30th Congress, 1st Session. [SENATE.] Miscellaneous. No. 144.

MEMORIAL

OF

JUDGES AND MEMBERS OF THE BAR OF NEW ORLEANS,

WITH

A REPORT OF A COMMITTEE OF THE LOUISIANA BAR,

Praying that the practice in the Circuit and District Courts of the United States, in the State of Louisiana, in all civil cases, may be made to conform to that of the District Courts of that State.

MAY 30, 1848.

Referred to the Committee on the Judiciary, and ordered to be printed; also, the resolution of the Legislature of Louisiana on the subject.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The memorial of the undersigned, judges and members of the bar of New Orleans, represents:

That by an act of Congress approved on the 26th of May, 1824, it was enacted, "That the mode of proceeding in *civil* causes in the courts of the United States that then were, or thereafter might be, established in the State of Louisiana, should be comformable to the laws directing the mode of practice in the district courts of the said State."

That under the provisions of that enactment, the proceedings of all courts of the United States in Louisiana, in civil cases of every nature, continued during a long series of years to be regulated by the rules of practice established by the laws of Louisiana for her own tribunals, to the perfect satisfaction of the bench, the bar, and the community.

That nevertheless, in the 1835, by a decision of the Supreme Court of the United States, rendered in the case of Livingston *vs.* Story, to be found at page 632 of the ninth volume of Peters's Reports, it was adjudged on the supposition "that there were no equitable claims or rights recognizable in the courts of the State of Louisiana, nor any courts of equity, and no State laws regulating the practice in equity cases." "That the law of 1824 does not apply to a case of chancery jurisdiction, and the district court of Louisiana was bound to adopt the antecedent modes of proceeding authorized under the former acts of Congress, according to the principles, rules, and usages which belong to courts of equity, as contradistinguished from courts of common law." Other subsequent decisions of the Supreme Court of the United States have confirmed their said opinion, and especially the case of Gaines and others against Relf and others, to be found at page 9 of the 15th volume of Peters's Reports for the year 1841.

Tippin & Streeper, printers.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

Your memorialists aver, that habituated as they are to receive the decisions of the highest tribunal of the land with respect, they feel nevertheless bound to declare, that the above decisions are in opposition to the opinions of a great majority of the members of the legal profession in this State, to the contemporaneous construction of the act of 1824, and to the uninterrupted practice of the federal court in this State for a series of years, by which the above act had always been considered as applicable to cases both on the common law and equity sides of said court.

Your memorialists represent that the effect of the above-mentioned decisions has been to unsettle the practice of that court, and to introduce a new and extensive system of jurisprudence, unconnected, if not incompatible with the system of laws which prevail in this State. The other States of this Union having adopted, as the basis of their jurisprudence, the common law of England, with its division into law and equity, no inconvenience could result from the establishment, within their limits, of federal courts vested with chancery jurisdiction. But when Louisiana was admitted into the Union, she brought with her the civil law by which she had been governed when a province, respectively, of France and of Spain. Shortly after the acquisition of the province by the United States, several eminent jurists were charged with the important task of preparing a code, embodying the leading principles of the civil law. This work was completed in 1808, and was adopted. In 1825 it was revised and much enlarged and improved, and, we do not hesitate to declare, is now as complete a system of legislation as any country can boast of. This work is not, as it has been sometimes supposed, a mere digest or compilation of the enactments of our legislature—on the contrary, its foundations are deeply laid in the Roman law, the most perfect system that human wisdom has ever devised, and the superstructure was built upon the model of the Code Napoleon of France, a work which has challenged the admiration of the civilized world.

Now your memorialists aver, that in the civil law no such distinction does or can exist as rights cognizable only at law, and others cognizable only in equity; and equitable rights not clearly contrary to law are enforced in the ordinary courts. But, because there are in this State no courts of equity *eo nomine*, charged exclusively with the enforcement of equitable claims, it by no means follows that no such claims do exist here, or that there are no courts competent to enforce them. On the contrary, the distinction between law and equity is as familiar to the civil as it is to the common law, and equitable rights are as effectually enforced in the courts of this State, as they can possibly be by a court of chancery. Indeed, it is well known that courts of equity have borrowed from the civil law not only their forms of proceeding, but many of their principles. We do not hesitate, therefore, to affirm, that among all the branches of jurisdiction appertaining to courts of chancery, there is not one that is not exercised by our courts; that there is no relief which they cannot grant, no injury which they cannot prevent or redress as effectually as a court of chancery, and in a manner more expeditious and more economical. In assuming, therefore, as the basis of their decision, in Livingston *vs.* Story, "that no equitable claims or rights are recognised in this State," and "that no courts of equity exist here," (9 Pet. Rep. 657,) the Supreme Court have fallen into a manifest error. With much more propriety might it be said that no common law courts exist here, as our courts are more analogous, both in their principles and their practice, to the former than to the latter.

But your memorialists aver, that although our courts do bear a resemblance to those of chancery, the practice in the two is by no means identical, and the system of jurisprudence founded upon each is, therefore, in many respects different. The consequence of this is, that if the law of 1824 is construed not to apply to equity cases, our State will present the singular spectacle of a country in which two distinct tribunals, *exercising a concurrent jurisdiction*, are governed by principles and forms essentially different. When it is recollected how difficult it frequently is to distinguish the precise limits between the right and the remedy, and that the one is often materially affected by the other, it is obvious, that in the same case a different measure of justice may frequently prevail in the federal and the State courts, and foreigners or citizens of other States have the privilege of selecting that court which is most favorable to themselves.

Your memorialists aver that it was to obviate this inconvenience that the practice on the common law side of the federal courts was made to conform to that of the State courts, and the necessity is equally apparent of a conformity between the equity side of these courts and the State tribunals.

Your memorialists further aver, that the incongruity between the two systems in this State necessarily leads to uncertainty in the law, and to a consequent increase in litigation. Already has property to the amount of millions of dollars been drawn into this sweeping vortex.

The consequence of this is, that the judiciary of the Union is thereby rendered odious to our citizens, who begin to look upon the federal court in this State as a foreign tribunal sitting in their midst, trampling on their laws, overruling the decisions of their courts, and unsettling the titles to their property. "Accustomed to the civil law," (justly observes Judge Baldwin, 11 Pet. Rep. 397,) "the first settlers of Louisiana, their descendants, and the emigrants thereto, cling to it as we of the older States do, and our ancestors did, to the common law as a cherished inheritance." They cannot, therefore, view with indifference the intrusion among them of a system which, to a certain extent, displaces and abrogates that law. They consider that their fate is in this respect worse than that of a country subjugated by war, whose conquerors rarely interfere with the laws affecting merely the pecuniary interests and civil relations of society. They complain, too, that such a proceeding is in violation of the spirit if not of the letter of the treaty by which Louisiana was ceded to the United States, by the third article of which, the inhabitants of the province are guarantied the "free enjoyment of their liberty, their property, and the religion they profess." They ask, since Congress can, without their consent and contrary to their wishes, introduce one branch of the common law system, why they cannot in the same manner introduce the other?

Your memorialists aver that their sincere belief is, that it never was the intention of Congress to introduce any portion of this system. They entertain no doubt that the act of 1824 was intended to apply *to all civil cases* whatever, and that this intention has been frustrated by the decisions above referred to.

Wherefore your memorialists do pray that an act be passed amending said act of 1824, so that the practice in the circuit and district courts of the United States in this State, in all civil cases, whether on the common

law or the equity side of said court, shall be conformable to that of the district courts of this State.

P. Soulé,
Edward Rawle,
C. M. Conrad,
W. M. Randolph,
Henry R. Denis,
Wm. W. King,
Ciprian Draford,
C. De Choisent,
R. N. Ogden,
J. Bermudez,
Thomas Gibbes Morgan,
J. M. Elam,
Jas. H. Muse,
L. C. Duncan,
J. A. Paterson,
J. Hunter Collins,
H. Lockett,
C. Raulins,
L. Eyma,
G. Schmidt,
Ben. Winchester,
James H. Van Dalson,
Wm. Dunbar,
Edward T. Parker,
D. T. Dagley,
A. K. Josephs,
G. K. Rogers,
J. Wightman Smith,
Armand Pilie,
Bn. Derbin,
Chas. Bienvenu,
Mazureau,
Isaac T. Preston,
Thos. J. Cooley,
Wm. A. Elmore,
H. Bullard.
Thomas J. Durant,
J. H. Kennedy,
Thomas H. Serrés,
H. D. Ogden,
A. M. Buchanan,
Edward Simon,
C. V. Stewart,
Julian Seghers,
M. W. Hiffman,
Arthur Denis,
F. Grimes,
O. P. Jackson,
Fred. Buisson,

S. A. Bernard,
E. Warren Moïse,
James Dunlap,
M. M. Robinson,
J. S. Clendenin,
J. B. Carr,
John B. Bemiss,
E. Legendre,
A. Graithe,
P. S. Warfield,
Andrew S. Herron,
G. B. Duncan,
Frs. Colongne,
John Carue,
John N. Carrigan,
J. Blair Smith,
G. F. Connety,
Jno. McVea,
H. L. Hunley,
J. C. Patterson,
Winchester Hall,
J. B. Elam,
Wm. H. Wilder,
R. W. Nicholl,
James Brewer,
J. G. Bryce,
M. H. Reynolds,
George C. McWhorter,
J. K. Gaudet,
John P. Waddill,
C. L. Swayze,
A. D. M. Haralson,
Charles Gayarre,
C. M. Chamberlain,
H. H. Strawbridge,
H. B. Cenas,
Wm. Hagan,
Paul Saquet,
M. Grivot,
J. Van Matre,
Ls. Duvigneaud,
Charles Janin,
H. R. Grandmond,
Victor Burthe,
S. F. Glenn,
J. Blodget Britton,
C. B. Beverley,
N. Hubert,
J. Hobert,

John Culbertson,
Martin Blacke,
Charles Maurian,
Henry H. Paul,
F. B. Conrad,
J. S. Halsey,
Geo. Strawbridge,
Jno. C. Delavigne,
E. Hiestand,
Jno. Livingston,
D. Augustin,
J. Lavergne,
J. M. Wray,
J. N. Lea,
G. Le Gardeur,
Alfred S. Godin,
L. Carter,
[Illegible.]
W. C. Buel, jr.
Geo. T. Ross,
Armand Pitot,
[Illegible.]
P. Anderson,
A. Magurean,
A. Morphy,
Eugene Thusson,
James Strawbridge.

Resolution of the House of Representatives of Louisiana, March, 1848.

Be it resolved by the Senate and House of Representatives of the State of Louisiana in General Assembly convened, That our Senators and Representatives in Congress be requested to use their best exertions to obtain the passage of an act amending the act of 26th May, 1824, so that the practice in the circuit and district courts of the United States in this State, in all civil cases, whether on the common law or equity side of said court, shall be conformable to that of the district courts of this State.

Resolution of the Legislature of Louisiana, March 8, 1841.

Whereas by repeated decisions of the Supreme Court of the United States, it has been determined that what are called in common-law States equity causes, as contradistinguished by English fictions from common-law causes, and cognizable by the court of the United States in Louisiana, are to be tried by complicated and artificial modes of proceeding called the chancery practice, consisting of the rules prescribed by the Supreme Court under the act of 1792, and the rules of proceeding of the court of chancery in England, unless there be laws of Louisiana directing the mode of proceeding in equity cases in their own courts, when by act of 1824 such mode of proceeding will dispense with the rules of the English courts of chancery:

And whereas there being no equity cases in Louisiana as known to the common-law system, because under our laws there are no informalities whose defects are to be cured by what is called relief in equity, the State of Louisiana is precluded from the advantages enjoyed by other States of controlling the rules of proceeding on the equity side of the United States court in Louisiana, and the rights of its citizens are consequently determined by rules difficult to ascertain and not familiar to the advocates of Louisiana, and under pretence of remedies that cannot be obtained on the law side, which, if the common law does not prevail in Louisiana, is a fiction: the whole of the chancery law of Great Britain is introduced

among us and established upon us contrary to the desires and interests of the State: Therefore,

Be it resolved by the Senate and House of Representatives of the State of Louisiana in General Assembly convened, That our Senators and Representatives in Congress be requested to procure an act of Congress placing us upon an equal footing with other States, and procuring the passage of an act amendatory of the act of 1824, so that our mode of proceeding in *civil* causes shall be adopted in what are called equity causes, in the courts of the United States for the State of Louisiana.

WM. DEBUYS,
Speaker of the House of Representatives.
FELIX GARCIA,
President of the Senate.

Approved March 8, 1841.

A. B. ROMAN,
Governor of the State of Louisiana.

STATE OF LOUISIANA,
Office of the Secretary of State.

I do hereby certify the foregoing resolution, dated March 8, 1841, to be a true and correct copy from the original in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of the State, at New Orleans, this 25th day of January, [L. S.] in the year of our Lord one thousand eight hundred and forty-seven, and of the independence of the United States of America the seventy-first.

CHARLES GAYARRE,
Secretary of State.

Report of the Committee of the Louisiana Bar.

The committee of the bar of Louisiana, appointed on the 22d of January last, report the following statement of their views on the subject of the proposed alteration in the practice of the courts of the United States exercising equity jurisdiction in this State, and recommend that it be forwarded to the Judiciary Committee of Congress, in support of the memorial heretofore presented, and of another herewith submitted, of which they recommend the adoption:

The committee are of opinion that it does not become the bar to notice a letter dated New Orleans, February 2, 1847, and addressed to the gentleman who was then chairman of the Judiciary Committee of the Senate, further than may be necessary to correct certain misstatements concerning the object and effect of the memorial which it opposes, and the system of jurisprudence which it assails. The author of that letter, now known to be a citizen of Mississippi, is free to express his own opinions, but has no right to explain ours. And it may not be amiss to say, that, among all the numerous signers of the memorial attacked, there is not

one so regardless of legal or personal propriety, or so ignorant of the constitutional powers of Congress, or of the rights of the several States of our Union, as to join either openly or secretly in any memorial, whether public or private, setting forth that the "laws of Mississippi are no system; that they are without any respectable degree of science, and little less than an inharmonious jumble of detached mandatory rules;" that her revised statutes "are both arbitrary and uncertain,"—"imperfect and inadequate;"—"her reports, absurd and contradictory, as well as unjust,"—"incongruous in the extreme; and as to scientific consistency, are a burlesque;"—her decisions not according to Eglish, French, Roman, or Lynch law, but peculiarly Mississippian, savoring of all these laws, or of none, according to the taste of the elective judge and his constituents;" "that it is affectation and mockery, insufferable ignorance, or affected presumption in her lawyers to talk about the common law of Mississippi;" and that "Congress, rather than give perpetuity to this miserable system, should rather abolish and sweep it from the land," "that the broad system of our common country may become homogeneous."

It has been asserted (and there is scarcely a stronger proof of a weak cause than evasion or misstatement of an adversary's arguments) that all the civil laws in force in Louisiana, before the promulgation of her Civil Code in May, 1825, and of her Code of Practice in September of the same year, were absolutely repealed by the 25th section of the act of 25th March, 1828, leaving in force only a mutilated and distorted abridgement of the civil law. This is erroneous. Decisions of our supreme court have limited its effect to the Roman and Spanish laws in force in the country at the time of the repealing statute. (6 La. Rep. 441.) In practice, however, these ancient laws, when not inconsistent with our own enactments, or with the spirit of our age, our people, and our republican form of government, continue to govern and to guide. Modelled on the Code Napoleon—a work which has condensed into a few clear, concise, and pithy axioms the great principles of equitable law, scattered through the glosses of a thousand commentators, and the decisions of ten thousand courts—the Civil Code of Louisiana, whatever its defects, is no unworthy copy of its prototype. If varying from it in those minor particulars where variance was made necessary by difference of races, customs, and political institutions, still the great characteristics of both continue unaltered; for the principles of truth and justice are immutable. It therefore results as a corollary that the wise and learned jurists of both ancient and modern times, whose decisions have cast such noonday clearness upon the system embodied in the Napoleon Code, must equally enlighten whatever may be obscure in the Codes of Louisiana. What is applicable to the one, applies equally to the other; and therefore, in spite of the broad and sweeping terms of the repealing statute of 1828, there is not a volume, there is scarcely a case in the reports of Louisiana, from beginning to end, during the lapse of twenty years, in which the arguments of counsel and the conclusions of our courts do not refer to, and rest upon, the venerated authority of Toullier, Duranton, Dalloz, Delvincourt, Locré, Sirey, Troplong; to earlier writers—Pothier, Merlin, Domat, Febrero, Casaregis, Cujas, Gothofridus, Heineccius, and Voet; or, earlier and more venerable still, the unforgotten works of Trebonian and his coadjutors, the Codes, Institutes, and Pandects, which have shed more lustre on the name and reign of Justinian than all his conquests. Such, then, to this very hour, are the sources of the civil law of Louisiana. And, even if impaired in its

primitive simplicity and symmetry by careless statutes or erroneous interpretations, it is still, as a system, the same that originated among the polished republics of Greece and Rome before the Anglo-Normans and Saxons had emerged from barbarism, or their feudal jurisprudence had been slowly and laboriously chiselled into a rude resemblance of a legal system, now shaped and polished into the majestic form of the common law.

The English courts of equity, as contradistinguished from courts of law, were originally intended to remedy the defects and abuses of the common law tribunals, whose rigid adherence to technical forms frequently defeated the very object for which courts are created—the administration of justice. Hence, by degrees, arose the court of chancery and the office of chancellor, "who mitigated the severity or supplied the defects of judgments pronounced in the courts of law upon weighing the circumstances of the case," "and whose chief judicial employment was in devising new writs directed to the courts of common law, to give remedy in cases where none was before administered." (3 Black., ch. 4, pp. 50, 51.) "To this chancellor's office in process of time much authority and dignity hath been adjoined, especially ever since that lawyers stand so precisely upon the strict points of law, and caught men with the traps and snares of their law terms; that, of necessity, there was a court of equity to be erected, and the same committed to the chancellor, who might give judgment according to equity and reason, and moderate the extremity of law." (See Camden's Britannia, p. 181.) Both office and officer were created, or rather invested with new powers, for the purpose of "qualifying, moderating, and reforming the rigor, hardness, and edge of the law, as assisting it where it is defective and weak, and defending it from crafty evasions and new subtleties against the justice of it." (See Wooddeson's Lectures, sec. 7, p. 200; 2 Bacon, p. 139.)

It was thus that the courts of England, which in earlier times undoubtedly administered equal justice according to the rules of both law and equity, became eventually divided into tribunals of separate judicature. As organized by the great and wise King Alfred, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. (3 Blackstone, chap. 4. Parke's History of Chancery, p. 25.) The Statute of 2 Westminster, cap. 24, which seems to have been intended to restore the ancient equitable power of correcting the defects of the law and supplying its deficiences, resulted only in the gradual creation of a tribunal claiming more extensive powers than the ordinary courts, which have ever adhered to the narrow routine of special forms, and confined their powers of relief to the narrow limits of special jurisdiction. (2 Bacon, pp. 135, 137; Blackstone, book 3, pp. 433 and 434.) Yet even in this tribunal, flexible though it be, the English lawyer, "*Captor formularum, auceps syllabarum,*" has continued to confine the free limbs of justice in the fetters of form until, in the course of time, proceedings in chancery have become nearly as much hemmed in with technicalities, and "legal traps and snares of law terms," as those of courts of law. Multiplied, prolix, and verbose as were the forms of pleading before, it became the interest of the English lawyers, clerks, and other officers whose compensation was established by law and regulated by the number of words their writings might contain, and by the number of documents filed, to make them still more interminable, until, from all these causes combined, the very name of chancery has become a by-word, and a proverbial phrase

to express helpless, hopeless, endless, litigation. Such are the *forms* of practice, which, with their attendant expense and difficulty, America has inherited from England as concomitant to the justly admired and inestimable *powers* of her equity tribunals. Complex and expensive, they are still retained; simplification and improvement are opposed as innovations; and even in an age of progress like the present we are compelled to fight our legal battles in the cumbrous armor of the fifteenth century.

Far otherwise is it in Louisiana. Our courts of justice, while invested with the most ample powers both of law and of equity, and with ample means of enforcing them, are subject to no distinct and peculiar forms. Whatever be the subject of contest, it is sufficient, in all judicial demands, to express clearly and in writing the cause of action and the thing demanded, with such conclusions as may serve as a basis to the judgment to be rendered. Code of Practice, articles 160, 161, 170, &c., &c. Nor are these judgments arbitrary and uncertain. Our judges, by articles 13 and 21, and the intervening articles of our code, are indeed bound, in the absence of express law, to proceed and decide according to equity, to natural law or reason, or to received usages. So C. C. arts. 1897, 1940, 1960, &c. These and the various other articles concerning the interpretation of laws and contracts, are but the embodiment of the very principles acted upon by all courts of equity; for, in the words of Blackstone, book 3, p. 429, "Equity in its true and genuine meaning, is the soul and spirit of all law; *positive* law is construed, and *rational* law is made by it. In the latter, equity is synonymous with justice; in the former, with the true sense and sound interpretation of the rule." Also Wooddeson, sec. 7, p. 193: "This distinction between law and equity, as administered in different courts, does not seem (except in England) to have been ever known in any country at any time; and yet, the difference of one from the other when administered by one tribunal, was perfectly familiar to the Romans, * * * but the power of both centred in one and the same magistrate, who was equally intrusted to pronounce the rule of law, and to apply it to particular cases by the principles of equity." 3 Blackstone, chap. 4, pp. 49 and 50. "In like manner the early Athenians entertained a general notion of judicial equity, as supplemental merely to their written law. Their judges were sworn to administer relief according to the laws, where the laws were particularly explicit, and in other cases to award the most equitable sentence." Wooddeson, sec. 7, pp. 199, 200. If the object of all judicial tribunals be to administer *justice*, there can be no good and natural reason why every court should not be invested with sufficient powers to effect the end of its creation, by affording just and lawful relief to all. Such, in all countries where the civil law prevails, *has* been the power and practice of its courts and judges from the earliest ages. Bound by no special forms, circumscribed by no special jurisdiction, the power of deciding according to laws and contracts, interpreted by the principles of natural equity and the right of reason, belonged ever to tribunals where the civil law is the ruling system of the land. France, Germany, Bohemia, Hungary, Poland, Scotland, Spain, Portugal, Naples, the Sicilies, the Romish States and most other parts of Italy, all acknowledge, in greater or less degree, the influence, and are guided in their proceedings by rules drawn from the civil law. And all, we believe, combine in the same officer and office the powers of

law and equity, which, by the common law of England, are vested in distinct tribunals.

It has been observed, perhaps rather by way of remark than of argument, that the constitutional powers of Congress may not extend to the creation of courts vested, like those of Louisiana, with the power of making equitable applications of the law in all cases. The decision in Livingston *v.* Story, 9 Peters, 632, rested upon no such reason, but solely upon the erroneous supposition that the courts of this State were not possessed of equity powers or an equity practice. The words of the constitution, art. 3, secs. 1 and 2, "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress *may* from time to time create," and "shall extend to all cases in law *and* equity," would rather indicate that the powers thus conferred must embrace both. But if it be held that by this expression were meant courts of law *or* equity, as contradistinguished by the law of England, we cannot perceive the constitutional propriety of the ancient legal fiction, which assigns to the very same court a law side and an equity side, and makes the presiding judge a kind of Janus, having two faces looking different ways—one for the law, and the other for equity. If the constitution requires separate tribunals for law and for equity, why not let them be separate in reality, and presided over by separate magistrates? If it requires the combination of both in one court and magistrate, why sever them? Be this as it may, we will concede the point for the sake of argument.

The constitution of the United States undoubtedly confers on the federal tribunals jurisdiction over a certain class of cases arising, whether in law or equity, in the different States, between certain persons. By this we are to understand that where a particular case arises between such persons, which, according to the English system of equity, would be cognizable by a court of equity, the courts of the United States sitting in the different States have authority to decide it. This is what we understand by *jurisdiction.* The constitution says nothing about the forms of proceeding—mere practice. The relief to which the party may be entitled may be afforded by the federal courts—the *means* by which that end is attained are not provided for by the constitution. But the relief sought or the remedy to which the party is entitled, and the measure of that relief, are to be sought in the local law. The United States as a sovereign have no common law. Cases are to be decided, and the rights and remedies of the parties adjudged upon, in conformity to the law of the place where the contract arose or the injury was inflicted. If, according to the law of Louisiana, under a contract here, a citizen of this State be entitled to a particular measure of redress, a foreigner or a citizen of another State, under the same circumstances, cannot be entitled to a different one, although his case may be decided by the courts of the United States instead of being brought before a court of concurrent jurisdiction sitting under the authority of the State. To say that under the constitution of the United States, a court of the United States, under a grant of mere jurisdiction, has a right to adopt a different standard by which the rights of the parties are to be determined and redress administered, would be to assert that those courts may decide, not according to local law, but according to a system of laws foreign to our own laws and usages. In other words, it would make them legislators, and authorize them to give effect to a violation of contracts never contem-

plated by the parties when they entered into the contract, and, under precisely the same state of facts, accord to a suitor in the federal courts a different measure of relief from one who should resort to a State tribunal. This could never have been intended by the framers of the constitution.

From the tenor of the letter addressed to the chairman of the Judiciary Committee of the Senate, one would suppose that Congress could, by fastening upon Louisiana the mere forms of proceeding adopted in the courts of chancery, supersede and sweep away that ancient system of laws which prevails here, and which the no less learned than courteous writer treats as a tissue of absurdities and barbarisms. Such is not the question, and never can be. That system of laws, whatever the ignorant and the prejudiced may say of it, is fortunately beyond the reach of federal legislation. That Congress may regulate the practice of its own courts, we admit—that they can abrogate the laws of Louisiana as they regard private rights and the relief which they afford in cases of a violation of such rights, or that under the forms and rules of practice they can authorize their courts to do so, we utterly deny.

This is not a proper occasion to vindicate the civil law of Louisiana against the puny attacks to which our attention has been called. To any writer who abuses what he does not understand, it is sufficient to reply in the words of the old adage, "*Ne sutor ultra crepidam.*" That law originated among the most intelligent and practical people of antiquity. During a succession of ages in a free and flourishing republic, they attained their highest perfection. Essentially founded in the spontaneous consent of the people, administered by popular magistrates and judges, themselves a part of the people, they assumed the form of a regular moral science, and by the uniform assent of after ages were and are esteemed a code of written reason. It was adopted by the barbarous invaders of the empire, and to this day prevails, with comparatively slight modifications, in four-fifths of the civilized world, including one of the States of this Union. That, as adopted and administered in Louisiana, it has met the approbation of eminent and learned jurists, appears by a letter from the Hon. Justice Story, dated July 11th, 1841, in which this State is mentioned as "that part of the Union whose jurisprudence presents the most valuable means of improving the science of the common law." And the late Chancellor Kent, in an epistle bearing date July 31, 1841, observes: "I always read the Louisiana reports as fast as they appear, and consider them the most learned and interesting decisions in the United States." These letters may be found at pages 158 and 159 of the Louisiana Law Journal for August, 1841. And that the predilection of their writers for the civil law is justified, would appear from the rapid extension, of late years, of the leading principles of that system through many of the American States, and from the favorable reception of several recent and admirable works (such, for instance, as Mackeldy's) upon the continent of Europe.

Is any man in the nineteenth century ignorant enough to imagine that cases do not every day occur in France, Germany, Italy, &c., which would in England be regarded as proper cases for a court of chancery to act upon, and that, in consequence of there being but one tribunal to which all cases are alike referred, private rights are without protection and private wrongs without remedy? Does any man at this day suppose that in these countries property is not as secure, and remedial justice as ample and complete, as in England, or in those States of our Union where a court

of chancery exists, and where the same man, acting as a *Judge*, to-day renders a judgment which to-morrow he annuls as *Chancellor*? And how is it, we would ask, in those States where no such tribunal exists, and where the ordinary tribunals administer the whole law and act upon every possible variety of cases arising between their own citizens? It is admitted by those who are acquainted with both systems of law, that the principles which constitute the basis of equity jurisprudence in England and the United States are derived in a great measure from the civil law. The two systems are essentially identical as far as relates to their great fundamental principles. The great difference consists in the manner in which they are administered. In England and those States where courts of chancery exist, a more complex and artificial system of proceeding has been adopted than in countries governed by the civil law, where such distinction is unknown.

Assuming, therefore, that the introduction of chancery practice is not intended to change the rules of decision by which the courts are to be governed, but only the method of attaining the great ends of justice according to the law of the place in which a controversy may arise, it is proper to inquire whether the system of practice adopted in Louisiana is sufficient in every supposable case, whether in law or in equity, to afford ample and complete relief.

Let us premise by saying that it is an error to suppose that the trial by jury does not exist here in civil cases. Parties have a right to claim a trial by jury in all cases, with but few and unimportant restrictions. Besides numerous statutes, our Code of Practice from article 493 to article 532 treats especially of the manner of exercising this privilege of the freeman. In courts of equity it is entirely excluded, except perhaps upon certain questions of fact upon which an issue may, if the court will permit, be made up to be tried by another tribunal, which thereby becomes merely auxiliary to the chancellor. See Wooddeson, sec. 7, p. 203.

In reference to pleadings, the difference is only nominal—a mere difference of technology. What is a bill in chancery but a petition; and what is a plea, a demurrer or an answer, but an answer or exception of one kind or another? A cross-bill is known in our system of pleadings as a plea of compensation or reconvention, and is admitted in a similar class of cases. If it becomes necessary to have a discovery, our Code permits interrogatories to be mutually propounded by the parties to each other as fully as in the practice in chancery, and they must be answered under oath at the risk of like penalties. Does the plaintiff ask for an injunction? Every court of record in the State can grant and perpetuate it in any proper case. Is it necessary to compel a specific performance? It is every day's practice. It would be tedious to follow out all the analogies of proceeding and remedy which exist between the two systems. All the great remedial writs known to the common law have been introduced here by statute. The courts have power to appoint auditors and arbitrators to whom may be referred all matters proper for a master in chancery; and in the settlement of partnerships and trusts, receivers *eo nomine* have been appointed. But even supposing that the Code of Practice may be in some particulars deficient to carry out the full powers of a court of chancery, which we altogether deny, that Code itself, art. 145, expressly authorizes the courts to establish such further rules of practice as are not inconsistent with its general provisions.

We regard it, therefore, as undeniable that a court vested with equity jurisdiction in Louisiana may exercise that jurisdiction by pursuing the forms of practice adopted in the State courts of chancery, and that whatever relief the plaintiff may be entitled to according to the law of the place, can be afforded to him without adopting the more complicated, tedious, and expensive forms of chancery practice. The great danger of adopting such practice to the exclusion of our own, consists in the fact that judges, in a great measure unfamiliar with our system of laws as distinguished from the common law, may confound the *remedy* with the *right*, and suppose that the equity jurisprudence which prevails in some of the other States is to furnish the rules of *decision* as well as the mere forms of proceeding. The consequence would be, that a party suing in the federal court would obtain a different measure of relief from one suing in a State court under precisely the same circumstances, and even under the same contract.

The general current of decisions in the federal courts of late years, and the occasional volleys of abuse discharged upon our laws, our courts, our officers of justice, and our citizens at large, by some blunderbuss of law, indicate clearly the danger which we apprehend—that under the guise of mere forms of practice, a system of law wholly foreign to our habits and usages may supersede our own so far as it can be done by the authority of the federal courts, and that a different rule of decision will thus be gradually introduced, and the State laws be abrogated without the authority or sanction of our legislature. The federal courts profess, it is true, to be governed by the law of the States in which controversies before them arise; but we have observed in many cases to what extent they may be misled by losing sight of the local law as a rule of decision, while the controversy is carried on in the form of a suit in chancery.

It is to guard against this danger and to preserve unimpaired our own laws, so far as our own citizens are concerned, until they shall be changed or modified by competent authority, that we have thought proper to explain at large our views on this subject. We believe that we have satisfactorily shown that the constitutional grant of equity jurisdiction does not necessarily carry with it the adoption of the *practice* of the courts of chancery; that for every purpose of remedial justice our own State practice, which is equally applicable to cases in law and equity, is wholly sufficient; that there is no necessity for adopting a foreign system here; and that even if our Code of Practice and its amendatory laws should appear in some particular cases deficient, our courts acting under its authority have a right to make such further rules of practice as may not be inconsistent with its special provisions or with the general laws of the land. And be it here remarked, that the Supreme Court of the United States has from time to time done the like by altering the ancient rules of chancery practice derived from the English courts, or by promulgating new ones, although not in accordance with the forms and rules of British chancery practice as existing at the time of the adoption of the federal constitution. It is therefore manifest that the convictions of that high tribunal are, that as to the modes of proceeding in courts of chancery there is no constitutional restriction, or the rules of practice for the United States courts sitting in equity which may be found prefixed to the first volume of Howard's Reports, and the seventh of Wheaton's, would not have been promulgated.

Your committee conceive that the policy of the general government on this subject has long been settled. By section 2d of the act of September 29, 1789, entitled "An act to regulate processes in the district courts of the United States," it was provided that "the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of civil law." By the acts of 13th May, 1800, 19th April, 1802, sec. 30, and 20th July, 1840, the courts of the United States are required to adopt the jury laws of the several States. By an act which passed the Senate at its present session, of January, 1848, a similar provision is made in cases of attachment. By the act of May 20th, 1838, the federal courts sitting in Louisiana are directed to be governed by its jury laws. By the act of 19th May, 1828, commonly called the Process Act, the rules of proceeding used in the highest courts of the several States, whether sitting in law or in equity, are made obligatory upon the federal courts established in the States respectively. And as this law has been held to apply to all future rules of practice which might be adopted by the various States, as well as to rules existing at the time, it follows that the States of the Union may, by their legislation on the practice of their own courts of law or chancery, control and regulate that of the federal tribunals within their limits. See the cases of Ross & King *v.* Duval, 13 Peters, 45. Yeaton *v.* Lenox, 8 Peters, 123. Beers *v.* Haughton, 9 Peters, 329. By section 3d of said act a reservation is made, "saving to the courts of the United States, in those States in which there are not courts of equity with the ordinary equity jurisdiction, the power of prescribing the mode of executing their final decrees in equity by rules of court, * * * and if they see fit in their discretion, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislatures of the respective States for the State courts."

From all this it is very evident that in matters of practice, either at law or in equity, "the broad system of our common country" is anything but homogeneous. The argument that the rights of citizens of other States litigating in the federal courts of Louisiana are to be prejudiced by assimilating the rules of practice in those courts to the laws which govern our own State tribunals, is therefore unsound and fallacious. Should a citizen of Louisiana, litigating in courts of our Union in Maine or Massachusetts, complain that he did not understand their forms of practice, small attention would be paid to him. The laws of Maine are made for the benefit of her own citizens; they are adopted by the courts of the United States there sitting, and cannot be changed to accommodate the citizens of other States; advocates well skilled in the practice thus adopted are at their service. We desire the same privilege, and nothing more. We know that *rights* are not to be changed even by Congress; but *forms and remedies* may be altered; and we are at a loss to find any good reason why the forms of foreign courts, which we consider more complex, but not more effectual than our own, should be fastened upon us, disavowing as we do all design to infringe upon any part of the constitution or laws of the federal Union, or to render its courts less useful and efficient. We had supposed that the 4th section of the act of 1828 implied a reservation of the rights accorded us by the act of 26th May, 1824. We believe with the Hon. Henry Clay, Alexander Porter, and Justice McLean, whose able arguments and opinions are reported in the case of Livingston *v.* Story, that

the words "civil causes" in the statute of 1824 applied both to causes in law and in equity. The majority of the court thought otherwise, and we must submit to its decision. We now ask of Congress to extend the provisions of the law of 1824 to the chancery side of the United States courts in Louisiana. The experience of twenty-four years has shown that law to work well; and there have been no complaints that it diminished the power or efficiency of those tribunals, or impaired any rights of aliens, strangers, or citizens of other States, on the *law* side of the federal tribunals. We can perceive no just reason why the privilege accorded to all other States of the Union, of being governed in law and in equity, either or both, by their own laws and rules of practice, should be denied to us, possessing as we do a system essentially equitable, both in substance and in form, and courts invested with chancery powers as full and complete as those of the equity courts of England. And on the other hand, we consider that as long as this privilege is withheld, as long as the rules enacted by ourselves for the equitable interpretation and enforcement of our own laws are cramped, controlled, and set at naught by others originally adopted some hundred years ago to govern the anti-jury tribunals, and enforce the feudal laws of a distant monarchy, so long will our rights be impaired, our property perilled, our very liberties rendered precarious, our territorial legislation converted into a solemn farce, and our system of jurisprudence itself be eventually jostled out of existence.

Our object has been misrepresented; let it not be misunderstood. Again, clearly and unequivocally, we disclaim all wish to impair or lessen the admirable powers and acknowledged utility of the federal courts of chancery. But believing as we do that the equitable powers conferred upon the courts and judges of our own States are equally extensive, equally searching, equally flexible—while the process of enforcing those powers is far more simple, far less tedious and expensive, and to the full as efficacious—we desire that the practice of the federal courts of equity should be assimilated to that of our own State tribunals, the amount and nature of whose jurisdiction is unlimited by any of the artificial distinctions known to the courts of England or of English origin alone. We ask the same privilege that has long ago been accorded to other sister States of the Union, and we ask not one iota more; nor can we believe that when our necessities and our true position are understood, our representatives in Congress assembled will refuse meting out to us that justice which they have already meted out to others.

Your committee therefore recommend a reapplication to Congress by a renewed memorial, sustained by additional signatures, and accompanied by a copy of these proceedings; and further suggest that, in furtherance of their object, our delegates in Congress be requested to present a bill conceived substantially in the following terms:

AN ACT to amend "An act to regulate the mode of practice in the courts of the United States for the district of Louisiana," enacted May 26, 1824.

Be it enacted, &c., That the mode of proceeding in civil causes in the courts of the United States that now or hereafter may be established in the State of Louisiana, sitting as courts of equity or chancery, shall be

conformable to and regulated by the laws now or hereafter directing the mode of proceeding in the district courts of said State.

All which is respectfully submitted by your committee.

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WM. KING.
THOMAS J. DURANT.
P. SOULE.
GEO. STRAWBRIDGE.
R. N. OGDEN.
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G. B. DUNCAN.
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G. SCHMIDT.
WM. A. ELMORE.
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THOS. GIBBES MORGAN.
HENRY R. DENIS.
JOHN McVEA.
W. R. COWGILL,
A. M. BUCHANAN.

NEW ORLEANS, *February*, 1848.