority seems clearly in favour of the legality of notice coming from persons so circumstanced.

On the whole, I have no doubt, that the judgment of the parish court should be affirmed with costs.

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MARTIN, J. I concur in this opinion.

MATHEWS, J. I do likewise.

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

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

DURNFORD vs. *SEGHERS' SYNDICS.*

An attorney, who collects and retains money in his hands, is not the depositary of his client And in case of his insolvency, no privilege exists in favour of the latter.

APPEAL from the court of the first district.

Hennen, for the plaintiff. The plaintiff and appellee claims the amount of a check of $5900, which was given him, by the insolvent, for the balance of money collected by him, as his lawyer. The payment of it is claimed as a privileged debt. The defendants and appellees contest the existence of the debt; aver that the claim is fraudulent and collusive, and, at all events, that it should not be paid as a privileged debt.

That the claim is a real and not a fictitious one, just and free from collusion, cannot be doubted, after the slightest consideration of the evidence. The money was certainly received by Seghers, the records of the court,

and his declarations under oath, as a witness, prove that most conclusively. *Therefore*, the suit was properly brought; and the syndics must admit the demand, on the tableau, as a debt due by the estate of D. Seghers, and pay the costs of the present suit, as a privileged debt. The confession of Seghers alone, unattended by other proof, would establish the deposit. *Acosta*, 320, *no.* 9. But the plaintiff contends, that this money is to be considered as an irregular deposit, in the hands of the insolvent, and that it should be paid as such, by privilege, before any of the chirographary creditors. The counsel for the defendants, admits, that the *irregular deposit*, according to the laws of Spain, unrepealed by the *Civil Code*, enjoys the privilege claimed: but denies that this money was an irregular deposit. The sole point, then for the consideration of the court is, *was this an irregular deposit.* What then is an irregular deposit? It differs most materially from the regular deposit. In the first place, it consists only of such things, as could be counted, weighed, &c. *Bolero*, 530, 9. *Part.* 5, 3, 9. In the second place, the same thing deposited is not to be returned; but another of the same

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value, weight, and as a natural consequence, the thing deposited may be used, by the depository. While in the regular deposit. the identical thing must be restored and cannot be used, or consumed. 7 *Febrero*, 102, *no.* 201, and the authorities there cited, *Merlinus*, 456, *no.* 51, 52. *Bolero*, 530, 9. *part* 5, 3, 9.

It is then, clearly, no objection to this action, that the identical thing is not claimed; nor that the thing claimed has been used. Indeed, in the irregular deposit, the thing becomes the property of the depository, and the risk of its loss is on him. *Rodriguez*, *de Concursu Cred.* 108, *n.* 204. *Part.* 5, 3, 2. and the *Gloss of G. Lopez*, *n.* 4, and *Lopez's Gloss.* 1, *part*, 5, 3, 9. *Bolero*, 530, 9.

By the law of the *Partida* just quoted, *part.* 3, 5, 2 & 9, the irregular deposit is constituted wherever money is received, to be kept without a reward for the keeping or guarding of it. The insolvent in this case, it is true, was to be paid as a lawyer, for collecting the money; but he was to receive nothing for taking care of the money when in his hands. The law makes the essence of the contract turn on this; was the keeping gratuitous? No one can say that it was not.

So, both by the Roman and the Spanish law, for the same reason, money placed in the hands of a banker, when used by him, but kept gratuitously, shall be repaid to the creditor, in case of the failure of the banker, with the privilege of the irregular deposit. *Rodriguez*, 110, *n.* 216, 220, and the authorities quoted by him, *Merlinus*, 388, *n.* 3. *Bolero*, 530, 9, *n.* 3, 4, 7, and 8.

The 9th law of the 3 *tit. part* 5, speaks in the most general terms, that in all cases where money has been received by one person, to be kept for another, such money is to be restored as a special deposit.

This money was received by the insolvent, to be kept for the plaintiff, and restored to him whenever he should call for it. It was at the option of Durnford, to let the money remain in the hands of Seghers, and the deposit was not at an end, until Durnford should say so; which is another characteristic of the irregular deposit, *Rodriguez*, 108, *n.* 201, and which distinguishes the irregular deposit from a loan.

The case of bankers holding money in deposit, has been mentioned, as an example put both in the Spanish and Roman law: but the

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principle extends to all persons, particularly to those, who from the nature of their office, or employment, receive money for others. *Rodriguez*, 110, *n.* 216, 225, 112. 2 *Gomez*, *Variæ Resol. cap.* 7, *n.* 2. 2 *Carlevallii op.* 218, *n.* 7. Now, in no employment or office, do men receive money for others more commonly than in that of a lawyer. In the very words of *Rodriguez*, 112, *n.* 225, "*sub ratione officii*, 2 *Gomez*, *Variæ Res. cap.* 7, *n.* 2. The insolvent received this money; and thereby bound himself, by virtue of the contract of an irregular deposit, to restore the money he received from the debtors of his client. But it will here be objected, Seghers was to be paid for his trouble in collecting this money; most true. But after he received it, was he to have any thing? Was not his keeping of it to be gratuitous? The insolvent might have refused to have received it; he might have insisted upon the debtor's paying the money over to Durnford himself. Seghers' services were not at all, of necessity, connected with his receiving the money. When the debtor was ready to pay, the insolvent might, I may say, should, have sent for his client to receive the money: in which case, he would

be entitled to charge just the same compensation. And he could not augment it, because he voluntarily engaged to receive and hold the money as a deposit for Durnford.

Our statute, moreover (1 *Martin's Dig.* 530, *no.* 6) speaks in the same words, as the *9th law*, 3 *tit. page* 5, when a counsellor, or attorney "shall have received money for his client," "*dineros contados, recibiendo alguno en quasda de otro.*" And in both, is an irregular deposit equally implied. In short, if money in the hands of an attorney or counsellor, received for his client is not a deposit, and one of the most sacred kind, I know of none.

But it will be here answered, that Seghers gave Dunford a check for the amount of the money to be paid over. Let us then examine, if this can make any difference. When Seghers gave his check, the money was in the Louisiana bank, to the full amount of it, deposited to his credit, and for months remained, ready on the receipt of the check, to be deposited to the credit of Durnford.—This clearly appears from the books of the bank, given in evidence. The money then, received by the insolvent, was actually deposited in bank by him, and he gave Durnford

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a check, in other words, an order on the bank, to return what he had deposited, to the real owner of the deposit. The plaintiff neglecting to claim the deposit, cannot at all affect his rights. Had the bank become bankrupt, it is true, the loss would have been his, but that could not change the *nature* of the contract which Seghers had made; *an obligation to restore the money, whenever called upon for it. Curia Phil. lib.* 2, *com. ter. cap.* 11, *no.* 49.

Seghers, however, after frequently enquiring at the bank, if this check had been presented, and finding that it was not, thought proper to make use of the money he had deposited, for the payment of it. The motives or correctness of this course of conduct, it is not intended to suspect or question. But does it not more forceably shew that Seghers withdrew a deposit which he had made? A deposit it clearly was in the bank; could the insolvent by withdrawing it, make it any thing else? The insolvent's counsel says, that when the insolvent gave his check, the contract of deposit was dissolved, and performed. Not so; the deposit which had existed, continued: and was not dissolved nor performed, and could not be, until the check was paid—*no no-*

vation was operated by the check. Our courts have determined, repeatedly, that a check, note, &c., is no payment of a debt, even when a receipt in full has been given, until the note, check, &c. has been paid. The admission of the counsel is conclusive. *The money was a deposit up to the time of giving the check*, the contract was not changed by the check, and the plaintiff had the same right against the bank, for the deposit, which the insolvent had. *Schulton. Juris prudentia*, 281, *no.* 8.

I conclude, therefore, that a case of irregular deposit, has been made out; and, as there is no dispute about the law, that the plaintiff and appellee should recover the amount of it, as a privileged debt of the lowest grade, but before any of the chirographary creditors.

Livingston, for the defendants. The plaintiff seeks to establish a privilege over the creditors by simple contract, on the following case.

The insolvent being an attorney-at-law, employed by the plaintiff to recover certain sums from several of his debtors; of those debts he secured some and recovered others, and came to a settlement with the plaintiff; delivered over the securities he had taken,

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and for a balance of $5,900, which appeared due in cash, gave him a check on the Louisiana bank; for which, the plaintiff gave a receipt (I believe) at the foot of the statement; this, however, will appear by a reference to the record, which I have not now before me.

At the time of giving this check, and for a considerable time after, and also at different periods before his failure, as appears by the testimony of Sel, and by the bank-book agreed to be read in evidence; the insolvent had a sufficient balance in bank, to have paid the check, but the plaintiff never presented it, until the time that the insolvent failed. It is also in evidence, that the plaintiff kept an account in the Louisiana bank, and was in the habit of lodging checks, which were given him on that bank, with one of its officers, in order, that they might be presented, whenever the drawers had a sufficient sum to pay the amount in bank. And it is positively proved, that if this course had been pursued, with respect to the check in question, it would have been paid.

This transaction, the plaintiff calls an irregular deposit. Our *Code*, in defining this contract, takes no notice of this division,

which, however, I admit was known to the Spanish law, and as there is no express repeal, may, I think, still be said to form a part of our law.

It agrees with the regular deposit in this, that the object deposited must be placed by the owner, in the hands of the depositary, who, on his part, engages to return it, on demand.

It differs from the regular deposit on this; that it must be of something which may be valued by its weight, number, or measure; and that, while in the regular deposit, the identical thing must be restored. In this, others of the same quality, weight, number, or measure, can only be required, and that the depositary may use, or dispose of the articles so deposited. It must, like the other, be gratuitous, and it must, also, be the result of a bilateral contract, in which the one party agrees to make the deposit, and the other to receive and restore it. Vide *Civ. Code*, 410, and the authorities cited by the plaintiff.

Applying this law to the facts, our first enquiry is, where is the evidence of any contract between the parties, constituting a deposit? Seghers owed money to the plaintiff, and he

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paid it by a draft on the bank; the contract here between the parties, was very different from that of a deposit. So far from being a contract, it was the dissolution and performance of one. Seghers had contracted to pay the money he recovered for the plaintiff, and he performed it by putting at his disposal, exactly the sum he owed. So far from agreeing to keep, it is the determination to restore; or in other words, to keep no longer. On the part of the plaintiff too, I see no evidence of a deposit in the hands of Seghers. After striking the balance, he receives the check on the bank for the amount; his neglect to present it, cannot be construed into a contract with any one. To such contract, two agents would be required; his own and that of the person with whom he contracts; here, then, was neither. Not his own, because neglect supposes the absence of all violation; not that of Seghers, because he, for a long time, believed the check had been presented and paid. At most, it can only amount (if he designedly returned the check) to a confidence, that Seghers would not draw out of the bank the balance there appropriated. The first ingredient to constitute a

deposit being wanting, the question would seem to be at an end. But suppose the objection obviated, by saying, that the contract arose on the original receipt of the money by Seghers, and that it cannot be extinguished until the plaintiff actually received his payment—there another and as fatal an objection occurs; the contract of deposit must be gratuitous—here the pretended depository received fees and commissions; and, moreover, the monies were never placed in his hands by the plaintiff, either for safe keeping, or to be returned on the happening of a certain grant, or the performance of a certain condition, as is the case in judicial deposits, sequestrations, and deposits by way of pledge; but the money was recovered from the plaintiff's debtors, to be instantly paid over to the plaintiff, not to lay in the hands of his attorney.

On no principle, therefore, can this transaction be characterised as a deposit, either regular or irregular, and therefore he can be entitled to no privilege—a more serious question for plaintiff is, whether he can even be admitted as a creditor by simple contract? When the court decides this cause, in order to do final justice, as all parties are before them.

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they must assign the plaintiff his proper rank among the creditors, and, of course, decide whether he is entitled to any place whatever among them.

The retaining this draft for so long a period, without any apparent reason, and by a man who has not been proved to be remarkably ignorant of the value of money, or careless of the benefits to be derived from the use of it, is certainly a very extraordinary circumstance. We see by Mr. Seghers' testimony, that he was long ignorant of this circumstance, and that when he discovered it, he had no communication with the plaintiff on the subject, and that no demand was made until after his failure.

Under these circumstances, would it be unsupported by principal to say, the plaintiff has made the debt his own, and that, as between other *bona fide* creditors of the insolvent, the demand is extinguished by his own negligence. In the case of an endorser, or drawer of a similar order, or check, if the drawer had failed, no recovery could be had. *Kyd on Bills of Exchange.* Now, although in the present case the drawer has not failed, and therefore this might perhaps be no good defence, if the suit were against the drawer himself, yet.

every reason of the rule applies to this suit, against his creditors; they would not have trusted him, if a false credit had not been given by the use of this sum; the state of his bank account must have given him a credit with the directors, and that have induced others to trust him; whereas, if the check had been presented, nearly his whole balance would have been withdrawn.

I have said, that as the drawee of the check has not failed, the delay of presentation might perhaps be no good defence by the drawer; but I believe, on reflection, that the proof of loss (where there has been gross and unaccountable neglect) is not required to be shewn on the part of the drawer. But that such neglect alone, deprives the payee of any remedy on checks, or bills payable as this was, on demand; if so, the case is still stronger in the case of creditors.

Another suggestion which the defendants' counsel are obliged, in duty to their clients, to make, is this—that a judgment given for the plaintiff, after the extraordinary delay which took place, and the first presenting his demand, after so long a lapse of time, when his debtor was insolvent, and solely with the view

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of sharing with his other creditors, would give rise to the greatest collusions, to ruin of fair creditors.

PORTER, J. The plaintiff claims the right of being placed among the privileged creditors of the insolvent, and paid in preference to those merely personal—on the ground that the debt due him, arose from a deposit.

The facts, proved in the case, shew that Seghers had been employed as attorney by the plaintiff, to attend to several suits, and collect debts, and that he received a compensation for so doing. In the month of July, 1812, there was a settlement of their accounts, and a check was received by the plaintiff, for the balance due, $5900 7 cents, which, it would appear from the evidence, he retained in his hands several years, without presenting it for payment. It is the amount of this check, that is now contended, should be paid as a privileged claim.

This is clearly not a regular deposit, where the depository is obliged to return the identical thing confided to his care. The plaintiff admits that it is not; but insists it is that species of contract known to our law,

called an irregular deposit, which is made of money, or other things that consist in number, weight and measure, and which are delivered without any restriction on the depository's using them, but merely with the obligation to return the same quantity of the article received.

There is no doubt from the authorities cited in argument, that this definition of an irregular deposit is correct, and that it gives the preference claimed. The only question here is, whether the contract now before the court comes within the definition given?

It is believed that it is of the essence of this contract, whether the deposit be irregular or regular, that it should be entered into without compensation on the part of him who receives the object in his care. *Pothier Traité du contrat de Depot, chap.* 1, *art.* 2, *sec.* 3, *no.* 13. *Febrero, part* 1, *chap.* 4, *sec.* 3, in the language of our *Code*, it is essentially gratuitous. *Civil Code*, 410, *art.* 4.

It is equally necessary that the will of both parties should concur in the contract, that there should be a delivery of the thing to be deposited, and that the principal object of this delivery, should be the taking care of the

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thing. *Pothier, ibid. chap.* 1, *art.* 2, *Civil Code,* 410, *art.* 1 *and* 2, 412, *art.* 8.

Applying this law to the case before the court, we find that the debt of $5900, was the balance of monies coming into the hands of Seghers, as a lawyer collecting various demands of the plaintiff. The account presented by the plaintiff, and annexed to the petition, shews that $1500 were paid for fees, and other expences, incident to these services. There is nothing gratuitous in this.

But the plaintiff insists that these payments were made to the insolvent for his services, as a lawyer, prosecuting the claims put into his hands to judgment—that receiving and paying over the money, made no part of his duty, and that, what he did in that respect was entirely gratuitous.

The evidence does not prove this. It shews that the services of the attorney did not end with the judgment; on the contrary, that he acted as the agent of the plaintiff afterwards. The account, already referred to, establishes the fact, that he settled and arranged those judgments by receiving part in cash, and part in other securities, which he paid over. How can it be said, that these services were not in-

cluded in the sum charged and allowed in the settlement, or that the compensation related alone to obtaining judgment?

But admitting that the evidence did support the plaintiff in the petition, where is the consent of Durnford, that Seghers should be his depository? I cannot discover from the evidence, that he intended the attorney should do any thing more than collect his money, and pay it over, or that he ever contemplated it was to be left in his hands. *Pothier*, in his treatise already cited, *no.* 9; states, that to make a contract of deposit, it must appear, "*que la principale fin de la tradition soit uniquement que celui a qui la tradition est faite se charge de la garde de cette chose.*" He puts many cases to illustrate this doctrine, and among others, that taken from the *Digest*, 16, 3, 1, *no.* 13; that if one party charges another to receive, and take care of an object, which was in the hands of a third person, that this does not make a contract of deposit; because the principal object of the contract, was not that the thing should be kept, but that it should be taken out of the hands of him who had it in possession. It is not easy to perceive the distinction between that case and the one now

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before the court, unless it be in circumstances still more adverse to the claim here set up—namely—that the attorney took the money, (as the plaintiff insists) without any particular authority to that effect; and that he received, (as I understand the evidence) a compensation for so doing.

I see nothing in the transaction which distinguishes it from the ordinary case of an agent collecting money on commission, and it is to my mind, a totally different contract from that of one man depositing in the hands of another, an object to be gratuitously kept for his benefit.

I am therefore of opinion, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff be placed as a simple creditor, on the tableau of distribution of the insolvent estate; that the appellee pay the cost of this appeal, and that the costs in the district court be borne by the appellants.

MARTIN, J. I concur in the opinion just pronounced.

MATHEWS, J. I do also.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff be placed as a simple creditor on the tableau of distribution of the estate of the insolvent.

LEONARD'S TUTOR vs. *MANDEVILLE.*

The proceedings of the court of probates of a parish, in which neither the minor, his tutor or under tutor reside, for the sale of his property, are void.

APPEAL from the court of the first district.

PORTER, J. This case is similar in many of its features, to that of *Cresse* vs. *Marigny*. 4 *Martin*, 54, and the decision there settles two questions raised in this—1. That a judicial sale does not in itself transfer the property of a third person, if the proceedings are not otherwise regular, and legally authorise it; and—2. That heirs are not estopped by the warranty decending from their ancestors, unless it is shewn they have accepted their succession.

Another question has been raised, whether the sale was void or voidable;—by the laws of Spain, it appears that minors, whose immovable property was sold without the necessary solemnities being pursued, had two rem-

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edies : one against their tutor, called "*accion de tutela directa*," for the damages they might have sustained by his fault or neglect; the other against the third possessor, for the object sold. *Febrero addicionado*, *part* 2, *lib.* 3, *cap.* 3, *sec.* 2, *no.* 67, 71. The same choice of action is still open to them in this country.

It now only remains to consider, whether the formalities required by our law, to render valid the alienation of the property of minors, have been pursued in the case before the court.

Many causes of nullity have been presented, but the opinion I have formed on the first, renders an examination of the others unnecessary.

That the father, under tutor, and minor, being all residents of East Baton Rouge, the proceedings before the court of probates, in New-Orleans, were void, for want of jurisdiction.

An act of the legislature, 3 *Martin's Dig.* 132, 17, requires the assent of the judge of the parish, where the minor resides, to make an alienation of his property valid.

The evidence here shews, that the parties were not residents of New-Orleans ; the father, a few days before the sale of the property,

it is true, made a declaration in this city, that it was his intention to take up his permanent residence here, but the law requires more; a declaration before the judge of the parish, from which the party removes, as well as that where he intends to reside.

Considering, therefore, that the proper domicil of the minor, was in the parish of East Baton Rouge, I am of opinion, that the whole of the proceedings before the court of probates, were *coram non judice*, and of course void.

I therefore conclude, that the judgment of the district court, be annulled, avoided and reversed, and as the value of the services of the slave sued for does not appear, the case must be remanded, with directions to the judge, to proceed to judgment, considering the sale as null and void, and that the defendant and appellee pay the costs of this appeal.

MARTIN, J. I concur in the opinion just pronounced.

MATHEWS, J. I do also.

It is therefore ordered, adjudged and decreed, that the judgment of the district court

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be annulled, avoided and reversed, and that the case be remanded, with directions to the judge, to proceed to judgment, considering the sale as null and void; the costs of the appeal to be borne by the defendant and appellee.

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

KELLY vs. *BREEDLOVE* & *AL.*

No appeal lies from the transfer of a cause.

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

PORTER, J. The defendants having obtained a stay of proceedings, in a petition for a *respite*, from the district court, judgment was given, that this cause be transferred to that court, before whom the suit for respite was pending. From that decision this appeal has been taken.

It has been decided in the case of *Agnes* vs. *Judice*, 3 *Martin*, 186, that the transferring a cause to another court for trial is not such a final judgment, as that an appeal can be taken from it. I am of the same opinion, and think that this appeal should be dismissed with costs.

MARTIN, J. If no decision had taken place on this question, I would believe that a party, who is sent out of the court in which he brought his suit, was not compellable to follow it, in another, which he supposed was not the proper one, without having the decision of the court, in which he had sued, examined by this, but I yield to the opinion of this court in the case of *Agnes* vs. *Judice*.

MATHEWS, J. I concur with the opinion expressed by judge Porter.

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

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

DYSON & AL vs. *BRANDT & AL.*

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APPEAL from the court of the first district.

Appearance of an incident debtor to the proceedings had against him by his creditors, and contesting their validity, cure want of citation. In order that a suit pending be plead

PORTER, J. The plaintiffs allege that they are creditors of the firm of John Brandt & Co., to a large amount; that the said Brandt & Co. obtained a *respite* of one, two, and three years, to enable them to pay their debts. That

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in bar, it must be shewn, that it was between the same parties as well as for the same thing.

The insolvent cannot complain of irregularity in the proceedings after the forced surrender is ordered, it is a question, in which the creditors are alone concerned.

A debtor obtaining a respite from his creditors, and not complying with its conditions, may be compelled to a forced surrender of his property.

they have failed to meet the installments as they became due—that they are secreting and wasting the estate, with an intention to defraud those to whom they are indebted; and that they have given improper preferences to some creditors, by paying them, to the injury of others.

The petition concludes with an averment, that by reason of the premises, Brandt & Co. are bankrupt debtors—and prays that a meeting of their creditors may be ordered; that the defendants be decreed to surrender all their property for the use of those to whom they are indebted; and that an attorney be appointed to represent the creditors who are absent. To it is annexed, the affidavits of different creditors and their agents, swearing to the existence of the debts, as set forth in the petition.

The judge granted an order, that a meeting of the creditors of the defendants be called at the office of a notary public; and that, in the mean time, all proceedings against the property of the defendants be stayed. Brandt & Foster, two of the partners of the house of John Brandt & Co., who had not been made defendants in the suit, nor, of course,

cited to appear, made themselves parties to this cause in court, and prayed an appeal from the order, calling a meeting of their creditors.

This appeal was granted.

A meeting of the creditors was had before the notary, at which Brandt & Foster appeared, by their counsel, and opposed the right of the agent of Johnston & Ward, to vote for syndics.

As soon as the proceedings before the notary were closed, the said Brandt & Foster protested against closing the proceedings, on various grounds of illegality alleged by them, to which protest they signed their own names; and also by their counsel, offered and filed various objections to the regularity of the proceedings.

On the 21st of March, and before the *process verbal* of what was transacted by the creditors, in the meeting held before the notary, had been returned into court; a supplemental petition was filed by the plaintiffs in the cause, requesting provisional syndics might be appointed, to take possession of the books and papers, and property of said Brandt & Co. until the homologation of the proceedings. The court acceded to this prayer.

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The defendants, by a rule to shew cause, endeavoured to have this order, for the appointment of syndics, set aside, and made null and void. On argument, the court refused to rescind it, and from this refusal an appeal was also taken.

The proceedings before the notary being filed, a rule was obtained, calling on the creditors of John Brandt & Co., Brandt & Foster, and all other persons interested, to shew cause, if any they had, why the said proceedings should not be confirmed, and why John Brandt and Henry Foster should not be decreed to surrender all their private property, and all the partnership property of John Brandt & Co., in their possession.

The defendants shewed cause against this rule, and placed on record additional grounds for setting aside the proceedings. The opposition was, however, overruled by the court; the nomination of syndics affirmed; a forced surrender was ordered; and John Brandt and Henry Foster directed to declare, on oath, the amount of property in their hands. From this decision the defendants have appealed, and now allege various causes of nullity.

First, that they were not made defendants in this cause. This defect, I think, is cured by their appearance, making themselves parties, and disputing the cause in all its stages. If they are not defendants, we ought to dismiss this appeal, for they are certainly not plaintiffs; and unless judgment has been rendered against them, they have no right to bring up this cause here. In two, out of the three petitions of appeal taken, they state they are defendants; in the third and last, they declare that they have been making opposition to the plaintiff's demands.

Next, they object, that they were not cited. This irregularity, in my opinion, is also cured by appearing and pleading, and contesting the cause on other grounds than the want of citation. 3 *Cranch.* 496, 7. *Johnson*, 207. *Febrero, del juicio ordinario, lib.* 3, *cap.* , *sec.* 3, *n.* 129.

It has been also insisted, that the evidence proves another suit was pending for a forced surrender on the demand of David L. Ward, at the time this action was commenced; but to make this a bar, it was necessary to shew that it was between the same parties, as well as for the same thing.

Various objections have been offered to

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the proceedings had before the notary, but there is, in my opinion, one answer to them all, that they come from a person not authorised to make them. The other creditors might oppose the homologation, on the ground of irregularity. But as to the debtor, the forced surrender once ordered, the property is for the common benefit of those to whom he is indebted; and he has no right to interfere with its management, nor have a voice in the decision, respecting those persons to whom its direction is to be intrusted.

The principal question in this cause is, whether the judgment of the court below is supported by proper evidence; for the right of the creditor to demand a forced surrender, has been fully examined in the opinion just delivered, in the case of *Ward* vs. *Brandt & Co.**

It is unnecessary to examine, whether the order granted, in the first instance, issued correctly or not; for as the case is before us, on the whole proceedings had, and all the evidence taken, in the cause, it must now be decided, if what is shewn on the record, supports the judgment, and requires it to be affirmed here.

* This opinion is not printed, a rehearing having been granted.

In this case, it appears from the evidence introduced, that the defendants had obtained a respite of one, two, and three years, for the payment of their debts; that the plaintiffs were creditors of John Brandt & Co., and placed on their schedules as such; and that the terms of that respite had not been fulfilled. The last fact I gather from the failure of the defendants, to prove a compliance with it; for if they did make the payments regularly, in pursuance to the conditions on which the delay was accorded, the proof should. nay must, have come from them; for the creditors could not prove that they had not paid, or in other words, prove a negative.

This proof, the defendants have not furnished, though ample means were offered them to do so, after they made themselves parties in the cause. I cannot, indeed, see that they even alleged on the pleadings, that they had complied with the terms of the respite.

On the whole, I am of opinion, that the judgment of the district court be affirmed.

MARTIN, J. I concur in the opinion just delivered.

MATHEWS, J. I do also.

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

Livermore for the plaintiffs, *Derbigny* for the defendants.

CARROLL vs. *WATERS.*

The part owners of a steamboat, are not liable *in solido*, to the freighters.

APPEAL from the court of the first district.

Maybin, for the plaintiff. The ground of the plaintiff's action, in this case, is that the defendant, as part owner of the steam-boat Newport, is responsible, *in solido*, for the amount of damage sustained by her goods, on board the boat. *ff.* 14, 1, 1, 25, *Inst.* 4, 7, 2, *Curia Philip. tom.* 2, *lib.* 3, *cap.* 4, *sec.* 22, 24.

The principle is recognised by sir William Scott, 5 *Rob. Adm. Rep.* 262, and note, 1 *East*, 20, *Wright* vs. *Hunter;* see the opinion of lord Kenyon. *Abbott*, 119, (*Story's edi.*) in speaking of the action against part owners of a vessel, states, "that regularly, such action should be brought against all jointly; yet, if all are not sued, the defendants now only avail themselves of the objection by a plea, in abate-

ment; and if they omit to plead such a plea, the plaintiff will recover his *whole* demand, and the defendants must afterwards call on the others for contribution." 7 *Johns.* 311, *Schemerhorn & al.* vs. *Loring & al.*, 1 *Dal.* 129, *Scottin* vs. *Stanley* & *al.*, *Civil Code*, 390, *art.* 15, 16, 17, 18, to shew the definition of an ordinary commercial partnership, the difference between it, and the special and corporate partnership, and that this case falls within the definition of an ordinary commercial partnership, *ibid* 396, *art.* 41, *Febrero adic.* 3, *part* 1, *cap.* 12, *sec.* 1, where the same division of commercial partnerships is made; as in the *Civil Code*, *nombre colectivo*, *comandita* and *anonima*, and similar provisions concerning the extent of the responsibility of those different partnerships, are made. In page 190, where the doctrine laid down would be supposed to militate against the plaintiff's case, the author is speaking, exclusively, of corporate and special partnerships; and establishes principles similar to those recognised on that subject, by the *Code;* but makes no provision respecting an ordinary commercial partnership, which are believed to exist in the case before the court.

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View the inconveniences which must arise, and the difficulties and embarrassments in which the mercantile community will be involved, if the doctrine set up in defence should be law. Shippers of goods, where there are several owners of the vessel, must institute as many actions as there are owners. It is for the interest of the community, that multiplicity of suits should be avoided.

If the owners reside in different parts of the country, the shipper must incur great expence, lose much time, and be subject to very serious inconveniences, if they are to be prosecuted in their respective places of residence; in fact, the difficulties under which he would labour, would amount to almost a denial of justice—the court cannot surely establish such a doctrine, unless borne down by positive law.

If the part owners be responsible, *in solido*, every shipper will be safe. A certainty will prevail, which will encourage and increase this discription of business. The mercantile community will then know who are the responsible persons, and will not be affected by any division of interest, or arrangements which may be made between the owners of the vessel:

they will then know, that, as regards the world, they are all bound, and must repair any damage which may be sustained, and as between themselves, their difficulties can be settled in any manner which they may deem best.

Chaplin, for the defendant. In this case there are two questions which arise, material to the interest of the defendant. Is he bound, *in solido*, with his co-partners, or in any manner liable, as part owner of the steam-boat? Is interest due from the inception of the suit?

1. The partnership, entered into by the defendant, was either universal or particular. Let us suppose the former to have been the case, and that the goods were actually damaged by the negligence of the captain; upon referring to the *Civil Code*, 323, *art.* 20, we find, that although principals are responsible for the acts of their agents, yet they are relieved from this responsibility, when it was totally out of their power to have prevented it. Was this so in the present case? Could the joint owners or partners have prevented this damage, and did not? No matter what be the nature of the partnership, still they are not answerable, as principals, until it can be

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shewn, that they could have prevented the damage, and did not?

But, if the defendant be liable at all, we contend that it is on a particular partnership, and consequently, that the defendant is bound only in proportion to his interest therein.

To understand any principle well, we have no better guide than to make ourselves well acquainted—first, with its opposite; in the present case, it will be found of infinite use. An universal partnership, which is contradistinguished to a particular one, is defined by our *Code*, to be either that in which the parties put in common, *all their estate*, moveable and immoveable, which they possessed, at the time of entering into it, and the profits arising from the same; or, it includes *every thing* which the parties may acquire by their industry, under whatever title it may be, as long as the partnership lasts. *Civil Code*, 391, *art.* 8, 9. Does the present partnership fall under either of the above definitions? Were the defendant's co-partners engaged in a general partnership with the defendant, and consequently, liable to *all* the defendant's losses, as a general merchant? Or were they only associated in one particular and determinate branch, that

of running a steam-boat? The case would have been quite different, had the defendant been engaged in no other transactions than the present; that is, had all his estate, moveable and immoveable, been vested in the steam-boat. But it was not; the defendant's principal business and establishment is in New-Orleans. His steam-boat transactions had nothing to do with his other business, nor had his co-partners any share of his profits and losses, as a general merchant.

This, then, was clearly a particular partnership, and consequently, each partner is bound only in proportion to his interest in the concern, if he be bound at all. *Civil Code*, 399, *art.* 43, 44, *Slocum* vs. *Sibley*, 5 *Martin*, 682. *Febrero*, 3, 190.

But we contend, that the loss of the boat entirely exonerates the defendant from any responsibility at all. *Emerigon, Traité des assurances &c., tom.* 11, *page* 454, *et seq. Mais cette action solidaire ne compéte contre les propriétaires, que jusque á la concurrence de l' intérêt qu'ils ont sur le corps du navire ; de sorte que si le navire perit, ou qu'ils abdiquent leur intérêt, ils ne sont garant de rien.*

2. It is presumed there can be no difficulty.

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The damages were liquidated only by the verdict, and interest cannot be allowed, from the inception of the suit, 4 *Martin*, 615, 5 *Martin*, 388, 6 *Martin*, 698.

From these considerations, it is presumed, that the defendant will be entirely discharged from any responsibility whatever, or if made responsible, that it will only be in proportion to his share in the partnership.

Maybin, in reply. The authority from the *Civil Code*, 323, *art.* 20, is not in the least applicable to the case before the court. This article cannot, by any construction, be extended to principals and agents, or owners and masters of vessels, according to the *lex mercatoria*. It is speaking of the responsibility of parents for the delinquency of their children, and of that of institutors of youth, or artisans for the delinquency of their scholars, or apprentices. The provision relied upon by the counsel, must be taken in connection with the above provisions, and the evident meaning of it will then be, that by the words, "masters and principals," are understood, those persons bearing these relations, in domestic life. The French text, I think

proves this:—the word *domestiques*, meaning servants, those belonging to a family; and the word *preposes*, meaning overseers, stewards, principals, and agents, as spoken and understood, in the commercial law, cannot be brought within the spirit of this article of the *Code*.

The other authorities from the *Code* are no less inapplicable. The definitions of universal and particular partnerships do not embrace a commercial partnership. Those partnerships comprehend every other but commercial. For, after defining them, the *Code* here proceeds to state, that there are three commercial partnerships in this state, and then gives the definitions of them. Now, if universal and particular partnerships be also commercial ones, then there must be in existence, in this state, more than three commercial partnerships, which is directly contrary to the provisions of the *Code*. This construction is rendered more probable by the words employed in those definitions. Immoveable property is here put into the funds of a commercial partnership. "Trade, action, or profession," are the words used in the definition of a particular partnership, and em-

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brace such an one as that on which this court decided in *Slocum* vs. *Sibley*, 5 *Martin*, 682.

We contend, that this case is an ordinary commercial partnership, and must refer the court to the authorities produced in the opening.

In what manner the opposite counsel makes his quotation from *Emerigon* bear on this case, I cannot perceive. In the first place, *Emerigon*, though highly respected on the continent of Europe, is yet of no authority in this court. But admitting that his opinions, on the general principles of maritime law, were binding, yet the passage quoted appears to have reference only to, and to be founded on, the different ordinances of those countries where it may be law. For *Emerigon* immediately after, observes, that, "such is the law which is observed in the north, and such is the regulation of our ordinance," so that this is not a general principle of maritime law, which the court would consider with respect, but merely an ordinance. Besides, when this author declares, that "if the ship perish, the owners are not responsible for any thing," he must mean, when the ship perishes, at the same time, that the master commits those acts, for

which they are liable. He cannot mean that if she perish, at any future distant period, they are discharged from responsibility. This would be a most unjust doctrine. In our case, the steam-boat Newport, was sunk a long time, between one and two years, after the damage to the plaintiff's property.

The law, as settled in 4 *Martin*, 615, 5 *ib.* 388, &c., cannot be denied. But those cases are clearly distinguishable from the present. In the former, the demands of the plaintiff's were uncertain; calculations were necessary to be made; and, it was impossible to say, to what they were entitled, until the jury or the court could decide on their case. In the latter, our demand is specific, certain, and so expressed in the petition, on it we could have held the defendant to bail, if necessary. This then is rendered more certain by the admission of the captain of the boat, that it was a just demand and that it could be paid.

It is therefore hoped, that nothing hitherto advanced in defence, can induce this court to reverse the judgment of the inferior court.

PORTER, J. The defendant and three other persons, were joint owners of the steam-

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boat Newport, on board of which the plaintiff shipped merchandise in good order. It was damaged during the voyage, through the fault, or neglect of the captain. And this action is brought for the injury which the plaintiff has thus sustained.

The evidence establishes the delivery of the goods, the damage they suffered, and that the defendant was part owner of the boat.—The only question therefore to be decided, is, whether he is responsible *in solido*, or only for his *virile* share, and as it is one of general interest to the community, I have taken considerable pains to arrive at a correct conclusion in regard to it.

Our *Civil Code*, *p.* 390, *art.* 12, defines a particular partnership to be, that "which relates to certain specified things, to their use, or to the benefit to be derived from the same."

The undertaking of several persons to run a steam-boat, for their joint benefit, comes completely within the spirit and meaning of this definition, and I do not see why ships or steam-boats may not as well be the object of a partnership, as any other particular, or specified thing, in regard to which men choose to

associate for mutual advantage. *Pothier Traité de Charte Partie, sec.* 2, *art.* 3, *n.* 50. *Watson on partnership*, 40.

Establishing this contract to be nothing more than a private, or particular partnership, the liability of each partner is easily determined. They are not bound *in solido*, but for their *virile* share. *Civil Code*, 398, *art.* 44.

If I did not conceive the question to be settled by the positive expression of legislative will, and if we were obliged to examine how the law formerly stood on this subject, and form a decision on it, I should come to the conclusion, that the owners were not responsible *in solido*.

It is true, it is stated in the *Curia Philipica. commercio naval, lib.* 3, *cap.* 4, *no.* 21 *and* 22, that the owners of vessels are responsible *in solido*, for the contracts, acts, and negligence of the master of the ship.

In a later work, however, *Febrero addicionado, part* 1, *cap.* 2, *sec.* 1, their responsibility is declared to extend only to the share which each partner has in the vessel; and the author further states, that the doctrine contained in the *Digest, lib.* 14, *tit.* 1, *de exercitoria actione* (which is referred to in the *Curia Phi-*

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lipica, as the authority for holding part owners of a ship to be responsible, *in solido*) is not in force in Spain.

This latter opinion, I should suppose correct. Nearly all the modern nations of Europe have adopted the principle, that owners of vessels are not responsible for damage done to property shipped, any further than the share which each partner may have in them—It is thus stated in the *Consulat de Mer. chap.* 72, 227, 239, a *Code* of great antiquity, of the highest authority on this subject in every country; and particularly in Spain, where it was originally compiled, and first edited. *Consulat de la Mer.* translated by *Bourcher*, *vol.* 1, *p.* 61, and 76. *Emerigon* declares that the maritime laws of the middle ages so understood it, that such was, and is the jurisprudence of the northern nations. It is also the law in Holland, in Germany, in England, in France. *Laws of the sea by Jacobson*, *chap.* 3, *p.* 37, 47: *Grotius*, *de jure belli et pacis*, *lib.* 2, *tit.* 2, *art.* 17: *Abbott on Shipping*, *chap.* 3, *no.* 13, *p.* 119, and *chap.* 5, *no.* 2, *p.* 298. *Emerigon*, *Traité des assurances*, *vol.* 2, *chap.* 4, *sec.* 11, *p.* 454, and 455: *Pothier Traité de Charte Partie. sec.* 2. *art.* 2. *sec.* 5, *no.* 34.

Owners of vessels, in those countries, have still further the privilege of discharging themselves from all responsibility, beyond the vessel and freight; and cargo, if they have any of their own on board, by abandoning their right in them, to the persons whose property may be damaged through the fault of the master, or mariners. *See authorities already cited.* It is true, this advantage is conferred by statute, or positive ordinance in some of those countries. But its existence shews plainly the opinion which the different nations of Europe hold on this subject. It proves that a provision, so generally adopted, must have been founded on extensive motives of public policy, common to all commercial nations. And I have great difficulty in believing, on the single authority of a work, however correct it may be generally found, that Spain alone had regulations on this subject, different from all the rest.

I am well satisfied that the principle of making the part owner of a vessel responsible out of his private fortune, and that to any amount, although his interest in her might not be the one-twentieth part of the whole, would tend to discountenance persons from engaging in enterprises of this kind; would discourage that

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uniting of capital, without which undertakings of this description cannot be carried on with advantage; and would operate as a complete check to enterprise in a branch of commerce, for which this country heretofore has been so eminently distinguished, and from which she has derived honour and profit.

I am glad therefore that the law does not, in my opinion, require, nor permit this court to give judgment against the owner to the extent which is asked by the plaintiff. And conceiving the case to come within the provisions of our *Code*, in relation to particular partnerships and governed by them, I conclude that the judgment of the district court should be annulled, avoided and reversed, and that judgment be given in favour of the plaintiff, for the sum of one hundred and fifty six dollars, 49 cents, and that the plaintiff and appellee pay the cost of this appeal, and defendant pay the costs of the court of the first instance.

MARTIN, J. The extent of the liability of the part owners of a steam-boat must be sought in the maritime, which is part of the commercial law. In the case of a steam-ship carrying goods from New-Orleans to the Havanah.

Charleston, and New-York, we would improperly look for it elsewhere; and it is there we must seek it, in the case of a steam-boat carrying goods from New-Orleans to Natchez and Louisville.

It is true, as we held in the case of *Slocum* vs. *Sibley*, 5 *Martin*, 682, the members of a particular partnership are not bound *in solido*. But this must be understood of partnership, for the exercise of some trade, *metier*, or profession, or any other but a mercantile transaction. *Civil Code*, 390, *art.* 13 & 14, *id.* 398, *art.* 43. The expressions used in the French text, which is clearly the original, are *les societes particulieres, autres que celles de commerce.* Hence we are to conclude, that in commercial partnership, the members are bound *in solido.*

The *Code*, in the first thirteen articles, in which it treats of the various kinds of partnerships, notices only such partnerships, the the object of which is something else than commerce. Commercial partnerships are the object of the five last articles. *Civ. Code*, 388.

That, at Rome, part owners of a ship, who navigated her, under a common master, were bound *in solido*, to the freighters, cannot be

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doubted. *Si plures navim exerceant cum quolibet eorum in solido agi potest. ff.* 14, 1, 1, *sec.* 25, that such is the law in Spain, the author of *Curia Philipica* informs us. So does *Rodriguez. Si eran muchos los administradores de la nave y todos nombraren un mœstre por el contrato, de este puede ser convenido cada uno in solidum;* and I see nothing that contradicts this in the part of *Febrero addicionado*, on which the defendant's counsel relies. Such is also the law of the other states of this union; and in England, where, however, by a particular statute, enacted in 1734, the liability was restricted to the value of the ship and freight.

The reason for this liability, *in solido*, given by *Rodriguez*, appears conclusive; *por que el contrato solo fue con el mœstre de la nave, y no es justo que a los que contraxeron con el. se los precise a litigar con muchos.* As the freighters contract with the master, a single person, it is not just that they should be compelled to bring suits against many.

It seems to me, the judgment of the court, *a quo* ought to be affirmed with costs.

MATHEWS, J. I concur in the opinion of judge Porter, considering the owners of the

steam-boat (admitting that their situation, as part owners, constitutes a partnership) partners in a particular partnership, and that not strictly commercial, being founded on a joint, or common ownership of a boat used to carry goods for 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 in favor of the plaintiff, for the sum of one hundred and fifty six dollars and forty nine cents, and that they pay costs in this court, and the defendant below.

TURPIN vs. *HIS CREDITORS.*

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

The ten days which a party has to appeal in, do not run till notice be served on him, of the judgment. This notice cannot be given till after the judgment is signed.

PORTER, J. This appeal is taken from an order of the parish court enjoining an execution.

The judgment was signed the 22d of December, and the *fi. fa.* issued the 24th. By law, the party cast in a suit has a delay of ten days given to him after notice of judgment,

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1 *Mart.* 438, to take an appeal and stay execution. The fair construction of this act is, that it is imperative on the party succeeding in the cause to give the notice; otherwise the right to appeal and arrest the execution, would become illusory and without effect.

As the expressions, used in the act, seem to require this notice only to assure the party cast, this advantage, it might be doubted, in a case sent down from this court with mandate, whether it would be necessary to notify the judgment. But on examining the record in the case, it appears, that the appeal was taken from a judgment not signed, and that it was dismissed.

As the decree of the court did not become perfect, until it obtained the signature of the judge, the notice given, before the appeal was brought up, cannot aid the proceeding. It was not giving the party cast, notice of a judgment, but of something which might ripen into one.

I am of opinion, therefore, that the judgment of the parish court be affirmed with costs.

MARTIN, J. I concur in this opinion.

MATHEWS, J. I do also.

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

Denis for the plaintiff, *De Armas* for the defendants.

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APPEAL from the court of the first district.

Pleas, which tend to prevent an examination of the case on its merits, cannot be aided by inference.

A judgment may be so far final, as to be appealable from without being final, as to the point in issue.

A pledge does not amount to an alienation.

PORTER, J. John Trimble, one of the creditors of the insolvent, Clay, claims to be paid in preference to those who are merely personal, on the ground, that one M. Grew, of whom he is assignee, placed in the hands of the insolvent, in the year 1808, notes and bills of exchange, to the amount of $12,000, to be held as an indemnity, against any consequences that might ensue from bonds given by him, at the custom-house, on the clearing out of a vessel, in which M. Grew had an interest.

This contract is proved by a written receipt, signed by John Clay, which was first endorsed and transferred to one J. Dillon, and by him assigned to the present claimant, Trimble.

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The syndics of Clay resist this application, on two grounds—1. That the matters and things involved in the demand, have been already finally adjudged, in a case wherein Dillon, under whom Trimble claims, is plaintiff; and—2. That the transaction gives no preference over the other creditors.

From the statement signed by counsel, it is admitted, that the suit in the district court of the united states, which was by bill in chancery, was for the use of the present plaintiff, and for the same cause of action, and formed on the same written document now filed. But the parties differ widely on the nature of the judgment rendered in that court. It is insisted, on one side, that the cause was merely dismissed without an examination of its merits; while on the other hand, it is strenuously contended, that all the matters and things arising out of the issue joined, were fully examined and finally decided on. On one point the parties agree, what, indeed, they could not differ about, that unless the merits were enquired into, the *res judicata* has not been formed by the decision.

The petition has been lost, but the answer is found, and makes part of the record. It

denies the facts on which recovery is sought; denies that the syndics are bound to pay the money claimed, and prays, that the premises may be enquired of by the country.

The judgment rendered, was in the following words, "the bill and answer in this cause, having been read, and the argument of counsel thereupon heard, it is ordered, adjudged and decreed, that the said bill be dismissed, and judgment be entered up in favour of the defendants, with costs of suit to be taxed."

Pleas of this kind, which go to prevent our examining a causé on its merits, should be fully made out by him who claims the benefit of them; they cannot be aided by inference, nor supported by deductions drawn from what is probable; they should be fully proved.

This proof, I do not think is furnished in this case, for the following reasons—

The answer prays, that the facts should be enquired of by a jury. The constitution of the united states confined the parties to the same mode of trial. It does not appear, that a jury ever passed on the cause; hence I conclude, that the facts were never tried.

It is not pretended, that the minutes of the

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court have been lost, and had any such trial taken place, the record would have shewn it.

The language used by the court, in giving judgment, satisfies me, that the case was not decided on the merits. "The bill and answer *being read*, and the argument of counsel heard, it is ordered, adjudged and decreed, that the said bill be dismissed." I do not presume, that any court in this state, if a cause was tried on its merits, would merely state, that the case was decided on the reading the petition and answer. At least, it cannot be presumed, that such inaccuracy would have been permitted by the enlightened individual who then presided in that court.

Nor, if the case had been considered as settled between the parties by the decision, would the court have used the expressions, "that the bill be dismissed." That language is not used in giving final judgment.

Great stress is laid on the petition of appeal, stating, that a final decree had been rendered; but I do not think, that any thing can be fairly drawn from this. Because, it was necessary to use that language; and because, it is every day's practice, even when one of the parties have suffered a non-suit. There are

many cases which are final, so as to authorise an appeal, and not final on the facts in dispute and at issue.

The next question is, whether the contract proved here, gives any privilege over creditors merely personal.

This is not a deposit, but a pledge, which is defined by *Pothier* in his treatise, *du Contrat de Nantissment;* a contract by which the debtor, or some one for him, gives to his creditor, a thing to be detained for the surety of his credit. Our *Code* has adopted this definition, 446, *art.* 1.

And it may exist, and be created for a debt to be contracted, or depending on a condition, as in this case before the court. *Pothier, id. chap.* 1, *sec.* 3, *n.* 10.

It is stated, by *Febrero*, and the author of the *Curia Philipica*, that in cases of insolvency, he who has delivered property to his debtor, by any contract which does not transfer the property in it, remains the master, and is paid in preference to the other creditors; and they both add, that the same privilege exists for the price, if the debtor should have alienated the object thus placed in his hands. *Febrero, del Juicio de Concurso,*

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lib. 3, *chap.* 3, *sec.* 2, *n.* 185. *Curia Philipica*, *lib.* 2, *Commercio Terrestre*, *chap.* 12, *Verb*, *Prelacion*, 415, *n.* 5.

A pledge does not amount to alienation: *pignus manente proprietate debitoris, solam possessionem transfert ad creditorem*, *Digest*, *liv.* 13, *tit.* 7, *Loi*, 35. Our *Code* recognises the same doctrine, 446, 448, *art.* 1, 2, and prohibits the creditor to sell it in case of failure of payment; and declares, that the debtor remains the proprietor of the thing pledged, which is in the hands of his creditors, only as a deposit to secure his privilege on it. *Art.* 15, *id.*

A difficulty suggested itself to me, in the course of this enquiry, from what is stated by *Pothier*, in his treatise already referred to, *chap.* 1, *art.* 1. *sec.* 1, *n.* 6.

He observes, that in respect to incorporeal things, such as debts active, they are not susceptible of the contract of pledge; because, they are not susceptible of a real delivery, which, according to him, is of the very essence of the contract; and he cites, in support of the opinion, a passage from the *Digest*, *liv.* 41, *Loi*, 43, *sec.* 1. It appears, however, from a note on the text, that according to the practice in France, it had been held,

they might form the object of this contract, if the act transferring them was passed before a notary. What weight the authority of this eminent writer would have had on deciding this question, it is unnecessary to say, as by a law of the *Partidas*, 1, *tit.* 12, *ley.* 2, it is expressly declared, that debts, and all other kinds of rights, may be pledged.

These authorities are, in my opinion, decisive on the question. They establish the principle, that when the debtor receives property by a contract, which in its nature, does not transfer the dominion or right in it; that the owner retains the privilege of being paid in preference to other creditors; that the pledge is a contract of that description, and that, if the thing be alienated, there is the same privilege on the price. I am therefore of opinion, that the judgment of the district court be annulled, avoided and reversed, and that the appellant be placed on the tableau of distribution of the estate of J. Clay, as a privileged creditor, to be paid in preference to those merely personal.

MARTIN, J. I concur in this opinion.

MATHEWS, J. I do likewise.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the appellant be placed on the tableau of distribution, as a privileged creditor, to be paid in preference to those merely personal.

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

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If a slave be claimed by prescription, the question is to be examined according to the laws of the country in which he was thus acquired.

A statute of limitations vests the property, when it prevents the former owner from recovering the thing, in consequence of a continued adverse possession. It is like the *usucapio* of the Roman law.

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

Turner, for the defendant. This suit is brought by the plaintiff, as heir to his mother, to recover a slave named Lazare.

The testimony on the part of the plaintiff is, that he is the only child of madame Broh; that the slave Lazare belonged to her, in the year 1803, when she resided at Jeremy, in the island of St. Domingo; that she sent him to Charleston in that year; that she died at Baracoa, about the end of 1808, or beginning of 1809; that the plaintiff was born in 1792, or 1793, and was consequently 26 or 27 years old when this suit was commenced.

The testimony on the part of defendant is,

that Lazare was in possession of Mr. Placide in Charleston, about fourteen years before this suit was commenced, where he always remained, until sold to defendant; that Placide sold him to Dastras, on the 26th of May, 1806, who possessed him, as owner, until his death in the summer 1817, a term of eleven years; that he was in October, 1817, sold to Lazarus, that Lazarus sold him to defendant on the 2d of August, 1819, in Charleston, South Carolina.

By the plaintiff's own shewing, he and his mother were out of possession sixteen years; of that time more than five years were in the life time of madame Broh, and more than five years elapsed after plaintiff came of age; making the full term of prescription for slaves by our law. *Civil Code*, 488, *art.* 74.

But the defendant contends, that by the laws of South Carolina, his title is undoubtedly protected; four years adverse possession, in that state, will give title against the former owner, if within the state, and five years if out of the state. By that law whatever might have been the right of Placide, when he sold him to Dastras, there can be no doubt that the eleven years possession in Dastras gave him a good

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title, which descended on his death to his heirs, and that possession has continued in the descendants, and their vendees ever since, until the institution of this suit, in September, 1819.

But it is contended by the plaintiff's counsel, that our law of prescription does not apply in this case, because the thing was not within the jurisdiction of the state, and that the law of South Carolina cannot apply, because it is not a law of prescription, but merely a law of limitation, of the time within which a suit may be commenced.

By the laws of nature and of nations, as laid down by *Puffendorf*, *b.* 4, *chap.* 12, and by *Rutherforth*, in his institutes, *b.* 1, *chap.* 8, property in things moveable and immoveable, in lands and in chattels, may be acquired by long possession, denominated prescription, or occupancy, and that mode of acquisition is common to all civilized nations. In England, under whose common law, South Carolina is governed, that mode was common as well as in those states where the same laws prevailed. But in the loose and undefined terms of their law, in early times, in every thing but what related to real estate, no precise term seems

to have been fixed, in which the possessor of a chattel acquired a right to it, in opposition to the first proprietor; and the courts adopted, as a rule, that the possession should have continued so long that no one could remember the former owner's title. This rule gave rise to many suits, on stale demands, to prevent which, the statute for limiting the time of bringing suits was enacted; that statute placed the occupant of the thing precisely on the footing of one who had acquired by prescription—*to wit*, that he could not be disturbed by any pretended former owner, after the lapse of the time fixed in the statute. 3 *Bac. abr.* 500.

Puffendorff says, "the word prescription, imports strictly that plea, demur, or exception by which the person thus in possession invalidates the claim of the first proprietor."

Rutherforth says, "prescription is a right to a thing acquired by long, honest and uninterrupted possession, though before such possession, some other person, and not the possessor, was the owner of it."

The possessor is presumed in England, and in the several states of this union, to be the proprietor of the thing, and in fact is so against all but him who hath the very right; so that

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none can disturb him in the enjoyment of that possession, but the rightful proprietor. *Eq. cases abr.* 369, & 18, *Vin. abr.* 71.

Therefore, when he who once had right, has lost that right, by neglecting to enforce it, by suit at law, the possessor remains the owner in full property; that is, he possesses, with the capacity to hold against all the world. What idea have we of property in a thing, but the right of the possessor to enjoy it, to the exclusion of all others? Where, or in what state or country, that possession was acquired, is immaterial, provided it was honestly acquired, and has continued so long, that the former owner has lost his right of reclaiming by suit.

It is established by two decisions in the supreme court of South Carolina, that the possession of a slave, or other chattel, does give title under their statute of limitations. 2 *Bay*, 156, 425.

In Virginia, under their act of limitations, similar to that of South Carolina, it was decided, "that twenty years adverse possession is a positive title to the defendant; it is not a bar to the action, or remedy of the plaintiff only, but takes away his right of possession." This was a land case. 1 *Mun. Rep.* 455.

In the same state, a person without a valid title, who has possessed slaves so long as to be protected by the act of limitations, acquires a legal title to them, and may sustain an action thereon. The court said, "that the long and peaceable possession of the slaves in question, acquired without fraud or force, gave to the plaintiffs a legal title to them," and might sue on that title. 3 *Hen. & Mun.* 66.

And again, when examining into the validity of the titles of adverse claimants of slaves, the defendants conceiving themselves protected by the act of limitations; the court said, "the possession of the plaintiffs ceased in the year 1785, and this suit was not instituted until October, 1791. There were more than five years adversary possessions in the defendants, which is a complete *bar to the plaintiff's title.*" 4 *Hen. & Mun.* 145.

If the court had understood the act only to be a bar to the remedy, they would have said nothing about barring the title. But, if the title is barred, it must be, because it is divested, and acquired by some other.

But the same statute has received the same construction in the supreme court of the united states—*to wit*, that the possession of slaves

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will ripen into a title, to the property. 5 *Cranch*. 385.

A contrary doctrine would bring with it a consequence inconsistent with the known principles of right of transmitting title to things, *to wit*, that the possession would be protected, in the first person, and not in the second, having a derivative right. So long as the first possessor should retain the possession, even until his death, he would be safe in the enjoyment of the thing. But, so soon as he parted with it to another, whether by sale, or by descent, this new possessor would be exposed to the action of the old proprietor, whose action had been long barred by the act of limitations. Such a state of things would defeat the very ends of the law, which are the *quietus* of man's possession.

But the law is otherwise, as I understand it, and those who have lost their right of action, to chattles, by the operation of the statute, as against the first possessor, can never assert it against any second or subsequent possessor.

In this case, can it be pretended, that Mr. Dastras had not a good right to the slave, after a possession of eleven years ? Can it be pretended that Michael Lazarus, had acquired

no right to the slave, by his purchase from Dastras? And, can it be doubted, that the defendant Jenkins acquired title in South Carolina, by his purchase, from Lazarus? Will any one pretend, that under the laws of South Carolina, the present plaintiff could have recovered the slave in that state from Dastras, Lazarus or Jenkins? By what rule of law is the right to the slave, thus acquired by the laws of that state, divested or weakened by removing into this state? Is not every citizen removing from one into another state, so protected in all his rights, acquired under the laws of the state from whence he removed? Is it not a principle well established, that the *lex loci contractus* shall govern the rights of the parties; the cases of interest, the cases of marriage, and succession, &c. are familiar to every one, that vested rights will not be lost by a removal into another state.

But, whatever may be the opinion of the court on the foregoing view of the case, I contend, that by our own state laws, the right by prescription is complete in the defendant.

The Spanish law, as found in the third *Partida*, title prescription, shews, that he who possesses in good faith, believing himself the ow-

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ner, may acquire title to the thing by prescription, though the thing did formerly belong of right to another; under this law lived madame Broh. By our *Civil Code*, 482, *art.* 32, "prescription is a manner of acquiring property, or of discharging a debt by the effect of time, under the conditions regulated by law."

"Slaves may be prescribed for in half the time required for prescription of immoveable estates; and in the same manner, and subject to the same exceptions." *Id.* 488, *art.* 72. Immoveable estates may be prescribed for, after the expiration of ten years, if the true proprietor resides here, and after twenty, if he resides abroad. *Id.* 486, *art.* 67. Every man is presumed to have possessed fairly, and honestly, until the contrary be proved; and it is sufficient if he commenced his possession fairly. *Id.* 488, *art.* 71 & 72. In our case there is not only a total absence of proof on the part of the plaintiff, of a knavish possession, but the proof is abundant, that it was *bona fide*, and for a fair price. To the time of our possession, we add that of those who possessed before us. *Civil Code*, 484, *art.* 43. To our own, and thus we complete seventeen years. But it will be said during part of that time the

plaintiff was a minor, and the prescription did not run for that term; let this be examined, and it will be soon seen to avail nothing. The mother of the plaintiff was out of possession from some time in 1803, until since about the latter end of 1808, when she died at Baracoa; making more than five years. The plaintiff came of age in Louisiana, 1813, and the suit was begun in September, 1819; making six full years after he was of age, for the prescription to run against him.

Now we have seen that ten years is the full time of prescription, where the plaintiff resides abroad, surely it cannot require more when half that time he resided here. Now add the five years of madame Broh, to the six years of her son's time, and we have more than ten to complete our right. So that taking this case by the law of Carolina, our title is a legal one. The whole time had run against madame Broh, in her lifetime, by the Carolina laws, and the title in Dastras was good; the whole time required by our law. has run against plaintiff, and the title in Jenkens is good. But if I fail in this, we cannot be dispossessed without being paid the price of our purchase. *Civil Code*, 488. *art.* 76.

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There is a distinction very manifest between the possession of things, and the non-performance of an express allegation; a debt being contracted in one state is recoverable in every other. This is a positive obligation; when contracted, the statute of limitations formed no part of it, and even if the action was barred, a new promise would revive it. But not so with things in possession of which the possessor believes himself to be the owner; a debtor is morally bound to pay his debt, no matter how long his creditor may have forborne to demand it, and the equity of the statute, in favour of the debtor, rests on the presumption of payment, arising from the long silence of the creditor. Besides a debt is invisible, a promise is not a thing, the promisor, or debtor remains in possession of no specific thing transferable by him to another; it is in every respect different from chattles, or things visible, tangible, and moveable, the right to which by long possession is given by the law of the place, and not by any contract or sale between the parties; the law is the ingredient, essential to the right, and a right thus acquired is permanent and transmissable. A contract has reference to certain laws, as

where by the law of the place, a certain interest is fixed, payable on the debt; the law of interest is an ingredient in the contract, and wherever it may be demanded, by suit, the law of the place of the contract will be regarded as fixing the rights of the one, and the obligation of the other. Therefore, the statute of limitations of one state has no validity in another, as it regards the performance of contracts, for the payment of obligations; but of rights acquired under them, they ought every where to be regarded.

Livingston, for the plaintiff. Madame Broh, the mother of the plaintiff, left St. Domingo, on account of the revolution, and came to Baracoa, in the island of Cuba, bringing with her two slaves, Lazare, the subject of the present suit, and another. In 1803, she sent those slaves to Charleston, by Darginier, to be kept until she should send for them; male negroes from St. Domingo not being permitted at that time to remain at Baracoa. She died the last of the year 1808, or the beginning of 1809.

Her son, the present plaintiff, was born in 1793, and is her heir.

He arrived here in 1809, the negro Lazare,

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was brought here by the defendant, in the month of August, 1819, and this suit was commenced the 15th September, in the same year.

The defendant sets up the title of prescription, by virtue of possession, in himself and others, under whom he claims, founded on several sales which he produced, but, as we allege, does not properly prove.

The first question to be disposed of is, by what law will the court judge of the prescription; that of South Carolina, where the slave was, or that of this state, where the suit is brought; if by the latter, whether any prescription begins to run until the subject of it be within the jurisdiction of the state; and finally, if it should so run, whether our laws of prescription, as applied to the facts in this case, will give a title to the defendant?

On the first point. It is not clearly settled as law, that the *lex loci contractus* governs in all questions, relative to the construction of such contract, but that the *lex fori* must govern the proceeding to enforce it and all its incidents, for the first part of this statement, see 2 *Huberus*, 30, 1 *Gal.* 375, 2 *John.* 241, 5 *Cranch.* 289, 2 *H. Bl.*, 553; for the second part, *Hub. ubi sup.* 5 *Cranch.* 239, 296, 302, 1 *Gal.* 376, 2 *John.* 199, 2 *Mass.* 89.

A plea of the statute of limitation or prescription, as it is stiled in our law, is one of these incidents to the mode of proceeding, which is to be governed by the *lex fori*, *Nash* vs. *Tupper*, 402, 3 *John.* 267, 2 *Mass.* 84. In addition to these direct authorities, on the effect of foreign statutes of limitation, it may be remarked, that so little authority was thought due to the acts done in other states, that neither letters of administration, nor letters testamentary obtained in one state, have been deemed sufficient to authorise the bringing a suit in another. 1 *Cranch.* 232, 2 *Cranch.* 323.

If the law of prescription of this state be the only one that can apply to the defendant's case, the first enquiry is, whether *any possession*, in a foreign country will support this plea? I do not find any express decision on this point, and I believe it has not yet been litigated. We must therefore, apply to the words of our law, and endeavour to find its true construction. *Civil Code*, 98, *art.* 19.—Slaves are considered as immoveable by the operation of law, *ibid.* 486, *art.* 67, "a man who becomes possessed of an immoveable estate

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fairly, and honestly, and by virtue of a just title, may prosecute for the same, after the expiration of ten years, if the true proprietor resides in the territory, and after twenty years, in case the said proprietor resides abroad."

Article 74. "Slaves may be prosecuted for in half the time required for the prescription of immoveable estate, and in the same manner, and subject to the same rule."

Slaves, by these provisions, are put on the same footing with real estate, but a possession to give rise to a prescription of real estate must, from the necessity, be *in the state*, if therefore, the words of the *Code* are to be taken literally, the same kind of possession would be necessary, in the case of slaves. Is there any thing either in the contract, or in sound reasoning, which would lead us to a different construction? It is thought not. The latter member of the 67th article, above quoted, provides only for the two cases of the absence, or presence, of the true *proprietor;* that of the *defendant*, or possessor, is not provided for, because the action being *in rem*, the plaintiff might always bring it, whether the defendant was absent or not. But this reason does not apply to a slave *out of the state*, when

the true proprietor resides within; no suit could be brought, until the slave or the holder came within the jurisdiction of our courts, and therefore, it would seem both unjust and against the spirit of the law, to give effect to a prescription which the true proprietor could not have avoided, by bringing his action.—*Poth. Ob. n.* 678, gives us the reasons on which the prescription (of actions) is founded, which he says, are two—1. Presumption of payment: 2. As a penalty for negligence, in not prosecuting a right. The first of those reasons cannot apply in the case of a prescription, founded on possession; it must then be for the second reason, and for the obvious one, of the interest which every community has of protecting long possessions, that the prescription of this kind, here pleaded, was established. But the negligence, for which the party is to be punished, must surely be one which respects *our own laws;* so heavy a penalty would never be imposed to make our citizens vigilant with respect to *the laws of other countries;* but there can be no negligence imputed to a man, who has no opportunity of applying to the laws of his own country, and thus *Pothier* teaches us expressly, *n.* 679.—

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Il resulte de ce qui vient d'etre dit, que le temps de la prescription ne peut commencer a courir que du jour que le creancier a pu intenter sa demande; car on ne peut pas dire qù il a tardé a l'intenter tant qù il ne pouvoit pas l'intenter; dè la, cette maxime genérale sur cette matiere : contra non valentem agere, nulla currit prescriptio.

As to the other reason, on which possessive prescription rests, the interests of the community, in securing long possessions, that can only apply to possessions acquired, and enjoyed under that community; for one state has clearly no interest whatever, in protecting an unlawful possession, which was only of a few days duration, under its laws, although it might have been the interest of the country from which the possessor came, with the property, to have protected him in it, if it was of sufficient duration, while he remained with it, under the laws of that country. And our law, with respect to moveables, is founded on this principle, and strongly corroborates my reasoning. "If a man has had public and no tortious possession of a moveable thing, during three years, in the presence of the person who claims the property of the thing, said person being a resident of the territory.

is presumed to have known the circumstance. The property becomes vested in the possessor, unless the thing has been stolen." *Civil Code*, 488, *art.* 75.

Here we find, that to prescribe for a moveable, both parties must have been within the state, during the whole period of prescription. Now, though slaves are declared immoveables by law, no law can make them so by nature; they are liable to be taken out of the territory and sold, which other immoveables are not; and it would seem very extraordinary, that a possession under such a sale, in a foreign country, should deprive the true owner of his property, even in cases where such possession may have had the duration required by our laws, to have had that effect, if the possession had been within the state. And if the construction, contended for, be the true one, our law gives greater protection to the owners of other moveables, than it does to those of slaves, which are, notwithstanding, placed in a higher class. If a man steal my horse, rides him out of the state, and there sells him, I may claim and recover him from the *bona fide* purchaser, if he bring him, after twenty years, again into the state; but

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the same operation performed with respect to my slave, deprives me of my property in him, if he be brought back after a lapse of only ten. This is an anomaly which ought not lightly to be introduced into our jurisprudence.

In whatever light then, slaves may be considered, whether as immoveables or moveables, the prescription can only begin from the time the slave is brought within our jurisdiction, if moveable from the necessity of the case, because the possession of such property, if literally taken, must be within the jurisdiction. If moveable, from reason and the express words of our *Code*, the possession must be in the territory and in the presence of both parties.

But, even if the possession in a foreign country, be considered as sufficient to establish a prescription, it must, at least, have been attended with the circumstances required by our law, both as to origin and duration.

First, there must have been a continued possession for five years, in the presence, or ten years in the absence, of the parties, after the party became of age; and this possession must have been *bona fide*, and founded on a just title.

The slave in question, was entrusted, as appears by the testimony, in 1803, by madame Broh, the plaintiff's mother, to a Mr. Darginier, to carry to Charleston. There is no sale produced, either from him or from the owners; but a paper, purporting to be the copy of a sale, from Placide Bossa, to John Dastras and Mathew Dastras, jun.; was produced on the trial, and excepted to by the plaintiff, *p.* 27, document *C.* This copy is inserted in the record; but, we argue, ought not to have been received, because it is not authenticated in the manner required by the act of congress. That act, *vol.* 3, (revised edition) 621, March 27, 1804, directs—1. That, "as to records and exemplifications of office-books, not appertaining to any court, they must be authenticated; first, by the attestation of the keeper of such records or books, and the seal of his office, if there be a seal—2. By the certificate of the governor, chancellor, &c. under the great seal, that the said attestation is in due form, and by the proper officer."

Now, without raising any question, whether this is such a record, or exemplification as is intended by this act; two essentials to

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the introduction of this paper are wanting. It is not under the seal of the keeper of the records, from whence it purports to have been copied. Nor is the want of a seal supplied by any allegation, that there was none.

Secondly, "the governor certifies under the great seal, that B. Elfie, who has signed the certificate, is deputy secretary of state, and that due faith, credit, and authority, ought to be given to his proceedings and certificates as such." Yet he does not certify, that which the law expressly requires, and which is most essential for us to know, that his attestation is in due form, and that he is really the proper officer to certify copies of deeds.

The governor might have given the same certificate of the act of a notary, a justice of the peace, or any other officer who had nothing to do with the records of deeds. And for ought that appears here, except from Mr. Elfie's own certificate, we have no such proof with respect to him; besides, even supposing this to be full proof, that this is a copy of a a deed. What proof is there that such copy is good evidence in Carolina, without producing the original.

This paper then ought not to have been ad-

mitted in evidence, and can form no foundation for a presumption.

The next deed is from John Paul Dastras, by procuration of Mathew Dastras, to Michael Lazarus, dated October 2, 1817. This deed was produced in original, but was not (as we say) duly proved. It was authenticated by one witness, who swore to the hand writing of Villars, one of the subscribing witnesses; the rule has been to admit this proof where the witness is abroad; but it is only from a principle of convenience (and in some cases of necessity) where the witness' residence is not known, and it is always stated to be, because the witness is not within the reach of process of the court; but in cases where the witness has been actually examined in the cause, the rule cannot apply. Here then was a commission to Charleston, and Villars was examined. It is true, he says, he signed, as a witness, a bill of sale of this slave to Lazarus, but he describes a very different one: he says it was from Paul Dastras—the deed produced is from John Paul Dastras; he says Paul Dastras was the owner, the deed is from John P. Dastras, as attorney for Mathew Dastras; but if he had described the deed accurately, it would not

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have been sufficient; it ought to have been exhibited to him, and his testimony in this form will no more avail the defendant, than if he had given the same testimony at the bar, without shewing him the deed. The rule seems to be established in the court of the united states, that it is only in cases where the testimony of the witness can not be had, that proof of his hand writing is to be received. Now, in this case his testimony not only could have been had, but actually was had, and would have been regular, had the deed been exhibited to him, and this neglect of the defendant can not be supplied by proving his hand writing, see 5 *Cranch.* 13, 14. Can our court follow a better authority in establishing rules of evidence, than the supreme court of the united states? The same objection lies to the proof of the remaining deed, from Lazarus to Jenkins, the present defendant.

Besides the court cannot but be struck with a remarkable confusion, and even contradiction, in the testimony, with respect to the possessors of this negro.

Mathew Dastras, who appears as one of the vendees of this negro, in the deed from Broh,

and as the *seller*, by his attorney, John P. Dastras, in the deed to Lazarus, is examined as a witness; and says, that the negro in question, was the property of Paul Dastras, but appears perfectly ignorant of John Dastras's interest, and what is more extraordinary, of his own.

It results then from this investigation, that no deed has been properly proved on the part of the defendant, and that of course, there is no foundation for the prescription, he has pleaded.

The copy of the deed from Bossa, to Mathew and John Dastras, is totally informal, but if it had been produced, there is no regular claim, for the next deed is not from the grantees in the first.

If the two last deeds should even be admited, the eldest only goes back to the year 1817, two years before the suit was brought, and as our law requires ten years, *under a lawful title*, between absentees, to found a prescription, these conveyances, if admitted, will be of no service.

But suppose all the deeds proved, that the possession has been transferred, and that possession in a foreign country is sufficient, yet

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the defendant has not made out his title. He can on no principle, go further back than his pretended deed from Bossa, to the Dastras's, the 26th May, 1806. Madame Broh died 1st January 1809, the difference is two years five months.

The plaintiff was then an infant, being born in 1793. He was not of age then till 1814, say prescription began to run against him in the middle of that year, the suit being brought on the 15th of September, 1819.— There was against him five years.

The whole time of prescription, seven years five months, allowing all their deeds; and, on a supposition, that all the points I have made should be decided against me.

PORTER, J. The presiding judge of this court, has gone so fully into the case, in the opinion which he has prepared, that I shall confine my examination to what I consider the main question in the cause, and that is, whether the statute of limitations, of South-Carolina, has vested a title to the slave in the defendant.

This enquiry, I think, will be best conducted by pursuing the following divisions of the subject:—

1. Did the statute vest a title in South-Carolina?

2. Whether the owner of the property is bound by a law of this description, when it proved, that he did not reside in the country where it was enacted?

3. Supposing the title to have vested, in the state where the statute was in force, is there any thing in our laws which prevents the defendant claiming the benefit of that title here?

I. The statute of South-Carolina, is an act of limitation, and from the perusal of it alone, it might be doubted, whether it was any thing more than a bar, which could be plead by the possessor, to an action [redacted]ch the property was demanded. But it appears, that judicial interpretation of the act has held, that it vests title, and there is no doubt, from the decisions in that state, that there, the person claiming slaves, under the statute, could recover them in the hands of another, as well as plead the act to an action commenced. 2 *Bay*, 156, 425.

II. The next point, whether the plaintiff, not being a citizen, or resident of South-Carolina. can lose his right to property by a law of that

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country, is that which has presented the most difficulty to my mind.—If it had been shewn in this cause, that both parties were citizens of that state, I should have no doubt that both were bound by these laws, in virtue of which the one acquired, and the other lost a title to the property, and that the right thus acquired would not be destroyed by the removal of one of the parties into another country.

It is stated by *Huberus*, an eminent writer on the subject, that whoever makes a contract, in any particular place, is subject to the laws of the place, as a temporary citizen, 3 *Dallas*, 370, *in note*. The rule is held to apply, wher[redacted]tract is made in one country, to be ex[redacted]ed in another, and the law of that where the agreement is to be performed, will form the rule of action for the parties. Now, although it has not been shewn, that the plaintiff, or those under whom he claims, ever were residents or citizens of South-Carolina; or that they made any contract there, in relation to the property now sued for; yet enough, I think, has been proved, to enable us to apply, safely and correctly, the principles of law just stated to the case now before the court. For as the evidence estab-

lishes, that the slave in question was sent by the plaintiff's mother into South-Carolina, under the care of an agent. This was a voluntary placing of her own property under these laws, to enjoy their protection; to take their advantages, if any in relation to it; and consequently, to bear with their inconveniences.

III. If the title set up here, was by sale, donation, exchange, or any other contract made in South-Carolina, we should hold it good here, if it was so in that state; and the only enquiry would be, did it vest title there? Prescription is a mode of acquiring property. *Civil Code*, 482, *art.* 32. *Pothier*, *Traité de la Prescription*, *chap.* 1, as strictly so as the cases of contracts just put. *Digest*, *liv.* 50, *tit.* 16, *loi.* 28. If in a common case of alienation, we hold it good and valid, because the laws of the country, where it was made, held it so; I cannot see any good reason to reject that of prescription; for it vests and divests title by the very same authority, which declares, that other species of contracts have that effect.

In some of our sister states, it has been

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held, that in a suit for the recovery of money, the law of limitation in the state where the suit is brought, must govern the rights of the parties, and not that, where the contract was made. There is a clear distinction in my mind, between cases of that description, when the statute is plead as a bar to the demand, and that now before the court, when it vests a complete title to a specific thing; for I have already stated, that I cannot distinguish between the title conferred by prescription, and that acquired by any other mode of alienation and acquisition. When the question does occur here, in a suit for money, it will be then time enough to examine, whether the law of this state, as it regards the limitation of actions, or that, where the parties contracted and lived, shall govern their rights; or if the decisions on this subject can be reconciled with the principles of law, or supported by the authorities on which they profess to rely.

I am therefore of opinion, that the judgment of the parish court be affirmed with costs.

MARTIN, J. I have carefully considered the opinion, which judge Mathews has prepared.

and is about to read, and perfectly concur with him.

MATHEWS, J. This suit is brought to recover from the defendant, a slave in his possession, claimed by the plaintiff, as sole heir to his mother, in whom he alleges title, at the time of her death.

The defendant relies on a title derived through several persons residing in South-Carolina, and on a right acquired by possession and prescription; judgment being for the defendant in the court below, the plaintiff appealed.

The evidence on the part of the appellant, which is entirely oral, establishes his heirship, as alleged, and shews that his mother *had* the slave in dispute, while she resided in the islands of St. Domingo and Cuba, from which latter place, she sent him to South-Carolina.

The acts of sale offered by the appellee, to support his title, were objected to by the counsel of the plaintiff, as not being sufficiently proven; and bills of exceptions regularly taken to the opinions of the judge of the court *a quo*, by which they were allowed to be given in

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evidence. But from the investigation which I have given to the cause, it is deemed unnecessary to examine those exceptions; as the testimony received without opposition, clearly establishes an uninterrupted and peaceable possession, of at least fifteen years duration, in the persons under whom the defendant claims.

Admitting that the evidence in the case proves title in the ancestor of the appellant, and that the defendant's claim rests solely on a title, vested in those under whom he holds the slave, acquired by prescription; the first question to be diposed of, as stated by the plaintiff's counsel, is, by what laws must the cause be decided, in relation to the title set up by the appellee? Those of South-Carolina, where the property was, or those of this state where the suit is commenced? I am of opinion, that the validity of this title, by prescription, ought to be ascertained and determined according to the laws of the former state: were it to be settled by our laws, on the subject, there would be little difficulty in deciding the case, as they could not operate on the slave in dispute, previous to his having been brought within the limits of the state;

and this did not happen, as is shewn by the record, until a month or two before the commencement of the present action.

The law of South-Carolina, on which the defendant rests his title, is a statute of limitations; prescribing the period within which suits may be rightfully commenced in that state, having for their object and end, the same which is here sought by the plaintiff. The period of limitation is there, four years, for persons present, and one more is allowed to those who are absent, making five for the latter, and by the lapse of this time, their right of action is barred.

It is contended on the part of the appellant, that this law must be considered as relating only to the remedy, or relief grantable by courts of justice, and not to the right of property. In other words, that it is *lex fori* and not *lex loci contractus;* and that to the former species of laws, a foreign tribunal will give no effect. So far as they relate to the recovery of debts, from the cases cited in support of this doctrine, little doubt can remain of such being the practice adopted by the courts in several states of the union; and supported by the opinions of judges highly eminent, for ta-

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lents and learning. Without admitting or denying the correctness of these decisions, as founded in justice, policy, and a proper comity between states. I think the case now under consideration, may be clearly distinguished from any which have been exhibited to the court. The questions in them decided, turned wholly on disputes about privileges, or a right to recover debts, barred by the laws of limitation which were in force, in the former residence of the contracting parties; and such laws are based solely on a presumption of payment. In no instance was there any contest relative to rights or title, vested in the possessor of property, as a necessary consequence, resulting from a statute of limitations which barred the claim of the owner.

Whatever might be my opinion, as to the force and effect which ought to be given to the laws of limitation, of a foreign state, in relation to the recovery of debts, I have no doubt, they may become the means of acquiring title, when they operate so as to prevent the proprietor from recovering his property, in consequence of an adverse possession.

Possession of things is *prima facie* evidence of right and title to them; and if it has been of

such duration, that the laws of the country, where they are situated, will not allow the possessor to be disquieted. I do not think it, by any means, a forced and unfair construction of law, to decide, that title, absolute and indefeasible, is gained by such possession.—The owner, by neglecting to use the remedy accorded to him, loses his right, which the *bona fide* possessor acquires.

It is perhaps true, that fraud on his part, or excusable ignorance on the part of the proprietor, might require a different interpretation and application of the law of limitation. But in the present case, it cannot be pretended that either of them existed. The evidence shews that good faith accompanied the possession of the slave, in every change of master; and that he was sent by the plaintiff's mother, to South-Carolina; so that she could not be ignorant of the laws under which he was placed, and her means of redress against adverse possessors.

This view of the subject places a law of limitation to an action, for the recovery of property, on a footing with the *usucapio* of the Roman system of jurisprudence, *viz.* a mean of acquiring property; nor am I able to discover

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any incongruity in the principles, on which these rules are founded—*usucapio* is defined in the *R. Digest*, to be *adjectio dominii per continuationem possessionis, temporis lege definiti.*— It was introduced for the public good, that the titles of property might not forever remain uncertain; after allowing sufficient time to the owners, to pursue their claims. *D.* 41, 3, 1 *et s.*

In the early periods of states, it may be considered as sound policy, to make the time for acquiring property by possession, of short duration. By the ancient Roman law, as contained in an article of the *Twelve Tables*, one year of possession was sufficient to save title to moveables, and two to immoveables, being what were termed *res mancipii.* In regard to incorporeal things, the *Prætor* had established a prescription of ten and twenty years, or as it is called *longi temporis.* At first, under this prescription the possessor did not acquire the dominion of the thing, but only the benefit of an exception, or plea in bar, to any action brought by the proprietor. Afterwards the *actio utilis* was accorded to the possessor to recover the thing, when he had lost the possession, *pour revendiquer la chose*, as expressed

by *Pothier*. The distinction between the *res mancipii & nec mancipii*, was abolished by the emperor *Justinian*, and *usucapio* and prescriptions *longi temporis* put on the same footing; this constitution, on this subject, it is believed, forms the basis of the laws, relating to prescription in those countries, which have founded their jurisprudence on the Roman law; and, in all of them, it is considered a mode of acquiring property. But it is seen, that even before this law of *Justinian*, an action had been accorded to a possessor, to recover property, of which he had lost possession; and this could only have been regular, on the principle, that he had acquired title by such possession.

Upon the whole, I am of opinion that laws limiting the time, within which actions ought to be commenced, for the recovery of property, may operate in such a manner, as to vest a title in a *bona fide* possessor, and that the law of South-Carolina has produced this effect in the present case.

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

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TURPIN vs. *HIS CREDITORS.*

TURPIN
vs.
HIS CREDITORS

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

The act of 1817, does not require that anterior claims be recorded.

A promissory note does not work a novation of the debt.

But it prevents the effect of the prescription of one year.

PORTER, J. Pizetti, one of the creditors, claims a privilege on the estate of the insolvent, for the balance due him for the price of a building, erected on a lot in the possession of Turpin, and sold by his syndics since his failure.

From the evidence it appears, that on the completion of the building, three notes were given by Turpin to Pizetti, payable at four, eight, and twelve months. The two first were paid, and the last was renewed by the note now annexed to the record. Turpin, at one time, drew up a receipt for the claimant to sign, acknowledging payment and satisfaction of the original contract, which he refused to do.

The parish judge allowed the privilege. From this decision one of the creditors has appealed, and now urges three different grounds, that the judgment of the court below, should be reversed.

1. That the claim has not been recorded according to law.

2. That there has been a novation of the debt.

3. That it is barred by prescription.

The act of our legislature, requiring contracts of this kind to be recorded, was passed the 18th of February, 1817. The agreement for the building of the house, on which the privilege is claimed, was passed the 14th of January of that year. As a general principle, laws are never construed to have a restrospective effect; and if any doubt existed on that head, the act itself would remove it; for it expressly provides, that "for the future, in all claims," &c. Expressions so positive, it seems to me, leave no room for interpretation, and I am clearly of opinion, that the act did not affect any contract, made before its enactment.

After the decisions of this court, in the cases of *Cox* vs. *Rabaud's syndics*, 4 *Martin*, 11, and *Holmes et al.* vs. *Davidson's syndics*, 8 *Martin*, 422, which cannot be distinguished in principle, from that which is now before us, it is unnecessary to enter into any reasoning to shew, that there was not a novation in the case.

As to the prescription, the objection I think.

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is wholly untenable. The renewed note was given the 8th June, 1818. Turpin, it appears, became insolvent in November following; and in the month of February ensuing, the claimant asserted his right to be paid as a privileged creditor. The renewing of the note interrupted the prescription, if, in reality, it ran against this claim. *Civil Code*, 484, *art.* 53. But in cases of this kind, when a note is taken, I am of opinion, that the prescription of one year does not apply. See *Civil Code*, 488, *art.* 77.

The judgment of the parish court should, therefore, be affirmed with costs.

MARTIN, J. I agree with my colleague, in the opinion just read.

MATHEWS, J. I do also.

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

Seghers for the plaintiff, *De Armas* for the defendants.

CHANDLER vs. *STERLING*.

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CHANDLER vs. STERLING.

Reasonable notice to the endorsee is a mixed question of law and fact.

APPEAL from the court of the third district.

PORTER, J. This is an action, by the endorsees of three several bills of exchange, against the endorsers. The statement of facts shews, that the bills were drawn, protested for non-acceptance, and for non-payment, and that notice thereof was given to the defendant, whose endorsement is admitted.

The case was tried by a jury, who found for the plaintiff; the defendant appealed, and the cause has been submitted without argument.

On examining the record, I do not see any objection that can be made to the judgment, unless it be, that notice was not given according to law, of the protests for non-acceptance and non-payment.

The bills, it appears, were drawn by a house in New-Orleans on one in Lexington, Kentucky; the defendant resides in St. Francisville, and the endorsee (whose representative is now plaintiff) resided at Huntsville, in the then territory of Mississippi.

Reasonable notice is required; and what is reasonable notice, is a mixed question of law and fact. *Chitty on Bills*, 238, 280. Depending on the distance between the residence of the

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parties, the course of the post, the facilities of communication. It appears, the defendant was notified of the protest of these drafts for non-acceptance and non-payment; and nothing has been shewn, that the information given him, was improperly kept back, or that it was a longer time reaching him, than what was necessarily occasioned by the distance of the parties from each other.

I am therefore, of opinion, that the judgment of the district court be affirmed with costs.

MARTIN, J. I concur in this opinion.

MATHEWS, J. I do also.

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

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

LAZARE'S EXECUTORS vs. *PEYTAVIN.*

When it is doubtful, whether testimony be material, it is to be admitted. A writing produced by a party, is a beginning of proof against him.

APPEAL from the court of the second district.

Workman, for the plaintiff. This suit is brought to recover the amount of two years salary, due by the defendant, to the deceased.

M. Lazare, for his services, as manager, or overseer of the defendant's plantation; and for another sum of one hundred dollars, due on a promissory note, with the further sum of one hundred and three dollars, for a bale of cotton, belonging to Lazare, which was sold by the defendant on his account.

The claim for the wages, is set forth in the petition, in two distinct counts; in the first, on a specific agreement; in the second, on an implied, or *quasi contract* for a *quantum meruit;* so much as Lazare's services were reasonably worth. The defendant pleads the general issue, compensation and payment. The defendant offered, in evidence, two letters written by Lazare to him, in one of which, Lazare admits that he then owed the defendant a certain sum, two hundred and fifty dollars. It appears from these letters, that Lazare was employed in the management of Peytavin's plantation. The plaintiff offered no written proof of a specific agreement, as to the amount of Lazare's wages: but he proved by the uncontroverted parole evidence of Mr. T. Martin, that Lazare had actually served the defendant as his overseer, with zeal and fidelity, for upwards of two years, and that these ser-

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vices were well worth eight hundred dollars per annum. The defendant contended that this proof, by a single witness, was insufficient, according to the provision of the *Civil Code*, 310, *art.* 243. The objection was over-ruled by the court below; and this is the principal point in the cause which this court will have to decide.

We maintain, that proof by a single witness was admissible on two grounds, pursuant to the exceptions specified in the 244th, 246th, articles following, that which contains the general rule on which the defendant relies.

The uncontroverted testimony of a single competent and credible witness, was sufficient in this case, because there existed a beginning of proof in writing.

1. In the letters of Lazare, which the defendant made evidence for us, by introducing them as evidence for himself.

A beginning of proof in writing is said of any act proceeding, or emanating, from him against whom the demand is made. It is not requisite that the act should be written or signed by him. If he offer, or publish it in any manner as his own act, or as an act which he admits to be worthy of credit, such act

comes within the spirit, and even within the letter of the law. *Pothier* gives many examples (2 *Oblig. no.* 767, 770, 772,) of this inchoate proof in writing. In the last mentioned number, he observes, " the instrument written by him who demands to offer the proof, cannot avail him as an inchoate proof, because one cannot make titles, or evidence for himself." This is incontrovertible. But when our adversary adduces our letter in evidence, it is he, not we, who makes that letter a title for us. It is with such letters, as with verbal confessions or admissions. The whole of them must be taken together. If one part be made evidence by a party, the rest must unquestionably be evidence also, so far as it relates to the matter in dispute. See *Desquiron de la preuve par temoins, p.* 193, *to* 197, *Code, lib.* 4. *tit.* 19, *lib.* 5, 6 *&* 7. *Febrero, part.* 2, *lib.* 3, *c.* 1. *sec.* 7, *no.* 328. *Phillips' on Evidence,* 79 *&* 80. with the cases referred to in the *notes:* also, *p.* 212. If the party who has only called for books and papers, inspects them, he thereby makes them evidence for the other party, although he has not used them himself in evidence. *Wharam* vs. *Routledge,* 5 *Esp. N. P. C.* 235, where he actually does make such use of

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them, there can be no doubt that he thereby makes them evidence for his adversary, as well as for himself.

2. I think there is also a commencement of proof in writing, in that part of the defendant's answer, in which he pleads payment; should it appear that any thing is due to the petitioner. The admission is very cautious, but it affords a strong presumption, which is all that this species of inchoate proof requires, that there was something due to Mr. Lazare by the defendant. This admission can hardly be considered as destroyed by the previous formality of the general issue. The just observations of this court in the case of *Nagel* vs. *Minot*, 8 *Martin*, 493, seem applicable to this part of our argument.

But should any doubt exist as to our commencement of proof by writing, there can be none, I conceive, that we come fully within the first exception of the 246th article; that exception which allows the testimony of a single witness to prove the obligations arising from implied, or as our *Code* styles them, *quasi* contracts. The doctrine of recovering *quantum meruit*, for services for which no specific agreement was made, has been recognized by

this court, in 2 *Martin's Rep.* 273; 3 *Martin's Rep.* 608, and in various other cases. *Desquiron*, in *liv.* 2, *sec.* 7, has many excellent observations on the articles of the *French Civil Code*, (1348) from which the exception in question has been transcribed into ours.

"A law, say the court, intended to guard against the abuse of verbal evidence, can be invoked only by those who deny absolutely the execution of the written act, the existance of which is offered to be proved by parole. 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 specially, in a manner which destroys their force. Special pleas must be consistent with the general one, not contradictory to it."

The defendant's plea of compensation is inadmissible, and ought to be rejected, for its want of particularity and precision. He who offers this exception should do it in such a manner that it may appear to the court, that the debt which he claims, is such a one, as may be lawfully set off against that which is claimed of him by the plaintiff; agreeably to what is

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ordained, in our *Civil Code*, 298, *sec.* 4.—Besides, the defendant pleading a set off, assumes the character of a plaintiff. *Nam reus in exceptione actor est. D.* 44, 1, 1. *In exceptionibus dicendum est, reum partibus actoris fungi oportere; ipsumque exceptione velut intentionem implere. Sec.* 3, *idem erit dicendum et si ea pecunia petatur, quæ pensata dicitur. D.* 22, 3, 19. *La compensation tiene naturaleza de accion. Febrero, p.* 2, *lib.* 3, *c.* 2, *sec.* 4, *n.* 186, 187. (*Febrero* in this part of his work, treats the subject of compensation very fully.) So completely is the plea of set off, considered as an action, in this state, that, by a particular statute, the defendant who makes that plea, may, if he can prove that his debt exceeds the amount claimed of him, by the plaintiff, recover judgment, and obtain execution against the plaintiff, for the overplus. From all this it follows, incontrovertibly, that a plea of compensation, should set forth the cause, nature and amount of the debt to be set off, with the necessary circumstances of places and dates, in the same manner, and with the same certainty and precision, as a plaintiff is required to state his demand in his petition. The reason is obvious; without all these circumstances, the plaintiff

could not come prepared, with proof to contest the defendant's claim. Without this certainty and particularity as to the nature of the debt pleaded in compensation, the plaintiff could not afterwards plead a judgment in the defendant's favor on that plea, (if the defendant should succeed in establishing it) in bar to another suit, which the defendant might bring against him, for the very debt which he had before pleaded, and obtained credit for, by way of compensation. *Ita tamen compensationes objici jubemus, si causa ex qua compensantur, liquida sit, & non multis ambagibus innodata, sed possit judici facilem exitum sui præstare. Hoc itaque judices observent, & non procliviores ad admittendas compensationes existant, nec molli animo éas suscipiant: sed jure stricto utentes, si invenerint eas majorem & ampliorem exposcere indaginem, eas quidem alii judicio reservent. Code*, 4, 31, 14.

In the present case, the defendant's plea of set off is destitute of every circumstance with which such a plea, should be set forth and specified. The answer states, merely that, if the defendant owes the plaintiff's testator any thing, it is more than compensated, by what the testator owed to him. No evidence

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on such a plea was admissible; but, as the plaintiff is very desirous of a final settlement of this affair, he has not appealed from the decision of the court below, on this point, being satisfied with the judgment, as it now stands.

Lastly, if the defendant's plea of compensation, and the evidence on it were admissible, the verdict and judgment may still remain good. For the sum, given by that judgment to the plaintiff, is not equal to the sum that would remain, after deducting from the amount clearly proved, to be due to him, the sum mentioned in Lazare's letters to have been at one time, owing by him to the defendant. The whole sum due to the plaintiff. according to the evidence on the record, would be about $1800. The sum stated in Lazare's letter, is but $250, and the verdict is only for $1309, and 36 cents. So that it would appear that the jury gave more than full credit to the defendant, for the amount offered in evidence, under his plea of compensation.

No argument was offered on the part of the defendant.

PORTER, J. On the trial of this cause, which

was to recover the value of wages due to the plaintiff's testator, for services rendered as an overseer, the defendant, who had plead the general issue, payment and set off, offered to read a letter written by the deceased; in which he requested Peytavin, against whom this suit is brought, to sell a bale of cotton belonging to him. The introduction of this letter was objected to, and the court sustaining the objection, a bill of exceptions was taken.

Judge Martin has gone so fully into the case, that I shall confine myself to a very concise statement of the reasons which induce me to think, this cause should be remanded.

As the evidence offered was pertinent and applicable to the issues formed by the pleadings, I think it ought to have been received. The reason given by the district judge, that it should not go to the jury, because it did not prove that Lazare ever took the bale of cotton, is not satisfactory to my mind. That was not deciding, whether the evidence was legal or not, but deciding how much it proved; or in other words, what conclusions should be drawn from it. This it was not, in my opinion. the province of the judge to determine.

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It is true, courts refuse parties the permission to put questions to witnesses wholly impertinent to the points at issue; and they reject any legal evidence, which it is clear would prove nothing in the cause. But in the exercise of this power great caution is necessary, and whenever it is doubtful, whether the testimony offered be material or not, it should be suffered to go to the jury.

Another bill of exceptions was taken, to the judge refusing to charge the jury, that one witness was incompetent to prove the contract as overseer, at the rate of $800 per annum. I am of opinion, that as there was a commencement of proof in writing, the judge did not err in refusing to give the charge requested.

The only doubt which could be raised is, whether a letter, written by the plaintiff, and voluntarily produced by the defendant as evidence, can be considered as a writing emanating from the latter.

Our *Civil Code* does not require, that the writing which is to serve as the basis for the introduction of parol testimony, should be signed by the party; it is sufficient if it proceeds from him.

This provision was introduced, to guard against the abuses of parol evidence, in proving contracts above a certain amount. The object of the law I think as well secured, when the party furnishes the ground for the testimony, by the voluntary production of writings within his own power, as if his adversary presented a paper with his signature affixed to it.

Pothier in his *Treatise on Obligations*, *n.* 772, it is true, states, that an act written by the party requiring the proof, cannot serve as a commencement of proof, because no person can make evidence for himself. But this reason fails here, and with it the rule. When a paper is introduced, the whole must be taken together. If it proves against the party by whom it was written, it is also evidence in his favour. It cannot be divided. See *Phillip's on Evidence*, (edit. 1820) 79.

Recurring to the first bill of exceptions, the only doubt I have had in this case is, whether the court ought not to take the letter, which was rejected on the trial below, as proved, and proceed to give judgment on the merits. But, on reflection, I am convinced, that as the record does not contain any evi-

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dence that it was written by the plaintiff's testator, we are not authorised to consider it as proved, because it was rejected as containing nothing material to the question at issue. The cause must therefore be remanded for a new trial, with directions to the judge to receive in evidence the letter referred to in first bill of exceptions, and the plaintiff and appellee pay the costs of this appeal.

MARTIN, J. The plaintiff claims wages, earned by his testator, as agent and overseer of the defendant, during two years, on a special agreement, at the rate of $800 a year, and the petition has a count on a *quantum merut.* Farther he claims the value of a bale of cotton of his testator, sold by the defendant, and the further sum of $100, the amount of a draft of the defendant, on the plaintiff's testator.

The defendant pleaded the general issue, set off, and payment.

The plaintiff had a verdict and judgment for $1309 36 cents, and the defendant appealed.

Our attention is first arrested by two bills of exceptions, taken by the defendant and ap-

pellant. A third, which was taken by the plaintiff and appellee, will not be considered, as he did not appeal.

1. The first is, to the opinion of the district court, in refusing to admit in evidence, a letter of the plaintiff's testator, to the defendant, containing expressions, in the French language, which are literally rendered by these: "If R. has not told you to sell the bale of cotton, which you have of mine, sell it. I will take one of yours, which I will have carefully weighed, and he who may be found the debtor shall pay."

2. The second is, to the refusal of the court, to charge the jury, that a contract for wages, at the rate of $800 a year, for two years, was not legally proven by the oath of a single witness.

I. Had this letter gone to the jury, the defendant might had insisted, (with what success it is not our business to inquire) that the sale of the plaintiff's testator's bale of cotton, by the defendant, did not expressly bind him to the payment of its value in money, but only to suffer the testator, or his representative, to take one of the defendant's bales.

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The letter is evidence, that the writer, at the period of its date, had in his possession, at least within his reach and controul, bales of cotton of the defendant, and unless it was shewn, that he had not time to take one of them, or was prevented from doing so, might have induced the jury to reject the claim. I think it was legal evidence for the defendant, and the jury alone were judges of its weight.

II. The plaintiff's counsel admits the general principle contended for by the defendant; but urges, that the present case comes within the exceptions of the *Code*, as there is a beginning of proof in writing, as the claim arises on a *quasi* contract.

1. The beginning of proof is presented to us in a letter of the testator to the defendant, produced and read to the jury by the latter, and in the plea of payment.

Letters of a party establishing a contract, the existence of which is put in issue, are certainly written evidence against him, and if introduced by the opposite party, are evidence for the former and against the latter; and I think, the letter, if containing a beginning of proof of the contract in issue, author-

ised the jury to find a verdict on the testimony of a single witness.

In this letter, the deceased informed the defendant, that he had, in vain, endeavoured to procure for him a few hundred dollars from one of his neighbours; that, in a few days, the cotton would be all cleaned; that it was dying almost as fast as it came up; that he put new seed where wanted; that as soon as all the cane would be up, he would put all the hands in the field; that there was nothing new, except that he had many sick negroes.

It appears to me, that if the deceased had been sued for neglect in the management of the defendant's farm, as his overseer, and had denied his being the overseer, this letter would have been strong evidence of his being so; of a contract to oversee the plantation; and as in the present case, the letter was offered by the latter, it is evidence, and written evidence proceeding from him, of a contract between the parties, that one of them should act as an overseer for the other.

I therefore conclude, that the letter offered in evidence by the defendant, is, in the words of the *Code*, an act in writing, which proceeds

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from him, and renders the fact (of the plaintiff's testator having been his overseer) probable, and that the judge ought not to have charged the jury in the manner required by the defendant's counsel.

This renders it, perhaps, unnecessary to examine the other points, but as the opinion which I have just emitted, may not be that of the court, I have examined them.

The position charges a contract, in a two-fold way, one for a special sum or consideration; and on a *quantum meruit.* In either case, the proof of a convention is necessary to support the allegation.

Conventions are not always made by express words, nor always by words. *La convention sans ecrit se fait verbalement, ou par quelqu' antre voye qui marque, ou presuppose le consentement*, 1 *Domat*, 1, 1, 10. *Tacite consensu convenire, l.* 2, *ff. de part. Sed & nutu solo, pleraque consistunt, l.* 52, *sec.* 10, *ff. de obl. & art.*

Domat puts the case of a deposit, and says, that he who receives one, binds himself without speaking. Now deposit is conventional, or judicial. A deposit is a contract. *Civ. Code*, 410, *art.* 1 & 2. It is either voluntary or necessary. *id.*

A beginning of proof in writing is not required, for the proof of a contract by one witness, when the value of its object does not exceed $500. It is not required, in case of a necessary deposit, *id.* 312, *art.* 246. In that of a voluntary one, the beginning of proof is, therefore, needful; and *Domat* says, that the person who receives a deposit (voluntary or necessary) without speaking, contracts all the obligations of a depository. Contracts and conventions exist, and in their full force, in cases in which the parties give only an implied assent, and these do not fall into the class of *quasi* contracts, from which they must be distinguished.

The letter referred to in the first bill of exceptions, marked A, in the record, and bearing date of Donaldsonville, March, 1819, without any mention of the day, having been rejected by the court, when it was offered in evidence, nothing shews, although a copy of it comes up, that it was proven; we, therefore, cannot receive it in evidence. If it had been, it would be proper to enquire, whether all the evidence being before us, we ought to pronounce on the merits; or whether, as the defendant prayed for a jury, (notwithstand-

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ing special facts were not submitted) the case ought to be remanded.

Upon the whole, I think we ought to remand it, with directions to the district court, to allow the letter referred to in the first bill of exceptions, to be proven and read to the jury. The costs of the appeal to be borne by the plaintiff and appellee.

MATHEWS, J. I concur in the opinion pronounced.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the cause be remanded for trial, with direction to the judge, to allow the letter referred to in the first bill of exceptions, to be proven and read to the jury; and it is further ordered, that the costs of this appeal be borne by the plaintiff and appellee.

GARNIER vs. *CAUCHOIX.*

Notice to the endorser must be alledged and proven.

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

PORTER, J. This is an action by the endorsee against the endorser of a promissory note—

notice of the protest is neither alleged in the petition nor appears of proof on the record, it is therefore, similar in its features to the case of *Abat* vs. *Rion*, 7 *Martin*, 562, and must receive a similar decision.

I am therefore of opinion, that the judgment of the parish court be annulled, avoided and reversed; that there be judgment for the defendant, as in case of a non-suit, and that the plaintiff and appellee pay costs in both courts.

MARTIN, J. I concur in this opinion.

MATHEWS, J. I do also.

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

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

DUFFY vs. *TOWNSEND* & *AL.*

APPEAL from the court of the first district.

An execution operates as a lien on all the moveable property of the defendant in the suit, from the day it comes into the sheriff's hands.

And the promise of a third

PORTER, J. The petitioner in this case obtained a judgment against Wm. H. Crocker & Co., and having issued a *fi. fa.* siezed a certain vessel, called the Rebecca, in which William H. Crocker, one of the partners of the firm, had

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an interest. On this seizure being made, the defendants entered into an agreement with the plaintiff, that if he would release the ship from execution, she should be sold within sixty days after her arrival in New-York; and that if the proceeds were not sufficient to satisfy the execution, they would make up the deficiency. The petition charges the defendants with having totally failed to perform the agreement, and prays judgment against them, for the sum of $1326, with interest, damages and costs.

person, who has purchased a vessel, subject to this lien, that she shall be sold within 60 days after her arrival in New-York to satisfy the execution, is not a *nudum pactum*.

The answer admitted the agreement as alleged, but denied that it was entered into without consideration on their part, as the said Crocker & Co. had, in truth, no interest in the said vessel at the time the seizure was made by the sheriff.

To prove property in Crocker, the plaintiff introduced a register of the ship Rebecca, dated 12th of February, 1819, by which it appeared, that William H. Crocker, P. Kingston, and N. B. Guathnay, were the owners, and called J. H. Holland, deputy sheriff, to prove that he seized the said vessel, at the request of one of the defendants.

The defendants introduced in evidence, a

sale by Crocker, to Dumner, of his interest in the ship, dated 19th of April, 1819, and the register, dated one day after, by which Guathnay, Dumner, and Wooster, were shewn to be the owners.

It has been disputed between the parties whether the sale from Crocker to Dumner, was previous or subsequent to the seizure by the sheriff, and the evidence on this point is not very satisfactory. But it is unnecessary, in my opinion, to examine it; for as it has been admitted that the execution was in the sheriff's possession several days before the transfer, there is no doubt, that from the moment it came into his hands, it operated as a lien on the ship, and other moveable property of the defendants in that suit. 2 *Martin's Digest*, 168. There was therefore a good consideration for the agreement, as but for it the plaintiff could have proceeded to sell Crocker's interest in the vessel. This opinion renders it unnecessary to examine the other questions raised in the cause.

I think that the judgment of the district court should be affirmed with costs.

MARTIN, J. I concur in this opinion.

MATHEWS, J. I do also.

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

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

RUSSEL vs. *ROGERS & AL.*

The discharge of a member of a commercial partnership, under an insolvent law, does not release the other.

A creditor, not placed on the schedule, is not affected by the proceedings.

APPEAL from the court of the first district.

PORTER, J. This suit was brought to recover the amount of a judgment formerly obtained against Rogers, one of the defendants, who being arrested on a *capias ad satisfaciendum*, gave bond, with security, to remain in the prison bounds of the jail of the city of New-Orleans. This bond, it has been alleged, has been broken, as Rogers was seen without the limits.

The answer alleged, that the bond was taken at a time when Rogers was in restraint and illegal custody; the writ of *ca. sa.* having issued after the said Rogers, as well as one W. H. Crocker, his partner in trade, had obtained a stay of all proceedings, and made a surrender of their estate, for the benefit of their creditors; among whom was Russell, the plaintiff in the suit.

The defendant, in support of this answer, produced a record of the proceedings of W. H. Crocker & Co. *vs.* their creditors.

This application was made, it appears, in the name of one of the partners, W. H. Crocker, and a question arises, whether this is a sufficient discharge for each of the partners of the said firm, to protect their persons from arrest.

As in a commercial or ordinary partnership, each of the partners is bound, *in solido*, for the debts contracted. It follows, as a consequence, that in case of failure, each partner must make a full and complete disclosure of all his property, whether it forms a part of the company funds, or remains in his possession, and assign it for the benefit of his creditors; until this step is taken, all are not discharged, and the individual who neglects it, remains responsible. Were it otherwise, the partnership might be insolvent, while the members composing it, had the means of discharging the debt.

Examining the record, it appears, that only one of the partners of the house of Croker & Co. made this application, and a disclosure of the property he held; he alone, therefore, can enjoy the benefit of it.

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But the defendants shew, that subsequent to these proceedings, Rogers filed a petition to make a cession of his property; that a meeting of his creditors was called, the cession accepted, and the proceedings duly homologated by the judge. This, if regularly granted, would, in my opinion, have been a good and valid discharge, which might have been plead as a bar to his suit. But from the record, it does not appear that the present plaintiff was put on the schedule as a creditor. This is a fatal objection, and renders it unnecessary to examine the other points made in the cause. The whole proceedings were to him *res inter alios acta*, and he cannot be bound by them, nor be deprived of his legal rights, by an order of court discharging his debtor, in a suit to which he was not a party.

To avoid the force of this objection, the defendants proved, that although the present plaintiff was not inserted among the creditors of Rogers, yet that he was among those of Crocker & Co. This is only presenting, in another shape, the question, whether these proceedings could avail Rogers. I have already stated, that they could not.

I am therefore of opinion, that the judgment of the district court be annulled, avoided and reversed, and that this court proceed to give such judgment, as, in my opinion, the district court ought to have given; should order, adjudge and decree, that the plaintiff do recover of the defendants, the sum of $389 41 cents, with interest on $334 66 cents, from the 20th of February, 1820, until paid, and that the appellees pay costs in both courts.

MARTIN, J. I concur in this opinion.

MATHEWS, J. I do likewise.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff recover from the defendants, the sum of $389, with interest on $334 66 cents, from the 20th of February, 1820, till paid, and that the appellee pay costs of both courts.*

Preston for plaintiff, *Morse* for defendants.

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* A decision, somewhat at variance with the latter part of this, was given by the superior court of the territory, in the case of *Davis* vs. *Mitchell*. 2 *Martin*. 115.

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

In a sale, by tale, when the things are delivered to the vendee, they are his property, altho' they remain at the vendor's risk, till they be counted.

In case of an illegal seizure, the officer and the party directing it may be instantly sued.

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Preston, for the plaintiff. Jacob Shuff states, in his petition, that on the 16th of June, 1819, he purchased of one Norris M. Mathews, 20,000 hoop-poles, and the flat-boat in which they were contained, worth, together, the sum of $625; that they were delivered to him by Mathews, and that he employed his labourers some days upon them. He further states, that by virtue of an attachment issued out of the parish court, at the suit of James M'Cullough *vs.* Norris M. Mathews, Geo. W. Morgan, sheriff of the parish of Orleans, on the 18th day of July, 1819, wrongfully attached the said hoop-poles and flat-boat, as the property of Mathews, and on the 14th, sold them as property legally attached in the said suit; that in so doing, the sheriff acted under the orders of James M'Cullough, who well knew that the property was that of the petitioner. The petitioner further states, that one Clement became the purchaser of the property, and illegally and forcibly detains it from him. He

prays that the hoop-poles and flat-boat might be sequestered and delivered to him, and in default thereof, that Morgan, M'Cullough, and Clement, might be adjudged, jointly and severally, to pay him $625, and costs.

The defendants answer, that the property at the time it was attached, was not the property of Shuff. but of Mathews, and was, therefore, legally attached; and that if it was Shuff's property, he had lost his rights by not intervening in the suit of *M'Cullough* vs. *Mathews*, and there prosecuting his claim to judgment.

The first question presented by the pleadings is, whether the property in litigation was, on the 1st of July, when it was attached, the property of Mathews or Shuff. Shuff alleges, that he purchased it from Mathews, on the 16th of June. A sale is perfect between the parties, as soon as there exists an agreement, as to the object and the price thereof, although the object has not yet been delivered, nor the payment made. *Civ. Code*, 346, *art.* 4. This court have determined, that delivery also is necessary to transfer the property, as to third persons; that is, subsequent vendees and attaching creditors. 3 *Martin*, 222. 4 *do.* 20. 5

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do. 23. 7 *do.* 24. 8 *do.* 25. It is incumbent on the plaintiff, therefore, to shew that there was an agreement between him and Mathews, as to the object and price, and that the property was delivered to him.

There was an agreement as to the object; it was three boat-loads of staves and hoop-poles; the price was certain, it was eight dollars per thousand. Lewis Abrahams testifies, that he heard the parties, in a negotiation for the sale of the staves and hoop-poles; the vendor told him the bargain had been completed; and from both, he learnt the terms of it, eight dollars per thousand, and the boats into the bargain. He saw the vendee make payments, in cash, but does not know the precise amount. Berry, another witness, wished to purchase the property himself, and was in a negotiation with Mathews to that effect, but was afterwards told by Mathews, that he had sold the property to the plaintiff. Monroe, a witness for the defendant, proves the hand-writing of Mathews, to three receipts, in the possession of the plaintiff, given between the 16th and 23d of June, for the sum of $230. and expressed to be on account of staves and hoop-poles. Cage saw money

paid by Shuff to Mathews, on the same account. And all the witnesses concur in proving, that the transaction was considered by them, and all persons concerned, as a sale; that Mathews and Shuff spoke of the property as belonging to the latter, and that the only difficulty of the former, was in getting payment for the property he had sold.

With regard to the delivery of the property, Abrahams testifies, that the plaintiff, in company with him, took possession of the boats, staves, and hoop-poles, and employed several of his workmen, a number of days, at work upon them. Wells, Ridgway, Fields, and Bostman, were all hands whom Mr. Shuff employed at work, on the very property now in dispute. They testify, that he employed seven or eight hands, seven or eight days, at work, upon the property, which it is maintained, was never delivered to him, nor in his possession. They prove that Shuff and Mathews were several times together, at the place where the boats were, during this period; the former exercised every act of ownership over the property, the latter exercised none. They assisted in counting the poles and staves, and Mathews himself, spoke to

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them of the manner in which they were counted, and approved it. George Ballard proves the same facts, and further, that in addition to the labour which Mr. Shuff employed on the property, he furnished materials that were necessary in preserving it. A part of the property was brought down from the steam-mills, to Livingston's canal, and it was not until half a month after the purchase that the balance was attached.

Such is the testimony on which the plaintiff relies, to establish the facts, that he purchased the property; that it was delivered to him; that he was in possession of it a length of time; that Mathews had no rights in it at the time it was attached, and of course that it could not be attached as his. The witnesses, by the variety of detail into which they descend, exhibit these conclusions in a more forcible point of view.

There is no testimony which conflicts with that of the plaintiff, but that of —— Munroe, that Shuff acknowledged to M'Cullough, in his presence, three weeks after Mathews' departure, and of course two weeks after M'Cullough's attachment (compare Cage's testimony with the date of the attachment) that he had never received the property attached; that

Mathews had never delivered it to him. The testimony of Monroe is open to great suspicion. He acknowledges that he was taken by M'Cullough to Shuff's house, to be a witness of what Shuff should answer while catechised by M'Cullough. Such witnesses, nine times in ten, testify, not to what they hear, but to what they are called to hear. This court have expressed an unfavourable opinion of the credit of such witnesses in the case of *Steel* vs. *Cazeaux*, 8 *Martin*, 363. What Monroe swears to is improbable in the extreme. Shuff had filed his claim in opposition to M'Cullough's attachment—they were litigating the right to the property in court. Is it probable that Shuff, under such circumstances, would admit to M'Cullough, his adversary, in presence of a witness, the contrary of every pretension he set up in court? And in opposition to truth, as well as to his interest. For if Shuff did admit what Munroe says he did, we prove by many witnesses, that it was not the fact, and the admission is vainly insisted upon, because it is not true. The testimony of half a dozen witnesses to the fact, that the staves and poles were delivered, must overbalance that of a suspicious witness, that he heard the contrary.

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As to the judgment demanded by the plaintiff, all the witnesses concur in fixing the number of poles, at about 20,000, and the coopers that have been sworn, prove them to have been worth thirty dollars a thousand; that in fact they paid that price for those very poles, and that the market price has been much higher since. As was decided in the case of *Williams* vs. *Gilbert*, 6 *Martin's Rep.* 553, we are entitled to the highest market price, since the property was taken out of our possession, as we have had a continual right to the re-delivery. At $30 a thousand we are entitled to $600, besides the price of the boat.

The judge below, bases his judgment much upon the fact, that the plaintiff did not prosecute to judgment, his intervention in the suit of *M'Cullough* vs. *Mathews*, and in accordance with the plea of the defendant, is of opinion, that by his omission the plaintiff has lost his right. A proceeding by way of intervention for the recovery of specific property is unknown to our laws. Our statute prescribes the mode of maintaining all our rights, and of redressing all our injuries. All suits shall be commenced by petition and defended by answer. *Acts*, 1805. The different steps in the

progress of the suit are particularised; but no relief by way of intervention is pointed out for the benefit of third parties.

By the laws of Spain, the parties to a suit are the *actor et reus*. The general rules of pleading collected in *Febrero* and the *Partidas*, seem opposed to the admission of an intervening party. I refer the court particularly to *Febrero*, *book* 3, *chap.* 1, *sec.* 2, *no.* 99. 3 *Part.* 3, 10, 6. Intervention was unknown to the laws of England. Such a proceeding was permitted in France, and is mentioned by *Poth. de la procédure civile*, *partie* 1, *chap.* 2, *art.* 3, *sec.* 3, and in the *Code de procédure civile*, *part* 1, *book* 2, *tit.* 16, *sec.* 2, *art.* 339, 340 & 341. The law of France is not our law; if it were, it only permits a party to seek his remedy by way of intervention, but does not preclude him from the ordinary remedy by suit.

Besides that, such a proceeding destroys the simplicity of suits, which is a great object of jurisprudence; a claimant may have good reasons for wishing to sue, rather than intervene. He may not choose to engage in litigation at the particular time, nor before the court which the plaintiff has chosen. He may not be prepared with his testimony, but, *L'intervention*

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ne pourra retarder le jugement de la cause principale quand elle sera en etat. Code de procédure civile, as above cited. He may fear collusion between the plaintiff and defendant, that the suit may be discontinued and with it, its incidents. And whoever heard before that a man might not sue a tresspasser upon his property, the actual possessor of that which belonged to him, or that the acts of others could deprive him of this right?

Such a doctrine would be attended with the most monstrous injustice, as might be illustrated by many examples. The creditor of a bad debtor wishes to devise means to secure his debt. He issues an attachment, and with the sheriff attaches your plantation, which every body knows to be yours; that it belonged from time immemorial to your ancestors, and regularly descended to you. You are at our antipodes, and know nothing of the suit or subsequent proceedings. The property is sold; you return; but in vain you tell to the purchaser that he acquired no rights, because he acquired those only of the defendant, who had none. He replies you did not file a claim, and prosecute it to judgment. In vain you tell the sheriff and plaintiff that they wrongfully

attached your property, that the attachment was issued against the property of the defendant and levied upon yours. You have lost all your rights by failing to intervene in a suit of which you could know nothing. A man cannot thus be divested of his property; for a wrong so crying the law does afford a remedy, and that remedy is a suit.

Hoffman, for the defendants. The plaintiff alleges he has sustained damage to the amount of $625, by the wrongful seizure and sale of a quantity of hoop-poles, at the suit of M'Cullough *vs.* Norris Mathews, and which he says was his property. It is admitted the poles once were Mathews', but the plaintiff alleges they had ceased to be so at the time the defendants caused them to be attached; and attempts to shew, that the property of them was in him, by a sale from Mathews to him. Before a recovery can be had against the defendants, it is necessary for the plaintiff to shew that the poles had ceased to be the property of Mathews at the time they were attached, and belonged solely to him, the plaintiff; leaving to the court to say whether the testimony of the plaintiff proves the agree-

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ment between him and Mathews as alleged. We contend that neither the petition nor the testimony makes out such a case as will entitle the plaintiff to recover. The petition is deficient, inasmuch as it does not state that the poles were counted and delivered; for as the plaintiff alleges he contracted for a quantity of poles, contained in a flat boat, at eight dollars a thousand, no delivery could be made until the quantity was known. Should this objection to the petition be over-ruled, it will be necessary to examine the testimony, in order to see if the plaintiff has proved that which he has omitted to allege. It is deemed unnecessary to call the attention of the court to the mass of testimony introduced by the plaintiff, and which proves little else than that he thought it necessary to shew the poles were counted, but this he has failed to do. From a close examination of the testimony of the plaintiff, it will appear that none of his witnesses allege that the poles were counted. Some of them say, a part were counted, others say what proportion, while all agree that a part thereof only, was removed from the boat, in which they were brought here. We are told by the witnesses, that Mr. Abrahams

"kept count," and that person tells us, he could not say within five thousand, how many poles there were. Can it be said he may have forgotten; he does not say so; and it is not likely his memory should serve him as to the number of staves, and fail him as to the poles; for he gives us the precise number of the former. But, we contend, that the testimony of the last witness examined by plaintiff, puts the question entirely at rest. His appearance (though a black man) induces us to think him the most likely to tell the truth, and therefore, in the cross-examination, he was interrogated on that point; upon the answer of the last mentioned witness, we might safely rest the question, whether the poles in dispute were counted; for we contend it is a fact incumbent on the plaintiff to prove; we have however, established the negative, by the best testimony, *to wit*, the party's own declaration. Munroe is positive that the plaintiff declared, in his presence, the poles had not been counted. Cage declares the same thing, and if the truth of the plaintiff's declaration can be doubted (as his counsel requires of us) it is fully confirmed, by the loud and repeated complaints of Mathews. It clearly appears,

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from the facts in the case, that the plaintiff wilfully delayed counting the poles, well aware that Mathews was a stranger, and must soon leave the city, or remain at the risk of his life.

Having shewn that the poles in question were never counted, can there be any difficulty in the application of the law? We think not. If the poles had been sold, *en bloc*, or at so much the boat load, the sale would have been complete as between the parties, as soon as the price was agreed upon: and delivery only would have been necessary with regard to third persons. But the plaintiff alleges he bought them at eight dollars per thousand, and in that case, the sale was not complete until the quantity was known. The poles were at the risk of Mathews until counted, and no delivery could be made until then. *Civil Code*, 346, *art.* 68.

The property in the poles, was either in the plaintiff or Mathews, at the time they were attached. If in the former, their loss by accident, could not fall on the latter, although in his possession and under his care. If A. have the property of B. in his possession, he may, perhaps, bind himself to bear the

loss thereof, even by accident, yet the loss would be that of B, the owner, and he could recover of A. upon the contract, the loss he had sustained. The same principle applies where the property of one is destroyed by the fault of another; for the law authorises the owner to recover back his loss, from the person who caused it. The plaintiff imagines he has brought himself within the principles laid down by this court, that delivery completes a contract of sale, with regard to third persons. In the cases referred to by him, the sale was complete, as between the contracting parties, before delivery; but, in a case like the present, the sale is not complete until counted or measured; and this is the case, says *Pothier* (already cited) even though the sale be made of all the grain, contained in a certain granary, if sold by the bushel. The plaintiff seems to think, he has shewn enough, by proving his workmen were in possession of the poles. But if he were not the absolute owner of them, they possessed for the owner. *Pothier*, *Possession*, *n.* 68, *p.* 43. *Domat*, *book* 3, *tit.* 8, *loi.* 1, *art* 8, 9.

The counsel for the plaintiff tells us, Mathews exercised no controul over the poles;

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and in the next sentence, he says that Mathews approved of the manner in which the staves and poles were counted. If the plaintiff were the owner of the poles, he might have used them without counting, and Mathews could have no interest in seeing them counted. But Mathews had a deep interest in seeing the poles were truly counted, and had a right to employ other persons in counting them, whose possession would not certainly have been that of the plaintiff. The plaintiff could have no possession of the poles in pursuance of the sale to him, until the quantity was known; for says *Poth. Contrat de Vente, n.* 44, "he who sells a thing by measure, is bound to cause it to be measured, unless the contrary be stipulated; for as the delivery cannot be effected until the quantity be ascertained, the seller is bound to have it done at his expence." It does not appear from the testimony, that the plaintiff agreed to count the poles at his expence; he, therefore, would have had a right to charge Mathews with the expence of counting. And why? Because the property belonged to Mathews, and the plaintiff might charge him for work and labour done upon it. The

contract of *vente à l'essai*, will be found in the *Partidas* cited, classed with the sale of things sold by measure, &c. In all such contracts of sale, something more is required than the mere consent, in order to vest the property. *Pothier*, *Vente*, 164, *n.* 310. It may be said, we have deprived the plaintiff of the right to complete the said sale, by counting the poles, but this might have been alleged by all the claimants, in the cases from *Martin's Rep.* *Domat*, 1, 2, *sec.* 2, *art.* 10.

The plaintiff cannot recover in the present suit, should he even satisfy the court that he was owner of the property. The record shews, that he intervened in the suit of *M'Cullough* vs. *Mathews*, and it was then in his power to stay the sale, and obtain the poles. He now alleges, that proceeding by intervention, is not strictly legal, but he was bound by the election he made. The course pursued by plaintiff, by intervening, has been the practice in our courts, since their creation, and is one on which the rights of parties have always been ascertained.

We deem it unnecessary to enquire, if a recovery can be had against the sheriff. The court will not favour a proceeding like the

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present, against an executive officer, when the party had other relief within his reach. It has never been called upon to sanction a claim as unjust as the present; for it will appear from the testimony of the first witness of the plaintiff, that only one half the purchase money, of the three boat-loads, have been paid for.

Preston, in reply. The counsel for the defendants relies principally on the argument, that the sale alleged by the plaintiff, was a sale by tale; that the hoop-poles now sued for by him were not counted before they were attached by M'Cullough, and therefore, the sale was not complete, and the property, although delivered, was not transferred either between the parties, or as to third persons.

With regard to the counting, we are at issue as to the fact; and if it be true that the poles were not counted, I shall contest the legal consequence which the counsel deduces therefrom. He is mistaken in point of fact, because all the witnesses say generally that the staves and hoop-poles were counted. Geo. Ballard mentions the manner in which they were counted, and Lewis Abrahams kept

count. But we are told that Abrahams cannot now tell within 5000 of the number counted, and George Ballard swears that as to the poles but one third of them were counted. Is it extraordinary that Abrahams who counted 60 or 70,000 staves and hoop-poles, and during eight days, probably reported two or three times a day to Shuff, should not sometime afterwards be able to recollect within 5000 the number of hoop-poles—should not be able to declare within $40 of the amount to which they came. He might very possibly recollect the whole number counted, and yet not recollect the precise number of either staves or hoop-poles. George Ballard worked on the boats but three days; during that time they counted only one third of the poles, and he could not testify that more were counted. But if one third of the poles were counted in three days, does it not afford a pretty strong presumption that the rest were counted during the remainder of the eight days that the hands laboured on the boats?

If we suppose that counting was indispensable to the completion of the sale, and that the whole of the poles were not counted; that a part were counted is unquestionable. The

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property was attached then while the parties were in the act of completing the sale. But such an attachment is vain, because third parties cannot interfere at such a time to prevent the completion of the sale. "If I offer money for a thing in market, and the seller agree to take my offer, and whilst I am telling the money as fast as I can, he doth sell the thing to another, my bargain is good, and upon payment, or tender and refusal of the money agreed upon, I may take and recover the things." *Shippard's Touchstone*, 225.

In addition to a contract of sale, delivery is necessary to transfer the property with regard to third persons, but there is an exception to this rule, if the third person knew of the previous contract of sale; because, if with this knowledge he becomes a subsequent vendee, he acts with bad faith to the first vendee, and he cannot establish a right in himself by his own wrong. *Delvincourt, cours du code civil*, 36, *and note* 3. By analogy the same exception is applicable to counting when necessary to complete the sale. The defendants knew of the plaintiff's claim upon the property in litigation, at the time they did the acts for which they are sued. Shuff himself adver-

tised Clement of his claim, at the time of the sale of the property, and Morgan was present. M'Cullough must have known of the same claim previously to his attachment, because a part of his cause of action was an account assigned to him by the witness Cage, who states his knowledge of the whole relation between the parties, and undoubtedly reported it to M'Cullough when he assigned the account. After his attachment, and before the property was sold, he knew of Shuff's claim because it had been filed in the suit. The defendants then acted with bad faith towards Shuff, in preventing the completion of the sale by counting. They are liable then to the exception, they cannot acquire rights by doing him injuries.

The laws quoted by the defendants' counsel, from the *Civil Code*, the *Partidas*, *Pothier*, and others, determine merely whether the thing be at the risk of the vendor or vendee, after sale and before delivery. They do not determine the right of property, nor whether the thing can be attached as the property of the vendor or vendee. "When (says the *Civ. Code*) goods, produce, or other objects, are not sold in lump, but by weight, tale, or mea-

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sure, the sale is not perfect, inasmuch as the things so sold are at the risk of the seller, until they be weighed, counted, or measured." The *Partida* supposes a sale, and enquires, only *a quien pertenesce el pro o el daño en las cosas que se suelen contar o pesar o medir o gustar despues que fuesen vendidas.* The law declares, *el daño que acaesciere en la cosa depues que la vendida es complida; diximos que es del comprador, maguer non sea la cosa que compro venida a su poder. Pero casos y a que non seria assi.* What is not the case; what is the antecedent of *assi?* The preceding sentence manifestly. It is not the case (with regard to the things now about to be spoken of) that the damage which happens to the thing, *despues la vendida es complida*, is on account of the buyer. The chapter of *Pothier*, from which the quotation is made, has the following title, *aux risques de qui est la chose vendue, pendant le tems intermédiaire entre le contrat et la tradition*, and the quotations shew that the object of the author was solely to determine when the thing was at the risk of the vendor, and when at the risk of the vendee.

I am told by the court, *res perit domino*, the risk determines the owner. I think not in all

cases. "Things of which the buyer reserves to himself, the view and trial, although the price be agreed on, are not sold until the buyer be satisfied with the trial." *Civ. Code*, 346, *art.* 8. They remain, therefore, the property of the seller. But says *Pothier*, *L'obligation qui résulte de cette clause (la clause par laquelle une chose est vendue à l'essai) s'éteint lorsque la chose vient à périr; car l'acheteur ne peut plus dire que cette chose ne lui convient pas, lors qu'elle n'est plus, ni obliger le vendeur a la reprendre; cette clause comme nous l'avons observe n'étant que résolutoire, la vente faite sous cette clause est parfaite, et la chose est par conséquent devenue aux risques de l'acheteur. Pothier, Cont. de vente*, 257, *n.* 266. Our *Civil Code* declares in the very case under consideration, a sale by weight, tale, or measure, that the buyer may require the delivery of the thing or damages, if any be for the same, in case of non-execution of the contract. But can I require the delivery to me of property which is not my own? Can I sue for and recover from my vendor, property which is his, because it is at his risk; and can he sue me for the payment of the price of what he never sold to me? Besides, the contract spoken of in this clause of the

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Code is manifestly a contract of sale, and a contract of sale is a contract by which the property of one man is transferred to another, *Civ. Code*, 344, *art.* 1. From the law of the *Partidas*, quoted by the defendant, I derive the same principle, that the property is transferred between the parties by the *contract of sale*, and is the property of the vendee, altho' the thing be not weighed, counted, or measured, and although it be at the risk of the vendor. I derive it from the title of the law, and from the terms *vendedor*, *comprador*, and *vendida*, used in the body of the law. There cannot be a seller unless he sells something; nor a sale, unless something is sold; but all these terms are used, according to the argument of the defendants, as applicable to a case where the thing is not transferred, and of course, nothing is bought or sold. From the last clause of the law we learn, that if the thing increase or diminish in value, after the contract of sale, and before the counting, weighing, or measuring, the profit or loss will be on account of the buyer alone. Why is the profit or loss on account of the vendee? Evidently, because the property is his. One cannot enjoy the profit or suffer the loss that

betides the property of another man. But the risk, it is admitted, is that of the vendor. The same result is deducible from the principles and reasoning of *Pothier* on the subject. The plain interpretation of our *Code*, and these authorities, is this:—there are three essentials to a contract of sale; a thing sold, a price, and consent. When these concur in the contract, the property is transferred between the parties. There are incidents to the sale, counting, weighing, and measuring; the existence or non-existence of these determines whether the property is at the risk of the vendor or vendee. The delivery determines the rights of third persons, and the payment of the price renders it a perfect sale. The property then, from the time of the contract of sale, is the property of the vendee, although not counted, weighed, or measured, and although the risk is that of the vendor. That the risk too, ought to be on account of the vendee in all cases, from the time of the contract of sale, is supported by such names as *Puffendorff*, *Barbeyrac*, and *Africain*; and but for our particular statute, might be easily established on general principles of justice.

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But whether the risk determines the proprietor or not in all cases, it certainly never determines the rights of attaching creditors. Where there is an agreement as to the price and thing, the sale is perfect between the parties, and the property and risk is transferred to the vendee; but, until delivered, it may be attached as the property of the vendor. Delivery then, in pursuance of a contract of sale, transfers the property with regard to third persons; they have nothing to do with the risk of the property; that belongs to the parties to the contract alone. Delivery establishes the rights of the first vendee, against attaching creditors and subsequent vendees. All the decisions of our supreme court, on the subject, concur in this principle. *Martin's Reports*, as quoted in the opening.

The laws and authorities quoted by the defendants, in support of the principle, that the property, until weighed, measured, or counted, remains at the risk of the vendor, suppose there has been no delivery to the vendee. The *Civil Code* declares, in the case supposed, "The buyer may require the delivery or damages;" and, says *Pothier*, *Il est*

vrai que dés avant la mesure, le poids, le compte, et dés l'instant du contrat les engagemens qui en naissent, existent; l'acheteur a des-lors action contre le vendeur pour se faire livrer la chose vendue." If the thing be delivered, none of the laws quoted, maintain that it remains at the risk of the seller, although not counted, weighed, or measured. In this case, the sale is complete between the parties, and as to third persons; but the vendor indeed, charges the vendee with ascertaining by counting, weighing, or measuring not the thing sold, that is the thing delivered, nor the price of the thing that is so much per dozen, per pound, or foot; but merely the amount to be paid. An example or two will shew, conclusively, that the property is absolutely transferred by delivery, although not the price, but the amount to be paid, remains to be ascertained by counting, weighing, or measuring. Suppose I sell and deliver a field, the bounds of which are precisely fixed in the bill of sale, for the price of ten dollars per acre. My vendee takes possession, employs his hands in its improvement, and plants his crop; can an attaching creditor take it out of his possession, because it has not yet been measured, and the number

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of acres ascertained. A merchant buys of a planter, one hundred hogsheads of sugar, at so much per cwt., conveys the same to his warehouse; employs his money and industry in preparing it for exportation, and makes his arrangements to that effect. But it has not been convenient to ascertain the precise amount by weight, although, indeed, some of it has been weighed and the price in part paid. Can it be attached, as the property of the planter? In the case before the court, there was a contract of sale and actual delivery in pursuance thereof. I maintain, therefore, that the property was the property of the plaintiff, in his charge, and at his risk. The thing was certain, it was three boat-loads of staves and poles; the price was certain, it was eight dollars per thousand, and the amount to be paid was certain, because *id certum est quod certum reddi potest.* A sale is complete although no price is fixed upon, provided it is agreed that a third person shall fix the price. *Inst.* 3, 24, *sec.* 1. Is the sale less complete when not the price but the amount to be paid, is to be ascertained by counting?

O, but says the counsel, and *Delvincourt, il seroit impossible, en cas de perte, de determiné*r

ce que doit l'acheteur. But, in case the poles had been lost before they were counted, how would you have determined what Shuff should have paid? The answer is simple. I would have ascertained by the ordinary rules of evidence, as nearly as possible, the number of poles, and multiplied each thousand by eight. The parties had agreed that the amount to be paid for the property delivered, should be ascertained by counting: that mode having failed, they were subjected to the next best mode of which the nature of the case was susceptible.

An attaching creditor cannot prejudice the rights of the possessor of the property, by whatever title he possesses. If he be a carrier his charges must be satisfied; if a consignee his advances must be paid, 8 *Martin's Rep.* 487. If then the sale in the present case were incomplete, the laws, quoted by the defendants, declare the absolute right of the plaintiff to complete it, and yet in violation of this principle, the defendants claim the power of destroying that right by rendering it impossible for the plaintiff to complete the sale. It is said that the objection lies equally against all the decisions of this court in the

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controversies between vendees and attaching creditors. Not so; in none of those cases, had the property been delivered; the vendee had acquired no rights as to third persons by possession. It is the delivery to us and the possession by us on which we have relied through the whole of this argument, and these are the grand criterions which distinguish our case from those that have been decided.

Shuff had the right of property by a contract of sale, and possession of the property by delivery, at the time it was attached. Mathews could not have recovered the property back; because if he had refused to deliver it to Shuff, the latter, say the *Civil Code and Pothier*, could have compelled him by suit. If Shuff could have compelled the delivery to him by suit, Mathews could not by suit have enforced the re-delivery. Mathews therefore had neither the right of property, nor the right of possession. He had passed all his rights away (except the right to sue for the price) not only by a contract of sale but by actual delivery. An attachment supposes the property attached to belong to the defendant in the attachment. It extends only to his rights in the property. The defendant in this at-

tachment, had no right in the property attached, but only a right to the payment of the price.

What then was the remedy for M'Cullough? It was manifest and simple, and would have been adopted, if his mind had not been led astray by the spirit of injustice. Mathews had sold his property. Shuff had bought it, and was in possession of it. The price had not been entirely paid. Mathews had a right to the balance of the price. It was his rights which the attachment law authorized M'Cullough to attach. He ought to have attached those rights and cited Shuff as garnishee. He would thus have secured his debt and all the litigation which has transpired in this case would have been avoided. But he chose to attach the property itself, to which Mathews had no right, and he is answerable for all the consequences.

PORTER, J. This case has been so fully gone into, by judge Martin, that I deem it sufficient to state that I concur fully with the opinion drawn up by him.

MARTIN, J. The defendants in this case contend, that the hoop-poles were properly

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attached for the vendor's debt, because they had not yet begun to be the vendee's property, notwithstanding they were sold and delivered to him, and he had partly paid for them; having been sold by tale, and not having been all counted, before the seizure, if any part of them was; for our statute provides, that such a sale is not perfect, inasmuch as the things sold are at the risk of the seller, till they be counted, *Civ. Code*, 346, *art.* 6. And it is hence held, that according to the general principle *res perit domino suo*, as the risk was for the vendor, he was the owner of the poles.

The principle is a general, but not an universal one. It is of the nature, not of the essence of the contract of sale. As soon as the sale is perfected by the assent of the parties, the vendee becomes as to the vendor, the owner of the thing; the latter cannot sell or abuse, nay neglect to have a certain degree of care of it, without becoming liable to the former. If he be discharged of the obligation of delivering it by its destruction without his fault, it is, because an obligation to give a thing is dissolved by the destruction of it. As to third persons, the property of the thing

sold does not pass to the vendee till after delivery.

Nothing prevents the parties to agree, that the thing sold shall remain at the vendor's risk till, or even some time after the delivery. And this convention has not any other effect on the contract of sale, than to charge the vendor with the risk; it does not impair the vendee's right, it is merely for his advantage.

If it be agreed, that the thing sold be at the vendor's risk till delivery, the vendee is not less the owner of the thing, as to the vendor, who can no more sell or abuse the thing, without being liable to damages.

If in the sale of a slave, sick, or convalescent, it be agreed, that till his perfect recovery, he shall remain at the risk of the vendor after delivery, till he be perfectly recovered or during a fixed time, this circumstance, introduced for the benefit of the vendee, does not impair his rights. He is, in the meanwhile, the absolute proprietor, although the slave be not at his risk, but at that of the vendor, whose creditors would, in vain, attempt to make the slave liable to their claims.

The liability of the vendor, in the case just

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put, is introduced by the agreement of the parties. It is so, by the law, in cases of sales by tale. The consequences of it cannot, we apprehend, differ in either hypothesis.

The principle *res perit domino suo* applies between the owner and possessor; the object of it is, that the former, not the latter, bear the loss of the destruction of the thing perishing without the fault of the latter.

I conclude, that the hoop-poles were, in the present case, the property of the plaintiff, the vendee, when they were attached.

If the property of A. be seized, on a writ commanding the seizure of that of B., there cannot be any doubt of the right of A. instantly to sue the officer at once, with the party authorising the seizure as trespassers. He is not bound to interfere in the suit in which the seizure is made.

I think the judgment of this court ought to be, that the judgment of the parish court be annulled, avoided and reversed, and that the plaintiff recover from the defendant, the sum of $625, with costs in both courts.

MATHEWS, J. I concur with the above opinion.

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It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed; and this court proceeding to give such judgment as in their opinion ought to have been given in the parish court, it is ordered, adjudged and decreed that the plaintiff recover from the defendants the sum of six hundred and twenty-five dollars, with costs in both courts.

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APPEAL from the court of the first district.

Where two suits to compel a "forced surrender" are carried on by different creditors at the same time, the order of a stay of proceedings made on the second application, does not estop the defendant to contest the legality of the first.

A "forced surrender" is that which is ordered at the instance of the creditors of an insolvent; whenever the application for relief comes from the debtor it is the "voluntary." This "forced

PORTER, J. The petition in this case sets forth, that John Brandt & Henry Foster, the defendants, together with James Johnson & William Ward, of the county of Scott, and state of Kentucky, were lately transacting business in the city of New-Orleans, under the stile of John Brandt & Co., and that said partnership was indebted on or before the 20th September, 1820, to James Johnson & William Ward, two of the co-partners, in the sum of $30,697 57 cents, to E. P. Johnson & Co. $5131 45 cents, to Ward & Johnson $14,287 45 cents, and to one Lee White $512 50 cents, amount-

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surrender" may be ordered in all cases where the insolvent, being a merchant or trader, is in failing circumstances.

But the oath of the creditor alone, is not sufficient to obtain an order, to sequestrate the property of the insolvent, and call a meeting of his creditors.

ing in the whole, to fifty thousand six hundred and twenty-eight dollars, ninety-seven cents; which debts it is alleged were legally assigned to the petitioner for a valuable consideration. And that in addition to these debts, he is also entitled by virtue of an assignment from the said James Johnson and William Ward, to any estate owned or possessed by them in Louisiana; to any owned by the late firm of John Brandt & Co., and to all accounts or claims of James Johnson and William Ward, against said partnership.

After this statement of the debts due by said firm, and the manner in which the plaintiff obtained an interest in them, various acts of fraud and misconduct, on the part of the defendants in this suit, are alleged. It is stated that they have unfaithfully and unskilfully managed the affairs of the partnership, in purchasing real property in their own names out of partnership funds; in purchasing real estate in the name of the firm with said funds, without the knowlege, and contrary to the consent of the co-partners; in stopping payment, by reason of their injudicious and fraudulent conduct, and obtaining a respite from their creditors; in refusing to permit their co-

partners to examine the partnership books; and finally, by wasting the estate and property of the partnership, and failing to meet the first instalment of the debts, for the payment of which their creditors had accorded them a term of years.

By reason of which it is averred that the defendants are insolvent, and that unless prevented by the interposition of the court, the estate of the late firm of John Brandt & Co. (which has been for sometime dissolved) will likewise prove insolvent.

The petition concludes with a prayer, that J. Brandt, Henry Foster, James Johnson, William Ward, and R. M. Johnson, be cited to answer the petition; that an account be taken of the affairs of said partnership; that a writ of sequestration may issue against the books, papers and effects of the said Brandt & Foster, jointly and separately; that a meeting of the creditors be called to advise upon a mode of settling their affairs, and disposing of the property of said firm of Brandt & Foster; and that such other and further relief may be granted as the equity of the case requires.

On this petition the judge granted an order, that the creditors should meet and receive

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a cession of the defendants estate; and that the goods, chattels, effects and other estate of the defendants be sequestered and held subject to the further order of the court. From this order the defendants appealed.

The only evidence, which comes up with the record, is an affidavit of the agent of the petitioner, who swears to the truth of the greater number of the allegations in the petition.— But as the record of the proceedings in the district court, in the case of Brandt & Co. *vs.* their creditors, praying for a respite, is referred to in the petition, and has been argued on by counsel, I have, in forming an opinion in this cause, considered the fact of such respite having been accorded, in proof before us.

Several questions, of considerable importance to the community, have been discussed, and are presented for decision. Before we can arrive at them, an objection not connected with the merits must be disposed of.

By an admission of the parties, signed and made part of the record by consent, it appears that since this appeal was taken, other creditors of Brandt & Co. have petitioned and obtained an order of the district court, calling

a meeting of their creditors, and staying all proceedings against their persons and property. Under this order syndics have been appointed, and it is now contended that this order of the district court staying all proceedings being unappealed from, is in full force, and that this court can take no further cognizance of the cause until that order is rescinded.

This objection may be considered in a two-fold aspect. First, as to the order of the court below having the effect of staying proceedings here; and second, whether the appointment of syndics has not produced a change of parties, and rendered Brandt & Foster incapable to act any further in this cause.

I. As the constitution has created this court, and given it supreme appellate powers, I do not think that its exercise of them can be suspended, or in any way affected by the orders which an inferior court may issue. Such a doctrine would render this tribunal subordinate, instead of being supreme; for in the case now before us, if the defendants had appealed from the decision, which it is contended, stays proceedings here, another creditor might

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have made a similar application to the district court, which in its turn would have produced the same effect; and in this way our power to grant relief have been suspended, until at last it was not of any advantage to the party to obtain it.

II. The authority of syndics to appear and be made parties to a cause where the insolvent is plaintiff or defendant, before the proceedings, in virtue of which they may be appointed, are homologated, is by no means clear. *Febrero cinco juicios*, *lib.* 3, *cap.* 3, *sec.* 1. *Bolero de decoctione*, *tit.* 4, *quest.* 2, *n.* 15, 16. But admitting that they have this right when the surrender is voluntary, it does follow they should possess it when forced; for the proceedings had against the debtor who opposes it, do not conclude him until finally homologated. It is true, the defendants might have appealed from the order, but they were not obliged to do so, as they may appeal from the confirmation by the court of the ulterior proceedings had before the notary. It would be incorrect I think to hold, that a case which we are bound to presume the defendants are obstinately disputing below, should during the pendency of it, be

used as a means to prevent them resisting a similar attempt here; and nothing but the most positive law could justify the court permitting persons to be made parties, who have an interest to lose the suit, they wish to be allowed to carry on. I am of opinion therefore that this objection cannot be sustained, and that it is the duty of the court to examine the case on its merits.

The first question arises on the form of the action:—that it is an action to make the defendants account, and yet takes the means of accounting from them; that it does not authorise the prayer for a sequestration, because it cannot be known until the account is rendered, if any thing be due.

I do not think there is any weight in these objections. There is no incompatibility between the prayer that the defendants shall account, and that a sequestration be accorded. A demand of this kind does not proceed on the presumption that nothing is due, but that something is, though the exact amount cannot be ascertained. The application for the books is also consistent with the object sought for, as the request in the petition is not that the defendants shall render an account, but that the court shall order one to be taken.

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Be this however as it may, it cannot affect the proceedings in this cause. for independent of the sum claimed by the petitioner, as representing the rights of partners in the firm of J. Brandt & Co., he also alleges debts due to those partners in their private right, and to other persons of whom he is the assignee.

The defendants next contend that the order given by the judge is not legal, and that the "forced surrender," known to our law. is that which the defendant himself is compelled to resort to, when imprisoned on execution, at the suit of his creditors.

In support of this, they rely on the law of the *Partidas*, 5, 15, 4, which declares that if a man will neither pay his debts, nor abandon his estate, the judge is directed to put him in prison until he does one or the other; and a statute of our legislature, 2 *Martin's Digest*, 448, which enacts that if a debtor refuses to deliver up his property. and transfer it for the benefit of his creditors, he shall suffer imprisonment at hard labour, not less than two or more than ten years.

These, it is contended, are the means, and the only means given by law, to force a surren-

der from the debtor, and that if he is obstinate and refuses to comply, there is no power in the court to order one.

If the enquiry was material, it would perhaps be found that these laws were intended to give relief in cases where the debtor conceals his property. This is very obviously the object of our statute, which compels a debtor in actual confinement, to make out a schedule of his property on oath, and transfer it to his creditors. For, as by law, the debtor cannot be imprisoned until a *fieri facias* is returned, no property found; the very proceedings given to make him disclose and abandon his estate, implies that he has effects which the creditor could not reach by the ordinary means.

But this question I think turns on, and must be governed by the positive expressions in our *Code*, *art.* 168. "The voluntary surrender of property is that which is made at the desire of the debtor himself."

"And the forced surrender is that which is ordered at the instance of the debtor's creditors, or of some of them, in cases provided for by law." *Idem.*

According to the defendants. the "forced

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surrender," here spoken of, is that which by imprisonment the debtor is forced to make.

That mode of proceeding would not, it appears to me, satisfy these expressions, "ordered at the instance of the creditors." It would not be ordering the surrender, but imprisoning the party until he consented to surrender.

If the course, contended for by defendants, is the correct one, in what then would it differ from ordinary cases? Every application, according to this doctrine, would possess the features, and take the appellation of a forced surrender. There is not a petition presented to have the benefit of the laws for the relief of insolvent debtor's, in which the party does not state that he is compelled by some cause or other, to apply for their protection. The reasons vary with the situation of the petitioner; sometimes because he cannot pay his debts; sometimes because a creditor threatens to pursue him in law, and he fears a fair distribution of his estate will not be made; or because he is threatened to be imprisoned; or because he actually is so. In all these cases it is compulsion which makes the debtor call his creditors together. But still it has not been doubted, that in cases such as are just

stated, there is a "voluntary surrender." They have been uniformly held so, and I do not think that we can by distinguishing the different degress of necessity which induce the demand, say that in the one case it is forced, and the other it is not. Whenever the application for relief comes from the debtor, the surrender is voluntary. I know of no other criterion to distinguish it from that which is forced.

Again, if we were to construe the law as contended for, so that a forced surrender was dependent on the will of the debtor, the words "ordered at the instance of the creditor," would have no meaning. The court could not order it; and if the debtor chose to be obstinate, the surrender never could be compelled. A construction, which ends by rendering important expressions of the law useless and of no effect, cannot be adopted; it violates the best rule for the interpretation of statutes.

It has been strenuously contended that the reference in the *Code* to the "cases provided for by law," means the case put in the law of the *Partidas*, and statute already cited, when the debtor will not pay his debts, and is imprisoned in consequence.

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It is quite probable, that the non-payment of debts may be one of the cases in which a forced surrender can be ordered. But it is not, in my opinion, the only one; it may also, I think, be decreed, whenever the defendant is in failing circumstances. Imprisonment, I do not consider as indispensable, for that is not so much a proof of insolvency as a consequence of these acts, from which a court is authorised to declare it.

The failing circumstances, already alluded to, are those cases where the debtor, who is a trader or merchant, conceals his person or his property from his creditors, with an intention to defraud them; or who absconds, taking with him his effects and books of accounts; or is unable to pay all his debts; or who applies for a respite; or to have the benefit of these laws made for the relief of insolvent debtors; or against whom execution has issued; or who fails to discharge his debts as they become due. *Novissima Recopilacian*, *lib.* 11, *tit.* 32, *l.* 2, 3, 5, 6, 7.

In all these cases, that proceeding which our law contemplated, by the expressions, "forced surrender" may be ordered; the creditors may apply, that a *concurso* be formed;

that syndics be appointed; that the property be sequestered and applied to the common benefit; and that the debtor, if he conceals his effects, be imprisoned until he makes a full and fair disclosure respecting them. *Curia Philipica*, *lib.* 2, *cap.* 11, *n.* 21, 31. *Bolero Tract. de decoctione titulus* 2, *quest.* 5, *n.* 18, 19.

Great inconvenience would result, and frauds of every description might be committed with impunity, if creditors had not such a power.

The defendants, however, still insist, that if such an order can be made, yet it issued improvidently in this case.

According to the practice in Spain, the debtor who had failed, or who was suspected of failing, could be arrested, and his property sequestered. To obtain these orders, *ex parte* proof, by witnesses, was held sufficient. *Curia Philippica*, *lib.* 2, *cap.* 11. *n.* 23. The same evidence must be given us, unless it can be shewn, that our statutes have changed the practice, or that great inconvenience would result from maintaining it.

I know of no change which our laws has made on this subject, and the inconviences, I think, are on the other side.

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To give every creditor, whether he be a resident or non-resident of the state, the privilege of declaring his debtor insolvent, and seizing his property of every description, without furnishing security for the consequent damage that may ensue, is evidently a power that might be exercised to the most iniquitous purposes. It is but right, therefore, to require, that the facts on which so severe a remedy is demanded, should be fully proved. What shall be the nature and extent of that proof, it is impossible to define; it must depend on the circumstances of the case, and those who have to act on it should weigh it cautiously. It may, however, I think be safely said, that the oath alone, of the party applying, is not sufficient.

In this case the facts have been proved by an agent standing in the place of his principal, acting for him, and representing him. His evidence, I consider, the same of that of the plaintiff himself, and is not that kind of proof which the law requires.

The fact of a respite having been granted, and the oath of the petitioner, swearing to a non-compliance with it, would, in my opinion, have been sufficient, if it appeared, that the

plaintiff was actually a creditor; but nothing has been shewn (except from the affidavit of the agent) to prove that he was so. And I understood, no fact admitted, except that Brandt & Foster did obtain a respite from those to whom they were indebted.

I am therefore of opinion, that the order for a meeting of creditors and sequestration, granted in this case, issued improvidently, and should be set aside, and that the plaintiff and appellee pay the cost of this appeal.

MARTIN, J. I concur in the opinion just expressed, except in the part which declares it necessary, that the prayer for a sequestration should be accompanied by some other evidence, than the oath of the applicant, or his agent.

If the question was *res nova*, I would perhaps, have no difficulty in acceding to the proposition; but ever since the Americans took possession of this country, process (directed to issue on the judge being satisfied with the truth of the allegations in the petition) has been obtained on the oath of the applicant; and it is too late, in my humble opinion, to examine the question. The evil which is

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apprehended might result from the continuation of the practice, appear to me merely theoretical. During nearly eighteen years this practice has prevailed, no case has happened, in my knowlege, which excites such an apprehension.

I think, that if the judge be satisfied of the truth of the facts alleged in the affidavit of the applicant, he may order the writ of sequestration to issue, and that this is left to his discretion; and if that discretion be properly exercised, this court ought not to interfere. In the present case, I think it was.

MATHEWS, J. I concur in the opinion read by judge Porter.

It is therefore ordered. adjudged and decreed, that the order for the meeting and the sequestration be set aside, at the costs of the applicant and appellee.*

Mazereau and *Livinston* for plaintiff, *Hawkins* and *Derbigny* for defendants.

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* A rehearing was granted in this case, on a point of evidence. But this opinion is now printed, to elucidate the decision, in the case of *Dysan & al.* vs. *the same defendants*, *ante* 493, in which the present is referred to.

GENERAL RULE.

GENERAL RULE.

No case shall be set down for hearing, unless the party moving to have it set down, shall, on or before the preceding Saturday, have filed with the clerk, a note of the points and authorities on which he intends to rely. It shall also be the duty of the opposite party, to furnish to the clerk, within three days after the cause is thus fixed for trial, a statement of the points made by him, and the authorities by which he intends to support them, and no rehearing shall be granted, on any point, which the parties may have omitted to furnish, in compliance with this rule.

When a petition for rehearing is presented, the court, if it doubts whether it ought to be granted, will communicate the petition to the opposite party, who shall be bound to answer, within eight days, or the court will proceed to decide on it, *ex parte*.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District.
May, 1821.

EASTERN DISTRICT, MAY TERM, 1821.

The court read the following notice and directed it to be entered on the minutes.—

The judges find it necessary to make it known, that they expect that no application for a license to practise law, will be made by any gentleman unacquainted with the legal language of the country.

It is true we have translations of our state laws, which may suffice to direct a citizen in the ordinary transactions of life; but he who aspires to the honor of being consulted on, and to explain these laws to his fellow citizens and the courts, must be able to read the text.

Very few of the acts of congress, which form a considerable part of our written law,

paramount to the acts of state legislatures are translated. The records of suits must be preserved in the language of the law. Hence the judges cannot designate as learned in the law, and able to give advice and carry on a suit, any person so little versed in the legal language of the state, as not to be able either to read the text of the law, or to undergo an examination in it.

HENO & AL. vs. *HENO.*

9m 643
105 744

APPEAL from the court of the first district.

A minor, under the age of puberty, cannot appear in court by a *curator ad litem.*

A man, who lives with a coloured woman, may be compelled to furnish alimony to his minor children out of his house.

PORTER, J. I concur entirely in the opinion drawn up by judge Martin. The minor, Marguerite, under the age of puberty, was not properly represented by a *curator ad litem*, our law has provided, imperatively, that for persons in her situation, there shall be an under tutor appointed by the judge, and that it is his duty to act for the minor whenever her interests are opposed to that of the tutor. *Civil Code*, 64, *art.* 33, 34.

The facts, disclosed in the case, fully justify the suit which these children have been forced to commence, in order to compel their father to do that, which nature and duty

East'n District. *May*, 1821.

HENO & AL. *vs.* HENO.

both require he should perform, without being urged to it.

His offer to receive them into his house, while living in open concubinage with a woman of colour, is only proving still more, the justice of their claim, and furnishing another reason why he should support them elsewhere.

As the minor heir, under puberty, was not represented before the court, the demand in the petition, as it respects her, must be wholly disregarded. The sum of fifty dollars a month allowed to Solidelle, and twenty-five to George, (the two children) is supported by the prayer, that one hundred and twenty be given, and furnished by their father. The judgment of the district court, should be affirmed as to these two. And as the other minor, under the age of puberty, was not represented, I am of opinion, that the judgment, so far as it directs a sum to be paid for her maintenance, be annulled, avoided and reversed; and that the cause be remanded, with directions to the judge, to proceed to ascertain the subsistance due to the minor Marguerite, she being first properly represented by an under tutor.

MARTIN, J. Geo. Heno and Solidelle Heno, minors, above the age of puberty, assisted by their *curator ad litem*, and Marguerite Heno, a minor, under that age, by P. Heno, her eldest brother and natural protector, sue the defendant, their father, for alimony; stating, that their mother is dead, and their father refuses to support them out of his house, where they allege they cannot go, owing to certain circumstances, which the respect they owe the defendant, forbids them to state, but which they will mention if necessary.—They aver his ability.

The defendant pleaded the general issue; averred his willingness to support the children at home, and his inability to make them an allowance, as he lately was compelled, by necessity, to surrender his property to his creditors, and he has no means of support but his labour.

On motion of the plaintiffs' counsel, the district court appointed P. Heno, *curator ad litem* of the plaintiff Marguerite, on the opposition of the defendant's counsel, on the ground, that Marguerite is under the age of puberty, and such a curator is only appointed to a minor above; and therefore, in the present case

East'n District. *May*, 1821.

HENO & AL. *vs.* HENO.

Marguerite can only be represented by an under tutor, whom the district court has no power to appoint; whereupon, a bill of exceptions was taken.

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

I am of opinion, that the minor, under the age of puberty, ought not to be represented by a *curator ad litem.* Persons of so tender an age ought to be under the protection of a tutor and under tutor, and when they appear in court, unassisted by one of these, their legal protectors, the court before whom they appear, ought to suspend its proceedings until the party be provided therewith.

I therefore think, the district judge erred in appointing a curator to her.

The plaintiffs have shewn, that their father lives in concubinage, with a woman of colour. This is certainly a good reason why the court should not compel his daughter, a white girl, to return into his house; neither can there be any propriety, though the reasons are not equally strong, in ordering the sons to return there, when it is shewn that their father made them associate and eat with the woman with whom he lives, and her children.

It is therefore clear to me, that it is just that these children should receive such a support as he is able to afford to them, out of his house. His ability was a proper subject of a jury's inquiry, as well as the quantum of the allowance, and I am not able to say that they formed wrong conclusions.

But the plaintiffs have prayed for an allowance of $120 per month only, and one of $110 has been made for the present, which is to be raised to $125, after the minor Marguerite arrives to the age of twelve years. As I think the judgment must be reversed, as to the plaintiff Marguerite, and the allowance to the other two is not extravagant, I see no reason to diminish it, which will leave the sum recovered below that demanded. And besides, it is not clear, that as a considerable part of the claim has been disallowed, we would be bound to disturb the verdict, on the ground, that a little more has been allowed on the rest.

I conclude, that we ought to affirm the judgment, as to the plaintiffs Solidelle and George, as separate allowances have been made to each plantiff, but that it ought to be reversed as to the plaintiff Marguerite, and

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the cause remanded, with directions to the judge to proceed therein, after her tutor or under tutor shall have appeared. The costs of the appeal to be borne by the defendant and appellant.

MATHEWS, J. I concur in the opinion of my colleagues.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, as to the plaintiffs, Solidelle and George, be affirmed; and annulled, avoided and reversed, as to the plaintiff Marguerite, and the case remanded, with directions to the judge to proceed therein after a tutor or under tutor shall appear. The costs of the appeal are to be borne by the defendant and appellee.

Davesac for the plaintiffs, *Cuvillier* for the defendant.

ST. AVID & AL. vs. *WEIMPRENDER'S SYNDICS.*

Syndics cannot take possession of an estate on the ground that the vendee fraudulently obtained it from their insolvent.

APPEAL from the court of the first district.

PORTER, J. Judge Martin has gone very fully into this case, and it is perhaps unnecessary for me to say any thing more than express

my concurrence with the opinion he has drawn up and communicated to me.

It appears by evidence that on the appointment of syndics to the insolvent's estate, they entered into and took possession of the property in the hands of the defendant, acting I presume upon the principle, that the sale from the father to his sons of the plantation was fraudulent, and that they had a right to disregard it.

Now this step appears to me to have been both harsh and illegal. If the sale was fraudulent, it was not less a sale, and binding upon third parties, until declared null by an action which the law gives for that purpose. *Curia Philipica*, *lib.* 2, *Verbo Revocatoria*, *no.* 1. And the possession of the vendees was a legal possession until deprived of it in due course of law.

With the question of fraud, therefore I think we have nothing to do in this case, and our enquiry must be limited to the single fact—had the claimants possession of this property at the time that the syndics forcibly took it from them? The evidence is satisfactory to my mind that they had. I am therefore of opinion that the judgment of the district court be annulled.

East'n District. *May*, 1821.

ST. AVID & AL. *vs.* WEIMPRENDER'S SYNDICS.

avoided and reversed, and that it be ordered, adjudged and decreed that the claimants do recover from the plaintiffs, the amount of the sugar and molasses bonded in this cause, and that the plaintiffs and appellees pay the cost of this appeal.

MARTIN, J. The plaintiffs, creditors of the defendant, brought their action for the forced surrender of his property, on the 7th of February, 1820. A few days after, George and Balthazar Weimprender, his sons, presented their petition of intervention; stating, that the syndics of the defendant's creditors were about seizing, as part of his estate, a plantation and negroes, the property of the intervening party, purchased by them from the defendant, by a bill of sale, under his private signature, of the 2d of May, 1817, and duly recorded in the office of the parish judge, on the 8th of July, 1819; whereupon they obtained an order, by which the syndics were enjoined from interfering with the said plantation or negroes.

On the 11th of March, Marguerite Weimprender, wife of George Weimprender, and George and Balthazar Weimprender, filed

their claim to ninety-seven hogsheads of sugar, sixty barrels of molasses, and a number of barrels of sugar, taken by the defendant's syndics, as part of his estate, and obtained the delivery of them on giving bond.

George and Balthazar Weimprender, having dismissed their petition of intervention, the claim of Marguerite, and George and Balthazar Weimprender, was submitted to a jury, who found, that one-third of the property claimed belongs to Marguerite Weimprender, and the rest to the syndics of George Weimprender, the father. Judgment being given accordingly, the claimants appealed.

By the testimony given in this case, reduced to writing, in open court, it appears, that

Roland Bouligny, a witness for the claimants, deposed, that he purchased, about three years ago, the crop of sugar of the plantation between that of Achilles Trouard and that of Mrs. Weimprender, the wife of the insolvent and defendant, and the mother of the claimants George and Balthazar; that he treated for it with the claimant George, who consulted his mother, who consented to the sale;

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that he knows that they (George and Balthazar) have been in possession of said plantation since the purchase. He has since purchased forty hogsheads of sugar from George. He knows that the mother and sons were concerned jointly in the cultivation of said plantation. He knows but one sugar-house on the plantation of the mother and sons; and knows not of any division having been made between the land of the mother and that of the sons. When he bought sugar of them, he treated with the mother and sons jointly.

On his cross-examination, he declared, that he resides in New-Orleans, and has never resided in the parish of St. John Baptist. He has known Weimprender, the father, these ten years. He used to come to deponent's house, then a tavern-keeper. He never was on the plantation of Mrs. W. nor that of her sons, before he purchased their crop; he staid two days. He paid partly down, and partly in his obligations to George. He gave a quarter of a cent per pound, below market price, the sugar being a little inferior in quality. He was there a second time after, when he bought the forty hogsheads.

J. Navarre, a witness on the same side, deposed, he knows that George and Balthazar Weimprender have been in possession of the plantation claimed by them since 1817. He was present at the sale. It is bounded above by that of their mother, and below by that of A. Trouard, and forms but one plantation with that of the mother, *i. e.* there is no fence between them. The whole land is cultivated in common; the sugar is manufactured in a house, which stands on her part; there is no house only a few cabins on the part of the sons. The sugar seized was made by the mother and sons.

On his cross-examination, this witness declared, he has known Weimprender, the father, about eleven years. Was, for the first time, about two hours on the above plantation, in 1816. He does not know who was in possession before the sale, being a stranger. He was a witness to a deed, from the father to his two sons, of a plantation of four acres. He saw the consideration paid, viz. $6000 in bank notes, and two obligations, as well as he recollects. He did not count the money. He does not know who wrote the deed, but thinks it was a planter. This was

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in 1816 or 1817, he cannot positively say; having no interest in the transaction, he did not charge his memory with it. It was on an afternoon, before sun-set. The family were present. Messrs. Losseu and Trouard were witnesses, and several other persons unknown to the deponent. The deponent does not know who had the direction of the plantation in 1816, as he was but a couple of hours on it; but he knows, that since 1817, George Weimprender's son has the direction of it. The father resides on the land. The notes were written before the deponent and other witnesses.

The documents introduced in evidence, at the suit of Marguerite Weimprender, wife of George Weimprender, father, against him, wherein she obtained a separation of property, on the 25th of March, 1816, and a notarial copy of the execution of said separation, executed on the 3d of April, 1817, under which she claims her plantation, were read.

On the part of the syndics, the proceedings between the said George Weimprender, the father, and his creditors, were read.

It appears to me, notwithstanding the utmost inclination which I share with the other

members of this court, to support the verdict of a jury, an imperious duty commands us to disregard the present, notwithstanding the learned judge having declared himself satisfied therewith. The sale of the plantation of the insolvent to his sons, took place nearly three years before his failure, and was recorded seven months before it. The evidence by which their possession and management of the premises is proven, is uncontradicted by any other. The near relationship of the parties is the only circumstance which appears to excite suspicion; but my mind cannot assent to the proposition of receiving it as strong *prima facie* evidence of fraud. I see nothing irregular in the transaction, and it appears to me, the claimants have fairly supported their pretentions. They ought to recover.

MATHEWS, J. I concur with my colleagues.

It is therefore ordered, that the judgment of the district court be annulled, avoided and reversed, and that ours be for the claimants, with costs in both courts.

Denis for the plaintiffs. *Eustis* for the defendants.

East'n District.
May, 1821.

LIVINGSTON
vs.
HEERMAN.

LIVINGSTON vs. *HEERMAN.*

APPEAL from the court of the first district.

Workman, for the plaintiff. This suit is brought in pursuance of the provisions of the 46th law of the 2d title of the 3d *Partidas*;— by which it is enacted, that no man shall be compelled to sue another, unless when he goes about declaring that, that other is his slave, or defaming him in his character, or slandering his title to his property. *See n.* 2 *of Greg. Lopez on this law; also* 2 *Elizondo.* 136, *and Febrero, page* 2, *l.* 3, *c.* 1, *no.* 2. In those and the like cases, he who is thus defamed or injured, may petition the competent judge to oblige the defamer to bring suit and prove what he has said, or to retract it, or make some other reasonable reparation.

This kind of suit differs materially from the common law action of slander of title; that action is founded on the supposed malice of the defendant. But if he can shew any title, or fair colour of title, to the property in himself, the plaintiff fails entirely in his suit. *Vid.* 6, *Bacon Abridg.* 221, 1 *Jacob's law Dic.* 36. He can in that case recover no damages; and damages form the sole object of the action.

9m 656
45 303

9m 656
47 923

9m 656
48 81
49 760

9m 656
51 1725

Whether a challenge to the competency of a juror should be made before he is sworn?—*quere.*

But if the party who objects to him, refuses to consent that he shall withdraw, and be replaced by another, he cannot allege it as error.

When a cause is tried on special facts submitted to a jury, the law has not made any provision for taking down the evidence by the clerk.

Private deeds of sale for real estate, are legal evidence to go to a jury.

A party cannot complain of the withdrawing of a paper which has been received in evidence, if he accompanys his objection by the declaration that he does not intend to make use of it.

On a trial in which facts a-

But this suit of ours goes much further. If the defendant can shew no title whatever, then, as in the common law action, we have a right to demand and recover damages for the malicious slander of our title. If he can shew any sort of title, which it may be supposed he believed to be just, the presumption of malice is removed, and he is discharged from all damages whatever. But he must then go on to the proof of his title, so that his claim to the property in dispute, shall be finally decided. Our law provides far more wisely than the common law in this respect; if in the common law action for slander of title, the plaintiff is defeated by the defendant producing a colourable title, the plaintiff is then without remedy. His adversary may continue with impunity to assert and publish his supposed right to the property in question, and thereby prevent its owner from ever disposing of it to advantage, and the owner can not compel the claimant to bring the question of his title to a judicial determination. Our law, on the contrary, will not allow this claimant to go on indefinitely, alleging a title to what another holds. He must bring that title to the test of the law, so that it may be known who the real

lone are submitted to a jury, the court cannot change them on points of law.

The facts submitted, need not be specially set out in the petition and answer. It is sufficient if they grow out of the pleadings.

A person who slanders the title of another to real estate, may be compelled to bring suit, to prove the truth of what he has said.

And, if in answer to the petition filed for that purpose, he sets up his title, and the parties go to trial on the merits, the court will not set aside the proceedings, on the ground, that nothing could be enquired into but the question, whether or not he was obliged to make good his declaration by an action at law.

And, in such a case, the defendant is *actor*, and the *onus*

East'n District. *May*, 1821.

LIVINGSTON *vs.* HEERMAN.

proprietor is. It is obvious that this provision of the Spanish jurisprudence is as beneficial to the whole community, as to the individual interests at stake.

In our petition, we have exactly complied with the requisites of this law. We first allege against the defendant, his slander of our title, and demand damages for it; or if the defendant hath any title, that he may be obliged to produce it; that the court do then decide upon it, and if it be found insufficient, that he may be forever enjoined from disturbing the plaintiff in his rights to the land in dispute.

The defendant in his answer does produce what he considers a title to this land; and prays that it may be determined by a jury of the country. Whatever may be our opinion of this pretended title, we are willing to suppose that it is not set up through motives of pure, disinterested malice, as a mere pretext for the slander of our title; but that the defendant offers it for the sole purpose of obtaining possession of our property. We therefore relinquished the pursuit of damages; and we went to trial with him on his title, in the manner he himself desired.

It is perfectly immaterial whether this ques-

probandi lies on him.

It is not necessary to enable the court to decide on the title for land, that there should be a prayer in the petition to be put in possession. After a cause has been fully tried on its merits, the court will feel great reluctance to remand a cause on a technical objection. The words *fuente a la leve*, to not signify a boundary on the river.

The purchaser of a riparious estate, under these expressions, does not acquire land on the river, when it is proved that there was property susceptible of private ownership, beyond the levee.

tion of title be determined on the claim of the defendant being set forth in his answer, or on being set forth in a petition of his, in a distinct suit. He might, we think, have chosen the last method if he had preferred it. But the law is complied with by either mode of proceeding The mode he has chosen, is certainly the best, inasmuch as it prevents multiplicity of suits, and the consequent delays, and accumulation of expence.

And yet, though he has gone to trial in the manner he himself made choice of, he has now the front to tell the court that he has subsequently brought another and distinct suit for this very land; but of such a suit there is no proof, no mention whatever on the record. This court can therefore take no notice of it. If it were brought, as the defendant alleges, it would be a nullity; being brought during the pendency of this suit for the same thing.

What can be the meaning and object of such vexatious procedings? Is it intended to weary out my client with never ending anxiety? To compel him to waste his life in perpetual litigation? Or is there some latent hope that by tormenting him in this manner, he may be at last induced to do in this instance, what

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he has done in too many others of a similar kind; to make a ruinous compromise of his interests; to sacrifice his property for the preservation of his peace?

The defendant, it appears, now becomes the actor in this suit; the sole object of which, from the course it has taken, is to try the title he has set up against the possessor of the land. The circumstance of the defendant, becoming the actor in the suit, occurs in various instances in the common law practice, as well as our own. It occurs in the action of replevin; (5 *Jacob's law dic.* 484,) when the defendant makes an avowry. It occurs in many peremptory exceptions, *reus in exceptione actor est:* particularly in the plea of compensation; when the defendant becomes clearly a plaintiff, and may by our law, obtain judgment and execution against the other, or first plaintiff in the suit, if the amount of the debt pleaded in compensation, exceed that of the debt due to the original plaintiff.

The form of this suit resembles that of the interdicts provided by the Roman law. They are explained briefly in the 15th title of the 4th book of the *Institutes.* There can be no more difficulty in rendering a judgment in this

case, either for or against the plaintiff, as the merits of the question may require, than there was in the well known action brought by John Gravier, against the mayor, &c., of New-Orleans. In that suit the plaintiff stated in his petition, that the mayor, &c. of the city of New-Orleans, pretended to some right in the batture, &c. and disturbed the petitioner by publications, tending to discredit his title, and the petitioner prayed that the mayor, &c. might set forth their title; and that he the plaintiff might be quieted in his possession.

The judgment of the court was, that the petitioner be quieted in his enjoyment of the batture, &c. against the claims and pretentions of the defendants, &c. *See the Report of the Trial, pp.* 1, 49.

The like judgment may be given for us, if the defendant fails in substantiating his title, provided that we shall have shewn any title, or a lawful possession in ourselves. If, on the contrary, the defendant's title is good, and better than ours, the land will then be ajudged to belong to him, and he will, of course, be entitled to a writ or mandate of possession, whereby the judgment of the court should be carried into complete effect. If we were even unpro-

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vided with any form of such a mandate, this court would have a right to devise one. The present defendant, Dr. Heerman, is undoubtedly entitled to all the rights, benefits, and advantages which he could justly claim, if he appeared on the record, as the plaintiff, in a petitory action. The present suit is, in fact, one of that kind known in the Roman law, by the name of *actio duplex*. Yet, although the defendant has become the real actor or plaintiff in the suit, it were better to continue to designate the parties as they are named, plaintiff or defendant, throughout the whole of this record. To change these denominations now, might produce confusion. It might be a sacrifice of clearness and perspicuity to that verbal fastidiousness, which, in judicial proceedings, is only justifiable when it is indispensibly necessary to secure both.

II. The objection to Mr. William Brandt as a juror, came too late, as it was not made until he had been sworn, 3 *Bacon*, 764. *Mima Queen* vs. *Hepburn*, 7 *Cran.* 290. Nor was it made for any cause which happened subsequent to his being sworn. The defendant's attempt to confound the cause of challenge

with his own knowledge of that cause, cannot avail him. The sophistry is too obvious and flimsy.

But, independently of this circumstance, it really does appear from the record, that Mr. Brandt was an excellent and most impartial juror. His impartiality is attested by his declarations, that neither party had any right to the batture in question. His opinion in particular, as to the manifest want of title in the defendant, was pronounced in court, after he had been sworn on the jury, and had heard the defendant's titles read. This shewed that he was attending to his duty, as a good juror ought. And we are persuaded that the impression which these title-deeds made immediately, on the sound, honest, unsophisticated understanding of W. Brandt, is the same which they produced on all who heard them, and which they will produce on the mind of this honourable court. It is not, however, very important what were that gentleman's opinions with respect to the rights of the contending parties. He was called upon to find a special verdict upon specific facts submitted to him, and not a general verdict, by which the legal rights of the parties, as

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well as the facts of the case, would be decided.

III. The statement of facts submitted to the jury by the plaintiff, is objected to by the defendant, because they do not, as he contends, fairly arise out of the pleadings, and are not pertinent to the matter in dispute.

The first law on this subject, 2 *Martin's Digest*, 156, ordains that the court shall examine whether such facts, &c., are *within the pleadings*, and strike out such as do not fairly *arise out of the petition or answer.* The next statute on the same point declares, that the *pertinency* of the statement of facts, shall be judged of by the court. The legislature adopted this last expression, no doubt on considering the frequent scantness and insufficiency of our written pleadings; and that many facts might be pertinent to a cause, although not fairly arising out of the petition or answer in it. This may often happen, from our very defective practice of not filing replications, even when pleas and exceptions are made, which contain new matter, and various distinct facts. It is enough, on the whole, if the provision of the last statue is fulfiled. That it has been

fulfilled, will be seen by the inspection of our statement of facts. They are all pertinent to the main issue of this cause, whether the batture claimed in it, belongs to the plaintiff or to the defendant. On that point, the adverse party cannot complain, that he has been taken by surprise. The contrary is apparent, from his own statement of twenty facts and eight supplementary questions, which go to every material question that our statement embraces. But, if the wonted ingenuity of his learned counsel, can detect, in his own statement or in ours, any fact not pertinent to the matters in issue, let it be struck out by the court. Quite enough will still remain for the determination of the cause.

The learned counsel further objects, that our statement does not contain simple or naked facts, but facts which are more or less mingled or complicated with questions of law. This is the amount of his oral argument on the subject. His bill of exceptions upon it, is manifestly insufficient for want of due precision. But where does the law require, that the facts submitted shall be thus simple and naked? One statute requires, that the facts shall arise out of the pleadings: the other.

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that the facts shall be pertinent. But neither act says or insinuates one word about this absolute nudity, in which, according to the learned counsel, these facts should be exposed. The truth is, that it is often impossible to present facts relative to the right to lands and inheritances in this naked state. The most simple, the most familiar language in which such facts can be set forth, must be founded upon or inseparably connected with notions and principles of law.

For instance; no fact can well be conceived more simple and naked, than the fact of the possession of a house or estate. It is a fact, which no one ever thought of objecting to, as improper to be submitted for the finding of a jury; yet there is no fact more frequently mingled with questions of law. I may possess a room in a house; that is a matter of mere fact. But will the possession of a single room give me the possession of a whole house, containing a dozen apartments? That is a question of law to be determined, according to the circumstances of the case. Will the possession of the key of a building, give possession of the building itself? Will the possession of an acre of ground, be the possession of an

estate of the 500, or 5000 acres adjoining? These are questions, and often very abstruse and knotty questions of law. Questions which the general and immutable law of nature cannot always solve, and which positive municipal statutes are therefore requisite to determine. Facts may be known and proved to exist, though they cannot be entirely separated from every law; in the same manner as in chemistry, the existence of oxygen is demonstrated, although it never has been found, except in combination with some other substance. But the defendant is absolutely precluded and estopped from availing himself of this exception. His own very ample statement of facts and questions, is acknowleged to be as much mingled with law as ours. It is too late for *him* to decline the forum, and the proceedings which, as the record shews, he himself has chosen. The case of *Center* against *Stockton & al.*, 8 *Martin's Rep.* 211, has decided this point against him. It would be too unjust, too preposterous to suffer a party to play the game of litigation in his own way, and on his own terms, with every chance of winning the wager; and yet, if he should lose it, to allow him to withdraw his stake, and play the game over again, in a new manner.

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The object of our statutes was evidently to require juries, in certain cases, to give special verdicts. If there be any thing doubtful in those legislative acts, it may be explained by referring to that system of jurisprudence, from which the trial by jury is taken. In England it will be seen, 7 *Bacon's Abridg. p.* 7, *&c.*, that special verdicts very often, and no doubt unavoidably, contain matters of fact, mingled with matters of law.

But not to leave any doubt or difficulty on this point of the cause, it will be seen on examining the record, that the jury have found facts enough, facts as clear, as simple, and as naked as such facts can ever be presented to the mind, to enable this court to make a final decision of the cause on its merits, and annihilate forever the inequitable, unjust, and unrighteous pretensions of the defendant.

If the jury have found any matter of law, distinct from fact, the finding is only a surplusage, and can do no hurt to either party.

The defendant objects to the jury's having found some of the plaintiff's title-deeds without setting them forth. This objection is now inadmissible. He might have taken his exceptions to these deeds, when they were

offered in evidence; and then they would have been set forth in the bills of exceptions, and this court would have been enabled to judge of their sufficiency. He did so, as the rec[illegible] shews, in two or three instanc[illegible] have done so in all the ot[illegible] thought fit.

IV. The defendant excepted to a plan offered in evidence by the plaintiff at the trial. The judge over-ruled the exception; but the plaintiff thought it safer to withdraw his plan, and not let it be taken as testimony. By thus withdrawing the instrument, we complied with the defendant's wish. We acceded to his exception—could he demand or expect more? Yes, he now contends, that he ought to have had the advantage of commenting upon and arguing against the very deed which, in the same breath, he contends was inadmissible in evidence. Is not this a preposterous inconsistency? Can he be allowed to maintain, that the plan is bad as evidence, and good for the purpose of being argued upon, as if it were evidence, that is, both good and bad at one and the same time? But, says the learned counsel, a party cannot withdraw any deed or writing which he has once

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filed or offered in court. We should not have withdrawn the plan in question, if he had withdrawn his exception to it. We could not, [redacted] safety, have suffered it to remain, while [redacted] to it stood on record. This [redacted] to risk the remanding of the cause for a second trial. But if the counsel really wanted to avail his client of any thing which that plan might prove, he should have withdrawn his exception to it in the court below. We have no objection, that he shall do this now, and make any use of that plan which he may think fit. But he must not complain, that he had no opportunity of arguing on that plan before the jury, when he himself, deprived himself by his own act, of the opportunity afforded him of doing so. The plan is declared by the jury not to be found; so that, whether it were good or bad, it can furnish no ground for remanding the cause for another trial. What the advantage is which the gentleman complains, that his client has lost by the withdrawal of this plan, may be judged of by this court, from the gentleman's argument upon it. He has contended, that it would prove, that the batture, forming the subject of the suit, belongs to the

public, and not to either the plaintiff or defendant. Such an argument might be of some use to the defendant, if he were in possession of the premises. But as he sues to acquire, and not to maintain a right, it is of no consequence to him who owns the property, unless his title to it be good. If it belongs to the public, as is pretended, it must remain with the present possessor, until the public shall assert and prove their right to it.

V. The defendant has also excepted to some of the titles of the plaintiff, on the pretext, that they were made and passed by private signature. This exception has not been, and it is believed, cannot be sustained. The law requiring registries and other public acts, is for the benefit of third parties only. Between the parties themselves to an act, it is undoubtedly as valid, when made under private signature, as it would be if executed before a notary public.

VI. The exceptions to the judge's charge, are next to be considered. The defendant complains, that the judge refused to charge the jury on certain points of law, on which he was

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requested to state his opinion to them; and that, on the other points of law, the opinions delivered by him to the jury were erroneous.

As the jury were impannelled to try facts only, it was not necessary for the court to have given them any charge at all on matters of law; nor can it affect their finding of any matter of fact, whether the charge actually given were, or were not erroneous, on any legal question. The law on this case, this court will presently see, is quite clear, independent of the decisions in the case of *Morgan* vs. *Livingston*. And sufficient facts, plain, naked, unencumbered facts are found by the jury, to enable the court to apply that law, and render a final judgment in the cause.

VII. The defendant prayed for a new trial on various grounds, filed in the court below, and now annexed to the record. That court refused to grant it, and the defendant excepted to its decision.

Many of the grounds on which the new trial was asked for, have already been discussed and disposed of. If these were not sufficient for remanding the cause, though no new trial had

been required, they cannot, of course, justify the granting of a new trial.

But there is another ground on which the defendant seems to rely: he alleges that the verdict is contrary to evidence in some parts, and without evidence in others. And he objects that the parole testimony was not taken down in writing, as he required, at the commencement of the trial, whereby this court might be able to judge whether the verdict was or was not conformable to evidence.

In the first place, we contend that these grounds are not stated with such precision as that this court can decide, whether the judge erred or not in declaring them insufficient. The defendant, instead of stating generally, that the verdict; a verdict consisting of more than forty distinct findings, on as many distinct propositions or questions, was against, or without evidence, should have stated specifically what part, or finding of that verdict was liable to these objections. Without such a specification, this court can not say whether the judge below exercised his discretionary powers wisely or not, in refusing a new trial.

To determine whether either party had a right to insist that the parole testimony should

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be taken down by the clerk in writing, we must refer to our statutes on this subject. The general law regulating the trial by jury in those countries from which we have taken that admirable part of our jurisprudence, gives no such right to either party. Notes of the evidence are taken by the *nisi prius* judge who tries the cause; and to these notes the parties and the court refer, when the evidence is made a ground for asking a new trial.

The 18th section of the act of 1817, (*p.* 32,) provides for the statement of facts, and the finding of special verdicts upon them. The 12th sec. of the same statute ordains, "That when any cause shall be submitted to the court or to the jury, without statement of facts, &c. the verbal evidence shall, &c. if either party require it, &c. be taken down in writing, by the clerk of the court, in order to serve as a statement of facts in case of appeal, &c." Without this statute neither party could require the evidence to be so taken down. But this statute is confined to the cases where there is no statement of facts: it is not therefore applicable to our case, in which each party submitted a full statement of facts. The defendant then had no more right in this case to

require that the evidence should be taken down, than he would have had before this statute was made; but no one ever had, or claimed such a right until that statute gave it. The object of that act is expressed and manifest. It is to provide what may serve as a statement of facts. When a special verdict finds the facts, no such statement is necessary. It would be a mere surplusage and incumbrance on the record: and it was no doubt to prevent the delay, trouble, and expence of such a proceeding, that the legislature put it in the power of either party to demand a special verdict when he thought proper. If neither the law of this state, nor the general law concerning the trial by jury, give the right which the defendant insists upon, what or who else can give it? Not this court certainly. Their powers are exclusively judicial. They cannot alter the usual mode of jury trial, further than our statutes authorize, whatever utility or convenience might arise from the proposed alteration.

The innovation required in this respect, is by no means necessary, as the learned gentleman contends, to enable this court to decide whether the judge below refused a new trial

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in this case improperly. The defendant might have referred, according to the well known practice of the common law courts, to the judge's notes for that part of the evidence on which he founded his application for a new trial. If the communication of these notes were refused to him, he might have presented an affidavit containing the substance of that evidence, and have annexed that affidavit to his bill of exceptions to the judge's opinion. In either case, the requisite facts might have been ascertained and brought before this court. In the progress of the trial he might have taken down so much of the testimony as he might think would be necessary for this or any other lawful purpose: and in fact, we know that the learned gentleman did, with his usual diligence, and no doubt with his usual accuracy, take down all the material parole evidence that was given in the cause. He had it in his power then, to produce every thing which could have enabled him to assert his right to a new trial, on this ground, without the aid of a new law, or an embarrassing practice upon the subject.

I examine the exception to the not taking down the testimony, merely with respect to the

question of a new trial: in no other view can the enquiry be necessary. What reasons then could the learned gentleman urge for this purpose, at the commencement of the trial, why the evidence should be taken down as he desired? That it might be necessary to support a motion for a new trial, if the jury should find a verdict which ought to be set aside; that the judge might take no notes, or might take incorrect notes; or might lose his notes of the evidence, and that the said judge might also give an erroneous decision on the motion for a new trial. These are suppositions, mere gratuitous suppositions, not one of which can be fairly presumed. And even admitting them all, admitting that both judge and jury should neglect their duty, and should give erroneous verdicts and judgments; even all these admissions, would not, on this occasion, avail the defendant. The answer to him would be; if you apprehend all these neglects, faults, errors and evils, make a correct note of the testimony yourself; annex an affidavit of so much of this as you may have occasion for, to the paper setting forth your grounds for a new trial, and you will then bring the whole subject completely before the su-

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preme court, if justice should be refused to you in the court below.

If this cause should be remanded for a new trial, on the ground that the whole testimony was not taken down in writing, then it will be so remanded, not because this court know or believe that a new trial ought to be granted, but because they wish to know whether a new trial ought to be granted or not. It would be a remanding of the cause for experiment, or through curiosity. And this might lead to very absurd as well as dangerous consequences. If the evidence on the second trial should be different from that on the first, as might happen from the death of some of the witnesses, or various other causes, then the jury might on this evidence give a verdict different from that of the former jury; although the first verdict should have been according to the testimony on which it was founded, perfectly just. Thus, would this court be led to an erroneous conclusion, and one of the parties be by this unprecedented experiment, deprived of his property.

Very different is this case from one where the court should have no statement of facts, or evidence to serve instead of it, on which

they could give a judgment, by affirming, reversing, or correcting the judgment of the inferior court. It is not pretended that there are no facts presented in this case whereupon to found a final judgment. Such facts are essential, are indispensably necessary for the due exercise of the appellate jurisdiction of this tribunal. And where a judge neglects or declines to make a statement of facts, in a case where it is his duty to do it, this court will of course remand the cause. Such was their decision in the case of *Porter* vs. *Dugal*, 9 *Martin's Rep.* 92, where the parties having agreed that a statement of facts should be made by the judge, he declined making it, having forgotten the facts, and lost his notes.—The plaintiff had moved for a new trial on the ground of new and material evidence discovered &c., and on the ground that the verdict was contrary to evidence. And the parties agreed that a statement of facts should be made by the district judge, who promised to do it. Afterwards, being called on for it, he answered that he had lost his notes, and could make no statement. In this respect the case differs most materially from ours. There the party asking the new trial, was in no fault.—

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The judge promised to make the requisite statement, and the other party agreed to it. If no such promise and agreement had been made, the plaintiff himself might have obtained a statement of the facts in question, by proper affidavits, and have annexed them to his bill of exceptions in the same manner the defendant might have done in the present suit, so as to enable this court to decide without remanding the cause. But our adversary has done nothing to entitle him to the like indulgence. It does not appear, nor is it I believe the fact, that he asked the judge below for any statement of the evidence from his notes; he did not present any such statement to the judge, requiring him to recognize its correctness, by inserting it in, or annexing it to, the bill of exceptions, offered on the judge's refusal to grant the order for a new trial. No consent whatever has been given by the plaintiff, as in the case to which I have referred. In that case, the plaintiff was in no fault whatever; he omitted nothing which he ought to do, for the end he proposed. In our case, the defendant has no one but himself to blame for not having taken the measures necessary to bring the requisite facts to the knowledge of this tribunal.

This court can only judge from the record before them, of what passed on the motion for a new trial. We see on that record, the grounds or reasons offered by the defendant, with his bill of exceptions, and nothing more. Nothing more can be presumed then to have been offered on the part of the defendant, or he would have asked for it, when he applied to this court for a *mandamus*, requiring the district judge to sign his bill of exceptions. Was it possible, I would respectfully ask, for any judge to have granted a new trial, on the grounds so vaguely and loosely stated, of a finding without evidence, and contrary to evidence? The verdict of a jury of twelve men, on their oaths, must surely be presumed good, until the contrary be shewn, especially when that verdict is on matters of fact. What in effect is shewn by the defendant, in the paper containing his reasons for a new trial? Not a word, whereby the judge could tell wherein the verdict was groundless, or erroneous. The trial had lasted nine days, and a large number of witnesses had been examined, upon thirty or forty distinct facts. Was it enough, in order to obtain another trial of such a cause, to allege merely that the verdict

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was without evidence, or contrary to evidence? Was it not proper and necessary, in justice to the court below, and to this court, to have stated, article by article, wherein the several findings of the jury were supposed to be thus erroneous? Then the district judge could have referred to his notes of the evidence, and decided accordingly. Then a full and satisfactory statement of the particulars might have been put on record, for the information of this tribunal. All this, no doubt would have been done by the defendant's learned and diligent counsel, if he were not well convinced that it would have been labour worse than lost; that it would have made the badness of his cause even more conspicuous and flagrant than it now appears.

The principal purpose of this statute, respecting special verdicts, was, I conceive, to render the trial by jury more plain, easy and effectual. To insist on taking down the whole testimony, in such causes as these, where a multitude of issues and questions are submitted, would be, in a great measure, to defeat that purpose. It would be to render the trial by jury, in such cases, almost impracticable; at least, so very tedious and painful.

as to make it an object of dread to those called to administer and attend to it. If it were desirable to make the jury-trial unpopular and odious, a better measure could not be adopted. Let us suppose a jury summoned in the month of July or August, to try this cause. Without taking down the testimony, this trial lasted nine days. And if the testimony had all been taken down, the period of the trial must have been twice or thrice as long. An attack of the bilous fever would be hardly less annoying than to serve as a juror on such a trial, in the summer season. That no such tedious and vexatious proceedings are requisite for the purpose, the defendant professes to have in view, (the obtaining of a new trial) will appear from the proceedings in the case already referred to, of *Porter* vs. *Dugal.* That too, was a case where several special issues were submitted to the jury. No one asked, desired, or imagined to have the whole testimony taken down. A motion was afterwards made by one of the parties for a new trial, on grounds similar in part to those relied on by the present defendant; and yet we find that party at no loss, as to the facts for determining his

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motion, from the circumstance of the parole evidence not having been taken down. The judge was properly applied to, and promised to state those facts. And he would have had no difficulty in fulfilling his promise and his duty, but for the accidental, and we may presume, rare circumstance of having lost his notes. The apprehended recurrence of circumstances so unusual, cannot be made the foundation for an embarrasing alteration in the law, or in the practice of a mode of trial, essential to our security, and which ought, by all means, to be rendered, in this state especially, as easy, as simple, and as little burdensome as possible to its worthy inhabitants.

We are at length prepared to meet the merits of the cause.—Here the counsel went into an examination and developement of the law of alluvion, the causes for which it appeared to be established, and the principles by which it should be expounded and applied. He endeavoured to shew, that whether the law *In agris limitatis*, was or was not of force in Louisiana, the defendant's land could not be entitled to any augmentation by alluvion, inasmuch as it was bounded on all sides by fixed,

invariable lines, and that the river never was, or had become its boundary, or added any thing directly to it, by way of alluvion; that the intervention of a public road alone, between a field, not bounded by the river, and that river, would in all cases prevent the owner of such land from having any right to the alluvial soil added by the river to that road, unless the state or sovereign to whom the road belonged, should make an exception to the general law of alluvion in favor of such proprietors. On these points the counsel cited various authorities from the Roman, the Spanish, and the French *Codes*, with the opinion of several commentators upon them. But whatever doubts, he observed, might exist on any of those, or other controverted doctrines, the court would feel themselves bound to decide this cause for the plantiff, on those principles which they had declared to be law in the case of *Morgan* vs. *Livingston*, and others.

The claim of the defendant, Dr. Heerman, differs from that of Mr. Morgan, according to the special finding of the jury, in several material circumstances.

1. The lot of Heerman is declared to be a limited field, and not to have been bounded by the river.

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2. The batture in front of that lot, is found to have existed, in a state susceptible of ownership, at the time of the sale under which he claims.

3. The bank opposite to the lot did not pass as an accessory to it.

4. The words of description in this case are, front to the levee, and not as in Morgan's deed, front to the river.

5. It is found here that neither the defendant, nor those under whom he claims, did repair the levee at their expence.

The foundation of the defendant's claim is a deed of sale by Bertrand Gravier and his wife, dated 10th of January 1789, to John Vessier, of the land in question, which is described as *situada fuera de esta ciudad, y hacienda frente à la levee de este rio.* From John Vessier it was transferred to the widow Trudeau, and afterwards it became the property of F. Trudeau, by whom it was sold to the defendant. In the transfer from F. Trudeau to the defendant, there are circumstances worthy of special remark: the act of sale, dated 30th December 1817, conveys the land to him in these words, "all that lot of ground owned by said Felix Trudeau, situated in the suburb St. Mary, of this city, forming the corner of Levee-street

and Girod-street, being in the front of the former seventy-three feet, eight inches, &c. It was soon found, that those words would not give the vendee a boundary on the river; and it was also discovered, that there had been some error in the direction of the side lines, and consequently of the line bounding the back part of the lot. To remedy these defects, a second act was ingeniously devised. It is dated 27th of March, 1818, and is called, an act ratifying and confirming the foregoing one. It states, that the plan annexed to the first act, having been found erroneous, from a survey which had since been made of the adjoining lots, the same should be corrected, &c. in the side lines, whereby a few inches were gained in the back part of the lot. And then this supplementary act goes on to say, "and that the description of said lot shall be as follows: *to wit*, fronting the river, seventy-three feet, eight inches, &c.

On these titles, the court will please to observe,—

1. That the only errors in the act of sale of December 30, 1817, which it was the object of the ratifying act to correct, were the errors in the back and side lines. the front

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line remaining exactly as before. It could not then have been the intention of the parties to run the side lines out to the river; for, from the oblique direction of those lines, that would have given to the front line an extent four or five times greater than the deed of sale specified.

2. Whatever may have been the intention of the parties, the vendor, Felix Trudeau, could not transfer any thing more than he himself possessed or had a right to. But the words of the deed of B. Gravier to Vessier, under which the defendant claims, are fronting the levee of this river; words which could not, according to any mode of construction, liberal or rigorous, give the claimant any right to carry his front boundary farther than the levee.

3. Even if the words, *fronting the river*, were to be admitted as the true description of this lot, they could not carry its front boundary to the river; for that would give to the whole lot above five times the quantity of land contained in the plan, and described in the deed. And this court has declared in *Morgan* vs. *Livingston*, 6 *Mart. Rep.* 225, that if the words, front to the river, or any other similar expression, would extend the lines so as to include four

times the quantity of land called for in the deed; the court must deviate from the received sense, in order to avoid falling into an absurdity.

4. But the jury have removed all doubts and difficulty on this part of the subject, by their finding, on the fourth special fact in the plaintiff's statement, that the words *frente à la levée*, in Spanish, or their equivalent expressions in French, have not been used in this state, while it was a territory or colony, to signify a boundary on the river.

Now this court, as well as the superior court of the late territory of Orleans, have constantly held, that such words in a contract, are to be understood in their most usual and known signification, and that that signification may be ascertained, as a fact, by parole testimony. That fact has been explicitly found, with respect to the words of description used in the conveyance under which the defendant claims the batture in question; and this court is so far bound by the verdict. On this ground alone, we are entitled to a judgment against Dr. Heerman.

Independently of this fact, the jury have found another, equally decisive in our favor.

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This is the sixth of the plaintiff's facts, which the jury find to be true, as follows:—That when Gravier sold to Vessier, there existed outside the levee, and between it and the river, a parcel of land, partly original, partly formed by alluvion. That a part of it might have been reclaimed, occupied, and converted to the use of the proprietor, which land being since increased by alluvion, is the premises in question. The jury also find, that the sale did not speak of this land.

If this part of the verdict stood alone, the defendant must lose his cause by it. The doctrine, that the sale of a lot of ground would include and carry along with it, a tract of land four times as large as that lot, not mentioned in the deed of sale, and lying on the opposite side of a wide public street or road, would be insupportable in every sense of the word. On the whole, Dr. Heerman is not entitled to this batture, either as an accretion, an accession, an accessory, or an appendage, because his lot was never bounded by the river; and because this batture was formed and was susceptible of being appropriated before he became the owner of that lot, and is not specified in the conveyance under which he claims it.

This is the third time that the claims of the front proprietors, to the everlasting batture, have been tried and decided by jury in this city; and in every case, the verdict of the jury, whether general or special, pronounced those claims to be illegal and unjust. We frequently adduce the opinions of other judges and tribunals, even those of foreign countries, in support of our arguments and our causes. I would, on the present occasion, offer the verdicts, the unanimous verdicts, of three juries of New-Orleans, as an authority entitled to high consideration and respect; not merely in so far as those verdicts are decisive of certain facts, but as they furnish a fair construction of the law applicable to those facts, or with which those facts are connected or co-mingled. The law in question, relates to one of the plainest and commonest transactions of the business of life; the contract of buying and selling. This contract, the great legislators and jurists tell us, is founded upon and regulated by the law of nature; that is, in simpler phrase, by the rules of good sense; by those rules of conduct acknowleged to be suitable and beneficial to all men, in whatever state of civilized society, and under whatsoever government they may

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be placed. Clear and explicit, and obvious, however, as these rules generally are, some of them may, in their application to particular cases, admit of controversy. To what authority shall we appeal in such cases? To that common sense and common honesty in which this universal and immutable law originates. When Grotius, the oracle of the law of nature and nations, investigates any dubious question, to whom does he appeal to decide it? Frequently to the celebrated poets, and orators, and historians of the world: not as possessing in themselves any authority to determine such difficulties, but as promulgating the general opinions and sentiments of mankind, to which, as the last resort, the decision of all such questions must be referred.

The general opinion, the general sentiment, calmly, cautiously and steadily expressed, of plain upright men, on any ordinary dealing or transaction with which they are well acquainted, and on which they are not biassed by any particular interest or affection, is entitled to great respect, and ought generally to be decisive, where positive municipal laws do not otherwise determine. The juries of whom I speak, were composed of honest, intelligent men, the principal occupation of whose lives

was buying and selling. If they felt any partiality in the causes they had to try, it was much more likely to be for the front proprietors, many of whom are wealthy and influential men, bank directors, and the like; than in favor of the opposite party, consisting of some poor, unknown foreigners; and a few of our own countrymen, not distinguished for opulence, or invested with power. And yet those three juries; thirty-six of our worthy fellow-citizens, have declared unanimously, on their oaths, that the sales of the front lots of the suburb St. Mary, did not convey to the purchasers any title to the opposite batture.

The concurrent verdicts of three juries are considered in the united states, and in England, as conclusive. Even when the courts believe such verdicts to be contrary to law as well as to evidence, they will not set them aside, or disturb them by granting any more trials. After three concurrent verdicts in ejectment, the courts of equity will issue their injunctions to prevent further litigation on the titles determined by those verdicts. This, it is true, takes place only where the litigation is between the same parties, for the same thing, and in the same rights: but it serves to

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shew the veneration in which the trial by jury is held in those states in which the civil rights of men are best understood and secured. This court assuredly prizes those rights as highly as any tribunal can do: it will therefore maintain inviolate that noble institution which is their most effectual safeguard.

Hennen, for the defendant. It is admitted that the remedy for what may be termed a slander of title, is more extensive by the law of this state, than that which is provided by the common law of England. But the authorities (all founded on the 46th law, 2 *tit.* 3 *part*) quoted by the counsel of the plaintiff, do not go the full length to which they are attempted to be extended in this action. The remedy provided by the *Partidas*, extends no further than to obtain a judgment against the party setting up a claim to the prejudice of another, ordering him to institute an action within a given time, to the end that his rights may be judicially ascertained. To this the defendant has, and can have, no objection. But to insist, because he has had the candor and good faith to set forth the nature of his title to the estate in controversy, that therefore the defen-

dant shall be compelled to litigate his rights with the plaintiff, on his own terms, is more, far more than the law authorizes; though the plaintiff in a cause is bound to make out his case by legal proof, yet in many respects he has a decided advantage over the defendant. The plaintiff need not institute his suit until he is perfectly prepared with all his requisite evidence; and should he find himself mistaken or unprovided at the trial, he may discontinue. Not so the defendant, he is at the mercy of the plaintiff; and being so, an unfair plaintiff may take the advantage of him at the moment when most unprepared. So in the present action, the defendant is mocked with his pretended advantages of being the actor, or real plaintiff in the cause: and told that he has every advantage which he could have had, were he plaintiff. This is very far from correct. The plaintiff, E. Livingston, could, and no doubt would have discontinued his action, if the special verdict had been found in conformity with the clearest evidence that was ever presented to a jury; evidence far clearer and more positive than that on which this honourable court decreed the batture to Benj. Morgan, against the present plaintiff. But the jury

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having found a verdict in conformity with the views of the plaintiff, in vain would the defendant move the court for leave to discontinue; much less would the plaintiff consent to give him such right as could not be refused him, were he in fact the plaintiff in the cause. Such considerations alone, without dilating, are sufficient to determine the judgment of this honourable court, not to extend the remedy beyond the provisions of the law; however plausable arguments may be used for the utility and convenience of another course.

It is said, however, that the defendant consented to this mode of trial, and that after verdict it is too late to make the objection now taken. The defendant no more consented to the trial than he did to the institution of the action. Every thing has been done, not only without his consent, but in violation of his rights as claimant of the property in contest. The defendant, it is true, has done all he could to protect himself in defensive warfare; but as yet he has not had the opportunity guaranteed to him by law, of attacking his adversary in the time, place, and manner which might have produced a totally different result in the special verdict, which now stains this record.

The defendant, though he has asserted his right to the batture, does not in his answer, claim any thing more than to be dismissed. He denies the right of the plaintiff to the $20,000 damages, claimed for the alleged slander of his title; but does not pray for any thing in his favour. It is then most incorrect and unfounded on the part of the plaintiff's counsel to say, that if the special verdict could have warranted it, judgment might have been awarded in favour of the defendant, to recover that which he does not pray may be granted to him. Had such a special verdict been rendered in this case, as its merits and the evidence, required at the hands of the jury, the defendant could have been met with objections perfectly unanswerable: no decree could have been pronounced in his favour against the plaintiff, for restitution of that which, indeed, he asserted was his; but for which he had made no prayer of restitution. Had the court *a quo* have been disposed on such special verdict, to render a decree of restitution against the plaintiff, would he not have exercised his right of discontinuance of the action to prevent it? The defendant could not have prevented it. Should not the

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inconveniences of the doctrine contended for by the counsel of the plaintiff, be apparent in this action, they must and will be in others, if a precedent is established by this honourable court, at variance with the principles of jurisprudence of every civilized nation.

For these reasons, the defendant contends, that this honourable court, disregarding all which occurred at the trial, ought to decree, that the defendant, as is prescribed by the *Partidas*, shall bring his suit within a specified time, for the purpose of ascertaining, by the judgment of a competent tribunal, his rights to the property, of which he has asserted himself to be the owner.

PORTER, J. The petitioner asserts that he is the owner of a lot of ground situated in the fauxbourg, St. Mary, having certain metes and boundaries on which he has made improvements: that he has wished to sell it, and that he could have obtained a great price for it. But that one Lewis Heerman, of the said city, gives out in speeches, that he is the owner and proprietor of the same; that he (the petitioner) had requested him to desist from thus slandering the title, or if he had any just

claim for the property, to bring a suit for it. That the said Heerman will neither give up his claim, nor prosecute it at law; but continues to assert his right to it, to the damage of the petitioner, $20,000.

The petition concludes with a prayer, that Heerman may set forth his title, if any he has, or pretends to have, for the said parcel of land, or any part thereof, and on his not producing a satisfactory title, that the petitioner may be quieted in his possession against his said claims and pretensions; that he be decreed and enjoined utterly to desist therefrom, and if the court shall decree that the said Heerman is the true owner of the said premises, that he be decreed to pay for all the improvements which the petitioner has made on the land, and expences by him incurred therein, to the amount of $90,000.

The defendant answered, denying all the allegations in plaintiff's petition; and specially alleged, that he was the true and lawful owner and possessor of a certain lot of land, situated in the suburb of St. Mary, having certain metes and bounds; that the prolongation of these boundaries to the river, included all the land within them, known by the name of bat-

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ture; that the plaintiff has not any legal title to the said premises, or any part thereof; and he further prayed that he may set forth his title, or pretended title, under which he claims.

The defendant further answered, that all the improvements made by the plaintiff on the premises, were made in his own wrong, and were an injury to the defendant, and concluded by a prayer that the premises may be enquired of by a jury.

The real question arising out of this petition and answer is, whether the alluvion or batture, in front of a lot, on Chapitoulas road belongs to the plaintiff or defendant? The plaintiff asserts his right to it by possession, and a conveyance from the heirs of Bertrand Gravier. The defendant claims in virtue of a sale made by said Bertrand Gravier and wife, in the year 1789, to one John Vessier, and by said Vessier, regularly conveyed, by several mesne conveyances, to him.

This cause was tried by a jury; on the part of the plaintiff, nineteen facts were submitted; on that of the defendant, twenty-one; and eight questions.

Before we can arrive at the merits of the cause, our attention is called to various bills of exceptions taken by the defendant,

I. The competency of Brandt, one of the jurors, is first objected to. From the first and second bill of exceptions, it appears that the plaintiff discovered this defect, after the jury were sworn, and that he immediately communicated it to the court, offering to withdraw this juror, and replace him by another, or to go on and try the cause with the remaining eleven; to both these propositions the defendant refused to accede.

It does not very satisfactorily appear that the juror was incompetent; for though the declaration made by him applied to the defendant's title, he followed it up by asserting, that he did not believe either of the parties had a right to the property,—that it belonged to the public.

The plaintiff insists that the challenge should be made before the juror was sworn, and that it came too late. Such is declared to be the law, 3 *Bacon ab.* 764. 7 *Cranch*, 290; and a new trial has been refused when the objection was not taken in due time. 2 *Bay*, 150. But it is unnecessary to examine that point, and see whether cases might not arise which would be properly an exception to the general rule. For as the defendant in this cause refused to

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permit the juror to be withdrawn, he cannot now make his incompetency the ground for remanding the case for a new trial.

II. The defendant, on the swearing of the jury, called on the court to direct that the evidence about to be given should be taken down by the clerk; this was refused; and a bill of exceptions being taken to this opinion, a question of some importance is presented.

This court, which has supreme appellate powers, is limited as to the manner in which it exercises them, and can only take cognizance of causes brought before it in that way, which the legislature has thought proper to direct.

On the organization of this tribunal, under the constitution, the act establishing the practice to be pursued in it, provided that there should be no reversal for any error in fact, unless on a special verdict rendered in the district court, or on a statement of the facts agreed upon by the parties or their counsel, &c.

It was, I believe, the general understanding of the profession throughout the state, as soon as this law was known, that the facts of a cause could not be presented to this court in any other mode, but that which the act pointed out.

Judicial interpretation of the statute soon confirmed this idea.

In the case of *syndics of Hellis* vs. *Asselvo*, 3 *Martin*, 201, the appeal was dismissed because the statement of facts was signed after, and not before judgment; it was not pretended there that the statement was incorrect; but it was rejected because the law had declared it should come up in an other manner.

In the case of *Longer & al.* vs. *Pigneau*, *ibid.* 221, the court decided that it could not act on the information derived from facts stated in the opinion of the judge.

In *Beard* vs. *Poydras*, *ibid.* 505, one of the parties offered to introduce new testimony. It was refused, and the court observed that the legislature had determined the mode in which causes should be sent up; that this was not the manner pointed out by the act, and that evidence coming in any other way was inadmissible. The same principle was recognized and enforced in *Dubreuil* vs. *Dubreuil*, 5 *Martin*, 81.

The power of the court, in regard to new trials, I understand to be exercised under the same limitation. Whenever we gather from the record, brought up according to law, that

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the merits of the case require us to remand a cause, it is our duty to do so. But we cannot arrive at a knowledge of the facts which require us to do this, in any other mode but that which the law points out.

The legislature has thought proper to afford to the citizen the benefit of a new trial from this court in many cases; as when improper evidence is received; when proper evidence is rejected; when new testimony is discovered after trial, which by due diligence could not be had before; when there is error in the opinion of the court on matters of law: in these and similar cases the remedy exists, because the mode of bringing the error before the appellate tribunal is pointed out. But if that legislature has not provided the means by which the court can get the facts before it, so that it may be enabled to judge of the propriety of granting a new trial, where the verdict is contrary to evidence; does it follow, as a consequence, that this court can supply the defect, and direct a mode in which the facts shall come before us? I am clear in the opinion that it cannot; and that we are not permitted to take notice of facts, either for the purpose of granting a new trial, or in giving final

judgment, in any other manner but that which the law has pointed out, and that where the legislature has chosen to be silent as to the *means*—it is an admonition to this court, that the *end* did not require they should be extended.

The reasoning is strengthened by the circumstance that when the act was passed, making the verdict of the jury conclusive on parties submitting a cause in the manner it has been done here; provision was made for taking down the evidence in every other case, except where a cause was presented on special facts. *Acts of* 1817, *page* 34, *sec.* 12.

It is true that in some of the courts in this state, since the passage of the act just alluded to, parties have been in the habit of taking down the evidence. But in those courts where that practice has been pursued, resort was had to it (as far as my experience extended) by consent; for as the verdict was uncertain, each party wished to guard against the consequences. This was the case in the suit of *Porter* vs. *Dugat*, decided at the last term of this court for the western district, and as the objection was not made there, no inference can

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be drawn from the court, remanding it for a new trial.

III. The fourth and fifth bills of exception were taken to the introduction of private deeds, the execution of which by the parties, was however admitted. I have been at a loss to discover on what this objection rests; an argument might perhaps be raised as to the time when they operated as notice to third parties, but that could not prevent them being evidence to go to the jury.

IV. A plan of the plantation of Bertrand Gravier, made by F. Trudeau in the year 1788, was offered in evidence, to the introduction of which the defendant objected upon the ground that Jean Vessier, under whom he claimed, did not purchase in pursuance thereof. The judge in permitting the paper to go to the jury, stated that they were not to consider the plan evidence in itself; but that it might be evidence if connected with the purchase, by extraneous proof. To this opinion the defendant excepted.

Immediately after the bill of exceptions was signed, the plaintiff asked permission to withdraw the plan which the jury had before

them. The defendant resisted this, stating that he did not wish to use the plan as evidence. But objected that the plaintiff had not a right to withdraw it. The court however, allowed him to do so, stating to the jury that they were not to consider it as evidence in the cause. To this opinion the defendant also excepted.

The most regular course, perhaps would have been, to have called on the party to shew the relevancy of the plan to the purchase made, before it was submitted to the jury. This is the ordinary practice, though it is difficult, when the evidence in a cause is made up of a variety of facts, to prescribe a certain order in which they must be presented. But the question now is, whether the admission of the document before its connexion with the defendant's title was shewn; under the declaration of the judge, that it was not evidence in itself, but might hereafter be made so by other testimony, has worked such an injury to the party that the cause must be sent back. I think it has not; because the judge told the jury that it was not evidence against the defendant until other proof was brought connecting it with the title; because it was withdrawn

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under a direction from the court, that the jury were not to consider it; and because it appears that they did not so consider it; for in their finding on the third fact submitted on the part of the plaintiff, they declare that the plan was not in proof before them.

On the right of the defendant to have this paper retained after the plaintiff offered it, altho' received under his exception, I should have no doubt, were it not for his own declaration annexed to, and making part of the bill of exceptions, "that he did not want or intend to make use of the plan in evidence." If he did not want it, then he could not be injured by its being withdrawn.

It is this circumstance which distinguishes this case from that of *Posten* vs. *Adams*; there the party wished to use the paper he first objected to.

V. The eighth bill of exceptions was taken to the refusal of the judge to charge the jury on different points of law, and directing them erroneously on others; as nothing but facts could lawfully be submitted to the jury, and as any law which they might mix up with their verdict, must be disregarded here; I do not

see how the defendant could be benefited by the charge he required, or injured by that which the judge delivered; it is unnecessary therefore to remand the cause for that reason.

VI. There is another bill of exceptions in which the defendant objects to the opinion of the judge, on the pertinency of the facts submitted to the jury.

The first law on this subject, contained in 2 *Martin's Digest*, 156, ordains that the court shall examine whether the facts are within the pleadings, and strike out such as do not fairly arise out of the petition and answer. The next statute on the same point: *Act of the legislature*, 1817, *page* 32, *sec.* 10, directs that the pertinency of the statement of facts shall be judged of by the court.

If the legislature intended these statutes to have the construction contended for by the defendant in this cause; that the facts as stated in the petition and answer, should be submitted and nothing else; there would not have been any necessity to provide that the parties should draw up a statement of the facts, and that the pertinency should be judged of by the court.

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This law has received a different construction, and the practice under it has been, that the plaintiff may present to the jury facts which go to establish the claim set up, although they should not have been set forth in the petition. It is true, that these facts must not be at variance with the allegations contained in the petition and answer. But it never has been understood that all the different circumstances which give a right, or furnish a defence of a particular kind, should be put in the pleadings. The facts submitted are always pertinent when they tend to support the title set up; and as no replication is filed, the plaintiff must often require that matter, not alleged in his petition, should be put in the statement, to rebut that growing out of his adversary's answer. If, by our loose mode of pleading, either party should be surprised, the law has vested ample power in the judge to correct the injury. Nothing of that kind however, appears here, no case ever heard in this court shewed parties better prepared, more perfectly acquainted with the strong and the weak part of their adversary's claim, and the care with which every fact that could bear on the cause was drawn out, and submitted,

proves that both came fully acquainted with what they had to resist, and what they must establish.

These objections over-ruled,—the next enquiry is, what facts have been ascertained by the verdict? The jury have found

That Bertrand Gravier, of the city of New-Orleans, died intestate, in the year 1797; that at the time of his death he was possessed of a farm in the neighbourhood of New-Orleans, of which the premises in question formed a part; that Livingston, the plaintiff, took possession of the property now in dispute, in the year 1807, and that he is still in possession thereof.

That prior to the time of the sale of Gravier to Vessier, under whom the defendant claims, the said Bertrand Gravier, had laid out a part of the plantation above mentioned, into building lots bounded by streets.

That, at the time of the sale to John Vessier, there was a road, at least forty feet in width, lying between the levee and the said lots; and that outside of the levee, and between it and the river, opposite to the said lots, there was a parcel of land, partly original, partly formed by alluvion, which was

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covered with water only at the time of annual inundation—was the rest of the year uncovered, and was of such height and extent, that a part of it might have been reclaimed, occupied, and converted to the use of the proprietor; which land being increased by alluvion, is the premises in question.

That the plaintiff has been in possession for more than ten years, with the exception of the time he was dispossessed, in the years 1810 or 1811, by the marshal, and a trespass committed in 1808, by the same officer.

In opposition to these facts, the defendant has presented his title, under the following finding:—

That John Vessier purchased from Bertrand Gravier and his wife, in the year 1789, a certain lot or parcel of ground, in the now suburb of St. Mary, in front of which is the soil called batture, being the premises in dispute, and that part of said lot has been purchased by the defendant, from those who held under said Vessier, by several mesne conveyances, which conveyances are annexed to the facts found by the jury, and make a part thereof. That the plaintiff was dispossessed in 1808 and 1810, by the marshal, and put in possession in the year 1813.

A variety of other facts have been submitted and found, as to the sum of money expended by petitioner; the period when each set up their respective claims, &c. all of which, from the view I have taken of this question, are quite immaterial in the decision of this cause. The law, which the jury has blended with their finding of the facts, must be entirely disregarded. 6 *Martin*, 209.

But before we can reach the merits, another question, which has been raised, must be disposed of.

It is contended, that by the law, in virtue of which this action is commenced, the only judgment, which the court can pronounce, is to decree, that Heerman shall bring suit.

Little can be gathered from the books, as to the particular practice adopted in Spain, in cases of this kind.

The law, *par.* 3, *tit.* 2, *l.* 46, declares, that no person can be compelled to bring suit, except in particular cases, wherein the judge may, by law, oblige him to do it; as when a man publicly says, that another is his slave, &c. in these and like cases, the person injured may petition the judge to oblige the defamer to bring suit, and prove what he has

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said, or to retract, or to make such reparation as the judge shall deem just; if he refuses to bring the suit, the party agrieved shall be for ever absolved from the charge made against him.

This law applies, according to the Spanish authority, to defamation respecting property, as well as person, and that whether it be moveable or immoveable, *Gregorio Lopez, on the above-cited law, n.* 2. *Elizondo Practico Universal, vol.* 2, *p.* 136.

Now, when a suit is commenced like the present, the defendant should do one of two things, either deny that he has said so, which would amount to a waiver of title, or admit the accusation, and aver his readiness to bring suit.

In the first alternative, this court would proceed to try the fact, whether he had defamed the title or not, and give damages accordingly.

In the second, they would order suit to be commenced. This, it appears to me, is the regular course. The object of this law was intended to protect possession; to give it the same advantages when disturbed by slander, as by actual intrusion. To force the defamer

to bring suit, and throw the burthen on him of proving what he asserted.

If this course had been pursued here, the defendant Heerman would have been directed to bring suit (in the language of the law) to prove what he had said; and the plaintiff, relying on possession, would have been maintained in it, until a better right was shewn. Instead of doing this, he has chosen to maintain the truth of what he has advanced, by setting forth his title in his answer, and avering it to be a better one than the plaintiff's. Having done so, I think the court can examine it, as well in that answer, as if set forth in a petition; it is only, in fact, anticipating the order which the court must have given, and coming forward, at once, with that title which the court would have directed him to produce in another suit. His adopting this course, at his own choice, cannot change the mode in which the proof must be adduced; he must make out his title as alleged; and cannot take from the plaintiff the advantage which he derives from his possession, by varying the form in which he has thought proper to make good his claim to the premises.

If it should appear, that he has a title for

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the premises, I have no doubt, that we can decree, that he has not slandered the plaintiff's title; that he has a better one; and that such decision would form the *res judicata* as to their titles, in virtue of which the defendant can, at any time, obtain possession by an action to that effect; for it is not necessary to enable the court to pronounce on title, that there must be a prayer to be put in possession. If the plaintiff succeeds, we can declare, that the defendant has failed to produce a title; that the plaintiff be preserved in the quiet enjoyment of his property, and the defendant be enjoined from reasserting this title to it.

This case differs little from the case of *Gravier* vs. *the Corporation of New-Orleans*, except, that trespass, as well as slander, was alleged there.

But if this point was doubtful, I should have great reluctance to send the parties back on a mere matter of form, to travel over the same ground again. *Interest republicæ ut sit finis litium.* And never did the maxim have a more proper application than in the cases which have grown out of this subject.

Having arrived, at last, at the merits, I

shall state, as concisely as the nature of the subject will permit, what I understand to be the law in cases circumstanced like this. After sixteen years, that the question has been in one shape or other before our courts, and the best talents of the bar and the bench employed in its discussion, the materials for forming an opinion, are in the hands of every one; and to cite authorities in support of the plain elementary principles, by which I consider the case to be governed, is only to quote what has already been cited twenty times before.

By alluvion, I understand, that which is added to land, little by little, so that we cannot know how much is added at each moment of time.

And, that all a river thus adds, by alluvion, to our field, becomes ours by the law of nations, or public law, common to all countries.

He, therefore, who owns land, bounded by the river, acquires whatever is added to it, as he suffers the loss of that which is taken from it.

When, therefore, a dispute arises between different purchasers, claiming under a person who once owned the riparious estate, their

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rights must be determined and governed by the fact—to which did he give a boundary on the river?

The defendant, Heerman, to establish his right to the property, produces a bill of sale from Bertrand Gravier and wife, to John Vessier, dated the 19th of January, 1789, by which they sell *un terreno de mi, la dha Dna. Maria Josefa Deslonde, compuesto de dos cientos y quarenta pies de frente y ciento y sesenta de fondo, situada fuera de esta ciudad y haciendo frente à la leevé de este rio.* A lot belonging to the said Maria Josefa Deslondes, having 240 feet in front, and 170 in depth, situated outside of the city, fronting, or having a front to the levee of the river.

The defendant owns a portion of this, containing 73 feet 8 inches in front, regularly conveyed from John Vessier; and in virtue of the title, asserts his right to all the alluvion formed between the levee and the river.

The force and effect of the words *face au fleuve, face, frente, frente al rio*, in a deed, or other act of conveyance, was most elaborately discussed in the case of *Morgan* vs. *Livingston*. Under the circumstances of that case, and the facts proved in it, the court

held, that these expressions give the first proprietor a boundary to the river.

In that case it was proved, that the words mentioned were used and universally understood, to designate an estate bounded by the river.

And it was established, that at the time of the sale from Gravier to Poeyfarré, there did not exist any private property susceptible of ownership between the trapezium and the river.

But in this case, the facts are wholly different. First, it is found by the jury, that the words used in the deed from Gravier, and wife to Vessier, *frente à la leveé*, front to the levee, do not signify a boundary on the river.

And that, at the time Gravier sold to Vessier, there existed outside of the levee, and between it and the river, land susceptible of ownership.

If this last circumstance stood alone, without the finding of the jury, on the expressions used in the deed, I should think, that it would controul the effect of those words, which have been held to carry the vendee to the river. For, if it had been the intention of one of the parties to sell, and the other to

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acquire the private property that intervened, it would have been so expressed; and the omission to insert it in the act of sale, is clear evidence to me, that did not enter into the consideration of the contract.

But we are free'd from all difficulty in this case, by the finding of the jury.

It has been held in the case of *Morgan* vs. *Livingston*, 6 *Mart.* 220, and that of *Gravier* vs. *mayor, aldermen and inhabitants of New-Orleans*, *Report of case*, 17, that the meaning of certain expressions in deeds, giving boundaries was properly ascertained by parol evidence, proving the sense in which they were used, and generally understood.

The meaning of the expression in defendant's deed, *frente à la leveé*, has been submitted to the jury, and found by them not to give a boundary on the river.

A great deal of discussion took place at the bar, whether the lot purchased by Vessier was what is called a limited field, or whether the law *in agris* was in force in this country. But these points it is unnecessary to decide on.

I have, in the opinion just delivered, noticed every thing which I consider material.

to answer, and comment on, all that was said, would be to write a treatise instead of delivering an opinion.

I have examined the case with the utmost attention, and with an anxiety that has more than once been felt as painful, to do that which is right between the parties and satisfy the law. And on the whole, I am of opinion, that, as at the time of the sale from Gravier and wife, to Vessier, there existed a portion of soil susceptible of private ownership, between the levee and the river; that this soil was retained by the vendor, and that the expressions in the deed, *frente à la leveé*, did not carry the purchaser beyond it.

That as the front boundary of said lot is given, in the act of sale, by particular expressions, which expressions the jury have found were not used under the former government, to signify a boundary on the river; that the purchaser did not acquire a riparious estate, and consequently, that he has no right to the alluvion formed in front of it.

I am, therefore of opinion, that the judgment of the district court be affirmed with costs.

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MATHEWS, J. The principal difficulty I find in the decision of this cause, as it is presented to the court, arises from the situation of the appellant. He is a defendant in an action for having slandered the title of the plaintiff to certain property, claimed by the latter, as set forth in his petition, and of which he has had uninterrupted possession during a long period of time.

The law, on which this action is founded, authorises a judgment, requiring and compelling a person who speaks against the title of a *bona fide* possessor, by asserting a right in himself, either to desist from such assertions, or to bring suit in support of his alleged claim; for the purpose of opposing his title to that of the possessor, in order that the respective claims, rights and titles of the parties may be finally settled according to law and justice.

If the pleadings in the present suit, do place the defendant in a situation similar to that which he would hold as a plaintiff, in an action which he might be compelled to institute; I can see no good reason for delaying a final judgment in the case, and that such is his situation, I agree in opinion with judge Porter.

The numerous exceptions taken to the propriety of the proceedings in the court below, have been so fully examined and correctly determined, that I consider it useless further to notice them.

As to the merits of the case, I have entertained but one opinion, in relation to the property of which the premises in dispute make a part, since the judgment in the suit of *J. Gravier* vs. *the city*, to the present time. I have always believed, that the alluvion or batture, as it is called, so far as it was sufficiently formed, to be a subject of private or individual ownership, at the time when B. Gravier sold the lots of land on the front of his plantation, made a part of said plantation, that the right to it was vested in him, and that he had acquired a complete title according to our laws, on the subject of alluvion.

The verdict of the jury in this case, shews that the lot or parcel of land in dispute, being a part of said batture or alluvion, was thus formed, and did exist at the time when Bertrand Gravier, sold the lot of land, situated immediately in the rear of the disputed premises, to the person under whom the defendant claims. And I am opinion that the expres-

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sions in the deeds of conveyance offered by him, are not sufficient to support his claim, against that of the plaintiff who claims under the same original title, *viz.* that of B. Gravier.

I doubted much on the propriety of the decision, in the case of *Morgan* vs. *Livingston*, and finally assented, under a conviction that full proof had been adduced shewing that no alluvion existed in front of the trapezium, at the time of its sale to Poeyfarré, the vendee of B. Gravier.

Upon the whole, I am of opinion, that the judgment of the district court ought to be affirmed.

LARCHE vs. *JACKSON*.

Although there be already some buildings on a lot, the owner of the adjacent one may put one half of the partition wall on his neighbours.

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

MARTIN, J. This case was before us some weeks ago, *ante* 408,* and the facts of it appear in the opinion then pronounced. The judgment of the court *a quo* was then affirmed, on the appeal of the defendant.

* The arguments of counsel, on this second appeal, were by accident, placed before the judgment, on the first.

The plaintiff, on the authority of the case of *Poeyfarré* vs. *Delor*, 6 *Martin*, 10, brought the cause up, in order to have an error to her disadvantage as she alleges corrected. She urges, that the injunction which she obtained *in limine litis*, ought not to have been dissolved.

Her counsel contends, that neither the original defendant, nor the present who has intervened, has shewn a legal title or possession to the lot adjoining her's; that her lot was actually built on; and that the territorial legislature had not the right of enacting the part of the *Civil Code*, on which the defence rests.

The testimony in the case. particularly that of Pilié, shews, that Jackson was in possession of the lot adjoining that of the plaintiff, as far as possession may be had of a vacant lot. He employed labourers to work on, and Pelié to survey it. All the witnesses speak of the lot as Jackson's. This, in my opinion, ought to suffice. The possessor of a lot ought not to be prevented from improving it, by a person who does not possess a right thereto. I conceive, that if it were not so, the plaintiff needs not to apprehend, as her counsel is pleased to do, that if the wall be

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built, and she purchases a moiety, she may lose the benefit of the half of it, by the act of the owner of the lot, who may pull the whole down. I think, that as she might, at any time erect such a wall, she may successfully resist its destruction, after having paid for one half of it. The law abhors waste, and no party could insist on the demolition of a wall, the building of which he would be obliged instantly to submit to.

The *Civil Code* provides, that he who builds first in the city, towns and suburbs of the territory, in a place which is not surrounded by walls, may rest one half of his on the land of his neighbour. *Civil Code*, 132, *art.* 23. The object of the legislature was clearly to promote the inclosure of lots, with stone or brick-walls, as much as possible; and the circumstance of a house having been already erected on the adjoining lot, does not preclude the party from the benefit of the provision, when the partition or wall does not interfere with any building previously erected.

The territorial legislature was not, in fact, as far I can ascertain, disabled from passing this part of the *Code*.

I have considered the case, as if the wall

was partly on the plaintiff's land, which is, as to her, the most favourable point of view.

I think we ought to affirm the judgment with costs.

MATHEWS, J. I concur in this opinion.

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

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

HAWKINS vs. *GRAVIER & AL.*

APPEAL from the court of the first district.

To support the plea of *res judicata*, the demand must be founded on the same cause.

PORTER, J. The plaintiff avers, that he is the owner and possessor of a certain lot or parcel of ground, situated in the fauxbourg, St. Mary, which he holds under title regularly deduced from John Gravier.

That, in virtue of this purchase, he has a right to various servitudes on a piece of ground, called the batture, lying in front of said fauxbourg. He also asserts a right to the use of it in common with the other citizens of New-Orleans; and alleges various reasons

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why the prayer of his petition should be granted, which it is unnecessary to set forth at length.

He complains, that notwithstanding these rights, the defendants unjustly sets up a claim to the exclusive enjoyment of the said property; that they wrongfully assert they are the owners of it; and that they have tortiously and illegally entered into possession of the premises, and have erected, or are about to erect, houses and buildings thereon, and do other acts wholly destructive of the rights which the petitioner has in and to this property. And he concludes, by praying reimbursement of his damages; the removal of the persons who may have taken possession; that the buildings already erected thereon, may be abated; and a perpetual injunction against the defendants, and all others. from occupying, or in any wise converting said property to private purposes.

The defendants meet this demand, by pleading the judgment, in the case of *John Gravier*, against *the mayor, aldermen, and inhabitants of New-Orleans*, as *res judicata* on the matters and things now sued for.

By an agreement between the parties, the

facts, as stated in the petition, are to be taken as true for the decision of this question.

As the plea now presented goes to the whole claim, as set up, it should apply to and embrace all the rights by which the plaintiff asserts his claim, otherwise it must be overruled.

The authority of the thing judged, says our *Code*, 314, *art.* 252, takes place only with regard to what has formed the object of the judgment; the thing demanded must be the same; the demand must be founded on the same cause; the demand be between the same parties; by them and against them in the same quality.

I have examined very carefully the record submitted, of the suit of Gravier, against the mayor, aldermen, and inhabitants of New-Orleans. The defence set up by the defendant was

1. That Jean Gravier was not the owner.

2. That he never had possession of the batture.

3. That Bert. Gravier had abandoned this property to public purposes, and that the public had enjoyed it from the date of the abandonment up to the time of commencing suit.

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In the present action, the plaintiff sets up a claim, founded on a different title from any here claimed, namely, by purchase from Gravier, who was plaintiff and obtained judgment in that case. The demand therefore is not founded on the same cause; and consequently I do not think the plea of *res judicata* sustained.

The briefs presented have been read with the utmost attention, and the authorities quoted looked into. But I cannot discover in them any thing in opposition to the above principle, contained in our *Code*, and which, I think, consistent with justice.

I am therefore of opinion, that the judgment of the district court, sustaining the plea, in this case, be over-ruled. and that this cause be remanded, with directions to the judge to proceed to the trial of the cause on its merits.

MATHEWS, J. The only question now to be decided on, in this case, is whether the judgment given, in the superior court of the late territory of Orleans, forms *rem judicatam* to the full extent of the rights, claims and causes of action, as set forth in the plaintiff's petition? The three principal requisites necessary to

give a judgment the effect of barring a subsequent suit, as that the parties should be the same; that the thing sued for should be the same; and that the demand should be founded on the same cause of action; which must all concur.

Without deciding any thing in relation to the character of the parties in this suit, I concur in the opinion just pronounced by the junior judge of the court, that it does not appear clearly from the pleadings in the case, that the plaintiff demands the same things for the same causes, which were settled by the judgment on which the defendants rely. If it should appear, on the final hearing of the cause, that any part of the rights and servitudes, claimed by him, have been finally adjudicated in the case of *J. Gravier* vs. *the corporation*, they will, of course, be considered as settled, without prejudice to a legal investigation of such new claims as may appear to be founded, *super alium corpus vel aliam causam petendi.*

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that

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the cause be remanded, with directions to the judge to proceed to the trial on the merits.

Hennan for the plaintiff, *Workman* for the defendants.*

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5 The discharge of a member of a firm, under the insolvent law, does no discharge the others. *Russel* vs. *Rogers & al.* - - 586

6 A creditor, not placed on the schedule, is not effected by the proceedings. *Same case.* *id.*

7 The appointment of syndics, in the French language, in the proceedings before the notary, is unconstitutional, and not cured by their homologation. *Viales' syndics* vs. *Gardenier.* 324

8 Three-fourths of the creditors, in number and amount, must agree in the point of a respite. *Clavier* vs. *his creditors.* - - - 390

9 Where two suits for a forced surrender are carried on at the same time, the order for the stay of proceedings, made on the second application, does not prevent the defendant from contesting the legality of the first. *Ward* vs. *Brandt & al.* - - - 625

10 Distinction between the forced and the voluntary surrender. *Same case.* - - - 625
11 When the latter may be ordered. *Same case.* *id.*
12 The oath of the creditor alone, does not suffice for the grant of an order of sequestration and a meeting of the creditors. *Same case.* *id.*
See ATTORNEY, 6.

INSURANCE.

If the copper be taken off a vessel, this being rendered necessary, on account of an injury which she had sustained, the insurers cannot avail themselves of its being done without their consent. *Waller* vs. *Louisiana Insurance Company.* - - - 276

INTERROGATORIES.

1 The plaintiff may read his answer to the supplemental interrogatories, although he failed to answer the original ones. *Woolsey* vs. *Paulding.* - - - - 280
2 If the same interrogatory be put in the original and the supplemental answer, and the plaintiff, having failed to answer it with the others in the original, does so with those in the supplemental, the interrogatory will not be taken as admitted, and the answer will be read. *Same case.* - - - *id.*
3 The party who puts an interrrogatory, is concluded by the answer, unless he disprove it by two witnesses. *Richardson* vs. *Terrell.* 1
4 An answer received by a mayor, and accompanied by the governor's certificate, under

the seal of the state is sufficiently authenticated. *Woolsey* vs. *Paulding*. - - 280

JUDGMENT.

When judgment is taken by default, the verdict cannot be for the defendant, although no damage be proved. *Allen* vs. *Lioteau*. - 459

JURY.

1 In proceedings by motion against the bail, he has a right to demand, that the facts be tried by a jury. *Labarre* vs. *Fry's bail*. - - 381

2 After the jury is sworn, it is too late to move that the suit be dismissed, because the plaintiff did not answer the defendant's interrogatories. *Woolsey* vs. *Paulding*. - - 280

3 In cases of tort, a new trial will not be granted to the plaintiff, unless a strong case of injustice be made out. *Seré* vs. *Armitage & al.* 394

4 Whether a challenge to the competency of a juror, should be made before he be sworn? *Livingston* vs. *Heerman*. 656

5 But if the party, who objects to him, refuse to consent, that he be withdrawn and replaced, he cannot allege it as error. *Same case*. *id.*

LAND.

1 If a tract of 200 arpens be sold to begin on a bayou, and run down and back for quantity, the grantee must have such a front on the bayou, as with the depth of the tract, will make 200 arpens. *Williams* vs. *Hall*. - 80

2 Whether the plaintiff may be perpetually enjoined from claiming the premises? *Porter* vs. *Dugat*. 92

3 Certainly not, when it was not prayed in the answer. *Same case.* - - - *id.*
4 When the owner of the land keeps works erected thereon he must pay their value. *Labrie* vs. *Filiol.* - - - - - - 348

See DAMAGES, ENTRY AND POSSESSION.

LICITATION

Is a mode of dividing estates held in common, and may be avoided like any other contract by the parties thereto. *Hayes* vs. *Cuny.* 87

LIEN.

1 A factor has one in the property of his principal, in his hands. *Canfield & al.* vs. *M'Laughlin.* 303
2 He may obtain the property subject to his lien, although he demanded it, in the petition, as his own. *Same case.* - - - *id.*

See ATTACHMENT, 2.

LIMITATION.

1 A statute of limitations vests the property, when it prevents the former owner from recovering the thing, in consequence of a continued, adverse possession. *Broh* vs. *Jennings.* 526
2 It is like the *usucapio* of the Roman laws. *Same case.* *id.*

MARRIAGE.

In the Spanish law, as under the *Civil Code*, the community of goods is a consequence of the marriage, without being stipulated for. *Bruneau* vs. *Bruneau's heirs.* - - 217

MINOR.

1 A minor, under the age of puberty, cannot appear by a curator *ad litem.* *Heno & al.* vs. *Heno.* 643

2 The proceedings of the court of probates of a parish, in which neither the minor, his tutor, or under-tutor resides, for the sale of his property, are void. *Leonard's tutor* vs. *Mandeville.* - - - - 489

3 The sale of a minor's property, must be made at the place where the family meeting have decided, that it is most advantageous that it should. *Case of Julia Pierce.* - - 461

4 A minor, whose property has been sold, without the necessary solemnities, has an action against his tutor for damages, and against the third possessor, for the property. *Leonard's tutor* vs. *Mandeville.* - - 489

NEW-ORLEANS.

Although there be already some buildings on a lot, the owner of the adjacent one may put one half of the partition wall on his neighbour's. *Larche* vs. *Jackson.* - - 724

NOVATION.

A promissory note does not work a novation of the debt. *Turpin* vs. *his creditors.* - 562

See DELEGATION.

PARTNER.

See INSOLVENT, 5—PROMISSORY NOTE.

PLEDGE.

1 There may be a pledge for a debt depending on a condition. *Clay* vs. *his creditors.* 519

2 Choses in action may be pledged. *Same case,* *id.*

3 The pledge does not amount to an alienation. *Same case.* - - - - *id.*

POSSESSION.

1 Actual possession of part, with title to the whole, is possession of the whole. *Donegan's heirs* vs. *Martineau & al.* - - - 43

2 The possession of one who shews no title, when the extent of it is not shewn to have reached within a mile of the *locus in quo*, cannot be considered as the possession of it. *Prevost's heirs* vs. *Johnson & al.* - - - 123

3 Feeding cattle and hogs, cutting wood and erecting pens, are not necessarily acts of possession: otherwise, clearing land, cultivating it, building houses, &c. *Same case.* - *id.*

See LAND.

PRACTICE.

1 Proceedings against bail need not pursue the form of a new action. *Hall* vs. *Farrow's bail.* 391

2 Notice to the attorney in such a case is good. *Same case,* - - - - *id.*

3 Seven months are not too long a period, for the counsel of an absent debtor residing in France, to obtain information as to the witnesses to be examined. *Lecesne* vs. *Cottin.* - 454

4 If the defendant, on an appeal bond, sued in the court in which it was given, crave oyer, a copy being tendered to his counsel and refused, the bond spread on the record will suffice. *Dussuau & al.* vs. *Rilieux.* - 318

5 The mere levy of a *fi. fa.* on the property of a co-debtor does not skreen that of the other. *Same case.* - - - - *id.*

6 Pleas which tend to prevent an examination of the merits, cannot be aided by inference. *Clay* vs. *his creditors.* 519

7 A judgment may be so far final as to be appealable from, without being so, as to the point in issue. *Same case.* - - - *id.*

8 When a case is remanded, after a reversal of the judgment, the inferior court may act on the verdict theretofore rendered. *Muse* vs. *Curtis.* 82

9 When the defendant applies for a continuance, to which his right is doubtful, the safest practice is to grant it, particularly in cases of attachment. *Lecesne* vs. *Cottin.* - 454

10 A party has a right to have the opinion of the court spread on the record, on any point of law arising in the cause. *Livingston* vs. *Heerman.* 195

11 If he be dissatisfied therewith, and state his objections at the time, he may draw his bill of exceptions afterwards. *Same case.* - *id.*

12 If there be several defendants, and they plead severally, they may have the case so tried; but, if they go to trial together they cannot assign that as error. *Serê* vs. *Armitage & al.* 394

13 On a trial in which facts are submitted to a jury, the court cannot charge on a question of law. *Livingston* vs. *Heerman.* - - 657

14 The facts submitted need not be specially set out in the petition or answer; it suffices, that they grow out of the pleadings. *Same case.* *id.*

15 After a full trial on the merits, the court will feel much reluctance to remand it on a technical objection. *Same case.* - - *id.*

PRESCRIPTION.

1 If a plea or prescription be received at the trial, the party must be permitted to submit it to the jury. *Porter* vs. *Dugat.* - - 92

2 If a slave be claimed by prescription, the question is to be examined, according to the laws of the country in which he was thus acquired. *Broh* vs. *Jenkins.* - - - 526

3 A promissory note prevents the prescription of one year. *Turpin* vs. *his creditors.* - 562

See ATTORNEY, 4—SUPREME COURT, 3–7, DEPOSITIONS, JUDGMENT, LAND, 2.

PRIVILEGE.

If the lessee give his note for the rent, and afterwards fail, the landlord has no privilege on the goods in the house. *Paulding* vs. *Kelty's syndics.* - - - - 186

See ATTORNEY, 6.

PROMISSORY NOTE.

1 If, after the dissolution of a partnership, one of the partners endorse a note, due to the firm, the endorser is not bound so strictly to give notice, in case of non-payment, as if the note were regularly endorsed. *Walker & al.* vs. *M'Micken.* - - - - 192

2 The maker of a promissory note may prove its execution. *Abat* vs. *Rion.* - - 465

3 Parol evidence of the written notice of protest, may be received tho' no call was made on the party to produce it. *Same case.* - *id*

4 A blank endorsement gives a right of action to the holder of a note. *Same case.* - - *id.*

5 Notice by the bank of a protest enures to the benefit of prior endorsers. *Same case.* - *id.*

6 The maker of a note cannot avail himself against a fair endorsee of an equity that would discharge the claim of the original payee. *Hubbard & al.* vs. *Fulton's heirs.* - - 86

See PRESCRIPTION, 3.

RES JUDICATA

Is only when the same thing is demanded for the same cause, and in the same quality, by and from same person. *Hawkins* vs. *Gravier & al.* 727

RESPITE.

See INSOLVENT, 3 & 4.

RIPARIOUS ESTATE,

The purchaser of, under the words *front to the leveé*, does not acquire the alluvion or batture, when there is land susceptible of separate ownership beyond the levee. *Livingston* vs. *Heerman.* - - - - 656

SALE.

A judicial one does not transfer the property of a third person. *Leonard's tutor* vs. *Mandeville.* 489

See ATTACHMEMT, 1 & 3—FRAUD, MINOR, 3 & 4.

SET-OFF.

The defendant cannot be allowed as a set-off, a payment for the plaintiff, without shewing that he made it at his request. *Rogers' heirs* vs. *Bynum.* - - - - 82

SLANDER OF TITLE.

1 A person who slanders the title of another, may

be compelled to bring suit. *Livingston* vs. *Heerman.* - - - - 656

2 If, in answer to the petition, he sets up his title, and the parties go to trial on the merits, the proceedings will not be set aside, on the ground, that nothing could be inquired into but the question, whether the defendant was obliged to make his declaration good by an action. *Same case.* - - *id.*

3 In such a case, the defendant is *actor* and the *onus probandi* lies on him. *Same case.* - *id.*

4 It is not necessary, in order to enable the court to decide on the title, that the plaintiff should have prayed to be put in possession. *Same case.* - - - - - *id.*

SLAVE.

1 If a slave of a bad character, be pursued on suspicion of felony, attempt to seize a gun, fly, and be killed in the pursuit, the supreme court will not disturb a verdict for the defendant who killed him. *Allain* vs. *Young.* - 221

See EMANCIPATION—PRESCRIPTION, 2.

STATUTE.

1 When the English and French part of a statute differ, if the expressions in the former be clear and unambiguous, the latter is to be disregarded. *Breedlove & al.* vs. *Turner.* 353

2 But if they leave the meaning of the legislature uncertain, the latter part may be resorted to, in order to clear the doubt. *Same case.* *id.*

SURETY.

The surety wishing to avail himself of the plea of discussion, must point out property. *Herries* vs. *Canfield & al.* - - 335

SURRENDER.

See INSOLVENT, 9—11.

TOWNS.

See NEW-ORLEANS.

TRESPASS.

A justice and constable, who proceed in an execution, after a prohibition, and a person who aids the latter, are trespassers. *Seré* vs. *Armitage & al.* - - - 394

2 A void authority will not justify a trespass, though the party acting under it be in good faith. *Same case.* - - - - *id.*

WILL.

One, clothed with all the formalities required by law, can only be avoided by attacking its genuineness. *Hayes* vs. *Cuny.* - - 88

WITNESS.

He may be asked, whether the defendant was or was not, in the habit of paying for goods, taken up by his children, before the time when these, the payment of which is claimed, are charged. *Finlay* vs. *Kirkland.* - 463

*** In the case of *Terrel's heirs* vs. *Crapper*, p. 350, PORTER, J. did not sit in the cause, nor join in the opinion of the court, having been of counsel in the same.