Taylor, George Taylor, William Primrose, and Eliza, his wife, George Porter, and Elspet, his wife, William Rainey, Alexander Rainey, and Elizabeth Rainey.

This cause came on to be heard on the transcript of the record *from the District Court of the United States for the Northern District of Alabama, and was argued [*278 by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said District Court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

William Taylor, George Taylor, William Primrose, and Eliza, his wife, George Porter, and Elspet, his wife, William Rainey, Alexander Rainey, and Elizabeth Rainey, appellants, v. *Vincent M. Benham*, administrator *de bonis non*, with the will annexed, of Samuel Savage, deceased.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel. On consideration whereof, this court having affirmed the decree of the said District Court in this cause, on the appeal of the respondents at the present term, it is now here ordered and decreed by this court, that this appeal of the complainants be and the same is hereby dismissed with costs.

GEORGE W. PHILLIPS, PLAINTIFF IN ERROR, *v.* JOHN S. PRESTON, DEFENDANT IN ERROR.

Under the practice of Louisiana, peremptory exceptions must be considered as specially pleaded when they are set forth in writing, in a specific or detailed form, and judgment prayed on them.

Although the court should refuse to receive exceptions thus tendered, yet if the party has the benefit of them on a motion in arrest of judgment and in a bill of exceptions, the refusal of the court is not a sufficient cause for reversal.

The statute of Louisiana, requiring their courts to have the testimony taken down in all cases where an appeal lies to the Supreme Court, and the adoption of this rule by the court of the United States, includes only cases where an appeal (technically speaking) lies, and not cases which are carried to an appellate court by writ of error.[1]

Where the laws permit a waiver of a trial by jury, it is too late to raise an objection that the waiver was not made a matter of record, after the case has proceeded to a hearing.[2]

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[1] RELIED ON. *Arthurs* v. *Hart*, 17 How., 12. See also *Paul* v. *Rider*, 58 N. H., 121.

[2] Trial by jury is a privilege that may be waived; and when either party has an opportunity to demand it, and

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In a suit by the first indorser of promissory notes against a second indorser, upon an alleged contract that the second indorser would bear half the loss which might accrue from their non-payment by the drawer, it is not a sufficient objection to the jurisdiction of the court, that the second indorsee and defendant were citizens of the same State. Such an objection would be well founded if the suit had been upon the notes.

But not where the suit is brought upon a collateral contract.[3]

omits so to do, he cannot complain that it is denied. *Flint River Steamboat Co.* v. *Foster*, 5 Ga., 194. Where an attorney of the objecting party was present, and made no objection to a reference to a master, and appeared before the master, it was held a waiver. *Houses* v. *Roth*, 37 Ind., 89; even where the defendant objected to going on with the case, and took no further action, except to watch the progress of the case, and the clerk's entry was, "Neither party requiring a jury, cause submitted to the court," this was held a waiver. *Tower* v. *Moore*, 52 Mo., 118. Where a statute provided that if the defendant refused to plead, judgment should be pronounced against him, it was held that such a refusal was a waiver. *People* v. *King*, 28 Cal., 265. If the record shows that the accused "did not demand a jury," it shows a waiver. *Dailey* v. *State*, 4 Ohio St., 57; and permitting the court to try the case until it makes its finding, is a waiver. *Ellithrope* v. *Buck*, 17 Ohio St., 72. Where the defendant in a criminal case cannot consent to a trial by a jury of less than twelve jurors, the record must show that there were twelve jurors on the jury. *Jackson v. State*, 6 Blackf. (Ind.), 461; *Maduska* v. *Thomes*, 6 Kan., 153; *Brown v. State*, 16 Ind., 496; *Brown* v. *State*, 8 Blackf., 561; *Cancemi* v. *People*, 18 N. Y., 128; s. c., 7 How. Pr., 271; *Foote* v. *Lawrence*, 1 Stew. (Ala.), 483; *Larillion* v. *Lane*, 8 Ark., 372; *State* v. *Meyell*, 68 Mo., 266.

[3] The general rule is that a general assignee of the effects of an insolvent cannot sue in the Federal courts if his assignors could not have sued in those courts. *Sere* v. *Pitot*, 6 Cranch, 332. One indorser may sue another indorser of a note in the Federal courts if they are citizens of different States, even though the plaintiff could not have sued the maker there. *Young* v. *Bryan*, 6 Wheat., 146; but if the suit is against a remote indorser, and the plaintiff traces his title, in his declaration, though an intermediate indorser, he must show that this intermediate indorser could have sustained his action in that court. Ib. If payable to bearer, a resident of another State may sue on it in the Federal courts. *Bank of Kentucky* v. *Wister*, 2 Pet., 319; *Bonnafee* v. *Williams*, 3 How., 574; *White* v. *Vt. &c. R. R. Co.*, 21 How., 575. Bills of exchange drawn by a citizen of one State on a citizen of another State are deemed foreign bills of exchange, and may be sued upon in such courts. *Buckner* v. *Finley*, 2 Pet., 586.

So unless the original parties to the note were residents of different States, the assignee of the note cannot sue in the Federal courts. *Gibson* v. *Chew*, 16 Pet., 315; *Keary* v. *Farmers' and Merchants' Bank*, Id., 89; *Dromgoole* v. *Farmers' and Merchants' Bank*, 2 How., 241; *Coffee* v. *Planters' Bank*, 13 How., 183.

The clause forbidding the assignee of a chose in action from suing when the assignor could not have done so, has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing *in specie*, or damages for its wrongful caption or detention. *Deshler* v. *Dodge*, 16 How., 622.

Nor does that clause apply, either directly or constructively, to a conveyance of lands from a citizen of one State to a citizen of another State. *Briggs* v. *State*, 2 Sumn., 252; *McDonald* v. *Smalley*, 4 Pet., 620. A Pennsylvania coal company sold coal to a citizen of Massachusetts and took a note therefor, payable to T. & Co. "*or agent*" for the company, or order, and then indorsed it to the plaintiff, a citizen of New York; it was held that the plaintiff could sue in the federal courts. *Heckscher* v. *Binney*, 3 Woodb. & M., 333. In this case, however, the declaration had money counts as well as a special count on the note; and it was held that no re-

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A contract between two indorsers, that they will divide the loss between them, is a good contract, and founded on a sufficient consideration.[4]

Being a collateral contract, by parol, parol evidence can be given to prove it. The payee is a competent witness, and so is the notary, bringing with him the act of sale.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Louisiana.

*It was a claim advanced by Preston, the first indorser upon certain promissory notes, that Phillips, [*279 the second indorser, should pay one half thereof, by virtue of a special agreement between them.

The facts in the case were these.

On the 15th of March, 1836, Sosthain Allain sold to Robert R. Barrow sundry pieces of property in Louisiana, for the sum of $110,700, payable as follows, viz.:—

1837, March 1, ...	$16,921 27
1838, March 1, ...	18,028 26
1839, March 1, ...	19,135 25

covery could be had on the special count, unless it was averred that the money was payable to T. & Co. or the agents of the coal company.

The holder of a coupon payable to bearer is not an assignee of the cause of action within the meaning of the first section of the Act of March 3, 1875. *Cooper* v. *Town of Thompson*, 13 Blatchf., 435; *Codman* v. *Vermont & Canada R. R. Co.*, 16 Id., 165; *Same* v. *Same*, 17 Id., 1; *Pettit* v. *Town of Hope*, 18 Id., 180.

The assignee of a right to an account of the proceeds of sales of mortgaged property cannot maintain a suit in the Circuit Court of the United States in a case where his assignors were not competent, on the ground of citizenship, to sue the defendants. *Wilkinson* v. *Wilkinson*, 2 Curt., 582. A suit to recover damages from a corporation for its breach of an implied contract, in neglecting to protest and give notice in regard to certain drafts forwarded to it by a correspondent bank, may be maintained by the assignee of the right of action, if of another State. *Barney* v. *Globe Bank*, 5 Blatchf., 107.

The assignee of a mortgage cannot maintain a foreclosure of the suit if his assignor could not have done so. *Sheldon* v. *Sill*, 8 How., 441. *Contra*, *Dundar* v. *Bowler*, 3 McLean, 204; *Brainard* v. *Williams*, 4 Id., 122. As to suit by an indorser against an indorsee, see *Campbell* v. *Jordan*, Hempst., 534.

[4] Contribution between successive indorsers for the accommodation of another party does not arise by operation of law, but only by special agreement. *Hogue* v. *Davis*, 8 Gratt. (Va.), 4; *Farmers' Bank* v. *Vanmeter*, 4 Rand. (Va.), 553; *Bank of United States* v. *Beirne*, 1 Gratt. (Va.), p. 265; *Chalmers* v. *McMurdo*, 5 Munf. (Va.), 552; *McCarty* v. *Roots*, 21 How., 432; *McDonald* v. *Magruder*, 3 Pet., 470; *Rey* v. *Simpson*, 22 How., 350; *Weston* v. *Chamberlain*, 7 Cush. (Mass.), 404; *Clapp* v. *Rice*, 13 Gray (Mass.), 403; *Sweet* v. *McAlister*, 4 Allen (Mass.), 355; *Gore* v. *Wilson*, 40 Ind., 206; *Davis* v. *Morgan*, 64 N. C., 576; *Easterly* v. *Barber*, 66 N. Y., 433; *Kirkner* v. *Conklin*, 40 Conn., 81; *Smith* v. *Merrill*, 54 Me., 48; *Coolidge* v. *Wiggin*, 62 Me., 568; *McCune* v. *Belt*, 45 Mo., 174. In *Johnson* v. *Ramsey*, 14 Vr. (N. J.), 42, it was held that an agreement to vary the terms of the contract, as it is raised by the presumption of law, could not be proven unless in writing.

1840, March 1, ...	$20,242 20
1841, March 1, ...	21,349 23
1842, March 1, ...	22,456 22
1843, March 1, ...	23,563 21

For the security of the notes given for the above payments, the property was mortgaged.

On the 17th of March, 1837, Barrow sold the above property (with a slight addition) to Samuel John Carr, for $141,695.68, payable as follows:—

Cash, ...	$16,921 27
1838, March 1, ...	18,028 26
1839, March 1, ...	19,135 25
1840, March 1, ...	20,242 24
1841, March 1, ...	21,349 23
1842, March 1, ...	22,456 22
1843, March 1, ...	23,563 21
	$141,695 68

The act of sale, which was signed by Barrow and Carr, and executed before Louis T. Caire, a notary public, contained, amongst other things, the following provisions, viz.:—

1. After reciting the cash payment, it proceeded thus:—"And in payment of the balance, the said purchaser handed over to me, the undersigned notary, six promissory notes, bearing even date herewith, subscribed by him, to the order [of] John S. Preston, indorsed by him, the said John S. Preston, domiciliated in the parish of Ascension, as first indorser, and by George W. Phillips, domiciliated in the parish of Assumption, as second indorser, it being understood that, although each of the indorsers is responsible for the whole amount of said notes, they are between themselves equally responsible; said notes have been made payable at the domicile of the Union Bank of Louisiana, and their amount and terms of payment are as follows, viz." (then followed an enumeration of the notes as above).

2. An agreement that the property should stand mortgaged.

3. An agreement that the last-mentioned notes should be substituted, if possible, for those given by Barrow to Allain, and if it *should not be possible to do so, then that payments made upon the last set of notes should be applied to the first set, as they became due.

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The notes given by Carr to Barrow were indorsed by John S. Preston, as the first indorser, and by George W. Phillips, as the second indorser.

On the 1st of March, 1838, the first note became due, and was not paid by Carr. But it appeared by the record not to have been protested until the 30th of March, 1839.

On the 1st of March, 1839, another note became due, which appears to have been protested in proper time.

On the 5th of April, 1839, Barrow filed a petition in the District Court of the Fourth Judicial District of the State of Louisiana (a State court), representing the above-mentioned facts, and stating further, that he had made the necessary payments and arrangements with Allain, respecting the notes due in 1837, 1838, 1839, and praying for a sale of the property.

On the 1st of March, 1840, another note fell due, which was not paid, and was protested.

On the 15th of August, 1840, the property was sold in block by the sheriff to Isaac T. Preston, for his brother, John S. Preston, for the sum of $67,500, the purchaser assuming the payment of the notes due in 1841, 1842, and 1843.

On the 20th of August, 1840, the sheriff executed a deed for the property to John S. Preston.

On the 17th of February, 1841, Preston, calling himself a citizen of South Carolina, filed a petition in the Circuit Court of the United States against Phillips, a citizen of Louisiana, alleging that, by virtue of the agreement between them, Phillips was bound to pay to him the one half of all that he had paid, being $28,702.87, with legal interest on $9,014.13 from the 4th day of March, 1838, and like interest on $9,567.62½ from the 4th day of March, 1839. And on $10,-121, from the 4th day of March, 1840, with half the costs of protests.

On the 26th of February, 1841, the counsel of Phillips filed an exception, being a plea to the jurisdiction of the court, upon the ground that Barrow was the assignor of the notes to Preston, and that Barrow, being a citizen of the same State with Phillips, was incapable of suing him in the United States court.

On the 20th of April, 1841, the court overruled this exception, and Phillips filed an answer, denying "all and singular the allegations contained in the plaintiff's petition, and particularly that he ever promised or undertook to be responsible on the notes described in said petition, in any other capacity except as second indorser and after and in default of the plaintiff, or that the said notes ever were duly protested, and notice given to this defendant."

In April, 1841, the cause came up for hearing. On the trial the following testimony was filed.

*281] **Testimony taken by Consent, this April 23d, 1841.*

John S. Preston v. *George W. Phillips.*

The testimony of Robert R. Barrow, a witness for the plaintiff, who, being duly sworn, deposeth and saith, being asked by the plaintiff what he knows in relation to an agreement between John S. Preston and George W. Phillips, in relation to their indorsement of certain notes given by Samuel J. Carr to him, on payment of a plantation and slaves in Point Coupee, purchased from him by said Carr, about the 17th of March, 1837.

(The counsel of the defendant, Seth Barton, Esq., objecting to the above question, and reserving all legal exceptions.)

The witness says, that he was present at the time the notes were signed, about the 17th March, 1837. Samuel J. Carr, the plaintiff, and defendant, with deponent, met by appointment at the time of the sale, at Caire's office, before whom the act was passed; the act was already prepared when the aforesaid parties met, it having been prepared by the notary, under the directions of witness and said Carr; the notes were also drawn up and ready to be signed, under Carr and witness's directions and instructions; the notes were then handed to the plaintiff to indorse; when about to sign, Mr. Preston observed that he thought those notes were to have been drawn to the order of Phillips, the defendant. Mr. Carr replied, that he did not know that it would make any difference. And thereupon Colonel Preston turned round, and, addressing himself to Colonel Phillips, the defendant, said he supposed it made no difference, and said he wished it particularly understood between them, that in case Carr should fail to pay the notes, and the indorsers compelled to pay them, that he (Phillips) and Preston should be equally bound, and share alike in the loss, and that he, Preston, wished it so stated in the act. After this conversation, Colonel Preston turned to Mr. Caire, the notary, and remarked, that he wished it noted in the act, that the indorsers should be bound alike on failure of Carr. The notary then put down on paper the exact words that Colonel Preston dictated; all the parties were near each other, and participating more or less in the conversation. After this, Colonel Preston and Colonel Phillips indorsed the notes and handed them over to the notary; Colonel Preston indorsed first, and Colonel Phillips next; and instructions were given to the notary, Caire, to draw up a new act, inserting the clause aforesaid, as regards the equal liability of the indorsers; and then,

to indentify the notes with the act, the clause was added in the new act, and witness, when his attention was called to it by Mr. Caire, objected to its insertion, because, as he then thought, it made the indorsers liable to him for only their half. Mr. Caire called upon an attorney at law, whose name witness does not remember, to explain it, and thereupon witness was satisfied that it did not affect him, but only *related to the respective liabilities of the indorsers. [*282 The act was not signed at the time the notes were given, but was signed at a different time on that day, or the day next, but he cannot remember. Witness recollects the conversation very distinctly, as it was impressed on his mind at the time, and has frequently thought of it since.

Being shown the copy of the act annexed to the petition, and the clause at the top of the page, says, they are the same referred to by him. The three notes marked A, B, and C, filed with this deposition, are part of the consideration of the sale; Colonel Preston took up three of the notes, A, B, and C, and paid them after protest, interest and all charges, which payment was made before this suit was instituted. The tract of land in West Feliciana, mortgaged to secure the payment of these notes, was seized and sold to pay prior mortgages of said Carr, and consequently there was nothing to come from that land to pay this debt of Carr's, for the plantation sold as aforesaid; this tract was woodland; Colonel Preston has paid the notes which have matured, and has assumed the balance due, he having purchased in the property mortgaged, to secure the payment of the notes aforesaid.

The defendant, by S. Barton, his attorney, objects to the whole of the foregoing deposition of the witness, as illegal and incompetent; and specially to all such parts of it as are hearsay or secondary proof; and specially, also, to all such parts of it as go to vary, or contradict, or explain the written testimony to which the witness refers; and particularly such parts as tend to prove any thing against or beyond the authentic act of sale, on file in this cause, and insisting on such objections (to be urged on trial), and waiving no part thereof, cross-examines the witness, under the above reservations.

Witness never had the act of sale referred to recorded in West Feliciana; that the property in Feliciana was sold for judgments of younger date than the sale aforesaid; the first note of $18,000 was paid by a renewal of note payable to the Union Bank; the other two were paid by drafts; the note given on renewal was not indorsed by Colonel Phillips; Colonel Phillips was no party to the drafts referred to; the drafts were on time and suited witness; witness thought

from appearances that Preston and Phillips were just introduced to each other, or not long acquainted, when they met at the notary's, as above related; some short time before the act was passed, witness met Colonel Phillips at the theatre, and had some conversation about his indorsing for Carr; said he, Phillips, had promised to indorse for Carr, but Carr said it would only be temporarily, as he had made arrangements to change the indorsements, by substituting Colonel Isaac T. Preston in the place; witness thinks that Colonel Phillips must have heard the conversation related to above, as it took place at the notary's; does not recollect *that *283] Phillips made any reply to Colonel Preston; Phillips must have heard it, as the conversation was made direct by Preston to him; and Phillips must have heard the direction of Preston to the notary, to insert the clause; thinks they met at the notary's at ten or eleven in the morning; neither the plaintiff or defendant attended at any other time at the notary's than that mentioned, nor were they present when he and Carr executed the act, nor can he say that Phillips has seen the act; there was no arrangement between him and Preston, in relation to the sale of the property. It is admitted, that the property was purchased by Colonel Preston, plaintiff, for $67,500; that the third note was paid by draft prior to the sale under the seizure and sale; the three last notes assumed by Preston are in the hands of witness; witness has never had the mortgage raised, to secure the last three notes.

(Signed,) R. R. BARROW.

Sworn to and subscribed before me, this 23d April, 1841.

DUNCAN N. HENNEN, *Clerk.*

Upon the trial, the counsel for Phillips, the defendant, filed the following bill of exceptions:—

1st. The defendant, by his attorney, offered to file document A as his peremptory exceptions founded in law; to the filing whereof the plaintiff's counsel objected, and their objection was sustained by the court; to which decision the defendant excepts.

This document was offered after the pleadings were read:

2d. Before any evidence was offered by either of the parties in support of the several issues, on their respective parts to be maintained, the defendant's counsel moved the court that the clerk be directed to take down the testimony of all the witnesses whom either party should adduce on the trial, and to file all documentary proof received in evidence, and keep minutes thereof; but the court overruled the motion, and

witnesses were examined without their testimony being taken down, and documentary proof received without being marked as filed, or minutes taken thereof; to which decision the defendant excepts.

3d. The plaintiff offered in evidence the deposition of Robert R. Barrow, marked B, to the reception whereof the defendant objected; but the objection was overruled by the court, and the deposition was admitted in evidence; to which decision of the court the defendant excepts.

4th. The plaintiff offered in evidence the first, second, and third of the promissory notes described in the petition, together with the protests thereof, and the several certificates of the notary in relation to the manner and times in which he notified the plaintiff and defendant of the dishonor of the notes as they respectively matured. Whereupon the defendant objected to the admission of the said certificates, or any proof adduced for the purpose of, and leaving notice to the indorsers of, protest, as no such notices were alleged [*284 *in the petition; the court overruled the objection, and admitted the evidence; and to its decision therein the defendant excepts.

5th. The plaintiff offered Louis T. Caire (the notary before whom the act of sale was passed that is described in the petition) as a witness to prove the allegations of the petition, and a verbal agreement between the plaintiff and the defendant, made before the passing of the act of sale, that, as between themselves, they would be equally liable as indorsers, as stated in the petition. And, also, to prove by him that the clause in the act of sale, setting forth said agreement, was inserted therein by the instruction of the plaintiff, in the presence of the defendant, and without any objection thereto on his part. Whereupon the defendant objected to the admission of such evidence; but the court overruled the objection, and admitted the evidence; and to its decision therein the defendant excepts.

6th. The plaintiff offered in evidence the copy of the act of sale described in the petition, and marked (C), to the admission of which, and such parts thereof as were adduced for the purpose, and tended to prove any agreement between the plaintiff and the defendant, as to their equal liability between themselves, upon their several indorsements upon the promissory notes described in the petition, and to charge the defendant with any liability resulting therefrom, the defendant objected; but the court overruled the objection, and admitted the evidence; and to such, its decision, the defendant excepts.

7th. The plaintiff offered in evidence the record of the suit

of *Robert R. Barrow* v. *S. John Carr*, being the order of seizure and sale, and proceedings therein, relating to the seizure and sale of such of the property described in the petition and act of sale, as was situated and located in the parish of Point Coupee, Louisiana. The said record is marked (D), to the admission of which record and proceedings the defendant objected, but the objection was overruled by the court; and to such, its decision, the defendant excepts.

8th. The plaintiff offered in evidence document marked (D), purporting to be an act of sale from the sheriff of Point Coupee, adjudicating the property last mentioned to the plaintiff, as the purchaser at public sale; to the admission whereof the defendant objected, but the court overruled the objection; to which decision of the court the defendant excepts.

The defendant, by his attorney, having reserved the foregoing several exceptions, as the occasions thereof severally arose in the course of the trial, and at the suggestion of the court, the drafting of separate bills of exceptions were dispensed with, and the general bill for the whole postponed, till the plaintiff's testimony was closed.

He now respectfully presents to the court this his bill of exceptions, enbracing all the several points reserved, and prays the court to sign and seal the same, which is done accordingly.

(Signed,) J. McKinley, [SEAL.]
P. K. Lawrence. [SEAL.]

April 28th, 1841.

*285] *Peremptory exceptions referred to in bill of exceptions, marked as filed, same day.

United States of America:—Circuit Court of the United States, being the Ninth Circuit thereof, and holden at New Orleans, in and for the Eastern District of Louisiana.

John S. Preston v. *George W. Phillips. April term*, 1841.

And now at said term came the defendant, George W. Phillips, by his attorney, and (not waiving, but insisting on his answer heretofore filed in this cause), availing himself of the provisions of the Louisiana code of practice in that behalf, and as the same has been adopted by this honorable court, he here presents his peremptory exceptions, founded in law, to the further maintenance of this suit.

And for causes of peremptory exception, he sets forth and assigns the following, to wit:—

1st. The agreement stated in the petition to have been en-

tered into by the plaintiff and defendant is nowhere alleged to have been in writing, or signed by the parties, or embodied in any instrument of writing to which they were parties, or to which they, or either of them, assented, by their presence or otherwise, at the time of the execution of any such instrument of writing, by those who may have been parties thereto.

2d. The petition in no part alleges any, or a sufficient, consideration for the said supposed agreement, nor does it allege or show, that the said agreement imported in itself any, or a sufficient, consideration.

3d. The said supposed agreement is at variance with, and in contradiction of, and seeks to change, the liabilities and relations of the plaintiff and defendant to each other, in relation to certain contracts in writing, to which the petition alleges they are parties, by respectively signing their names on the backs of six several promissory notes, as first and second indorsers thereof.

4th. The petition, in no part of it, alleges that either the plaintiff or the defendant was duly notified of the dishonor of any of the said promissory notes, which it alleges to have been protested for non-payment, as they severally matured, nor does the petition show in what manner the plaintiff was, or could have been, coerced to make the several payments he alleges he has made.

5th. All the statements and allegations of the petitions in reference to any agreement or circumstance, out of which any liability of the defendant to the plaintiff is supposed to arise, are loose, vague, and indefinite, and insufficient in law to put the parties to their proofs upon the several issues of fact which the pleadings present.

Wherefore, and for divers other good reasons in this behalf, the defendant prays judgment of this honorable court upon the said *petition, and the dismissal thereof, with a further judgment for costs in this behalf most unjustly sustained. [*286

(Signed,) JANIN & BARTON,
Defendant's attorneys.

And afterwards, to wit, on the 29th day of April, 1841, the following motion in arrest of judgment was filed.

United States of America:—Circuit Court of the United States, holden at New Orleans, in and for the Eastern District of Louisiana.

John S. Preston v. *George W. Phillips. April term*, 1841.

And now comes the defendant, by his attorney, and prays the court to arrest the judgment in this case, and sets forth and assigns as grounds for the motion :—

1st. That the plaintiff's petition does not allege that the agreement described therein, and out of which the defendant's liability is supposed to arise, was signed by either plaintiff or defendant, or that the same was in writing.

2d. The petition does not allege any, or a sufficient, consideration for the agreement which it states to have been entered into by the defendant, to and with the plaintiff.

3d. The agreement stated in the petition is at variance with, and in contradiction of, the contract of indorsements, which arises from the signatures of plaintiff and defendant as first and second indorsers, upon several promissory notes, which the petition alleges they signed as such.

4th. There is no allegation in the petition of notice or notices being given, either to plaintiff or defendant, of the dishonor or protest of any one of the said promissory notes, as they respectively matured.

5th. The evidence adduced at the trial, as shown by the statement of facts, and the several documentary proofs to which it makes reference, is not sufficient in law to support the issues on the plaintiff's behalf to be maintained, or to authorize any judgment in favor of the plaintiff, and against the defendant.

6th. A trial of this cause by the court, and without the intervention of a jury, unless there had been an express waiver of record, is not authorized by the law regulating the practice of this court.

Wherefore, the defendant prays that the judgment be arrested, that the plaintiff take nothing by his plaint, that his petition be dismissed, and that the defendant may go hence without day, and recover of the plaintiff his costs in this behalf most wrongfully sustained.

(Signed,) S. Barton, *Defendant's attorney.*

On the 29th of April, 1841, the court entered up judgment in favor of the plaintiff, John S. Preston, and against the
*287] defendant, *George W. Phillips, for the sum of $19,688.74, with interest of five per centum per annum upon $9,567.62 thereof, from the 4th day of March, 1839; and upon $10,121.12, from the 4th day of March, 1840, till paid ; for $5.25, cost of protest, and cost of this suit.

This judgment was for one half of the note due March 1, 1839, and one half of the note due March 1, 1840, viz.:

Amount of judgment, ...	$19,688 74
Note due 1–4th March, 1839, $19,135 25	
One half of which is	9,567 62
Note due 1–4th March, 1840, $20,242 24	
One half of which is	10,121 12
	$19,688 74

The defendant's counsel moved an arrest of judgment, upon the grounds just stated, which motion was overruled.

To review all these opinions of the court, the case was brought up to this court.

The cause was argued by *Mr. Barton* for the plaintiff in error, who contended, that if Preston obtained the notes from Barrow by substitution, then the plea to the jurisdiction of the court must be sustained, because Barrow and the original defendant, Phillips, were both citizens of Louisiana. 4 Dall., 8, 10, 11.

Until payment of the note, there is no claim against the present indorser. 4 Cranch, 46.

By the law of Louisiana, peremptory exceptions are taken to matters of fact or matters of law, by way of demurrer. Code of Practice, art. 343–346.

The court was wrong in refusing them. Act of 1824; 4 Stat. at L., 62.

An appellate court may admit the exceptions, and go on to decide the case. Code of Practice, 902; 1 La. R., 315; 4 Mart. (La.) N. S., 437.

Barrow did not record the deed, and therefore a younger judgment came in. It was sold when three notes only were paid. When Preston got it, there was nothing due upon it.

Parol evidence cannot be introduced to vary a written contract. Civil Code, 2256; 1 Mart. (La.) N. S., 641.

The first indorser is always supposed to assign to the second for a valuable consideration. Mart., 2 N. S., 361, 367; 3 Id., 692; 5 Id., 3; 2 La. R., 48, 447, 448; 3 Id., 692; 4 Id., 469; 6 Mart. (La.) N. S., 517.

In order to be bound by an act before a notary, the party concerned must sign. 11 Mart. (La.), 453.

The first indorser is liable, and must pay notwithstanding the existence of an understanding. 4 Wheat., 174; 1 Pet. C. C., 85; 6 Pet., 59.

*Preston took renewed notes, and thereby extinguished Phillips's liability. For the doctrine of novation, see New Civil Code, art. 2181, 2187, 2194; 2 Mart. [*288

(La.) N. S., 144; 1 La., 527; 4 Id., 511, 512; 1 Rob. (La.), 302, 303; Code of Practice, 642, 680, 732, 745.

Mr. Justice WOODBURY delivered the opinion of the court.

The points which have been argued in this case are in part connected with matters of form, and in part with what is substance. We shall dispose of the first, before proceeding to examine the last.

The principal objection in respect to form is, that the court below refused to receive what are called in the practice of the State of Louisiana "*peremptory exceptions.*" These are of two kinds, one as to form, and one as to law. Those in this case were offered as "peremptory exceptions, founded in law." By the Code of Practice in Louisiana, art. 345, such exceptions "*may be pleaded in every stage of the action previous to the definite judgment.*" 1 La., 315; 1 Mart. (La.) N. S., 437.

Hence, though offered here after the pleadings were read, they are admissible, while peremptory exceptions relating to *form* would not be then admissible. See art. 344. The only doubt as to their being duly offered arises from the provision in the 346th article, which requires them to "be pleaded specially," and they are not here in the precise form of a special plea at common law. But, in the absence of any adjudged cases to the contrary, we are inclined to think, that, under the liberal and general pleading in use in Louisiana, these exceptions must be considered as "*specially pleaded,*" when set forth as they were here in writing, and in a specific or detailed form, and judgment prayed on them in favor of the present plaintiff. Has he then been deprived of the advantage attached to them? That is the important inquiry. On examination of the record it will be seen, that he had the benefit of all these exceptions, first in a motion in arrest of judgment.

Again, he had the benefit of all the important matter in those exceptions by the bill which was afterwards filed and allowed, and upon which this writ of error has been brought. We cannot, therefore, perceive that he has suffered any by the refusal of the court to receive these peremptory exceptions when first offered.

The case in this respect is like one at common law, where the defendant should propose to demur generally to the declaration, but, being refused, objects to the sufficiency of it to cover various portions of the evidence as it is offered, and also objects to the sufficiency of the declaration in arrest of

judgment. He thus, by a subsequent bill of exceptions to the rulings on the testimony and on the sufficiency of the declaration, obtains every advantage that he could have had under his general demurrer, and thus suffers nothing which requires a reversal of the judgment and a new trial for his relief.

*The next objection of a formal character is, that the court below refused, though requested by the original defendant, to have the clerk take down in writing and file the testimony of the witnesses and the documentary evidence. [*289

It is true, that by a statute of Louisiana, passed July 20th, 1817, their courts are directed to have the testimony taken down "in all cases where an appeal lies to the Supreme Court, if either party require it." It is also true, that an act of Congress, passed May 26th, 1824 (4 Stat. at L., 63), has made the practice existing in Louisiana the guide to that in the courts of the United States, when sitting in that State, except as it may be modified by rules of the judge of the United States court.

And it is further shown in this record, that the district judge there, November 20th, 1837, adopted the practice of Louisiana, as then existing, in all cases not of admiralty jurisdiction.

In a cause once decided by this court, which was connected with this point, *Wilcox et al.* v. *Hunt*, 13 Pet., 378, it was remarked, that the plea put in there as a part of the State practice, as the latter had not been adopted, was not received. But the practice there standing differently from that which is urged in this case, that decision does not control the present one.

In considering, then, the propriety of the ruling of the court here, it is first to be noticed, that, by the words of the statute, this testimony is to be taken down and filed only in those cases "where an appeal lies." That means, of course, a *technical* appeal, where the facts are to be reviewed and reconsidered, for in such an one only is there any use in taking them down. But in the present case no appeal of that character lay to this court, but merely a writ of error to bring the law and not the facts here for reëxamination. To construe the act of 1824 as if meaning to devolve on this court such a reëxamination of facts, without a trial by jury, in a case at law, like this, and not one in equity or admiralty, would be to give to it an unconstitutional operation, dangerous to the trial by jury, and at times subversive of the public liberties. *Parsons* v. *Bedford et al.*, 3 Pet., 448.

In a case of chancery or admiralty jurisdiction it might be different, as in those, by the law of the land, a technical appeal lies, and the facts are there open to reconsideration in this court. *Livingston* v. *Story*, 9 Pet., 632; *McCollum* v. *Eager*, 2 How., 64.

In this case, likewise, it would be totally useless to have all the facts taken down in that manner, because, if so taken and sent up here, it would be irrelevant and improperly burdening the record, as much as the whole charge and opinion of the judge, instead of the naked points excepted to. See 28th rule of this court, and *Zeller's Lessee* v. *Eckert et al.*, 4 How., 297, 298. If a case comes up in that manner, this court never reconsiders or reëxamines all the facts, but merely the
*290] law arising on them, as if a bill of exceptions *had been properly filed. This has been decided already in *Parsons* v. *Armor et al.*, 3 Pet., 425; *Minor* v. *Tillotson*, 2 How., 394.

Besides these considerations, showing that neither the words of the statute, nor the reasons for it, reach a case like this, there is another in the practice and laws of Louisiana, which shows that this provision does not extend to a cause like the present in this court. There the court of appeal, even in cases at law, often decides on all the facts as well as the law; but not so here. The court there may be substituted for a jury by consent of the parties in a trial at law, and were in this case below. But no such power can be conferred on this Supreme Court by parties in cases at law; and, as before shown, it exists under acts of Congress merely in cases in equity and admiralty.

To conclude on this point, then, it will be seen that the plaintiff in error, notwithstanding the refusal to have the clerk take down this evidence, has enjoyed all the benefit of it under his bill of exceptions, where it was material and he wished to raise any question of law on it, and has enjoyed it as fully as if the whole had been taken down and filed. And thus he loses nothing and suffers nothing by the court refusing to do what we think neither the language nor spirit of the law requires in a case like this. *Parsons* v. *Bedford*, 3 Pet., 433.

There are two other objections of form, which appear on the record and may well be noticed, though they are not embodied in the bill of exceptions. One is as to the waiver of a trial by jury in this case in the court below. After a hearing there, it was urged, that, the waiver not having been entered on the record, the court was not authorized to proceed without a jury.

But it would hardly be permissible for a party to proceed without objection in a trial of facts before the court, in a case at law in a State where the statutes permitted it, and the habits of the people under the civil law inclined them to favor it, and then, after a decision might be announced which was not satisfactory, to offer such an objection as this. From its not being incorporated into the bill of exceptions, or argued at the hearing before us, a strong presumption arises that it has been abandoned.[1]

The other objection is spread upon the early part of the record, and was a proper one for the consideration of the court in that stage of the case, as it went to its jurisdiction. This was urged on the ground, that the notes mentioned in the petition of the plaintiff below belonged or ran originally to R. Barrow, a resident of Louisiana, in the same State with the defendant, and that his title was assigned to the plaintiff, and thus the latter cannot sue the defendant in this court, if Barrow could not. This position would be well taken under the provision in the 11th section of the Judiciary Act of 1789, if the original plaintiff had instituted his suit upon the notes as assignee of them. See *Towne* v. *Smith*, 1 Woodb. & M., 115; *Bean* v. *Smith* **et al.*, 2 Mason, 252; 16 Pet., 315; *Stanley* v. *Bank of North America*, 4 Dall., 8–11; *Montalet* v. *Murray*, 4 Cranch, 46. But so far from that, he does not declare at all on the notes. He sets out a separate and different contract as his ground for recovery, resting on an original agreement between him and the defendant; and does not set out any assignment of those notes to himself by Barrow. Even if he counted on the notes, but not on or through an assignment of them, this court would have jurisdiction. 6 Wheat., 146; 9 Id., 537; 2 Pet., 326; 11 Id., 801; 3 How., 576, 577; 1 Mason, 251; 1 McLean, 132. The judge below, then, properly overruled this objection. [*291

We come next to the only remaining question in this case, which branches into five or six different exceptions. It is a question of substance, and in some respects is not without difficulty. It is whether the ground upon which the objection going to the jurisdiction was overruled is well founded in the declaration and the facts, by showing a separate and independent contract, and one which had a good consideration in law.

On looking to the petition, it will be seen that it sets out a sale of land between other parties; the mode of payment

[1] Followed. *United States* v. *King*, 7 How., 866. Cited. *Barreda* v. *Silsbee*, 21 How., 167; *Gilman* v. *Illinois &c. Tel. Co.*, 1 Otto, 614. See *Kearney* v. *Case*, 12 Wall., 282.

stipulated; the agreement between the plaintiff and defendant to become indorsers of certain notes, and divide between them any loss; the subsequent failure of the purchaser to pay the notes; the settlement of them by the plaintiff, and his right under the agreement and facts to recover of the defendant one half of the amount. The whole claim proceeds on the collateral agreement, and there is no pretence of grounding the suit, as holder or indorsee, on any promises contained in the notes, or in the indorsements on them.

There is also a good consideration for this collateral agreement. It is the promise of the plaintiff beforehand to loose one half, if the defendant would become a surety with him and loose the other half, and the actual payment afterwards of the whole by the plaintiff. Being then a collateral agreement by parol, which is sued, it stands free from the objection to the parol evidence offered to prove it. Were the action on the notes, and this evidence offered to contradict them, it would be entirely different; because, in an action on a note, parol testimony is not competent to vary its written terms and probably not to vary a blank indorsement by the payee from what the law imports.[1] Civil Code of Louisiana, art. 2256; *Stone et al.* v. *Vincent*, 6 Mart. (La.) N. S., 517; 15 La., 539; 10 Id., 205; 1 Pet., C. C., 84; *Bank of the United States* v. *Deane*, 6 Pet., 59; 3 Campb., 56, 57; 9 Wheat., 587; 1 Mart. (La.) N. S., 641; Chit. Bills, 541; 12 East, 4; 4 Barn. & Ald., 454. So, between the contracting parties, likewise, all prior conversation is supposed, as far as binding, to be embodied into the written contract. 4 L., 269; *Taylor* v. *Riggs*, 1 Pet., 591; 8 Wheat., 211. But the parol evidence here is not offered *in any action on the note, or to alter its terms or its indorsements; nor is any prior or contemporaneous conversation offered to vary the note, or its indorsement, in an action founded on either of them. But it is offered to prove a separate contract, which was made by parol, and is of as high a character as the law requires in such cases, and this evidence is plenary and entirely satisfactory to substantiate the separate contract. It is true, at the same time, that, after a prior indorser has paid a note, he cannot recover, even in an action, not on it, but for contribution of one half from a second indorser, if they were not in fact joint sureties, nor in fact made any collateral contract whatever, nor in fact had any communication whatever as to their liability. *McDonald* v. *Magruder*, 3 Pet., 474; 3 Harr. & J. (Md.), 125; 7 Johns. (N. Y.), 367.

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[1] CITED. *Clark* v. *Manufacturers' Ins. Co.*, 8 How., 246.

But the present is a case differing, *toto cælo*, from that. Here, by a deliberate arrangement before a public notary, and by the positive evidence of two witnesses, the two indorsers were co-sureties, and specially agreed to bear any loss equally between them; and the right to recover is, therefore, entirely clear. 3 Pet., 477; *Douglass* v. *Waddle*, 1 Hamm. (Ohio), 413, 420; *Deering* v. *The Earl of Winchelsea*, 2 Bos. & P., 270.

There are two or three other views connected with this part of the case, which may be usefully adverted to, but by which we do not decide it.

Thus, where a person like Phillips, the original defendant, was not a party to a note, but put his name on the back of it, parol testimony has been deemed competent to show the real object for which it was placed there; and especially if it did not contradict any legal implication from the name being there. And hence, under circumstances like these, where, as in Louisiana and some other States, it is implied by law that such a person puts his name there as a surety or guarantor, no objection exists to parol proof to that effect. 10 La., 374; *Lawson* v. *Oakey*, 14 Id., 386; *Nelson* v. *Dubois*, 13 Johns. (N. Y.), 175; *Dean* v. *Hall*, 17 Wend. (N. Y.), 214; 5 Mass., 358; 12 Id., 281; 1 Vt., 136; *Ulen* v. *Kitteridge*, 7 Mass., 233; 4 Wash. C. C., 480; 5 Serg. & R. (Pa.), 363. In *White* v. *Howland*, 9 Mass., 314, he is held to be liable as if signing with the maker as a surety. But however much, in some States, the practice may go beyond this in suits between the parties to the agreement, as in 1 Hamm. (Ohio), 420, and 5 Serg. & R. (Pa.), 363, it could generally not be competent to prove any thing by parol, in actions on the note, contrary to what is written or to what is implied in law. *Bank of the United States* v. *Dunn*, 6 Pet., 59.

And in other States and in other circumstances, where the inference of law is not that such a name is placed there as a surety, it is very doubtful whether, in a suit on the note, proof that he did it only as a surety is competent. 6 Mart. (La.) N. S., 517; *Bank of the United States* v. *Dunn*, 6 Pet., 59.

*In England, in the case of such a name on the back of a bill of exchange, the person may be treated as a new drawer (Chit. Bills, 241); and if the payee there has also indorsed the note, the implication deemed most proper is, that another name on the back is that of a second indorser, and should so be held in the hands of third persons. Chit. Bills, 188, 528; Holt, 470; 5 Ad. & E., 436; 6 Nev. & M., 723. So, 6 Mart. (La.), 517. It will be seen, however, [*293

that these last are generally cases of actions on the notes or bills of exchange themselves, while the present case is not brought on the note itself, but on a distinct and collateral contract.

Another suggestion bearing on the case might be, that in Louisiana the surety, when paying, may step into the shoes of his creditor, if he pleases, by subrogation, and enjoy all his rights against the debtors or other sureties. *Hewes et al.* v. *Pierce*, 1 Mart. (La.) N. S., 361; *Calliham* v. *Fanner*, 3 Rob. (La.), 299; Civil Code of Louisiana, art. 2157. But there the suit is probably in the creditor's name, and not, as here, in that of the surety. So, in some countries where the civil law prevails, such a contract as this, deliberately made before a notary, and by him reduced to writing by request of the parties, would in law be deemed equivalent to a contract in writing; and on that ground be admissible even in a suit on the note between the original parties to it.

The doings of the parties thus have a sort of public form given to them, *quasi* judicial, and they are bound by them, though not signed by the parties. 2 Domat's Civil Law, b. 2, tit. 1, § 1, art. 28, and tit. 5, § 5, pp. 661, 662. It would be there deemed an act of too much deliberation by the parties, and of too much formality before that public officer, to be treated merely as an ordinary verbal arrangement. Coop. Justinian, 586; 3 Burr., 1671; Story, Bills, § 277. But, though the Louisiana code, founded chiefly on the civil law, may not expressly abrogate such a doctrine, it does not in terms make records by a notary valid, unless signed by the parties, or consisting of copies of papers signed by the parties and acknowledged before witnesses. Civil Code, art. 2231, 2413; 8 Mart. (La.) N. S., 568; 10 La., 207, 354. And though the paper containing this is signed by the parties to the sale and attested by witnesses, it is not signed by Preston and Phillips, the parties to this arrangement.

It is not necessary, however, to decide absolutely on the effect of either of these last views. Deeming the action here to be founded on the collateral agreement, and deeming the evidence offered to be competent, for the reasons first stated under this head, these conclusions will virtually dispose of the last six exceptions contained in the record of this case.

Thus, as to Barrow's deposition, the admission of which was the ground of one of these exceptions, it is clearly com-
*294] petent to prove this *separate parol contract in a suit on that, and not on the note. So, the certificates and notices, also excepted to, were properly proved as a part of the collateral transaction under the general expressions in

the petition, and not as notices that should be specially set out in a declaration, where notes are counted on by a holder. In a case like that, the averment of them and the proof are highly material, but in the former case they are rather historical and merely a part of the *res gestæ*, without its being essential to give them in detail. The original plaintiff avers in the petition that the notes were protested, and that he was obliged to pay them, which would not have been the case without due notices; and this is quite enough in an action on a collateral undertaking.

So, the notary's evidence, which is another of the exceptions, becomes under this aspect entirely competent, and the written memorandum made by him at the time, which is another objection, was also admissible evidence to refresh his memory, if not *per se* of the facts stated in it. Greenl. Ev., §§ 436, 437. That it was admissible to refresh his memory, see *Smith* v. *Morgan*, 2 Moo. & Rob., 259; *Horne* v. *McKenzie*, 6 Cl. & F., 628. Other cases say such a memorandum is admissible itself to go to the jury. Greenl. Ev., § 437, note; 1 Rawle (Pa.), 182; *Smith* v. *Lane et al.*, 12 Serg. & R. (Pa.), 84; 2 Nott & M. (S. C.), 331; 15 Wend. (N. Y.), 193; 16 Id., 586–598. If this last be a rule controverted, the writing here was "the act of sale," and contained other matters as to the transaction in connection with this as the whole terms of sale, which were clearly competent, and the whole properly went together to the jury as exhibiting the progress and character of the transaction, beside being admissible to refresh the memory of the witness. *Bullen* v. *Michel*, 2 Price, 422, 447, 476.

So, the evidence of the sale of Carr's property and of the transfer of it to the original plaintiff, Preston, by the sheriff, and the terms of the transfer, though objected to, are mere links in the chain of the transaction, and unexceptionable in that view; and were, like the evidence of the former sale to Carr by Barrow, duly authenticated.

Upon the whole case, then, we are happy to find that no legal objection seems to be tenable against making the original defendant meet an engagement which, on the record, he appears to have been bound in honor and justice, no less than law, faithfully to discharge. Although the court have deemed it proper thus to deliver an opinion on this case, as it has been argued by the counsel for the plaintiff in error, yet the death of the plaintiff has since been suggested; and no appearance is entered for the defendant. We shall not, therefore, enter judgment in conformity to the opinion until the defendant or the representatives of the deceased appear.