Livingston Vs. Story

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Appeal No. : 36 U.S. 351

Appellant : Livingston

Respondent : Story

Judgement :

Livingston v. Story - 36 U.S. 351 (1837)
U.S. Supreme Court Livingston v. Story, 36 U.S. 11 Pet. 351 351 (1837)

Livingston v. Story

36 U.S. (11 Pet.) 351

APPEAL FROM THE DISTRICT COURT OF THE UNITED

STATES FOR THE EASTERN DISTRICT OF LOUISIANA

SYLLABUS

Louisiana. On 25 July, 1822, Livingston applied to and obtained from Fort and Story a loan of $22,936 on a security of a lot of ground in New Orleans on which stores were then being built. This sum was received, part in cash, part in a

promissory note, and $8,000 were to be paid to the contractor for finishing the stores on the lot. The property was conveyed by Livingston, to Fort and Story by a deed of absolute conveyance, and he received from F. & S. a counter-letter by which they promised to reconvey the property to him if, on or before 1 February, 1823, he paid them $25,000. By the counter-letter, on payment of the loan the property was to revert to L.; if not, it was to be sold by an auctioneer of the City of New Orleans, and the residue of the proceeds of the same paid to L.; the money advanced by F. & S., with the interest and the expenses, being first deducted. The agreement for building the stores was transferred by L. to F. & S., and they agreed to pay the $8,000 as the work proceeded, in installments.

On 1 February, 1823, the buildings bad not been completed, and F. & S. agreed that the payment of the sum due on that day should be postponed until 2 June, 1823; the sum of $25,000, to be increased to $27,500, being at the rate of eighteen percent per annum for four months, and the residue for expenses of selling the property at auction, &c.; An agreement was made that if the amount named should not be paid on 1 June, 1823, the property should be sold at auction, and after the repayment of the sum of $27,500, the expenses of sale &c.;, the residue should be paid to L. By the same agreement, the counter-letter was to be delivered up and the record of it cancelled.

On 2 June, the money not being paid by L. to F. & S., it was agreed, that if on or before 5 August, 1823, the sum due, with interest, at eighteen percent per annum, to amount to $27,860.76, should not be paid by L. to F. & S., the lot, and all the buildings, should become the full and absolute property of F. & S. The money was not paid, and F. & S. protested, as they had done on 4 February for noncompliance with the agreement to pay the money agreed to be paid. From this time, F. & S. continued in possession of the lot and the buildings until the death of Fort in 1828, when S. purchased the share which had belonged to F., and he holds the property to this time. The evidence in the case showed that after July, 1822, the contractor did not apply the $8,000 to the completion of the stores on the property, and although F. & S. knew that he was so neglecting to apply the funds, they continued to pay over the same to him in weekly payments according to the

contract.

In 1832, L., having become a citizen of New York, filed a bill in the District Court of the United States for the Eastern District of Louisiana claiming to have the property held by S. reconveyed to him on the payment to S. of the sum due to him and interest on the same, deducting the rents and profits of the estate, or that the same should be sold according to the terms of the counter-letter, and after the payment to S. of the amount due to him, with interest, the same deductions having been made that the balance remaining from the sale should be so paid to him. By the court;

"After much inquiry and

Page 36 U. S. 352

deliberation and a comparison of the Civil Code of Louisiana with the civil law from which it derives its origin and with which it is still in close connection, we have come to the conclusion that the original contract and counter-letter constituted a pledge of real property, a kind of contract especially provided for by the laws of Louisiana, denominated, 'an *antichresis* .' By this kind of contract, the possession of the property is transferred to the person advancing the money. That was done in this case. In case of failure to pay, the property is to be sold by judicial process, and the sum which it may bring, over the amount for what it was pledged, is to be paid to the person making the pledge. In this case, a provision was made for a sale by the parties upon the failure of payment, but this feature of the contract is rather confirmatory of the contract and counter-letter being an antichresis than otherwise, for it is, at most, only a substitution by the parties of what the laws of Louisiana require. The decree of the court was in conformity to those principles."

Under the law of Louisiana, there are two kinds of pledges -- the pawn and the antichresis. A thing is said to be pawned when a movable is given as a security; the antichresis is when the security given consists in immovables.

The antichresis must be reduced to writing. The creditor acquires by this contract the right of reaping the fruits or other rewards of the immovables given to trim in

pledge on condition of deducting annually their proceeds from the interest, if any be due to him, and afterwards from the principal of his debt. The creditor is bound, unless the contrary is agreed on, to pay the taxes, as well as the annual charges of the property given to him in pledge. He is likewise bound, under the penalty of damages, to provide for the keeping and necessary repairs of the pledged estate, and may lay out from the revenues of. the estate sufficient for such expenses.

The creditor does not become proprietor of the pledged immovables by the failure of payment at the stated time; any clause to the contrary is null, and in that case it is only lawful for him to sue his debtor before the court in order to obtain a sentence against him and to cause the objects which have been put into his hands to be seized and sold.

The debtor cannot before the full payment of his debt claim the enjoyment of the immovables which he has given in pledge, but the creditor who wishes to free himself from the obligations under the antichresis may always, unless he has renounced this right, compel the debtor to retake the enjoyment of his immovables.

The doctrine of prescription, under the civil law, does not apply to this case, which is one of pledge, and if it does, the time before the institution of this suit had not elapsed in which, by the law of Louisiana, a person may sue for immovable property.

The 23d rule of this Court for the regulation of equity practice in the circuit courts is understood by this Court to apply to matters applicable to the merits, and not to mere pleas to the jurisdiction, and especially to those founded on any personal disability or personal character of the party suing, or to any pleas merely in abatement. The rule does not allow a defendant, instead of filing a formal demurrer or a plea, to insist on any special matter in his answer and have also the benefit thereof, as if he had pleaded the same matter or had demurred to the bill. In this respect, the rule is merely affirmative of the general rule of the court of chancery, in which matters in abatement and to the jurisdiction, being preliminary in their nature, must be taken advantage of by plea and cannot be taken

advantage of in a general answer, which necessarily admits the right and capacity of the party to sue.

Page 36 U. S. 353

The case, as stated in the opinion of the Court, was as follows:

The complainant, the appellant's testator, on 1 February 1834, filed a bill in equity in the District Court of Louisiana, in which he stated himself to be a citizen of the State of New York, against Benjamin Story a citizen of the State of Louisiana.

The bill charged that sometime previous to 22 July 1822, the complainant, being in want of money, applied to the defendant and John A. Fort for a loan, offering as a security a lot in the City of New Orleans on which a building, intended for stores had been begun; that the defendant and Fort agreed to loan him $22,936, of which a part only was paid in cash, part in a note of John A. Fort, and $8,000 of which was afterwards agreed between himself, the defendant, and Fort to be paid by Story & Fort, to one John Rust, a mechanic, who had contracted with the complainant to complete the stores. That to secure the money borrowed, complainant conveyed to Fort and Story the lot of ground mentioned, and that, contemporaneously with the deed of sale, they executed on their part an instrument in writing, called a counter-letter, by which they promised, on the payment of $25,000, on or before 1 February 1823, to reconvey to the complainant the property which he had conveyed to them. The complainant further charged that of the sum of $25,000 to be paid by him on 1 February, a part of it was made up by a charge of interest at eighteen percent per annum, upon the amount of $22,936, actually advanced to him, and to be paid on his account to Rust by Fort and Story.

The complainant also transferred his written contract with Rust to the defendant and Fort rendering himself responsible for the proper employment of the $8,000, and which was to be paid Rust in weekly payments by the defendant and Fort. Rust, on his part, consented to the transfer of his contract, and accepted Fort and Story in the place of the complainant. The stores were to be completed by Rust by

1 November, 1822, in a workmanlike manner, and all the materials except those already provided were to be found by Rust, and in his contract he renounced all claim or

Page 36 U. S. 354

privilege upon the building beyond $8,000, which was to be paid him by Fort and Story for the complainant. The deed and counter-letter and agreement with Rust are in notes [Footnote 1]1, [Footnote 2]2, and [Footnote 3]3.

Page 36 U. S. 355

The complainant charged that soon after the transaction, he left New Orleans, and that when he returned to it, he found that Fort and Story had paid to Rust $8,000 on his account, but that little or nothing had been done toward the completion of the stores, so that if the property had been sold on the first of February according to the terms of the counter-letter, it would not have

Page 36 U. S. 356

produced anything like its full value. That under these circumstances he applied to Fort and Story for further time, which they would not consent to but on certain conditions, which were that the property should be advertised for sale on 22 June 1823; that the sum due them should be increased from $25,000 to $27,500, which was so increased by the addition of $1,500 as interest, at eighteen percent for five months, $800, for auctioneer's commissions, $50, for advertising, and $150 arbitrarily added by the said Fort and Story. The complainant stated that being entirely at the mercy of Fort and Story, he consented to those terms, and executed a paper accordingly. [Footnote 4]

The bill further stated that the complainant, on 2 June, in order to obtain a delay of sixty days, was forced to consent to sign a paper by which it was agreed that the debt should be augmented to the sum of $27,830.76, and that if the same was not paid on 5 August, then the property should belong to the said Fort and Story without any sale. [Footnote 5]

But there was no clause by which

Page 36 U. S. 357

he should be discharged from the payment of the sum so borrowed as aforesaid, whereby he would have been liable to the payment of the sum so advanced, in case the property had fallen in value, and the bill stated that on 5 August, above mentioned, the said Fort and Story demanded, by a notary, the full sum of $27,830.76, which included the charge of $800 for auctioneer's commissions for selling, although no sale had taken place, and all the other illegal charges above stated; and on nonpayment, protested for damages and interest on the said sum, thereby showing their intention to hold him responsible for the sum demanded if the premises should by any accident become insufficient in value to pay the same. Fort and Story remained in possession of the said premises until the death of the said John A. Fort, which took place sometime in the year 1828; after his death, the said Benjamin Story took the whole of the said property by some arrangement with the heirs of the said John A. Fort, and was and ever since had been in the sole possession thereof, and the bill charged that the said John and Benjamin, in the lifetime of the said John and the said Benjamin, after the death of the said John, had received the rents and profits of the said property to the amount of at least $60,000, and that the complainant was advised and believed that he had a right to ask and recover from the said Benjamin Story the possession of the said property and an account of the rents and

Page 36 U. S. 358

profits thereof, the said conveyance of the same from the complainant having been made on a contract for the loan of money, and although in the form of a sale, in reality only a pledge for the repayment of the same, the act by which he agreed to dispense with the sale being void and of no effect in law.

The bill also prayed, that an account might be taken, under the direction of the court, between the complainant and the defendants to the bill, in which the complainant agreed he should be charged:

1st. With such sum as should be shown to have been advanced to him or paid on his account under the loan made to him on 25 July, 1822, with the interest which he agreed to pay of eighteen percent per annum to be calculated upon each advance from the time it was made until 5 August, 1823, and after that time at legal interest.

2d. With all reasonable expenditures judiciously made and incurred by the said John and Benjamin in building, repairing, and safekeeping of the said property, and that the complainant be credited in such account with all such sums as the said John and Benjamin or either of them had received or might, if they had used due diligence and care, have received from the said property,

and that in such account the rents and profits be applied as the law requires, first to the payment of the sums necessarily incurred in building and repairing, secondly to the payment of interest on the sums which should appear to have been advanced on the said loan, and thirdly to the discharge of the principal of the said loan. And that if on said account it should appear that there was a balance due him, as he hoped to be able to show will be the case, that the said Benjamin Story be decreed to pay the same to him and to surrender the said property to him, and that if any balance should be found due from the complainant, that the said B. Story might be decreed to deliver the said property to him on his paying or tendering to him the said balance, and that he might have such other relief as the nature of his case might require. That he, the said Benjamin Story, in his own right and also as executor of the last will and testament of the said John A. Fort or in any other manner representing the estate of the said John A. Fort, might be summoned to answer this bill, the complainant averring that he was a citizen of the State of New York and that the said Benjamin Story was a citizen of the State of Louisiana, and then resided in New Orleans.

The protests, made at the request of John A. Fort and Benjamin Story on the nonpayment of the money stipulated to be paid by Edward Livingston on 1

February, 1823, stated that on that day the notary had requested from Edward Livingston payment of the sum of $25,000, and was answered that "he could not immediately pay the sum due to Fort and Story, but that he hoped soon to be able to do it." The answer to the demand made stated in the protest of 5 August, 1823, to have been given by Edward Livingston was

"that owing to the very extraordinary scarcity of money, he was prevented repaying the money he had borrowed from Messrs. Fort and Story at this time, but was willing to allow them the same interest at eighteen percent, with good personal security in addition to the real property they now have, for the renewal of the obligation for six months."

On 17 February, 1834, Benjamin Story appeared to the bill and demurred to the same, alleging for cause of the demurrer that the case made in the bill was not such a one as entitled the claimant in a court of equity of the State of Louisiana to any discovery touching the matters contained in the bill or any other matters, or any relief, and that by complainant's own showing in the said bill, the heirs of John A. Fort, who was therein named, were necessary parties to the said bill, as much as it was therein stated that all the matters of which he complain were transacted with the defendant and John A. Fort, whose widow, the present Mrs. Luzenburg, was the sole heir and residuary legatee.

The district court sustained the demurrer and dismissed the bill on two grounds -- 1st, that this is not a suit that can be maintained in its present form in a court of the United States sitting in Louisiana; 2d, that a material party is omitted in the bill. The complainant appealed to the Supreme Court, and at January term, 1835, the decree of the district court was reversed and the case remanded for further proceedings. 34 U. S. 9 Pet. 632.

On 15f December 1835, Benjamin Story filed in the District Court of Louisiana an answer on oath to the original bill in which he said that he did not admit, but if it were the fact, required proof that the complainant was a citizen of the state New York; that at the time of the transaction mentioned in the bill and for a long time thereafter, he was a citizen of the State of Louisiana and one of her Senators in

the Senate of the United States, and if he had ceased to be a citizen

Page 36 U. S. 360

of that state, the defendant knew not when or how, and called for the proof.

And the defendant, further answering, said that he expressly denied, that on or about 25 July 1822, he and John A. Fort agreed to lend to the complainant the sum of $22,936 or any other sum. That he expressly denied that at any time he either jointly with the said Fort or separately ever agreed to lend to the said complainant any sum of money whatever, as alleged in the bill of complainant. That so far from there having been any loan intended by the parties, the defendant stated that the negotiation for the sale of the said lot, commenced between John A. Fort and Nathan Morse, Esq., since deceased, the latter acting for the said complainant, and that one of them informed the defendant that the complainant wished to raise money on mortgage, but the defendant peremptorily and expressly refused to advance any money whatever to the complainant on mortgage. That during the progress of the negotiation, the complainant having learned that the defendant was to be interested in the purchase and was to make the principal payments, mentioned to the defendant that he would prefer obtaining money by mortgage on the property rather than make a sale of it, and the defendant again repeated to him his refusal and insisted upon a sale's being made to him.

As evidence of the understanding of the parties and of the real nature of the transaction, certain communications which had been addressed by the alleged agent of Mr. Livingston to John A. Fort and Story were annexed to the answer.

Page 36 U. S. 361

The sale was agreed to, and an act was passed on 25 July 1822, containing the clause of *non enumerata pecunia.* The answer referred to the different documents which were stated and referred to in the complainant's case. The money not being repaid, as was provided in the counter-letter on 2 February 1823, no sale of the property was made by auction, because of the request of the

complainant, and on 4 March they made another agreement [Footnote 6] by which they agreed to postpone the sale of the property, until 2 June 1823, and the said Edward Livingston, in consideration of allowing him such additional chance to repurchase the said lot and buildings or obtain some person to purchase it, agreed to pay to them a compensation therefor, as is in said agreement stipulated, and in this agreement it was covenanted between the parties that the counter-letter should be annulled and given up so that there then existed between the parties the absolute bill of sale, and this stipulation of 4 March, 1823.

And finally, 2 June, 1823, having arrived, and Edward Livingston would not pay the price of said property, nor was there any offer therefor, at his request, an agreement was entered into before H. Lavergne, a notary public, whereby the said Edward Livingston requested that the sale might not take place, for his accommodation, and the said Fort and Story agreed thereto on the following conditions:

That on or before 1 August, 1823, the said Edward Livingston should pay the said sum of $27,830.76 and any further sum by them expended for the care and preservation of said property, and that then the said lot and buildings were to become the property of said Livingston, and in case the said Livingston should fail, on 5 August, 1823, to pay to the said Fort and Story the sums above specified, then the said lot, with the buildings thereon, were to become the full and absolute property of Fort and Story, and the said Livingston engaged thereupon to surrender and cancel all and every writing or other document in relation to said property that might give to him any equity of redemption or other right to the said promises, it being in said act expressly stated that it was the true intent and meaning of the parties that in the case of failure of payment as aforesaid, said lots, with all the buildings and appurtenances to the same belonging, were to vest in said Fort and Story a full, free, and absolute title in fee simple forever.

The answer denied that at the time of the purchase, the property was worth more than the money Fort and Story paid for it and that any loan of money was made, but it was an absolute sale, with power to redeem, which was twice extended to the complainant and was finally closed by the last agreement, and on 5 August, 1823, a demand was made and payment refused, whereby all clauses of redemption were annulled by articles 93 and 94 of the act then in force in Louisiana, and the property became absolutely and irrevocably the property of Fort and Story. The answer also denied that the property had become as valuable as was represented by the complainant, and it stated that on 10 March, 1832, he, the respondent, by a purchase from the widow of John A. Fort, now Mrs. Luzenburg, became to owner of the moiety of the property which had belonged to John A. Fort, for which the sum of $50,000 was to be paid. A liability by Mrs. Luzenburg and her husband to repay this money in case of eviction was alleged to exist under the laws of Louisiana, and that the purchaser had a right under those laws to call on the vendor to assist in his defense,

"and the respondent submits to the court, whether by the proceedings having been instituted in the district court of the United States, Mrs. Luzenburg is to be precluded from claiming and defending the ownership when, being vendor, she is interested in the case."

The answer prayed a citation to the widow of John A. Fort, who intermarried with Dr. Luzenburg, that they might appear and defend the sale and abide by any decree of the court.

To the answer was annexed a statement of the moneys paid and received on account of the estate by the respondent and John A. Fort. The sums paid for the estate from July 26, 1822, to May 27, 1817, amounted to $51,537.20, the interest at ten percent, which is $26,261.12; total $77,796.32; the sums received, up to January 26, 1829, amounted to $29,705.69 -- interest $7,073.18 -- total $36,778.87. The answer claimed the benefit of the proscription of five or ten years under the laws of Louisiana as constituting a bar to the suit.

Afterwards, on 14 March 1836, the defendant filed an amended answer stating that Mary C. Luzenburg, the widow of John A. Fort, deceased, had, since the filing of the original answer, set up a claim to the moiety of the estate in controversy and had instituted a suit in the Judicial district Court of the State of Louisiana against the respondent for the purpose of vacating the contract by which he became invested with a title to the interest of which Fort died possessed, and to recover the same from him, and as the claim was not admitted, but in the event of the success of the appellant, she and her husband would be liable to the respondent, and consequently, the rights of the respective parties could not be fully, fairly, and finally decided unless Luzenburg and wife be made parties to this suit.

The amended answer prayed they might by the complainant be made parties to the bill. A copy of the bill of Mrs. Luzenburg to the judge of the District Court of the first Judicial District of the State of Louisiana was annexed to the amended answer. It alleged a sale of the moiety of the property which belonged to John A. Fort, to have been made to Benjamin Story on 10 March, 1832, for $50,000, when in truth and in fact the said moiety was worth $100,000.

The testimony of two witnesses was taken in open court. Hughes Lavergne, the notary before whom many of the documents in the case had been executed, deposed,

"Mr. Nathan Morse came to his office, accompanied by Mr. Story at the period named, for the purpose of making the sale above referred to. Mr. Morse appeared in this transaction to be the legal adviser of Messrs. Story & Fort; at this time, Mr. Livingston was and had been for some time a member of the New Orleans bar of great practice and celebrity, and it was not probable that Livingston would employ a lawyer to advise him. Cross-examined by the defendant's counsel to the question if deponent did not know that Mr. Morse was the financial agent of Mr. Livingston, he answered that he did not know that he was."

Money was very scarce in New Orleans in 1822.

"H. Lockett, Esq., the agent of Mr. Livingston, deposed that the complainant had not been in Louisiana since 1829; that he had written to deponent often, that he had changed his domicile to New York; he had property there and voted there. Cross-examined, deponent stated that Mr. Livingston was the

Page 36 U. S. 364

Senator from Louisiana until the year 1831, when he was appointed Secretary of State at Washington; it was then that Mr. Livingston changed his domicile to the State of New York; deponent never saw Mr. Livingston in New York, as he had never been there, but he had received letters, and still received letters from E. Livingston, dated and postmarked New York."

On 3 June 1836, the district court made a decree that the bill of the complainant should be dismissed. The complainant, Edward Livingston having died, his executrix was made a party to the proceedings, and she prosecuted this appeal.

Page 36 U. S. 377

MR. JUSTICE WAYNE delivered the opinion of the Court.

The legal question to be decided in this case depends altogether upon the facts disclosed in the bill, answers, and documentary evidence on the record. The complainant charges that sometime previous to 25 July, 1822, being in want of money, he applied to the defendant and John A. Fort for a loan, offering as security a lot on the batture of the suburb St. Mary, between Common and Gravier Streets in New Orleans, on which a building intended for stores had been

Page 36 U. S. 378

begun; that the defendant and Fort had agreed to lend him $22,936, of which a part only was paid in cash, part in a note of John A. Fort, and $8,000 of which was afterwards agreed between himself, the defendant, and Fort to be paid by Story & Fort to one John Rust, a mechanic, who had contracted with complainant to complete the stores; that to secure the payment of the money borrowed,

complainant conveyed to Fort and Story the lot of ground mentioned, and that contemporaneously with the deed of sale, they executed on their part an instrument in writing, called a counter-letter, by which they promised, on the payment of $25,000 on or before 1 February, 1823, to reconvey to the complainant the property which he had conveyed to them.

The complainant further charges that of the sum of $25,000 to be paid by him on the 1st of February, a part of it was made up by a charge of interest, at 18 percent per annum, upon the amount of $22,936 actually advanced to him, and on his account to Rust, by Fort and Story. The complainant also transferred his written contract with Rust to the defendant and Fort, rendering himself responsible for the proper employment of the $8,000 by Rust, and which was to be paid Rust, in weekly payments, by the defendant and Fort. Rust, on his part, consented to the transfer of his contract and accepted Fort and Story in the place of complainant. The stores were to be completed by Rust by 1 November, 1822, in a workmanlike manner, and all the materials except those already provided were to be found by Rust, and in his contract he renounced all claim or privilege upon the building beyond the $8,000 which was to be paid him by Fort and Story for the complainant.

For the deed of sale from Livingston to Fort and Story -- the counter-letter to Livingston -- Rust's contract, and the transfer of it -- all of the same date, *see* documents, *see* footnotes [Footnote 1]1-3. The complainant further charges that soon after the transaction, he left New Orleans, and that when he returned to it he found that Fort and Story had paid to Rust $8,000 on his account, but that little or nothing had been done towards the completion of the stores, so that if the property had been sold on 1 February, according to the terms of the counter-letter, it would not have produced anything like its full value. That under these circumstances he applied to Fort and Story for further time to make the

Page 36 U. S. 379

payment of the sum loaned, which they would not consent to but on the following conditions: that the property should be advertised for sale on 2 June, 1823; that

the sum due them should be increased from $25,000 to $27,500; which was so increased by the addition of $1,500 as interest at eighteen percent for four months, $800 for auctioneers' commissions, $50 for advertising, and $150 arbitrarily added by the said Fort and Story. The complainant states that, being entirely at the mercy of Fort and Story, he consented to those terms and executed a paper accordingly.

On 2 June, the complainant being still unable to repay the actual sum advanced to him and the additions made by the charge of interest at eighteen percent, &c.;, he applied to Fort and Story for a further extension of the time of sale, which they consented to for two months longer, to 5 August, by which his debt to them was augmented to $27,830.76, he agreeing in writing that if on the last-mentioned day he should fail to pay $27,830.76, then the lot and all the buildings thereon were to become the full and absolute property of Fort and Story. The day came, and the complainant did not pay. The defendant had him protested, as he had before done on 4 February for his noncompliance with his agreement to pay the sum of $25,000, and on that 5 August for his noncompliance with his agreement to pay $27,830.76, and for all damages, costs and charges and interest suffered or to be suffered be the said Fort and Story. The defendant and Fort, after this, continued in possession of the lot and buildings until the death of Fort, which took place in 1828, and after the death of Fort, the defendant Story retained or took possession of the property by an arrangement with the heirs of Fort. It is to be remembered that the possession of the property was given by Livingston to Fort and Story on 22 July, 1822, when the deed of sale and counter-letter were executed.

Here it is proper, for a full understanding of the transaction between these parties, to set out what were the rights of Livingston and obligations of Fort and Story to Livingston growing out of the counter-letter and continued by them on the subsequent agreement

until that of 2 June, when it was stipulated by Livingston that if he failed to pay on 5 August, the property was to become absolute in them.

The counter-letter, after reciting that Livingston had sold and conveyed to them the lot, buildings and improvements, for the sum of $25,000 in cash, declares it to be the true intent and meaning of the parties to said deed of sale, that if Livingston shall pay and reimburse to Fort and Story $25,000, on or before 1 February 1823, then Fort and Story stipulate and bind themselves to reconvey the property to Livingston. And the case of nonpayment, at the stipulated time, then Fort and Story

" *covenant and agree to cause the said property to be sold at public auction, by one of the licensed auctioneers of this city, after twenty days' public notice, on the following terms, to-wit, $25,000 in cash, and the residue in equal payments, at one and two years, the purchasers giving satisfactory endorsed notes, and special mortgage on the property, until final payment. The residue, after deducting the costs attending the sale, to be delivered over to the said Edward Livingston.* "

When the first extension of the time of payment was given, we find substantially the clause of the kind just recited. It will be well to give it in terms.

" *Agreement between Edward Livingston and John A. Fort and Benjamin Story"*

"1st. The sale of lot No. 1, on the batture, with the buildings thereon, to be postponed until 2 June next."

"2d. On that day it shall be sold by McCoy & Co., unless sooner redeemed, after being advertised in the Courier de la Louisiana, in French, and the Orleans Gazette, in English, from 1 May previous to sale."

"3d. The conditions of the sale shall be $27,350 cash, and the residue at one and two years, with special mortgage, but in this sum is included $850, at which the auctioneers' commission and charges of advertisement are calculated, which are to be deducted or reduced to what they shall really amount to, if payment be made before 1 June."

"4th. The overplus, after deducting the cash payment, is to be delivered to Edward Livingston."

"5th. The counter-letter, executed by Messrs. Fort and Story

Page 36 U. S. 381

shall be delivered up, and the registry thereof annulled, immediately after the signature of this agreement, made by duplicate, &c.;"

The defendant begins his answer by denying the right of the complainant to sue in the District Court of the United States for the Eastern District of Louisiana on account of both being citizens of the same state, equivalent to a denial of the jurisdiction of the court over the case.

He then denies positively and repeatedly that Fort and himself, either jointly or separately, ever agreed to lend the complainant $22,936. So far from any loan's having been intended by the parties, he says, the negotiation for the sale of the lots began between Fort and Nathan Morse (the latter of whom he states as having acted for the complainant), and that one of them informed him that the complainant wished to raise money on mortgage; that he peremptorily refused to advance any money to the complainant on mortgage. That this refusal was afterwards made by him to the defendant himself, and for a confirmation of his refusal and understanding of the parties, he refers to two notes of Morse, as a part of his answer, both of them addressed to Fort, the first dated 13 July and the other on the day the conveyance of the lot was made to himself and Fort by Livingston. *Ante,* 36 U. S. 360 . He then states the sale of the lot to himself and Fort, refers to the deed of sale, and generally declares himself and Fort have paid more than the price agreed on for the property so purchased. He then admits the execution, by himself and Fort on the day of the sale of an instrument in writing giving to Livingston the power to redeem whereby, upon the payment of $25,000 on or before 1 February, they were to reconvey the property to Livingston, and if he failed to pay, that Fort and Story were to sell the property so acquired and purchased, and if it brought more than $25,000 that they would give the surplus to the complainant.

The answer then contains the failure of Livingston to pay, the extension of time to him by another agreement to 2 June, on which they agreed to postpone the sale, and that Livingston was to give them a compensation for the additional chance which the time allowed gave him to repurchase the lot. Upon this agreement the defendant relies to prove an absolute bill of sale of the property to himself and Fort at the time of its execution because the fifth and last clause of it annulled the counter-letter. The defendant recites the second failure of Livingston to pay, the

further extension of time to him to 5 August, and Livingston's stipulation (*ante,* 36 U. S. 356), by which, on Livingston's failure to pay $27,830.76 and any further sum that Fort and Story may be under the necessity of paying for the care and preservation of the property, the lot and buildings were to become the full and absolute property of Fort and Story, and Livingston's obligation to *surrender and cancel all and every writing or other document in relation to the property, that may give him any equity of redemption, or other right in the premises, it being the true intent and meaning of the parties that in case of failure of payment, the lot and buildings and appurtenances are to vest in Fort and Story a full title in fee simple forever.*

The defendant insists that Livingston was the guarantor of Rust, for the application of the $8,000 to the completion of the buildings. He then relies upon the 93d and 94th articles of the Civil Code of Louisiana, then in force in the state, to give himself and Fort an absolute and irrevocable title to the property, on Livingston's failure to pay on the 5th of August. The articles relied on are: "The time fixed for redemption must be rigorously adhered to, it cannot be prolonged by the judge," and

"if that right has not been exercised within the time agreed on by the vendor, he cannot exercise it afterwards, and the purchaser becomes irrevocably possessor of the thing sold."

He reiterates his denial of any loan, or that time was given to Livingston to repay a loan, but that the extension of time was to enable Livingston to repurchase, or to effect the sale of the property, and that the increase of the sum from $25,000 to $27,830.76 was the sum demanded by them as the consideration of their waiver of their right to have the sale made at the time the money was payable. The defendant denies the deduction of interest at eighteen percent per annum, or any other.

To the second interrogatory in the bill, he answers that at the time of the purchase, he paid Livingston, in a check on the United States Bank, $12,006.57 in a note of John A. Fort in favor of defendant, due and paid November 25, 1822, $2,764.83, and to Nathan Morse, Esquire, the attorney of Edward Livingston, $1,000, which sum *Morse stated to Story he considered ought to have been paid him by Livingston for effecting a sale of the property.* To the fourth

Page 36 U. S. 383

interrogatory, which is, if Fort and Story did not consent to postpone the sale of the property to the second of June, and did not exact, as a condition of such postponement, that the counter-letter should be cancelled, and that the complainant should pay the sum of $2,500, in addition to the $25,000; and whether the sum of $2,500 was not made up of interest, charged for four months, at 18 percent per annum, of $800 auctioneers' commission, $50 for advertising, and an arbitrary sum of $150, the defendant answers that Fort and himself did consent to postpone the sale, but that he does not know, except from the act, how the additional sum stipulated to be paid by them was composed; nor does he recollect any memorandum containing the items of the additional sum.

In an exhibit by the defendant, we however, have a more precise state of the sum paid to Livingston.

July 26, 1822, Cash paid E. L. $12,006.57

27, 1822, J. A. Fort's note, pay-

able 25 Nov. 2,764.83

Sept. 10, 1822, Cash paid John Rust

at sundry times 8,000.00

Interest . . . . . 2,228.60-$25,000

Thus, substantially confirming the allegation of the complainant that the sum of $25,000 expressed on the deed of sale, as the consideration for the purchase, was made up in part of an amount of interest upon that sum, deducted by Fort and Story contemporaneously with the execution of the deed of sale and counter-letter. There is this difference, too, between the answer of the defendant and the exhibit, that it appears from the latter the sum of $1,000 paid to Morse, which the defendant in his answer alleges to have been paid by him as a part of the consideration for the lot, or on account of Livingston, was not paid to Morse until 12 February, 1824, more than six months after the time when the defendant considered himself and Fort to have acquired a full and absolute title to the property, from the failure of Livingston to pay on 5 August preceding. Upon this item of money paid to Morse, we remark that the letters of Morse (*ante,* 36 U. S. 360), do not prove Morse to have been the agent of Livingston in negotiating the transaction between the parties, but rather that he was, if not altogether the agent of Fort and Story the agent of both

Page 36 U. S. 384

the parties, and that the defendant, without consulting Livingston, graduated the compensation of Morse by his own ideas of the service rendered by him, and chose to pay Morse $1,000 after he considered Livingston had forfeited his right to redeem the property. The answer and exhibit are contradictory upon this point, but the latter being more detailed and certain, it forces the conclusion to which we have come as regards that item. We must remark, too, that the answer and exhibit are also contradictory in a more essential particular, as regards the interest alleged to have been deducted from the $25,000, at the time the deed of sale was executed, the exhibit stating the fact of interest being then deducted, and the

answer denying that *18 percent interest was deducted, or any other.*

Soon after the transaction of 25 July 1822, the complainant left New Orleans, and did not return to it until after the time within which Rust was to have had the buildings completed. They were not finished, however, and this incident deserves a passing notice. The defendant and Fort had required an assignment of Rust's contract to them; indeed it is of the same date with the deed of sale and counter-letter, and seems to have been made by Livingston and Rust for them. It was transferred, with Rust's consent, they undertaking to make weekly payments to him of $666 during the progress of the work, to the amount of $8,000 and Livingston rendering himself responsible for the proper employment of the money by Rust. In a short time, however, the defendant admits that he discovered Rust misapplying the money to some other contract, and that, upon remonstrating with him against such conduct, Rust persisted in a declaration of his intention to expend the money otherwise than in the execution of his contract. Under these circumstances, what should the defendant and Fort have done?

We think, good faith with Livingston, as they had made themselves his agent to disburse $8,000 for a particular object, to which they had become parties by the transfer of the contract, required from them, in Livingston's absence, to have stopped further payments to Rust, notwithstanding Livingston's responsibility for the proper employment of the money; for Rust's obligation to them, under the transferred contract, was to have the stores finished by 1 November, and as they held the funds to be applied to that object, they should have withheld them from Rust when he declared his intention not to do so, and had ceased to work upon the

buildings. Rust's conduct was as much a breach of his contract with them as it was with Livingston, and they should have protected themselves and Livingston, which they could easily have done. Instead of this being done, the defendant admits, he continued the weekly payments to Rust after he had discovered the misapplication of the money, and that but $1,000 of the $8,000 were applied to the buildings.

They neither protected themselves nor Livingston, and it cannot be disguised that the misapplication of the money was much more fatal to Livingston than themselves; for the buildings being unfinished in November, Livingston was deprived of any further resources from them, to aid him in redeeming the property on the 1st of February, by paying the money advanced by them.

This incident gave Livingston a strong claim upon the defendant for an extension of time, and we cannot but remark that it has a bearing in favor of the allegation of the complainant, that by the contract of July, 1825, an absolute sale was not intended. Is it reasonable to suppose that the defendant and Fort, if an absolute sale had been intended, would have calmly seen the misapplication of $8,000 from what they deemed their property, and taken Livingston as a security, upon his general responsibility for Rust; when the defendant himself declares he would not have loaned Livingston money on any account? The consequence of this misapplication of $7,000 by Rust, was to take so much from Livingston's ability to redeem the property. The complainant, however, does not pray to be discharged from this sum, on a settlement of the transaction with the defendant, and therefore, the payment to Rust of $8,000, must be allowed to be a charge against Livingston.

We do not deem it necessary to make a further synopsis of the bill and answer.

They are contradictory in several points, but a careful examination of them, and of the documents and exhibits attached to the answer, has enabled us to fix the legal character of the transaction, throughout, under the laws of Louisiana; whatever may have been the designs of the parties upon each other or their individual intentions when the contract was made on 25 July 1822. The law of Louisiana controls the controversy between these parties, and the first -- indeed, only -- question to be determined is what was the legal character of the contract between them from the execution of the first papers to the last, on 2 June 1823?

The defendant's counsel do not contend, that it was an absolute sale. The defendant's answer shows it was not. He admits Livingston's power to redeem,

and their obligation to reconvey, as expressed in the counter-letter. For although the conveyance of 25 July 1822, is in form a positive sale, yet the counter-letter explains its nature as fully as if it were inserted in that conveyance. Executed as it was at the same time, it is a part of the contract; a separate clause, modifying and explaining the other clause, states the deed of sale; the two must be construed together. The Civil Code of Louisiana says, "all clauses of agreements are interpreted the one by the other, giving to each the sense which results from the entire act." Civil Code, 1808, 270, 5, art. 61. It can make no difference whether these clauses be on one piece of paper, or on two pieces; whether there be two separate instruments, or one instrument containing the substance of the two. The Civil Code of Louisiana does not require that the stipulation of parties, relative to a sale of property, should be in one instrument. They are to be reduced to writing and the parts necessarily make up the entire contract, in this regard corresponding with the rule in equity which makes a defeasance attach itself to a conveyance, absolute in the first instance, converting the latter into a mortgage, as it is expressed by Chancellor Kent, in 4 Kent's Com. 135, treating of mortgages.

"The condition upon which the land is conveyed is usually inserted in the deed of conveyance, but the defeasance may be contained in a separate instrument, and if the deed be absolute in the first instance, and the defeasance be executed subsequently, it will relate back to the date of the principal deed, and connect itself with it so as to render it a security in the nature of a mortgage."

We do not mean to be understood, as applying this rule, to make, under the laws of Louisiana, a constructive mortgage out of an absolute conveyance or deed of sale on account of some other paper explaining or controlling the first, but have used it only as an illustration, that by the law of Louisiana, a contract of sale, and a power to redeem, need not be in one instrument.

The contract of 25 July 1822, not being an absolute sale then, what is it? It is either a conditional sale, vente a remere (sale with the right of redemption), a mortgage, or a pledge. The defendant's counsel say it is the first, a conditional sale, *vente a remere.* We will use their language. They say it is a contract of sale, not a

pure and simple sale, but a sale with conditions, and a right or power of redemption annexed, *vente a remere;* that the right and power of redemption stipulated for in this case is in exact conformity with the provisions of the same code of 1808 in form and substance, and identifies it still farther as a sale, *vente a remere.* That is defined to be "an agreement or paction by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it" (Civil Code 245), and the provision of the code regulating the right of redemption, or that "the time fixed for redemption must be rigorously adhered to, it cannot be prolonged by the judge," and

"if that right has not been exercised within the time agreed on by the vendor, he cannot exercise it afterwards, and *the purchaser becomes irrevocably possessed of the thing sold,* "

just as at common law and in equity, in the case of an absolute sale with an agreement for a repurchase, the time limited for the repurchase must be precisely observed or the vendor's right to reclaim his property will be lost. 1 Poth. on Sale 183; 1 Ves. 405.

But in this instance there was no sale corresponding to the *vente a remere* unless other provisions in the counter-letter than Livingston's right to redeem shall be altogether disregarded. By the counter-letter, Fort and Story covenant with Livingston, upon his failure to pay, that the property shall be sold at auction and that the residue of what it might bring over the sum which they claimed should be paid to Livingston. Upon failure to pay, the land and buildings did not become the property of Fort and Story. The failure to pay only gave to them the right to have it sold according to the terms prescribed for their own reimbursement. Had the contract been a *vente a remere,* the land would have become their absolute property, for the code is

"If the right to redeem has not been exercised within the time agreed on by the vendor, he cannot exercise it afterwards, and the purchaser *becomes irrevocably*

possessed of the thing sold. "

The exclusion of that irrevocable possession by Fort and Story in the counter-letter upon Livingston's failure to pay destroys so principal and effective a provision of the *vente a remere,* that the law will not permit us to consider the contract to have been one of that kind.

The question then recurs what was the nature of the contract of 25 July 1822? It is not a mortgage, because no property in the soil nor right of possession is given by the contract of mortgage

Page 36 U. S. 388

by the law of Louisiana. By that law, a mortgage is defined to be

"a contract by which a person affects the whole of his property or only some part of it in favor of another for security of an engagement, but without divesting himself of the possession thereof."

In this instance, possession accompanied the execution of the deed, and has continued in the defendant. It was a part of the contract, and a feature of it entirely inconsistent with a mortgage, under the laws of Louisiana. The contract then, being neither a sale upon condition, with a power to redeem annexed, a *vente a remere;* we must seek further in the laws of Louisiana, to establish its legal character. After much inquiry and deliberation, and a comparison of the Civil Code of Louisiana with the civil law from which the former derives its origin, and with which it is still in close connection, we have come to the conclusion, that the original contract and counter-letter constituted a pledge of real property; a kind of contract, especially provided for by the laws of Louisiana, denominated an antichresis. By this kind of contract, the possession of the property is transferred to the person advancing the money. That was done in this case. In case of failure to pay, the property is to be sold by judicial sentence, and the sum which it may bring over the amount for which it was pledged, is to be paid to the person making the pledge. In this case, a provision was made for a sale by the parties upon the failure of payment, but this feature of the contract is rather confirmatory of the

contract and counter-letter being an antichresis than otherwise, for it is, at most, only a substitution by the parties of what the laws of Louisiana require, and what we think the law requires to be done by itself, through the functionaries who are appointed to administer the law. But upon this point let the law speak for itself.

The Civil Code of Louisiana says, "the pledge is a contract, by which the debtor gives something to his creditor as a security for his debt." Tit. 20, art. 3100.

"There are two kinds of pledges -- the pawn and antichresis. . . . A thing is said to be pawned when a movable thing is given as security; the antichresis is, when the security given consists in immovables."

Tit. 20, art. 3102.

"The antichresis shall be reduced to writing. The creditor acquires by this contract, the right of reaping the fruits or other revenues of the immovables to him given in pledge, on condition of deducting annually their proceeds from the interest, if any be due to him, and afterwards from the principal of his debt."

Art. 3143.

Page 36 U. S. 389

"The creditor is bound, unless the contrary is agreed on, to pay the taxes as well as the annual charges of the property given to him in pledge. He is likewise bound, under the penalty of damages, to provide for the keeping, and useful, and necessary repairs of the pledged estate, and may levy out of the revenues of the estate sufficient for such expenses."

Art. 3144.

"The creditor does not become proprietor of the pledged immovables by failure of the payment at the stated time; any clause to the contrary is null, and in this case it is only lawful for him to sue his debtor before the court in order to obtain a sentence against him and to cause the objects which have been put in his hands

to be seized and sold."

Art. 3146.

"The debtor cannot, before the full payment of the debt, claim the enjoyment of the immovables which he has given in pledge. But the creditor, who wishes to free himself from the obligations mentioned in the preceding articles, may always, unless he has renounced this right, compel the debtor to retake the enjoyment of his immovables."

Art. 3145.

These appear to us to be equitable provisions, affording ample security to the creditor and fully protecting the rights of the debtor. Especially protecting the latter from a rapacious creditor, who might otherwise push his debtor's necessities into a relinquishment of all his rights in such a contract; to make himself the proprietor of the thing pledged, upon the failure of the debtor to pay. This is a high species of security, over which the law watches benignantly, because, though one of choice and convenience, very frequently, it is commonly the resort of distress in the last alternative, when all other means of raising money have failed. It was this high species of security that Fort and Story received from Livingston, or their contract cannot be comprehended within any of the provisions of the Civil Code of Louisiana. If anything else, it is a contract unknown to the laws of that state. We class it with the antichresis, not because the instrument between the parties provides specifically in every particular for the rights and obligations of parties to the antichresis, but because it does so, in the main and substantial requisites of such a contract, and from those main and substantial particulars in this contract, being irreducible to any other kind of contract provided for by the laws of Louisiana. The property was put into the possession of Fort and Story; they looked to it to reimburse them, upon the failure of Livingston to pay; upon that failure, it did not, from the terms of the counter-letter, become

theirs absolutely; as, we see, would have been the case if it had been a *vente a remere.* It was to be sold at public auction, and if a sale should be made for more than they had advanced, the residue was to be paid to Livingston. But no such sale could be made, without a judicial sentence; such a decree was not obtained; no sale was made, so the parties stood under the contract on the 1st of February, when Livingston first failed to pay, as they did when it was first entered into. It is therefore plain, that Fort and Story acquired no absolute property in the lot and buildings, under the contract of 25 July 1822, and if they did not, it was only a pledge or antichresis for their ultimate reimbursement.

We now proceed to inquire, whether the antichresis was converted into a sale, by the annulment of the counter-letter, after 1 February, 1823, under the agreement of 4 March. It appears by the document (*ante,* 36 U. S. 356), that the complainant did, on the last-mentioned day, execute a paper annulling the counter-letter of 25 July. But supposing the first to have been so annulled; was not the second, in effect and in terms, another instrument of the same kind, only extending the time for redemption upon consideration of Livingston's paying a larger sum than the $25,000 originally expressed in the first deed of sale, and providing still for a sale in the event of Livingston's failing to pay a second time, and giving to him the residue, if any should remain, after they were reimbursed. Consequently, until 2 June, the pledge continued. Livingston, under the agreement of 4 March, could, by paying the money at any time, on or before 2 June, have prevented the sale, and if a sale was made, he was entitled to the overplus.

The defendant in his answer says that he and Fort agreed with Livingston to postpone the sale until 2 June, for which Livingston agreed to pay *them a compensation,* &c.; that he had until 2 June to redeem, but did not do so, and then the property was to have been sold, &c.; Thus showing that the property in his possession continued to be a pledge, and in case of Livingston's not paying, that a sale was to be made, notwithstanding the annulment of the counter-letter. But for what purpose was the counter-letter annulled? Clearly because an increased sum was to be paid to Fort and Story by the second agreement, and not because it was the intention of the parties to alter substantially their respective

rights in the property. The counter-letter, the agreement to sell at a fixed day, and after reimbursing the defendant and Fort,

Page 36 U. S. 391

to deliver the surplus proceeds of the sale to Livingston; the prolonged agreement to sell, after annulling the first counter-letter, without any renunciation of Livingston's right to the overplus, as set forth in defendant's answer, prove conclusively to us that Story regarded the contract to be what it is really made by the law of Louisiana, a contract of pledge; a security for money advanced upon property. We think it was, in its inception, an antichresis, and that it continued so until the 2 June 1823. Did it, after that time, retain its original character?

The agreement of 2 June recites

"That it being the day fixed upon by the contract between Livingston and Fort and Story for the sale at auction of the lot, &c.;, and Livingston having requested that the sale might not take place, for his own accommodation; on condition that Fort and Story would assent to that request, Livingston agreed to increase the sum due to them to $27,830.76 (which they deem the whole of the consideration money paid by them for said lot), and to pay the same on 5 August, then next, and any further sum that they may be under the necessity of paying for the care or preservation of the property, in which case, the property should revert to Livingston. But if he should fail to make such payment, on 5 August, the said lot should become the absolute property of Fort and Story, it being declared to be the true intent of the parties, in case of failure of payment, that the said lot, with all the buildings thereon, are to vest in Fort and Story a full, free and absolute title, in fee simple, forever."

Such an instrument as this would have the effect to vest in Fort and Story an absolute title in the property, if it were not positively controlled by the law of Louisiana. We must administer the law as it is, and having established that the original transaction was an antichresis, and continued so, up to 2 June, it was not in the power of the parties to give to it such a character, as to vest, by the act of

Livingston, an absolute title in Fort and Story.

"In the language of the Code, 1808, tit. Pledge, art. 28, already cited, the creditor does not become proprietor of the pledged immovables by failure of payment at the stated time; *any clause to be contrary is null,* and in this case it is only lawful for him to sue his debtor before the court in order to obtain a sentence against him, and to cause the objects which have been put into his hands in pledge, to be seized

Page 36 U. S. 392

and sold."

If such a clause had been inserted in the original agreement, it would have been void. Can it be more valid because subsequently introduced in a paper having a direct relation to the first contract, and which was intended to alter its character into something which the law prohibits, when it determines the original contract to be one of pledge? We think not. Such an allowance to a creditor would be a precedent, giving to all creditors, in cases of pledges, the power to defeat the benevolent vigilance of the law, preventing them from becoming proprietors of the debtor's property unless by a decree of the court. We think it immaterial whether such covenant be in the original agreement or in a subsequent instrument. In either case, the law is express; the creditor does not become the proprietor by the failure of the debtor to pay, *any clause to the contrary is null.*

It would be difficult to find a case more clearly illustrating the wisdom of this rule than that under our consideration. Story & Fort advanced to Livingston $22,936, and took possession of the lot; looking to Livingston, in the first instance, for reimbursement, and on his failure to pay, to a sale of the lot. Livingston being unable to pay at the time fixed, applied for an extension of time; it is granted, but only upon condition of an addition of $2,500 to his debt, for a delay of four months, thus creating a debt of $27,500, in ten months, upon an advance of $22,771.40. This increase, the exhibit attached to the defendant's answer proves was not on account of expenditures upon, or in the care of the property, for that account

shows the disbursements of the defendant, in the care of the property, up to 5 August 1823, did not amount to $400. When 2 June came, Livingston was still unable to pay, and asked for a further extension of time; it was granted, but by another addition to the debt, or to the amount for which the property was already encumbered, and only upon condition that, upon a third failure, the property was to vest absolute in Fort and Story. This final result is what the law of Louisiana intended to prevent, in cases of pledge, and we know not a case to which it can be more fairly applied. In the enforcement of the law, in this case, we are pleased to find authorities for doing so in the courts of Louisiana. We refer to the cases of *Williams v. Schooner St. Stephens,* 1 Mart.N.S.

417, and *Snydics of Bermudez v. Hanez & Milne,* 3 Mart. 17 and 168.

In regard to the plea of prescription urged in the defendant's answer, we think it inapplicable to a case of pledge, and if it be so, then that plea cannot prevail in this case, because the time had not elapsed which the law of Louisiana gives to a person to sue for immovable property.

It now only remains for us to dispose of the defendant's protest, in the beginning of his answer, against the jurisdiction of the Court in this case. The 23d rule of this Court for the regulation of equity practice in the circuit courts has been relied on to show that it is competent for the defendant, instead of filing a formal demurrer or plea, to insist on any special matter in his answer, and have the same benefit thereof as if he had pleaded the same matter or had demurred to the bill. This rule is understood by us to apply to matters applicable to the merits, and not to mere pleas to the jurisdiction, and especially to those founded on any personal disability, or personal character of the party suing, or to any pleas merely in abatement. In this respect it is merely affirmative of the general rule of the court of chancery, in which matters in abatement and to the jurisdiction, being preliminary in their nature, must be taken advantage of by plea, and cannot be taken advantage of in a general answer, which necessarily admits the right and capacity of the party to sue. *Wood v. Mann,* 1 Summ. 506.

In this case, the judgment of the court below is reversed, and a decree will be entered accordingly.

[Footnote 1]

Deed. In the City of New Orleans, State of Louisiana, on 25 July 1822, and in the forty-seventh year of the Independence of the United States of America, before me, Hughes Lavergne, a notary public, duly commissioned and qualified, in and for the City and Parish of New Orleans, residing therein, and in the presence of the subscribing witnesses hereinafter named, personally appeared Edward Livingston, of this city, counselor-at-law, who declared to have granted, bargained and sold, and doth by these presents grant, bargain and sell, with all lawful warranty, unto John A. Fort and Benjamin Story of this city, merchants, here present and accepting, all that parcel of ground situated on the batture of the suburb St. Mary, between Common and Gravier Streets, measuring eighty-two feet, fronting Common Street, one hundred and twenty-six feet or thereabouts, fronting Tchoupitoulas Street, one hundred and forty-six feet or thereabouts, fronting New Levee Street, and bounded on the other side by the lot of ground belonging to Messrs. Livermore, Morse, and Miller & Pierce, containing one hundred and twenty feet or thereabouts, the said parcel of ground sold, together with the buildings, improvements, and all other appurtenances to the same in any wise appertaining or belonging, without any exception or reserve, the said purchasers declaring that they are perfectly acquainted with the premises, and do not wish for any further description of the same. The above-described property belongs to the said vendor by virtue of the compromise entered into between him and the heirs of Gravier by act before Carlisle Pollock, notary public of this city, under date of 3 May 1818, and is free of mortgage, as appears by the recorder's certificate, delivered this day and hereunto annexed. This sale is made for and in consideration of the sum of $25,000, which price the said vendor acknowledges to have received from the said purchasers, out of the presence of the undersigned notary and witnesses, renouncing the exception *non numerata pecunia* and giving by these presents to the said purchasers a full and entire acquittance and discharge of the said sum of $25,000. In consequence of which payment the said

vendor doth hereby transfer and set over unto the said purchasers all his rights of property on the above parcel of ground and buildings thereon, consenting that they should take immediate possession of the said premises now sold, to have, hold, use and dispose of the same as fully belonging to them by virtue thereof. This done and passed in my office in the presence of John Baptiste Desdunes, Jr., and Charles Janin, witnesses, residing in this city, who, together with me, the said notary, have signed this act, after the same had been fully read and understood. The contracting parties having previously signed.

[Footnote 2]

Counter-Letter. Whereas the said Edward Livingston, by act before H. Lavergne, notary public, hath this day sold and conveyed to said Fort & Story a certain lot of ground situated on the batture in front of the Faubourg St. Mary and designated as lot No. 1 on the plat thereof deposited in the office of the said notary, together with all the buildings and improvements thereon, for the sum of twenty-five thousand dollars in cash.

Now be it known, and it is the true intent and meaning of the parties to said deed of sale, that if the said Edward Livingston shall pay and reimburse to said John A. Fort and Benjamin Story the aforesaid sum of twenty-five thousand dollars on or before 1 February, 1823, then and in that case the said Fort & Story stipulate and bind themselves to reconvey the said property above described to said Edward Livingston. And in case of nonpayment of the said sum of twenty-five thousand dollars on or before the day as above stipulated, then the said Fort and Story covenant and agree to cause the said property to be sold at public auction by one of the licensed auctioneers of this city after twenty days' public notice on the following terms, to-wit, twenty-five thousand dollars in cash and the residue in equal payments one and two years, the purchaser given satisfactory endorsed notes and special mortgage on the property until final payment. The said residue, after deducting the costs attending the sale, to be delivered over to the said Edward Livingston. And the said Edward Livingston, on his part, having taken cognizance of this agreement, declares himself to be perfectly satisfied and contented therewith and gives his full and free assent to the terms of sale and all

the conditions as above stipulated.

[Footnote 3]

Agreement with John Rust. It is hereby agreed between Edward Livingston and John Rust as follows: first, that the said John Rust engages, for the price hereinafter mentioned, to finish the sixteen stores now commenced and brought up to the ground floor, situated at the corners of Tchoupitoulas, Levee and Common Streets according to the plan and elevation signed by them and delivered to the said Edward Livingston, except that the said stores, instead of three, are to be only two stories high, to be covered in terrass. The whole to be finished by 1 November next in a workmanlike manner, and all the materials, except those already provided, to be found by the said John Rust. And the said Edward Livingston agrees to pay to the said John Rust eight thousand dollars in weekly payments of six hundred and sixty-six dollars each during the progress of the work. And the said John Rust declares that he renounces any kind of claim or privilege upon the said building beyond the said eight thousand dollars to be paid as aforesaid.

Know all men by these presents, that I, Edward Livingston, for myself and my representatives, do hereby transfer and assign the within contract to John A. Fort and Benjamin Story they complying with the stipulations on my part therein contained, and John Rust being here present, consents to the said transfer, and accepts the said John A. Fort and B. Story in the place of Edward Livingston. Dated 25 July, 1822. I do further agree to allow the said weekly payment of six hundred and sixty-six dollars to be charged to me, rendering myself responsible for the proper employment thereof by the said John Rust.

[Footnote 4]

"Agreement between Edward Livingston, and John A. Fort and Benjamin Story of the other part, as follows:"

"1st. The sale of lot No. 1, on the batture, with the buildings thereon, to be postponed until 2 June next."

"2d. On that day, it shall be sold by McCoy & Company unless sooner redeemed, after being advertised in the Courier de 1a Louisiane, in French, and the Orleans Gazette, in English, from 1 May previous to the sale."

"3d. The conditions for the sale shall be $27,350 cash, and the residue at one and two years with special mortgage, but in this sum is included $850, at which the auctioneers' commission and charges of advertisement are calculated, which shall be deducted or redueed to what they shall really amount to, if payment be made before 1 June."

"4th. The overplus, after deducting the cash payment, is to be delivered to Edward Livingston."

"5th. The counter-letter, executed by Messrs. Fort & Story shall be delivered up, and the registry thereof annulled, immediately after the signature of this agreement, made by duplicates, this 4 March, 1823."

[Footnote 5]

"In the City of New Orleans, State of Louisiana, on 2 June 1823, the forty-seventh year of the independence of the United States of America, before Mr. Hughes Lavergne, notary public, duly commissioned and qualified in and for the City and Parish of New Orleans, residing therein, and in the presence of the undersigned witnesses hereinafter named, personally appeared, Edward Livingston, counselor-at-law, of this city, on the one part, and John A. Fort and Benjamin Story of this city, merchants, of the other part, which said appearance declared that this being the day agreed on by contract, between Edward Livingston and the said Fort and Story for the sale, at auction, of lot No. 1, situated on the batture, in the front of Fauxbourg St. Mary, and the said Edward Livingston having requested that said sale might not take place, for his own accommodation, the said Fort and Story have agreed to the said Livingston's request, on the following conditions, to-wit: that on or before 5 August, he, the said Livingston, shall pay to the said Fort and Story the whole amount of the consideration money paid by them for the said lot -- that is to say, the sum of $27,830.76, and also any other sum they may be under

the necessity of paying for the preservation of the said property, then the lot and buildings to revert to the said Livingston and to become his property, and in case the said Livingston should fail, on the day above mentioned, to-wit, 5 August next, to pay to the said Fort and Story the sums above specified, then and in that case, the said lot with all the buildings thereon, are to become the full and absolute property of the said Fort and Story, and the said Livingston hereby engages thereupon to surrender and cancel all and every writing or other document in relation to said property that may give to him any equity of redemption or other right to the same premises, it being the true intent and meaning of the parties that in case of failure of payment as aforesaid, that said lot, with all the buildings and appurtenances to the same belonging, are to vest in said Fort and Story a full title in fee simple forever."

"Thus done and passed in my office, on the day, month and year above written, in the presence of J. B. Desdunes, Jr., and Charles Janin, witnesses, residing in this city and requested to be present, who, together with the parties, signed this act, as well as me the said notary, after the same had been fully read and understood."

[Footnote 6]

"To John A. Fort, Esq., Present."

"Messrs. John A. Fort and Story will oblige Mr. Livingston by sending in writing their definitive terms -- that is, what sum will they give in cash; what sum they retain in their own hands to appropriate towards the building; what sums, and at what periods they give their notes; that they must have an absolute sale of the lot and buildings free from all encumbrances and a transfer of the contract, and are to put in immediate possession, the property to be returned in case the money is refunded punctually, at the expiration of __ months."

"To Mr. John A. Fort, Present."

"Messrs. Fort and Story are requested to meet at Lavergne's office, corner of Royal and St. Louis Street, this day, at 12 o'clock for the purpose of completing the arrangements for the batture."

"Friday, 26th July [Signed] N. MORSE"

MR. JUSTICE BALDWIN, dissenting.

When this case was before the Court at a former term, I dissented from the judgment then rendered, being of opinion that the case ought to be decided by the law of Louisiana, not the code of equity adopted from the English system into the jurisprudence of the United States, as the Court then decided. As the civil law was admitted to have been in force in that province, before its cession to the United States, and remained afterwards the basis of the jurisprudence of the state, with only such modifications as were made by their local laws; I felt it to be the duty of this Court to administer it, as it does the law of other states, "precisely as the state courts should do." 27 U. S. 2 Pet. 656; 30 U. S. 5 Pet. 400. It is admitted, that in the code of the civil law, there is no

Page 36 U. S. 394

discrimination between the law and equity jurisdiction of its courts, either in the principles or mode of proceeding; the process and rules of judgment are the same, without regard to the nature of the right asserted or the remedy sought. This contradistinction exists only in the jurisprudence of England, and the states which have adopted it; nor can it exist elsewhere unless the common law prevails. The jurisdiction of courts of equity, separately from those of common law, is a necessary part of the common law, though the forms of proceeding are borrowed from the civil law, yet the principles and rules of decision are those of the law of England, by which the judge is as much bound as in a court of law. By the adoption of its forms, an English court of chancery no more adopts the civil law, as a code of system of jurisprudence, superseding the common law, than it does the decrees of the Emperor, in place of acts of Parliament. Both systems remain as distinct, as if the modes of proceeding differed as much as the two systems, and though the civil law forms are better adapted to equity proceedings than those of the common law, there is another incompatibility between the two systems. The separation of cases in law from those in equity is a necessary incident of the common law; one part of the system cannot be engrafted on the civil law without

the other; of consequence, the introduction of the equity part of the common law into a state which has adopted the civil law necessarily displaces it and introduces a system of jurisprudence wholly at variance therewith.

This conclusion is the result of the opinion and reasoning of the Court, which is applied to all *civil causes* in the courts of the United States, in that state, 34 U. S. 9 Pet. 656-657, for if the English system of equity is in force, because there is no court of equity, the whole common law is also in force, because there is no court of law, contradistinguished from equity; on this ground alone, my objections to the former decision were insuperable. By the third article of the Louisiana treaty, the inhabitants are guaranteed "in the free enjoyment of their liberty, property and the religion which they profess." 8 Stat. 202. "That the perfect inviolability and security of property is among these rights all will assert and maintain." 34 U. S. 9 Pet. 133. "An article to secure this object, so deservedly held sacred in the view of policy as well as of justice and humanity, is always required, and is never refused." 25 U. S. 12 Wheat. 535; 31 U. S. 6 Pet. 712; 33 U. S. 8 Pet. 86-88. "According to the established principles of the laws of nations, the laws of a conquered or ceded country remain in force

Page 36 U. S. 395

till altered by the new sovereign." 34 U. S. 9 Pet. 747. This principle was recognized by Congress by the 11th section of the act of 1804, organizing the government of Louisiana; the 4th section of the Act of 7 March, and the 9th section of the Act of 3 March, 1805.

"The laws in force in the said territory at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force until altered, modified or repealed by the legislature."

2 Stat. 286, 322, 332. Congress extended none of the provisions of the judiciary or process acts to Louisiana, and instead of reserving to themselves the power of altering the local laws by those acts, expressly declared that power to be in the local legislature. These were solemn pledges, which the legislative power of the

United States had never attempted to violate, nor, in my opinion, could violate without disregarding the faith of the treaty; to my mind, a guarantee of property is inconsistent with the abrogation of the laws under which property is acquired, held, and regulated, and the consequent substitution of a code to which the people were utter strangers. Satisfied that if there could be a power to change the laws of a ceded country, it was in the legislative, and not the judicial department of the government, I considered these provisions of the acts of Congress to be as imperative on this Court as any other laws were, or could be.

A reference to the terms of the process act of 1792 will show that it could not apply to a state in which the civil law prevailed, for it directs the modes of proceeding "in suits at common law," and "in those of equity, and maritime and admiralty jurisdiction, according to the rules," &c.;, which belong to courts of equity, and to courts of admiralty, as contradistinguished from courts of common law. 1 Stat. 276. These terms necessarily exclude its application to a system in which there was no such contradistinction, but in the act of 1824 the term is peculiarly appropriate to the law of Louisiana: "That the mode of proceeding in all civil causes, &c.;" 4 *id.* 62. The reason was obvious; there was but one mode of suing, whatever may be the cause of action. Congress thus declared that the laws of the state regulating the practice of their courts shall be the rule in the courts of the United States therein; so it had been for twenty years, and the state practice was confirmed, subject to such rules as the district judge might make. So it was construed and declared by this Court in 1830.

"If no such rule had been adopted, the act of Congress made the practice of the state the rule for the

Page 36 U. S. 396

court of the United States. Unless, then, such a special rule existed, the court was bound to follow the general enactment of Congress on the subject and *pursue the state practice.* "

Parsons v. Bedford, 3 Pet. 445; *S.P., 28 U. S. Armor,* 3 Pet. 424. In *Duncan v. United States,* the Court, after reciting the act of 1824, was still more explicit.

"This section was a virtual repeal within the State of Louisiana of all previous acts of Congress which regulated the practice of the courts of the United States and which come within its province. It adopted the practice of the state courts of Louisiana, subject to such alterations as the district judge might deem necessary to conform to the organization of the district court and avoid any discrepancy with the laws of the Union."

32 U. S. 7 Pet. 450.

"As the act of 1824 adopted the practice of the state courts, before this Court could sanction a disregard of such practice, it must appear that by an exercise of the power of the district court or by some other means the practice had been altered. On a question of practice, under the circumstances of the case it would seem that the decision of the district court as above made should be conclusive. How can the practice of the court be better known or established, than by its own solemn adjudication on the subject?"

Id., 32 U. S. 451 -452.

The act of 1828 is still more conclusive when taken in connection with the decision of this Court on the process act of 1792.

"In order to understand the bearing which the instruction moved for has upon the cause, it is necessary to remark that the State of Ohio was not admitted into the Union till 1802, so that the process act of 1792, which is expressly confined in its operation to the day of its passage, in adopting the practice of the state courts into the courts of the United States, could have no operation in that state. But the district court of the United States, established in the state, in 1803, was vested with all the powers and jurisdiction of the District Court of Kentucky, which exercised full circuit court jurisdiction, with power to create a practice for its own government."

26 U. S. 1 Pet. 612.

This decision was made in 1828, and the same view was taken five years afterwards in *Duncan v. United States.*

"Nor did the act [of 1792] apply to those states which were subsequently admitted into the Union. But this defect was removed by the Act of 19 May, 1828, which placed all the courts of the United States on a footing in this respect except such as are held in the State of Louisiana."

32 U. S. 7 Pet. 451.

This act uses the same terms as the process act of 1792, in referring

Page 36 U. S. 397

to cases in law, equity and admiralty, and so would not be applicable to Louisiana. Congress, however, did not leave this matter open to any doubt; the fourth section is peremptory:

"That nothing in this act contained shall be construed to extend to any court of the United States which is now established or which may hereafter be established in the State of Louisiana."

4 Stat. 282.

There is no phrase so potent as this, *"nothing in this act shall be so construed;"* it has not only the effect of an exception, a limitation or proviso; it is a positive and absolute prohibition against any construction by the judicial power by which the thing prohibited shall be sanctioned. The effect of these words in the 11th Amendment of the Constitution has been adjudged by this Court to annul all jurisdiction over cases actually pending therein, past, present and future, though the Constitution had expressly given jurisdiction in the very case. 3 U. S. 3 Dall. 382-383; 19 U. S. 6 Wheat. 405-409. "A denial of jurisdiction forbids all inquiry into the nature of the case." 22 U. S. 9 Wheat. 847. "The Constitution must be construed as it would have been had the jurisdiction of the Court never been

extended to it." *Id.* at 22 U. S. 858 ; *S.P.,* 22 U. S. 9 Wheat. 206-207, 22 U. S. 216 ; 25 U. S. 12 Wheat. 438-439.

No construction, therefore, can be put on the act of 1828 which will make it applicable to the practice of Louisiana; how, then, this Court could apply the act of 1792 in direct opposition to the subsequent acts of 1804, 1805, 1824 and 1828 was and is to me a matter of most especial surprise. The provisions of the acts of 1792 and 1828, so far as they refer to the rules &c.;, of courts of law, and of equity jurisdiction, as contradistinguished from each other, are identical; it was therefore perfectly nugatory to exclude Louisiana from the operation of the act of 1828 and leave the act of 1792 in force within that state. It was worse than idle; it was a solemn mockery, a legislative farce, a trifling with the people of that state, after a uniform course of legislation for twenty-four years, on a subject upon which all people are peculiarly sensitive -- their local laws, usages and customs.

Accustomed to the civil law, the first settlers of Louisiana, their descendants and emigrants thereto cling to it as we of the old states do and our ancestors did cling to the common law as a cherished inheritance. Had Congress declared in 1804 what this Court did in 1835, or had there been a fifth section to the act of 1828 enacting that the process act of 1792 was in force in Louisiana, it may well be imagined what would have been the state of public

opinion. No such imputation rests on the legislative department as would be fastened on its faith if, in either their first or last act, in professing to maintain and protect the people in their property according to the plighted faith of the treaty of cession, had been to deprive them of their laws, and force a foreign system upon them. Nor for more than forty years after the act of 1792 and thirty years after the acquisition of Louisiana had there been an intimation from this Court that that act applied to the courts of the United States within it, either as a territory or a state of the Union; the contrary had been declared and adjudged. In 1828 it was decided that this act applied only to the states then composing the Union. 26 U. S. 1 Pet. 612. The declaration was repeated in 1833, 32 U. S. 7 Pet. 451, and to leave no

room even for discussion, this Court at the same time held that the act of 1824 was a virtual repeal of all previous acts of Congress on the subject. 32 U. S. 7 Pet. 650. When this case came up in 1835, it had been decided by this Court that the act of 1792 never was in force in the new states, and that it was repealed as to Louisiana; the act of 1828, which applied to the other new states, was expressly prohibited from being applied to Louisiana, yet the act of 1792 was declared to be in force them.

If I am capable of comprehending this decision, it repeals five acts of Congress, directly overrules three previous solemn decisions of the Court, revives an act which had been repealed, extends to Louisiana a law which never applied to any other new state, and overthrows everything which carries with it legislative or judicial authority. As a precedent, it is of the most alarming tendency; no question, in my opinion, can be settled if this was an open one in 1835. Congress may legislate and this Court adjudicate in vain if the acts of the one and the judgments of the other are thus to be contemned. My respect for both forbids my assent to such a course or my acquiescence in a principle which must absolve judges from their obligation to follow the established rules of their predecessors in the construction of laws and the settled course of the law.

Having entirely dissented from a rule laid down by this Court in *Green v. Lessee of Neal,* 6 Pet. 299, wherein the majority of the Court put and answer the question

"Would not a change in the construction of a law of the United States by this tribunal, be obligatory on the state courts? The statute, as last expounded, would be the law of the Union, and why may not the same effect be given to the last exposition of a local law, by the state court? "

Page 36 U. S. 399

That the principle of *"legis posteriores priores contrarios abrogant"* is sound when applied to legislative acts all admit, but it is an innovation upon all rules to apply it as a general rule to the exposition of statutes which have received a settled construction by a court of the last resort. It is an assumption of legislative power

and a reversal of the established principle that judges cannot amend or alter the law, but must declare what it is, and from the very nature of such a rule as is laid down in *Green v. Neal,* the law can never be settled so as to be binding on the judges of this Court, as is most clearly illustrated in this case.

In 1835 there had been three solemn decisions, either of which was conclusive, that the act of 1792 was not in force in Louisiana, and there had been an uninterrupted course of practice in the district court of the United States, sanctioned by acts of Congress and this Court for more than thirty years. One judge only dissented in the case of *Parsons v. Bedford,* but it was because, in his opinion, the Court did not adhere with sufficient strictness to the state practice. 28 U. S. 3 Pet. 452. In the cases in 26 U. S. 1 Pet. 612 and 32 U. S. 7 Pet. 450, the Court appears to have been unanimous; all the Judges had then concurred in opinion on the very point which arose at the former argument, and the act of 1828 was a direct legislative sanction of the judgment of the Court in the former case, being adopted to cure the defect of the nonapplication of the act of 1792 to the new states. There were but five judges present, who took part in the former decision, two of whom dissented, so that the case was determined by only three judges. I do not mean to assert that the effect of a judgment depends on the mere number of judges who concur in it, but I do assert most distinctly that such a decision does not settle the law in opposition to *three* previous solemn and unanimous adjudications. If the question thus decided remained open, there is, to my mind, neither reason, precedent, nor principle, to sanction the doctrine that any judge is bound by the *last* decision when he is not bound by *former* ones. When *three* last decisions can be overruled, it is strange that one cannot be. The decision of 1833 was the last before another was made. The act of 1792 was then declared to have been repealed, and never to have been in force in Louisiana, yet no respect was paid to it or the one in 1830 or 1828; neither of them was thought deserving of even a passing notice or the most remote reference to them. The act of 1828 was treated in the same manner, as alike unworthy of attention.

Had any other department or officer of the government any circuit or district court of the United States, or any state court thus drawn a sponge over these acts of Congress and our repeated decisions upon them, it would have been justly deemed a disregard of the constituted authorities.

I freely admit that a court may and ought to revise its opinions when, on solemn and deliberate consideration, they are convinced of their error. It is often done, though never without the fullest investigation; even then, one decision does not settle the law; when they are contradictory, the matter is open for future research. There is no more certainty that a last opinion is more correct than the first. Generally speaking, a construction of a law nearest the time of its passage is most respected and is adhered to, though there may be doubts about it, on the principle of *"stare decisis."* But it is believed to be unprecedented to consider a subsequent decision that omits any reference to prior ones and from some cause overlooks them, though they are in point and by a court of the last resort, as having settled the law. If, however, such is the rule, it necessarily follows that it can only remain until another last decision shall be made restoring the old law or making a new version of it.

A judge who, in 1835, was at liberty to make a last construction of a law is certainly as free in 1837 as he was two years before. The very principle of this case is that prior decisions, though unanimous, are not binding; the next in point of time by a divided court can then be of no more authority, and *a fortiori* one such opinion cannot outweigh three contrary ones unless every last decision has the same effect whenever a present majority may think fit to make one. To such a principle I can never yield assent unless in the last judgment of this Court all prior ones have been fully considered, the more especially on such a subject as is involved in this case, in which we were called on to repudiate the laws of a state of this Union and substitute therefor, by judicial power, a system equally repugnant to the habits, the customs, and the choice of the people. In introducing into Louisiana that part of the law which constitutes the law and practice of courts of equity, the other part of the same system, being commitant, cannot be excluded; if it is to be done or can be done, it is only by the legislative power.

These were my reasons for dissenting from the judgment heretofore rendered in this cause; they still operate on my mind in their full force; they are, indeed, strengthened by the judgment now

Page 36 U. S. 401

given, which seems to me as repugnant to the former as that was to all former ones and the existing laws.

The controversy between these parties is respecting real property of great value; the plaintiff claims it subject to a payment of a certain sum of money; the defendant claims it as his own absolutely by purchase from the plaintiff pursuant to several contracts made according to the forms of the law of Louisiana. The suit was commenced by a bill in equity, according to the form of process adopted to such courts and contrary to the practice of the district court from the first organization of a territorial government in Louisiana in 1804 till the filing of the bill in 1834. A demurrer was put in assigning two causes.

1. That plaintiff had not set out such a case as entitled him to any discovery or relief in any court of equity in the state.

2. That by the bill it appeared that the transaction complained of was between the plaintiff, on one side, and the defendant and one Fort, on the other, whose heirs were not made parties, 9 Pet. 6 [argument of counsel -- omitted], 34 U. S. 36 ; that this was necessary by the law and practice of Louisiana was admitted.

It was not a matter of mere form or practice that the heirs of Fort should be made parties; the transaction was a joint one. Story had purchased from Fort and paid him a large sum of money for his interest in the property. To Story, therefore, it was highly important that when the original transaction was to be unraveled, he should not alone be held answerable to the plaintiff and be compelled to reconvey without his partner's being compelled to contribute. By the law of the state, he had a right to this protection; it was equitable, too, that the plaintiff should be compelled to call into court all the parties who had been concerned; to the defendant, it was but justice that he should not be put to his remedy against his associate and the

consequences be visited on him alone. This right to have the heirs of Fort brought in was absolute had the plaintiff sued in the mode prescribed by the law and practice of the state; it was a substantial benefit to Story of which he could have been deprived in no other way than on abrogation of the established course of proceeding then in force in the state. This was done by the court in overruling the demurrer on both points; they declared that the process act of 1792 applied to the case, and as the defendant, at the time of filing the bill, was the only person claiming or possessing the property, none other need be made a party. 34 U. S. 9 Pet. 658-659.

By the terms of this act,

"The forms and modes of proceeding in suits in equity . . . which

Page 36 U. S. 402

are to be pursued in the federal courts, are not confined to the mere process employed;"

it is to be "according to the principles, rules and usages which belong to courts in equity,", &c..; 1 Stat. 276. When it is recollected that there is no statute in England which defines the jurisdiction of these courts or prescribes their course, the whole law or code of equity jurisprudence is necessarily made up of its own "principles, rules and usages," which make it a system, as contradistinguished from that which prevails in courts of law. When, too, we look to its adoption by the judiciary and process acts, it is at once apparent that its effects go far beyond forms and practice; if it is in force in Louisiana, it does not stop at substituting an *English bill* for *a civil law petition;* the whole law of equity, as a distinct code, necessarily accompanies it by the very words of the act of 1792. So it must have been understood by the court, or they would have directed the heirs of Fort to be made a party to "a bill of equity," as they must have done had the proceeding been by petition. On this point their language is most explicit in using the very words of the act of 1792.

"And that in the modes of proceeding, that court was required to proceed according to the principles, rules, and usages which belong to courts of equity, as contradistinguished from courts of law."

34 U. S. 9 Pet. 655. So again,

"As the courts of the Union have a chancery jurisdiction in every state, and the Judiciary Act confers the same chancery powers on all and gives the same rules of decision, its jurisdiction in Massachusetts [and of course in Louisiana] must be the same as in other states."

34 U. S. 9 Pet. 656. And if no such laws and rules applicable to the case exist in Louisiana, then such equity powers must be exercised according to the principles, usages, and rules of the circuit courts of the United States, as regulated and prescribed for the circuit courts in the other states of the Union. 34 U. S. 9 Pet. 660. There can therefore be no mistake in considering that the whole system of English equity jurisprudence henceforth is the law of Louisiana, both in form and substance (*see* 34 U. S. 659), if the judgment first rendered in this case is the settled law of the land.

In its present aspect, then, the suit must be taken as a bill in equity, to be decided on and by the same principles, rules, and usages which would form the law of equity in a circuit court of any other state. In so viewing this case, there seems to be insuperable objections to the relief prayed for in the bill, even on the plaintiff's own showing, and the documents referred to.

Page 36 U. S. 403

The first contract between the parties was, in form, an absolute sale, in July, 1822, for the consideration of $25,000; of even date there was a defeasance or counter-letter, stipulating for a reconveyance, on payment of that sum, in February, 1823, and in case of nonpayment, the property to be sold. In March, 1823, an agreement was made extending the time till June, stipulating the terms. The sale was postponed at plaintiff's request, and a new agreement made whereby he was to

pay Fort and Story $27,830 on 5 August, otherwise the property was to be absolute in them and the defeasance to be cancelled so as to bar any equity of redemption, the declared intention being "to vest in Fort and Story a full title, in fee simple, forever." The plaintiff not paying the money, the defeasance was cancelled, and Fort and Story remained in the possession and enjoyment of the property. In his bill the plaintiff alleges that the original transaction was a loan of money for the security of which the contracts were executed, and rests his whole case upon that allegation; he avers no fraud or unfairness on the part of Story or Fort, no ignorance of his rights, or of any fact or matter in any way material to him, when the subsequent agreements were made. His only equity is in averring that the property was worth more than the sum he had received, his inability to repay it, owing to the great pressure for money in 1822 and 1823, the nonapplication of $7,000, which sum was to have been expended in improvements on the property, and that it was worth $120,000 at the time of suit brought in 1834. In such a case, a court of equity would look for the equity of the case in the acts of the plaintiff, in March, June, and August, 1823, and if not satisfied that the release of all right of redemption and the agreement that the right of Fort and Story should become absolute in fee simple was made in ignorance by the plaintiff or by fraud or imposition by the defendant, the plaintiff could have no standing in court. Admitting the first contract to have been a mortgage, the parties voluntarily changed its nature on the application of the plaintiff; his object was to avoid a sale and to gain time till the pressure subsided, but finding it continuing, he preferred making the transaction an absolute sale rather than expose the property to a public sale during the pressure.

If better terms could have been obtained than were offered by Fort and Story, or if the averment in the bill that it was worth

$60,000 in 1823 was true, it is incredible that the plaintiff should have been so desirous of keeping it out of the market or that he would have entered into the agreement of June if he could have obtained a better price from others. Be this, however, as it may, the mere inadequacy of price is of no consequence in equity;

courts will never set aside a contract on this ground if it is free from all other objections; the agreements of March and June were solemn, deliberate, and executed according to the solemnities of the civil law, and were binding by all the rules and principles of the English system of equity. By that law, Mr. Livingston was not a minor, deemed incapable of managing his own affairs; neither is ignorance of the law or facts of his own case imputable to him, and he shows in his bill no reason why he should not be bound by his contracts or why he should have them annulled.

As a mortgagor, in the first instance, a court of equity would protect him against any unfair release of his equity of redemption to the mortgagee; yet if fairly made, it would be as valid as if he had conveyed it to a third person. So far from any equity's arising to him from the rise in the value of the property from 1323 till 1834, it is, in my opinion, a strong circumstance in favor of the defendant, who advanced his money during a severe pressure, when he could have purchased this property at auction at a rate below its estimated value proportioned to the demand for money or have purchased from others. This ground of relief, however, entirely fails when we consider the answer of the defendant; he denies the whole equity of the bill, as well as every allegation on which it rests; the answer is responsive to the bill, is full and explicit, and the plaintiff has not disproved one fact or averment contained in it, nor proved any one matter averred in his bill. It is distinctly denied that the original transaction was a loan; that the property was worth more than the sum to be paid for its reconveyance, or to prevent a sale; the nonapplication of the $7,000 is accounted for in a manner which throws on the plaintiff all its consequences and shows it to have been by his own acts and those of the person for whom he was surety to the defendant. These circumstances alone would take from him any standing in a court of equity in England or any circuit court of a state.

Another view of the case is equally conclusive, on an inspection of the bill, answer and exhibits. The plaintiff did not rest his case on the documentary evidence; he averred the transaction to have been different from what was expressed

in the written agreement and called for the aid of a court of equity to compel the defendant to disclose the real nature and character of the original contract and the true intention of the parties on his oath. By this he made the answer to the bill and interrogatories evidence; it is directly responsive, full and positive, and supported by evidence of the most satisfactory kind; the written application of the plaintiff's agent to Fort and Story on 13 July, preceding the first agreement. *See ante,* 36 U. S. 360 . No attempt was made by the plaintiff to prove the averment that a loan was intended, so that there was nothing in the case which could vary the terms of the writing. The only original contract was, then, the conveyance, and the defeasance or counter-letter in connection, as one agreement, the terms of which show its legal character to be a conditional sale and not a mortgage when tested by the rules of equity as recognized by this Court.

To make such a transaction a mortgage, it is indispensable to show that the party receiving the money was bound to repay it, unless it clearly appears from the evidence that a loan was intended and that the form of a sale was adopted as a cover for usury. The principal and interest must be secure; there must be a remedy against the person of the vendor or the borrower, and clear proof that he was liable. 11 U. S. 7 Cranch 236-237; 34 U. S. 9 Pet. 445-454. If it is not proved by extrinsic evidence that a loan was intended and the party bound to repay it, it matters not how extravagant the terms of repurchase may be; the redemption must be on the day stipulated, or the estate vests absolutely if the principal was at hazard. 34 U. S. 9 Pet. 455, 34 U. S. 459 . Inadequacy of price is not a circumstance which will convert a conditional sale into a mortgage, 11 U. S. 7 Cranch 241, and if the party makes no claim to the property while the other is in possession making valuable improvements on it without any notice of an intention to assert a right of redemption, a court of equity will not aid him. 11 U. S. 7 Cranch 240.

In the counter-letter, Mr. Livingston is not bound to repay the money; Fort and Story had no remedy against him; had the property sold for or been worth less than the sum advanced, the loss was theirs. There is an averment in the bill that the plaintiff was liable, but it is expressly denied by the answer, and the plaintiff

has not offered a spark of evidence to contradict it; the protest made in August was not to found an action, but was made as authentic evidence of the fact of nonpayment and to silence the pretensions of the plaintiff, as is expressly sworn to in the answer. It

Page 36 U. S. 406

is also positive as to the value of the property as the time and afterwards.

"This deponent was repeatedly offered after 1823 by John A. Fort the half of the property at cost and charges, which he refused, considering the property not worth it. It has been only the rise of all property in that part of the city where it is situated that has saved them from loss."

Rec. 22.

Should it be thought worthy of inquiry why they should pay for the property more than it was worth in 1822 or 1823, the answer is at hand. By the contract, $8,000 of the money was to be expended in improvements, which would have been so much added to the value of the property; the plaintiff was security that this sum should be so applied by Rust; trusting to this guarantee, Fort and Story advanced the $8,000 to Rust, who misapplied it in the manner stated in the answer to the interrogatories of the bill. In the answer it is also stated that plaintiff represented that a quantity of joists and iron work had been found for the buildings then erecting, but on inquiry defendant found they had not been paid for, and he and Fort had been compelled to purchase them at a cost of $1,370. This sum, added to the $7,000 misapplied by Rust, was a diminution of the value of the property more than $8,000 below what it would have been if the plaintiff had fulfilled his guarantee and made good his representation, and the work done would be worthless unless the buildings had been made tenantable. Fort and Story had no option but to submit to this loss, inasmuch as they had confided in the plaintiff that he would do what he was engaged to without holding him personally bound to repay them the $25,000, $8,300 of which was lost to them in the manner stated. To save themselves, they were thus compelled to advance this sum to put the

buildings in the state they were stipulated for when they made the agreement. Under such circumstances, no court of equity could have considered the transaction a mortgage or the plaintiff as entitled to any relief.

On another ground the plaintiff's case was divested of all semblance of equity. He had laid by eleven years after he had voluntarily cancelled the counter-letter and surrendered the property by an absolute title in fee simple, during which time he had given no notice of any claim on his part, or any intention to assert a right of redemption, when Fort and Story to his knowledge, were making costly

Page 36 U. S. 407

improvements under the full belief that they owned it, as the plaintiff had solemnly engaged that they should own and hold it. He waited till all risk was out of the question, when the speculation was a certain great one, and in his own good time comes into a court of equity demanding a reconveyance, and offers to allow to Story five percent per annum for the use of his money, but refusing even to make the heirs of Fort a party, though the plaintiff knew and stated in his bill that Story relying on his contract had purchased out his interest at a large advance.

For this delay the bill assigns no reason or excuse, nor can any be found in the whole record; none has been offered in argument, none can exist to which any court of equity would listen while it respected the principles laid down by this Court at the same term in which this cause was first before it.

"A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party slept upon his rights or acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing: laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this Court. The same doctrine has been repeatedly recognized in the British courts, as will abundantly appear from the cases already cited. It has also repeatedly received the sanction of the American

courts, &c.; And it has been acted upon in the fullest manner by this Court, especially in,"

&c.;, *Piatt v. Vattier,* 9 Pet. 416-417.

With submission, then, it must be asked why this principle should not be applied to this case. There can be none which calls more loudly for it; it is a fundamental rule by which all courts of equity act; it is an essential part of that system of equity, which in this very case this Court, two years ago, held to be in force in Louisiana as well in the principles and rules of decision as in matters of practice, furnishing the law of the case in place of the local law which was then suppressed. In Louisiana, ten years is a positive bar by limitation when the law is applied; the principle of analogy therefore would apply to a shorter period than in other states where the time of limitation is twenty years. In such a case, and circumstanced as this case is, the lapse of eleven years, wholly unaccounted for, would be as fatal to the plaintiff's claim in any court of equity

Page 36 U. S. 408

in England, in any of the states, or in this Court, as if it had continued for any period, however long. The same question may be put as to the rules and principles on which equity acts or would act in annulling contracts like those of March, June, and August, 1823; also as to the established rules in deciding on what is a conditional sale or a mortgage, as likewise declared at the same time. 34 U. S. 9 Pet. 445.

One answer has been given to all questions which can be put if this case is to be decided by the English system of equity jurisprudence as adopted by the process act of 1792 and declared to be a part of the law of Louisiana in 1835. It is now most solemnly adjudged that this case is not to be determined by "the principles, rules and usages of courts of equity, as contradistinguished from courts of law;" that it depends on and is governed by the Louisiana law of antichresis or mortgage, by which no length of possession, no amount expended in improvements, no laches of a mortgagor, however incompatible with every

principle of common justice or English equity, can bar a redemption without a sale. Nay, this law, by the decree as now made, declares Mr. Livingston to be a minor, under a pupilage so strict that his contracts in relation to this property are mere paper and pack-thread, and his pledged faith, that Fort and Story should hold and enjoy it idle wind, because no sale was made on account of his repeated and most urgent efforts to prevent it. He too, the distinguished jurist who revised and compiled codes for Louisiana and was deeply versed in all the details of its laws, asks this Court to give him the benefit of this law of antichresis as the only ground on which it can give him a decree for property without irretrievably compromitting that which he deemed far more valuable -- his character.

Fort and Story did not intend to pay their money on such a contract as an antichresis. Mr. Livingston did not intend to mislead or deceive them by persuading them to waive a sale which, under such a contract, was indispensable to bar his right of redemption; he did not cancel the counter-letter, and pledge himself that his equity of redemption was forever extinguished, knowing that the law incapacitated him from doing it. Fort and Story never contemplated that their only right to the property was only a pledge upon it for their money and legal interest, nor could it have entered into their minds that by indulging Mr. Livingston in avoiding a public sale, they were thereby giving him the sole benefit of their capital, expended in the

Page 36 U. S. 409

purchase and improvements, as well as the appreciation in value of the property. That an antichresis was ever in their minds cannot be pretended, or that he knew that the contract was of that nature and intended to avail himself of it, if a change of times should make it his interest to do so, when the property rose to a sufficient value, while he held out to Fort and Story that their title was perfect -- is incredible. He must have been as ignorant of the law as they were, and both have intended the transaction as a conditional sale; in such a case, a court of equity would so reform the contract as to make it conform to the real intention of both parties. On the other hand, if they intended the contract to be a conditional sale, and he intended it to be a mortgage, there is a fatal bar to this case.

It was laid down by this Court in 1835 that where the contract was in terms a conditional sale, it would not be turned into a mortgage or the money be deemed a loan unless the intention to do so was mutual. 34 U. S. 9 Pet. 450. That it was not so in this case is manifest from the conduct of the defendant and his positive oath in his answer, which decidedly negative any mutuality of intention.

There are, then, the following distinct grounds of defense on equitable principles to the plaintiff's bill.

1. He has failed in adducing any evidence competent to vary the terms of the original contract.

2. He has shown no ground for annulling the subsequent contracts, or why they are not binding on him in equity.

3. All the averments in the bill are positively denied by an answer, directly responsive, which remains uncontradicted, without an attempt to disprove any part of it or to support the bill.

4. The plaintiff was never bound to repay the money, and the defendant incurred the whole risk of a depression in the value of the property.

5. The defendant never intended to enter into a contract of loan or mortgage.

6. The plaintiff is barred by the lapse of time and acquiescence without notice.

If, then, the decree of this Court at this term had been rendered in accordance with those "principles, rules and usages of a court of equity" which they adjudged two years before to be the law of the case, the decree of the court below must have been affirmed; yet is now reversed because the local law, which was wholly repudiated then, is applicable now. Herein there seems to me an utter discrepancy between the two decrees of this Court. In 1835, the practice and law of Louisiana was displaced by the practice and law of equity, by the rules of which the demurrer was overruled when it must have been sustained if the act of 1792 had not been in force in that

state. In 1837, the forms and modes of proceeding in equity are retained which deprive the defendant of the benefit of the law of the state, compelling a plaintiff who sues for the redemption of mortgaged property, according to the law of *antichresis,* to join all the original parties, in consequence whereof, the plaintiff retained his standing in court which he must otherwise have lost. *The law of equity,* having thus performed its appointed office, is, in its turn, displaced by the state law, and ceases to be a rule of decision; *the law of antichresis* is then brought in to perform the final office of annulling the contracts of the parties, taking the property from the defendant and awarding it to the plaintiff. Now if the law of *antichresis* must govern this case, it is by sheer, dry, legal right, as destitute of any equity as it is contrary to its most sacred principles when applied to such a case as this; by every rule of its action, equity calls on the plaintiff to show "conscience" in his claim; "good faith" in his conduct; and reasonable diligence in pursuing his rights before it moves one step. Let the record answer how these calls have been met.

In his bill, the plaintiff holds the defendant to the most strict rules of accounting as a trustee or agent; he offers to pay legal interest (which is five percent) on the money due in August, 1823, say $28,000, which, for eleven years at the time of filing the bill amounts to $15,400, so that defendant would be entitled to a credit in account of $43,400, from which must be deducted $29,700 he had received for rents up to 1829, and at the rate stated, he would be indebted to the plaintiff in 1834. The plaintiff would then regain a property, stated in his bill to be worth $120,000, and by Mrs. Fort to be $200,000, and by the use of the defendant's money, while Story is left to seek his remedy against her for the $50,000 paid her in 1832, for her share. In his offer, the plaintiff omits any credit to the defendant for taxes on the property or compensation as his *bailiff and receiver* for collecting the rents of the buildings *erected with his own money,* as it now seems, for the plaintiff's use, on an interest of five percent in New Orleans. This is the conscience of the case. Its good faith can be ascertained by the stipulations and solemnly declared intentions of the plaintiff, in the contracts of March and June, 1823; the

cancellation of the counter-letter; and after an utter silence for eleven years, then, for the first time, asserting the contract to be

Page 36 U. S. 411

an antichresis; with a *perpetual right of redemption,* till a sale was made by its authority. *Reasonable diligence* would seem to consist in the plaintiff's pleasure; eleven years must be held not to be "a great length of time" under the circumstances of this case, or the utter silence, and want of notice for this period must be held not to be an "acquiescence" in the defendant's right. It has been a truly fortunate result for the plaintiff that with a case not sustainable by either the practice or law of Louisiana or by the rules and principles of a court of equity separately, he has been able to attain his object at one term by one law and at another term by the other, so happily applied as to meet the exigencies of his case at both terms. Had the one law been made the rule of decision on the whole case, I might have acquiesced in the result; as it is, I am constrained to dissent from the whole course of proceeding, as, in my settled judgment, in direct conflict with the acts of Congress as well as the repeated and most solemn adjudications of this Court.

I have not examined into the law of *antichresis* in Louisiana, for the want of the necessary books, conceding, however, that if it is as the Court has considered it, it gives the plaintiff a sheer legal right for the violation of which a court of equity is not the proper forum to resort, the right being in contravention of the fundamental principle of such courts, the remedy must be in a court which decides by the rules and principles of the civil law, to which code alone such a contract is known.

There is one other matter on which I also dissent from the opinion of the Court which has too important an effect on the rules of pleading and practice in suits in equity to be passed unnoticed, and is in my opinion a dangerous innovation unsupported by principle or precedent.

From the preceding view of this case it is apparent that if Mr. Livingston had been a citizen of Louisiana, he could have sued only in the court of the state; his

proceedings must have been according to its practice and laws, by which he must have made Mrs. Fort a party. Admitting his right to the property to be what this Court has held it, it would have placed the defendant in a very different position from that in which he now stands, without the least injury or inconvenience to the plaintiff. Mrs. Fort would have been compelled to refund the rents she had received, which, by the decree, the defendant must pay, together with the $50,000 she received from him, with the accruing interest, as well as the loss sustained by receiving only five percent on their capital, and

Page 36 U. S. 412

probably paying to banks eight or ten percent, as is usual in Orleans. *See* 16 U. S. 3 Wheat. 146. By suing in a court of the United States, the plaintiff, by the aid of the process act of 1792, has protected Mrs. Fort and thrown the whole loss on Mr. Story, leaving him the chances of a suit with her in place of the certain remedy that a state court would give him. To him it was no matter of form, practice, or mode of proceeding whether he was sued in the one or the other court; it may be that his whole indemnity from Mrs. Fort depended on it; to the plaintiff it mattered not, so that he obtained the benefit of the law of *antichresis,* which the state court was bound to administer as much as the court below was. The measure of justice to him was the same in both courts.

It was by being a citizen of New York that this Court enabled the plaintiff to overrule the demurrer; by the application of the process act of 1792, the law of the case was changed, so that it was a most important fact in its bearing on the merits of the cause, not one affecting the form of proceeding in the suit. It was averred in the bill that the plaintiff was a citizen of New York; the defendant, in his answer, says

"That he does not admit, but if it be the fact, requires proof that the complainant is a citizen of the State of New York; that at the time of the transaction mentioned in the bill and for a long time thereafter he was a citizen of the State of Louisiana and one of her Senators in the Congress of the United States, and if he has ceased to be a citizen of that state, the defendant knows not when, or how, and calls for

proof."

To this part of the answer an exception was made because the objection came too late after a demurrer had been overruled. The exception was overruled and the general replication was filed. On the hearing, one deposition was read on the part of the plaintiff, to prove the fact; but in my opinion, it failed to do so. This, however, was not deemed material by the court, which held that the averment of citizenship could be controverted in no other way then by a plea in abatement, and that not having done so, the defendant was too late in reserving the denial till he answered, applying to the case the same rule which prevails as to pleas to the jurisdiction of a court of equity.

Had this been a suit by petition, according to the practice of the state, a denial of the citizenship or alienage could have been made in the answer after a plea in bar, and the cause ordered for trial; it was so decided by this Court in 1833, declaring, that "the courts of Louisiana do not proceed by the rules of the common law;" "their

Page 36 U. S. 413

code is founded on the civil law, and our inquires must be confined to its rules." 32 U. S. 7 Pet. 429. This plea was offered, after issue joined on a plea in bar and after the argument had commenced; the court might admit it, and the court might also reject it; it was in the discretion of this Court to allow or reject this additional plea. 32 U. S. 7 Pet. 432. In 26 U. S. 1 Pet. 612, it was decided that a district court in a new state had "power to create a practice for its own government." The practice of the state courts, adopted by the district judge of Louisiana, has been always recognized by this Court and acted on. 31 U. S. 6 Pet. 198; 32 U. S. 7 Pet. 429-430; 33 U. S. 8 Pet. 303. In *Brown v. Keene,* this very objection was taken in the answer and considered by the Court. 8 Pet. 33 U. S. 112 , 33 U. S. 115 .

Such being the established practice of the court below, sanctioned by this Court and the act of 1824, the plaintiff would have been bound to prove this averment,

and considered himself so bound by the attempt to do it; but this Court has relieved him by expunging the state practice and substituting what they assume to be the equity practice of courts of chancery in England. The consequence of which is that the defendant is not allowed to deny by his answer, a fact averred in the bill unless by a plea in abatement, in which he takes on himself the burden of disproving it; of course if he fails in doing so, the averment must be taken to be true, without any proof offered by the plaintiff to sustain it. That this decision of the court is as repugnant to its own principles, often declared, and to the rules of pleading in equity cases, as it is to the recognized practice of the court below, is clear to my mind. By the 18th rule prescribed by this Court

"for the practice of the courts of equity of the United States, . . . the defendant may, at any time before the bill is taken for confessed or afterwards with the leave of the court, demur or plead to the whole bill, or part of it, and he may demur to part, plead to part, and answer to the residue,"

&c.;, 7 Wheat. xix. By the 23d rule,

"The defendant, instead of filing a formal demurrer or plea, may insist on any special matter in his answer and have the same benefit thereof as if he had pleaded the same matter or had demurred to the bill."

Ibid.

When this case was before this Court two years ago, this was their language:

"It is an established and universal rule of pleading in chancery that a defendant may meet a complainant's bill by several modes of defense. He may demur, answer, and plead to different parts of a bill."

34 U. S. 9 Pet. 658. Such were the rules of equity *then.*

There must have been a great change in equity practice since if a defendant may not now deny in his answer any averment in the bill, or call for proof of any fact averred as to which he has not sufficient knowledge, to be safe in admitting or denying it. When he answered this bill, there was no rule of this or any court of equity, by which the averment of citizenship was exempted from the special rules of this Court or "the established and universal rule of pleading in chancery;" it was not a privileged allegation, but like all others material to the plaintiff's standing in court, he was bound to prove it when called on by an answer which did not admit or put it in issue by a denial. It is hard indeed on the defendant that he suffers under the adoption of a rule unknown to the law or practice of equity; when he put in his answer, his counsel looked to the existing rules, after he found that the rules of the state practice had been superseded, and must have felt safe in following those which had been laid down as universal in that opinion which fastened the equity code of England on the state and people of Louisiana. They had a right to confide in its future administration according to the rules and principles promulgated by that tribunal, which, by its own power, imposed it on them. It has been held by this Court for more than forty years that an express averment of citizenship is necessary to enable a citizen of one state to sue in the federal court of another; that it is a special privilege conferred by the Constitution and the Judiciary Act, to which the plaintiff must show his right by the record; that the averment must be positive, and not in the alternative; that it must be in the body of the bill, and does not suffice that it is in the title or caption; that it is not only a fatal defect after a final decree, but it is deemed so important that the judges feel bound to notice it, though counsel do not. 33 U. S. 8 Pet. 148.

When the whole action of a court of equity on a bill, which does not, in its body, contain this averment in positive terms, is thus a mere nullity and a final decree does not cure the defect, it is a most strange conclusion that it cannot be denied by the answer or the plaintiff be put to its proof; that as one of the allegata of the bill it is indispensable, while as one of the probata it is immaterial. As the defect goes to the jurisdiction of the court, it would seem consonant to reason as well as to law that if the averment of the fact was material, its truth was equally so, yet if the doctrine of the court is sound, the defendant cannot put the plaintiff on proof of

it, or make it a matter in issue, on which he can adduce negative evidence. By

putting the defendant to his plea in abatement, the Court seems to me to have overlooked its requisites. Such a plea must be on oath, and it must give the plaintiff a better writ or bill by pointing out how he ought to sue; such are its requisites in a suit of law or equity. 1 Day's Com.Dig. 151; 1 P.Wms. 477; Beames 92-93; 1 Ves.Sr. 203-204.

The requisites of all pleas in equity are also overlooked. A plea must set up matter not in the bill, some new fact as a reason why the bill should be delayed, dismissed or not answered, or the plea will be overruled. Mitf. 177-179; Beames 2-7; 2 Madd. 346 (Am. ed).

The nature and effect of a plea to the jurisdiction of a court of equity, are also wholly misapprehended. It does not deny the plaintiff's right to relief or that the bill does not contain matter proper for the cognizance of a court of equity, but it is made on the ground that the court of chancery is not the proper one to decide it; it admits the jurisdiction of equity, but asserts that some other court can afford the remedy. Mitf. 180; Beames 57. This must be done by matter set up in the plea, because the court of chancery being one of general jurisdiction in equity, an exception must be made out by the party who claims an exemption in order to arrest its jurisdiction. Mitf. 186; Beames 57, 91; 1 Vern. 59; 2 *id.* 483; 1 Ves.Sr. 264. This objection must be by plea, and cannot be taken by demurrer; it must show what court has cognizance of the case; that it is a court of equity, and can give the plaintiff a remedy; if no circumstance can give jurisdiction to the court of chancery, then no plea is necessary; a demurrer is good. Mitf. 123-124; Beames 100-101; 1 Atk. 544; 1 Saund. 74; 1 Dick. 129; 3 Bro.C.C. 301; 2 Ves.Sr. 357.

From this view of a plea to the jurisdiction of the court of chancery in England it must be manifest that there is and can be no analogy between its jurisdiction and that of a circuit or district court, sitting as such; the former, being general, attaches to every case not brought within an exception, by matter specially pleaded,

showing that the case is cognizable in some inferior court of equity, competent to give the relief prayed; the latter is special, and limited to the cases specially enumerated, within which the plaintiff must bring himself by averment and proof of the necessary fact. A denial of this fact does not oust an existing general jurisdiction; it puts in issue the only fact which can give the court cognizance of the case; no fact or matter, not in the bill, is set up by way of avoidance or delay or as a reason for not answering; nothing is put in issue

Page 36 U. S. 416

but the truth of the allegation, in which the plaintiff claims a right and privilege denied to the citizens of Louisiana. He has claimed, and the court has granted him, a much higher privilege than that of merely suing in a federal court; he is exempted from the obligation of suing according to the law and practice of the state; the benefit of the equity code of England is given to him, and the defendant deprived of the right secured to him by the law of the state -- that of having the heirs of his former partner made a party. The plaintiff's privilege is the defendant's oppression; the plaintiff is a favored suitor, not because he is a citizen of New York in truth or in fact, but merely because he says in his bill that he is, and the defendant must submit to all the consequences of the averment being true unless he will also consent to undergo the perils and inflictions of a plea in abatement.

We have seen what its requisites are; now let them be applied to this case, and the consequences of such a plea. It must be on oath, the fact is not within his knowledge; he swears to a negative of a fact asserted in the bill, whereby he is compelled to incur the risk of perjury. As pleas in abatement in the court of chancery are governed by the same rules as in a court of law, 1 Ves.Sr. 203; Beames 89-90, there is another rule worthy of notice: "If the plaintiff take issue on a plea in abatement, and it be found against the defendant, then final judgment is given against him." 2 Saund. 111a, note 3, and cases cited. He must therefore incur the danger of a final decree against him if he does not make out his negative issue; his plea must be overruled because it sets up new matter not in the bill. He must give the plaintiff a better writ or bill by showing that some other court of equity has cognizance of the case; this is impossible in Louisiana, in which there is

no such court; his plea is then bad because he cannot comply with the requisites unless it is incumbent on him to do it in the only possible way left him. He can set up new matter by averring that the plaintiff is a citizen of some other state than New York or Louisiana, and thus give the plaintiff a better bill, for then the same court would have jurisdiction, so that the plea would be nugatory and subject the defendant to all the consequences which he sought to avoid. The reason given for the rule of pleading in chancery shows its entire inapplicability to a suit in a federal court.

"The reason of this is that in suing for his right, a person is not to be sent everywhere to look for a jurisdiction, but must be told what other court has jurisdiction or what other writ is proper for him, and this is matter

Page 36 U. S. 417

of which the court, where the action is brought, is to judge."

1 Ves.Sr. 203. The plaintiff knows his own residence.

It would be the most perfect anomaly in pleading to draw up a plea to the jurisdiction of the court of chancery in the English form, and apply it to a bill in equity in a Circuit Court of the United States so as to meet the averment of citizenship of the plaintiff according to the present decision of this Court. Its exhibition to an equity pleader in Lincoln's Inn, who would read our Constitution, the Judiciary Act, the rules and decisions of this Court, would not fail to cause him to admire it as an improvement in the science of pleading. For myself, I am utterly unable to comprehend that the denial of an averment of a fact in a bill can be deemed a plea of any kind unless it is the general issue or a special issue on that fact; to be a plea in abatement or in bar, every rule of pleading in law or equity requires that it should set up some matter not in the bill. And I can imagine no greater departure from the practice and principles of equity than to deprive a defendant of the right of denying a fact stated in the bill unless by exposing himself to the perils and incurring the consequences of a plea in abatement. If the decision now made remains the law of the court, the rule must be carried out to all its

consequences. Equity pleading is a science; its settled rules form an admirable system, but an innovation upon them would produce the most crying injustice. To my mind, there cannot be a case which can more forcibly illustrate the dangerous effects than the present, when the record is examined, and its judicial history compared, throughout its progress to its present state, with the acts of Congress, the rules of practice, and decisions of this Court.

For these reasons, I feel constrained to express my dissent to the whole course of the Court in this case, whether it is tested by the practice and law of Louisiana or the English system of equity, it is an entire departure from both if I can understand either. The transition from the one system to the other in the different stages of the cause (each operation to the manifest prejudice of the defendant) tends, in my opinion, to the worst of all consequences -- utter uncertainty in the administration of the law in Louisiana. If the legislative or judicial authority of the Union could command any respect, the process act of 1792 never did or could apply to that state; if both are overruled by one decision, it cannot be expected that the solemn adjudications of this Court will hereafter be deemed better evidence of its rules of practice or the principles of equity than they have been

Page 36 U. S. 418

in their bearing on the present case.

My opinion on the general equity and merits of the case is as much at variance with that of the Court as it is on the subjects to which my attention has been mainly directed; I have forborne an examination of this part of the case for obvious reasons. Whether the property in question, however valuable, shall be held by the plaintiff or defendant is a matter of small concern compared with the consequences which must follow from the decrees rendered if the opinions and reasoning of the Court must henceforth be taken as the established law.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana and was argued by counsel. On consideration whereof it is ordered and adjudged and decreed that

the decree of the said district court dismissing the bill of the complainant be and the same is hereby reversed and annulled, the Court being of opinion that the transaction of 25 July, 1822, between John A. Fort, Benjamin Story and Edward Livingston was a loan to the said Edward Livingston, secured by a pledge, denominated an *antichresis* in the law of Louisiana. And it is hereby further ordered, adjudged, and decreed that the cause be sent back for further proceedings in the court below, with directions that the cause be referred to a master, to take an account between the parties. And it is hereby further ordered, adjudged, and decreed that in taking said account, there be allowed to the defendant all advances which shall be shown to have been made by him or paid on account of the loan made to Edward Livingston on 25 July in the year 1822, with the interest which the said Edward Livingston agreed to pay of eighteen percent per annum, to be calculated upon cash advances from the time it was made until 5 August, 1823, and after that time at legal interest. And further that in taking said account, the defendant be allowed all reasonable expenditures made by the defendant and John A. Fort in building, repairing and safekeeping of the property pledged by the said Edward Livingston to secure the loan made to him on 25 July 1822, and that the complainant be credited in such account with all such sums as the defendant or John A. Fort or either of them have received from the said property, and that in taking such account, the rents and profits be applied first to the payment of the sums necessarily

incurred in building and repairing; secondly to the payment of the interest on the sums which shall appear to have been advanced on the said loan or in the improvement of the lot, and thirdly to the discharge of the principal of the said loan. And if, on taking said account, it shall appear that there is a balance due to the complainant, it is hereby further ordered, adjudged, and decreed that the defendant pay to the complainant such balance within six months from the time of entering the final decree in the cause, and shall surrender and reconvey the said property to the complainant or such person or persons as shall be shown to be entitled to the same. And if, upon the taking of said account, it shall be found that

any balance is due from the estate of the said Edward Livingston, deceased, to the defendants, it is hereby further ordered, adjudged and decreed that on paying or tendering to the defendant the said balance, he shall deliver up the possession and reconvey to the person or persons who shall appear to be entitled to the same the property so pledged to secure the aforesaid loan. And it is further ordered, adjudged, and decreed that in case a balance shall be found due to the defendant and shall not be paid within six months after a final decree of the district court, then the said property shall be sold at such time and on such notice as the said court shall direct, and that the proceeds be first applied to the payment of the balance due the defendant, and the residue thereof be paid to the complainant. *

MR. CHIEF JUSTICE TANEY, having been of counsel in this cause, did not sit in the same.

* For further proceedings in this cause, *see* 37 U. S. 12 Pet. 339, and 38 U. S. 13 Pet. 359. The plaintiffs eventually recovered the property in dispute and the sum of $32,958.18, found due to them by the report of a master, on a settlement of the accounts between the parties.