40/9

Oct 1845 #28

Honore Picotte et al
vs.
William Cooley et al
Pike Co.

ejectment

French and Spanish land claims

land
marriage
wills
women
Dower

Page 1. In the Circuit Court of Pike county in the State of Missouri, the following declaration appears - to wit -

" In the Circuit Court - 2nd Judicial Circuit November term A.D. 1835.

Pike, to wit. Honore Picotte & Therese his wife, John Baptiste Lesperance & Elizabeth his wife, John Baptiste Duchouquette & Joseph Duchouquette by Beverly Allen their attorney ~~& Marie Papin, Cordia Papin, Adolphe Papin & Henry Papin infants under the age of twenty one years by John Baptiste Lesperance their next friend~~ complain of William Cooley of a plea of Trespass & ejectment - For that the said Plaintiffs heretofore, to wit - on the first day of September in the year one thousand eight hundred and thirty five at the county of Pike were legally entitled to the possession of a tract of land situate in said county containing one league square, being the same granted by Zenon Trudeau Lieutenant Governor of upper Louisiana under the Spanish Government, to Joseph Brazeau & subsequently confirmed under the authority of the United States to said Brazeau & is bounded northwardly by land now or lately claimed by the heirs of Auguste Chouteau, Southwardly by land now or lately claimed by Peter Chouteau, westwardly by land now or lately claimed by Auguste A. Chouteau & Eastwardly by land of the United States or of persons claiming under same & is the same described in the deed executed by Antoine Soulard & Julia his wife, Marie Therese Brazeau widow of Joseph Brazeau & Baptiste Duchouquette to Mary E. Carter, Walter Coles & Edward Coles & dated the twenty fifth day of November in the year 1818, & being so entitled

erasure in original

" 2 the said defendant afterwards, to wit - on the day and year aforesaid at the County aforesaid, with force & arms, entered into and upon the said premises, & ejected & expelled them the said Plaintiffs from the same. -

And for that also the said Plaintiff afterwards to wit, on the said first day of September in the year one thousand eight hundred and thirty five were legally entitled to the possession of a certain other tract of land situate in said county of ~~Pike~~ Pike containing seven thousand fifty six acres, more or less, being so entitled the said defendant afterwards, to wit - on the day & year last aforesaid with force and arms at the county aforesaid entered into & upon the same premises, & ejected & expelled them the said plaintiffs from the same to the damage of the said Plaintiffs of one thousand dollars, & therefore they sue &c

erasure & interlineation appear in original

R. Allen Atty.
for Plffs.

And upon the said declaration appears the following endorsement - to wit

"Foregoing declaration & precipe filed in Clerk's office of Circuit court, October 10th 1835.

Levi Pettibone Clerk."

And thereupon ~~the following~~ a writ of summons was issued by said Clerk, in the words following - to wit -

"County of Pike, Set.

"The State of Missouri,

To the Sheriff of Pike county - Greeting:

We command you to summons William Cooley Defendant, that he be and appear before the Judge of our Circuit Court, at the next term thereof, to be held at the town of

Writ

3. within and for the county aforesaid, then and there to answer unto Honore Picotte & Therese his wife John Baptiste Lesperance & Elizabeth his wife, John Baptiste Duchouquette & Joseph Duchouquette, by their Attorney, & Marie Papin Coralie Papin, Adolphe Papin & Henry Papin, Infants by John Baptiste Lesperance their next friend, Plaintiffs of a plea of Trespass & Ejectment to the damage of the said Plaintiffs of one thousand dollars; and have you then there this writ, with your doings therein, certified to our said Judge.

Witness Levi Pettibone, Clerk of our said Circuit Court at office this tenth day of October in the year of our Lord one thousand eight hundred and thirty five, and the seal of said court hereto affixed.

(Seal) Levi Pettibone Clerk Circuit Court"

And the return endorsed by the Sheriff, upon the said writ of summons, appears in the words and figures following - to wit -

Return

"State of Missouri }
County of Pike } I certify that I have executed the within writ, by reading said writ and declaration, to the within named William Cooley Defendant, in said county of Pike on the 17th day of October A.D. 1835.

Moses Kelly Sheriff P.C."

And the following endorsement by the Clerk of the Circuit Court, appears on said writ, to wit -

"Returned by Sheriff & filed in Clerks office November 6th 1835.

Levi Pettibone Clerk

And afterwards, to wit - at a Circuit Court begun and held, at the court house, in the

4. town of Bowling Green, within and for the county of Pike in the State of Missouri, on the Second monday being the ninth day of November in the year of Our Lord eighteen hundred and thirty five - to wit - on the second day of said term of said court - to wit, on Tuesday the 10th day of November 1835, the following appears of Record, as a proceeding of said court, in said cause - to wit -

"Honore Piote & Therese his wife - John Baptiste Lesperance & Elizabeth his wife - John Baptiste Duchouquette & Joseph Duchouquette by their Attorney - & Marie Papin, Coralie Papin, Adolphe Papin & Henry Papin, Infants by John Baptiste Lesperance their next friend - Plaintiffs

vs. } Trespass & ejectment

William Cooley Defendant } Damages $1000.

And now at this day comes the parties aforesaid by their attorneys, when on motion of Defendant by his Attorney, leave is given Walter Coles, Edward & Mary E. Carter to appear here at next term & make themselves Defendants & plead to Plaintiffs declaration & this cause is continued".

And afterwards - to wit - At the July Term of the said court, in the year of our Lord 1836, (It appearing by an entry on the record, made by the Clerk of said court, that no Circuit court, was holden in the month of March 1836, for said county,) to wit - on the 12th day of July 1836, the following appears of record as a proceeding of said court, in the said cause, to wit -

"Honore Piotte & Therese his wife

" 5. Lothers Plaintiffs
vs. } In ejectment.
William Cooley, Mary E. Carter
Walter Coles & Edward Coles Defts

And now at this day came the said Defendants by Edward Bates and Adam B. Chambers Esqrs. their Attornies and filed herein their plea of not guilty of the wrongs and trespasses above charged against them by the said Plaintiffs and put themselves on the country. And the cause is continued until the next term of this court."

Plea N.G. and issue

And the said Defendants pleas by them pleaded, and filed in said cause, appear in the words and figures following, to wit—

"Honoré Picotte wife & others
vs. } Ejectment in Pike Cirt.
William Cooley } Ct. July Term 1836.

And the said William Cooley comes & defends the force & injury when &c and says that he is not guilty of the wrongs & trespasses above laid to his charge in manner & form as the said plaintiffs have above in declaring alleged against him, and of this he puts himself upon the country. For Deft
Bates & Chambers.

Plea N.G.

And Mary E. Carter, Walter Coles & Edward Coles, who, by rule of court, are admitted as parties to this suit by entering themselves as Co-Defendants with the above named William Cooley, come & defend the force & injury when &c and say that the said Cooley is not guilty of the wrongs & trespasses above laid to his charge in manner & form as the said Plaintiffs have above in declaring

Same by Coles & Carter

alleged against him, and of this they put themselves upon the country.

Bates & Chambers, Attys.

And at the November Term of the same court, in the year last aforesaid, to wit, on the 15th day of November 1836, the following appears of record as a proceeding of said court, in said cause - to wit -

"Honore Piotte & Theresa his wife
& others " " Plaintiffs
vs. } In Ejectment
William Cooley & others Defts

This day came the parties aforesaid by their counsel and by consent this cause is continued untill the next Term."

And afterwards, to wit at the March Term of said court, in the year 1837, to wit - on the 15th day of March 1837, the following appears of record as a proceeding in said cause - to wit -

"Honore Piotte & Therese his wife
& others " " Plaintiffs
vs. } In Ejectment
William Cooley & others Defts

This day came the parties by their Attorneys and this cause is continued"

And at the July Term of said court in the year last aforesaid - to wit - on the 17th day of July 1837, the following appears of record as a proceeding of said court, in said cause - to wit -

"Honore Piotte & others
vs. } In Ejectment
William Cooley & others

For reasons appearing to the court

" 7. this cause is continued untill the next Term."

And at the October Term of said Court, in the same year, to wit - on the 9th day of October 1837, the following appears of record as a proceeding in said cause, in the same court, to wit -

"Honore Picolle & others Plff
vs. } In Ejectment
William Cooley & others Defts

This cause is continued untill the next Term."

And afterwards - to wit - at the March Term of the said court, in the year 1838 - to wit on the 17th day of March 1838. The following appears of record as a proceeding in said court, in said cause, to wit -

"Honore Picolle et al Plff
vs. } In Ejectment
William Cooley et al Defts

This cause is continued untill the next Term of this court."

And afterwards - to wit - In the same court, at the July term thereof, to wit - on the 9th day of July 1838. The following appears of record as a proceeding of said court, in said cause, to wit

"Honore Picolle et ali
vs. } In Ejectment
William Cooley & others

Continued

This cause is continued untill the next Term."

And afterwards - to wit - at the October Term of said court, in the year last aforesaid, to wit - on the 10th day of October 1838.

" 8. the following appears of record, as a proceeding of said court, in the said cause - to wit -

"Honore Pecotte & others
heirs of Duchouquette Plf
vs. } In Ejectment
Walter Coles Deft.

On motion of the Plaintiffs counsel leave is given him to file (as of this term) a new declaration in the name of such (and as many as many as he may think fit) of the Plaintiffs who claim the land in question as tenants in common against the defendants Mary E. Carter, Walter Coles and Edward Coles, so that the same be filed and a copy thereof served on the Attorney of the Defendants thirty days before the next term, and the cause or causes to stand peremptorily for trial at the next term, unless continued at the instance of the defendants, and the cause is continued."

And afterwards - to wit - at the March Term of said Circuit Court, in the year of our Lord 1839, to wit - on the 13th day of March 1839, the following appears of record, as a proceeding of said court, in said cause - to wit -

"Honore Pecotte &c.
vs. } Ejectment.
William Cooley &c.

"By consent of the parties in this cause, the order entered at the last term of this court is rescinded and the cause is continued".

And afterwards - to wit - At the July

" 9. term of said court, in the year 1839, - to wit, on the 15th day of July 1839, the following proceeding appears of record in said court, in the said cause - to wit -

" Honore Picotte &c. Plaintiff
vs. } Ejectment.
William Cooley Defendant

This cause is continued untill the next term of this court at the costs of the Plaintiff."

And afterwards - to wit - At the October term of the said Circuit Court, in the year last aforesaid - to wit - on the 15th day of October in the year 1839. the following appears of record as a proceeding of said court, in said cause. to wit

" Honoré Picotte & Therese his wife
John B. Lesperance & Elizabeth his wife
John B. Duchouquette Joseph Duchouquette
Marie Papin, Coralie Papin, Adolphe B.
Papin & Henry Papin Plaintiffs
vs } In ejectment
William Cooley, Mary E. Carter
Walter Coles & Edward Coles Defendants

And now at this day come the parties aforesaid by their respective attorneys for motion of Plaintiff, with consent of Defendants leave is given to amend the pleadings in this cause by erasing the names of Marie Papin, Coralie Papin, Adolphe Papin & Henry Papin Plaintiffs inserting the name of Theodore Papin as plaintiff, which is accordingly done. It is also suggested in this case that Elizabeth wife of John B Lesperance hath since the commencement of this suit departed this life which is not denied but admitted to be true.

" 10. Honoré Piotte & Therese his wife, John B. Lesperance, John B. Duchouquette, Joseph Duchouquette & Theodore Papin Plaintiffs

vs

William Cooley, Mary E. Carter, Walter Coles & Edward Coles Defendants } In Ejectment.

And now at this day come the parties aforesaid by their respective attorneys whereupon also came a jury, to wit- A. B. &c twelve good and lawful men who being duly elected tried & sworn well & truly to try the issues joined between the parties aforesaid, upon their oaths do say as to the trespass & ejectment in said declaration mentioned on & in parcel of the tract of land in said declaration mentioned & situate in the county of Pike bounded as follows, to wit- commencing at the north western corner of United States survey number one thousand seven hundred & thirty seven, in the South East quarter of section thirty five, township fifty two north range one East, theme North sixty degrees East with the North west exterior boundary line of said survey two hundred & forty five chains to the most northern corner thereof in the North west quarter of section twenty nine township fifty two north range two east, theme South thirty degrees east with the north Eastern boundary line of the said survey number one thousand seven hundred & thirty seven one hundred & eighty chains to the intersection with the line between townships fifty one & fifty two north range two east, theme west with the said said township line & the line between townships fifty one & fifty two north range one east to the intersection with the south western line

verdict

Beginning of the special verdict

boundaries

" 11. of survey number one thousand seven hundred & thirty seven thence north thirty degrees west with the said southwestern boundary line thirty six chains & seventy four links to the most western corner & place of beginning, containing two thousand six hundred & fifty five acres six hundredths of an acre being parcel of a tract of land granted by Zenon Trudeau Lieutenant Governor of upper Louisiana, under the Spanish Government to Joseph Brazeau & subsequently confirmed under the authority of the United States to said Brazeau & bounded northwardly by land now or lately claimed by the heirs of Auguste Chouteau, southwardly by lands now or lately claimed by Peter Chouteau, westwardly by land now or lately claimed by Auguste A. Chouteau eastwardly by land of the United States or of persons claiming under the same & is the same tract described in the deed executed by Antoine Soulard & Julia his wife Marie Therese Brazeau widow of Joseph Brazeau & Baptiste Duchouquette to Mary E. Carter, Walter Coles & Edward Coles dated twenty fifth day of November in the year one thousand eight hundred & eighteen, that the same is situate in the counties of Pike & Lincoln & State of Missouri & was conceded to the said Joseph Brazeau by the proper authorities of the Spanish Government on the eighteenth day of December in the year one thousand seven hundred & ninety seven, that the said Joseph Brazeau became thereby seized & possessed thereof & being so seized & possessed, he on the fifth day of May in the year one thousand seven hundred & ninety eight made his last will purporting to devise the said tract of land in full en-

end of description

concession to Brazeau

will

joyment & during her natural life only to Marie Therese Delisle his dear spouse & from & after her death to his niece Marie Brazeau absolutely & forever, that on the twenty second day of November in the year one thousand eight hundred & sixteen at St. Louis in the Territory of Missouri the said Joseph Brazeau being possessed & possessed of said tract of land departed this life, that on the twenty sixth day of November in the year one thousand eight hundred & sixteen at St. Louis in the territory of Missouri the last will aforesaid of the said Joseph Brazeau was duly proved, that the said concession was confirmed by the United States on the twelfth day of April in the year one thousand eight hundred & fourteen to the said Joseph Brazeau, that the said Joseph Brazeau & Marie Therese Delisle aforesaid his wife were married at Kaskaskia in the Illinois on the seventh day of November in the year one thousand seven hundred & sixty nine, that the said Marie Brazeau niece & devisee aforesaid of the said Joseph Brazeau intermarried on the third day of July in the year one thousand seven hundred & ninety eight at St. Louis in the province of upper Louisiana with Jean B. Duchouquette, that the said Marie Brazeau wife of the said Jean B Duchouquette departed this life at St. Louis in the Territory of Missouri on eight day of July in the year one thousand eight hundred & eighteen & the said Jean B. Duchouquette departed this life on the twenty third day of March in the year one thousand eight hundred & thirty three at St. Louis

Death

Duchauquette married Marie

" 13. in the State of Missouri & Marie Therese Delile widow of Joseph Brazeau departed this life at St. Louis aforesaid on the third day of February in the year one thousand eight hundred & thirty four; that a marriage contract was executed between the said Marie Brazeau & Jean B. Duchouquette previous to their intermarriage, to wit - on the second day of July in the year one thousand seven hundred & ninety eight, at St. Louis aforesaid by which it was provided that the said Jean B. Duchouquette & Mary Brazeau have promised to take one another in the name & law of marriage & to have the same made & solemnized in the Catholic Apostolic & Roman Church our holy mother so soon hereafter as may be or as soon as one of the parties shall require it of the other; the said future husband & wife to be united common in all estate (biens) moveable & immoveable purchases (conquets) & acquisitions (acquets) according to their desire without power to change any thing from this disposition even if they should make purchases or transfer their residence in a country where the laws usages & customs are contrary which they expressly derogate renounce; the said future husband & wife take each other with all their rights & estate (biens) such as have come & follow to them or may fall to them from the succession of their father & mother to whatever sum they may amount, of whatever nature they may be & in whatever place situate even from this present time with those they may have of their own either either by donation or otherwise; it shall & may be lawful to the said future

Marriage Contr.

wife to the children which may issue from the said marriage in renouncing the present community to retake freely clearly & frankly all & whatsoever she may have brought, or may have happened & be fallen to her during the said marriage either by inheritance, gift-legacy or otherwise — And the jurors aforesaid on their oaths aforesaid do further find that Therese Piotte one of the Plaintiffs is a daughter of the said Jean B. Duchouquette & Mary Brazeau his wife, that said Therese was born at St. Louis aforesaid on the ninth day of February in the year one thousand eight hundred & thirteen & intermarried at same place on the fifteenth day of August in the year one thousand eight hundred & thirty one with Honoré Piotte one of the Plaintiffs, that John B. Lesperance another of the Plaintiffs is the surviving husband of Elizabeth Lesperance deceased which said Elizabeth was a daughter of the said Jean B. Duchouquette & Marie Brazeau his wife & was born at same place on ninth day of September in the year one thousand eight hundred & fifteen & intermarried at same place on the seventh day of July in the year one thousand eight hundred & thirty four with said John B. Lesperance & died at same place on the twenty ninth day of July in the year one thousand eight hundred & thirty eight leaving in full life her said husband John B. Lesperance, that John B. Duchouquette & Joseph Duchouquette two of the Plaintiffs are sons of the said John B. Duchouquette & Marie Brazeau his wife that the former was born at same place on the first day of De-

Children

15. ember in the year one thousand eight hundred & ten & the latter was born at same place on the tenth day of October in the year one thousand eight hundred & eight; that Theodore Papin another of the Plaintiffs is the surviving husband of Celeste Papin which said Celeste was a daughter of the said Jean B. Duchouquette & Marie Brazeau his wife, was born on the twenty fifth day of November in the year one thousand eight hundred & two, at St. Louis aforesaid, was intermarried with said Theodore Papin at same place on the twenty fifth day of October in the year one thousand eight hundred & twenty & died at same place on the twenty third day of November in the year one thousand eight hundred & thirty three leaving in full life her said husband Theodore Papin; that there was issue of the said marriage between the said John B. Lepercane & Elizabeth Duchouquette & the said Theodore Papin & Celeste Duchouquette & that the said defendants at & before the time of the commencement of this suit was in the possession of the said parcel of the said tract of land & have taken to themselves the rents issues & profits thereof seeing to the said Plaintiffs any interest in the said land or any share of the profits of same claiming to themselves to be whole & sole owners thereof. And the jurors aforesaid upon their oath aforesaid do further find that a marriage contract was executed between the said Joseph Brazeau & Marie Therese Delisle previously to their intermarriage, to wit, on the sixth day of November in the year one thousand seven hundred & sixty nine at

" 16. Kaskaskia aforesaid, by which it was provided that the said Joseph Brazeau & Mary Therese Delisle have promised to take one another in the name & law of marriage & to have the same made & solemnized in the Catholic Apostolic & Roman Church as soon as possible to be united & form one sole community in all the goods & chattels moveable & immovable acquirements & purchases, conformable to their wishes, without having the power in any manner whatever to change or alter anything to this disposition or settlement although they should acquire other property, or remove into a country where the laws usages & customs should be contrary, to which they do hereby expressly derogate & renounce, the said future spouses receive each other with all their rights & property whatever such as they may have acquired or shall hereafter come to them by inheritance from their father & mother to whatever sum they may amount of whatever nature they may be & in whatever place they may be situate even there they possess at this present time in their proper name as also those which they may have in their own right, whether by gift or otherwise, the said future spouses do mutually give to the survivor of them during life all & singular the property moveable or immovable, purchases or acquisitions which may have been acquired by the said future husband & wife during the coverture even such as they hold in their own right to whatever sum they may amount & of whatever value & wherever situate to be held & enjoyed by the survivor during his or her life only in case however there should be no child or children living or to be born of the said marriage, —

Mar. Cont of Brazeau and wife

" 17. in which case of children this present gift shall remain null in law.

And the Jurors aforesaid upon their oath aforesaid do further find that there was no child born of the said marriage between the said Joseph Brazeau & Marie Therese Delisle.

And the jurors aforesaid on their oath aforesaid do further find that on the fourteenth day of February in the year one thousand eight hundred & seventeen the said Jean B. Duchouquette & the said Marie Brazeau his wife executed a writing under their hands & seals purporting to convey to Marie Therese Delisle widow of Joseph Brazeau in fee all their interest in the quantity of one thousand eight arpens or the seventh part of said tract of land that said instrument in writing was on the same day acknowledged by the makers thereof before the Clerk of the Circuit Court of the county of St. Louis in the territory of Missouri & that the wife of the said Jean B. Duchouquette was previously to her acknowledgement examined separate & apart from her husband & by the officer taking her acknowledgement made acquainted with the contents of said writing & upon such examination & information declared that she executed the same freely, voluntarily & of her own free will & accord, without fear restraint coercion or undue influence of her said husband & that the said writing thus acknowledged was on the ~~thirteenth~~ day of March in the year last aforesaid filed for record with Recorder of the county of St. Charles in the territory of Missouri & recorded in which

Deed of Duchouquette & wife to M. Brazeau

" 18. county the said tract of land was then situate: that on the fourteenth day of February in the same year the said Marie Therese Delisle widow of Joseph Brazeau deceased, executed a writing under her hand & seal purporting to convey to Jean B. Duchouquette in fee all her interest in the quantity of one thousand eight arpens or the seventh part of said tract of land, that said instrument in writing was on the same day duly acknowledged by the maker thereof & on the thirteenth day of March in the same year duly recorded: that on the twentieth day of March in the year one thousand eight hundred & twenty four, one Daniel Draper styling himself Collector of taxes for the county of Lincoln in the State of Missouri executed under his hand & seal a writing purporting to convey to Henry S. Sublard in fee the said tract of land granted as aforesaid to Joseph Brazeau, which was duly acknowledged & recorded: that on the same fourteenth day of February the said Marie Therese Delisle widow of said Joseph Brazeau, the said Jean B. Duchouquette, & the said Marie Brazeau his wife & niece of said Joseph Brazeau executed a writing under their hands & seals purporting to convey to Antoine Soulard in fee all their interest in the quantity of five thousand & forty arpens or the five sevenths of the said tract of land, that same instrument of writing was on the same day acknowledged by the makers thereof before the Clerk of the Circuit court of the county of St. Louis in the Territory of Missouri & that the wife of the said Jean B. Duchouquette was previously to her acknowledgement examined separately & apart from her said husband

B's deed to Duchouquette

Deed to Soulard

" 19. & by the officer taking her acknowledgement made acquainted with the contents of the said writing & upon such examination & information declared that she executed the same freely voluntarily & of her own free will & accord, without fear restraint constraint coercion or undue influence of her said husband & that said writing thus acknowledged was on the thirteenth day of March in the same year filed for record with the Recorder of the county of St. Charles aforesaid, in which county the said tract of land was then situate & on the next day recorded, that on the twenty fifth day of November in the year one thousand eight hundred & eighteen Antoine Soulard & Julie his wife, Marie Therese Delisle aforesaid widow of said Joseph Bazeau & the said Jean B. Duchauquette executed a deed to Mary E. Coates, Walter Coles & Edward Coles aforesaid, purporting to convey to them the said tract of land in declaration mentioned & that said deed was duly acknowledged & recorded.

Deed of Soulard & wife to Coles & Coales

but whether on the whole matter by the jurors aforesaid in form aforesaid found as regards the said parcel of said tract of land in said declaration mentioned, which is situate in the county of Pike the defendants are guilty or not the jurors aforesaid are entirely ignorant & thereon pray the advice & consideration of this court, & if upon the whole matter aforesaid found it shall appear to the court that the said defendants are guilty of the trespass & ejectment in manner & form as in said declaration alleged, on & in said parcel

" 20. of land then the same jurors say on their oath aforesaid that said defendants are guilty in manner & form as in said declaration alleged, on & in said parcel of land, & they assess the damage of the said Plaintiffs by reason thereof to one cent - but if upon the whole matter aforesaid by the jurors aforesaid in form aforesaid found it shall appear to the court aforesaid that the said defendants are not guilty of the said trespass & ejectment as to the said parcel of said tract of land in said declaration mentioned in manner & form as in said declaration alleged the the same jurors say on their oath aforesaid that the defendants are not guilty of the trespass & ejectment in said declaration alleged on & in said parcel of said tract of land in said declaration mentioned, which being seen & inspected by the court & mature deliberation being thereupon had sit appearing to the court that the said defendants as to the said parcel of said tract of land in said declaration mentioned are not guilty in manner & form as in said declaration alleged. It is therefore considered by the court, that the said Plaintiffs take nothing by their suit & that the Defendants go thereof without day & that the said defendants have & recover of the said Plaintiffs their costs & charges by them about their defence in this behalf expended & that they have execution &c."

End of the Opinion over decr

State of Missouri }
County of Pike }
I M. T. Noyes, Clerk of the Cir-

cuit Court, within and for said county of Pike, certify that the above & foregoing writing contained in the pages numbered 1. to 20 inclusive, is a true & perfect copy of the record and proceedings in said court, in the cause therein mentioned, at the respective Terms of said court, and on the days therein mentioned, as fully and amply as the same remain and appear on the record and files of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office this 26th day of February in the year of our Lord 1840.

M. J. Hayes Clerk.

Fees for this copy 5322 words $5.32
Certificate & seal .50
$5.82

STATE OF MISSOURI, } SS. { THE STATE OF MISSOURI—
Second Judicial District.

To the Judge of the Circuit Cou[illegible] Judicial Circuit in said State:—GREETING.

Whereas, in the record and proceedings in a certain cause lately pending in the Circuit Court within and for the county of Pike in said district, wherein Honore Picotte & Therese his wife John B Lesperance John B Duchouquette Joseph Duchouquette & Theodore Papin we— William Cooley Mary E Carter Walter Coles and Edward Coles were — Plaintiffs and defendants in an action of Ejectment — wherein, judgment was rendered at the October term of the Circuit Court, for the said county of Pike — in the year of our Lord, 1839 in favor of said Defendants manifest error, hath intervened to the great damage of the said Plaintiffs as by his complaint, we are informed, now we being willing that the error if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid, in that behalf

Do Command you, that you send to us, destinctly and openly under your seal, the record and procceedings in the cause aforesaid, as fully as the same remains of record before you in said court [illegible] our Supreme Court, to be begun and held at the town of Palmyra, in [illegible] of Marion, in said State, on the 2nd Monday in June next, that the record and proceedings aforesaid, being inspected, we may cause to be further done, thereupon, for correcting the error, what of right and according to law, ought to be done.

Given under my hand, and the seal of our said Supreme Court, done at office in Palmyra, at the District aforesaid, on this 1st day of November in the year of our Lord, 1839

Stanton Buckner CLERK.

B. III. 3. 6 28 III

Oct. 7 1845

(24) (25) (26)

Henry Nicolle et al

vs 3 Writ of Error

William Cooley et al

Pike County.

Filed 4 November 1839. H. G. Evans Clk

Filed June 8th 1840

J. Buchner Clerk

2 McCorkle 31

4 Pleas 207 567 878

Pike

State of Missouri

County of Pike } Pursuant to the within writ I. M. J. Hayes Clerk of the Circuit Court, within and for said county of Pike herewith send, distinctly and openly under the seal of said court, the record and proceedings in the cause within mentioned, as fully and amply as the same remain, on the files and record of said Court, a copy of said record and proceedings duly certified being, hereto attached.

26th Feby 1840.

M. J. Hayes Clerk.

1/5 5040
1008
7
7056

Honore Picotte Sal:
" In Error.
William Cooley Sal:

And the said Honore Picotte & others plaintiffs by their attorney come & say that in the record & proceedings aforesaid as well as in the rendition of the judgt aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears that judgt was rendered by the circuit court for the said William Cooley & others defendants whereas by the law of the land the same should have been rendered for the said plaintiffs: and this they the said plaintiffs are ready to verify, wherefore they may judgt &c.

B. Allen
attn: for pltiff:

The defendants join in Error
E. Bates atty

Picotte sal:
"
Cooley sal:

assignment of error.

B. Allen
p.q.

Filed June 8th/840
S Buckner Clerk

Honore Picote & Therese his wife & al
vs.
Wm Cooley and others

Error to the Pike Circuit Court.

This was an action of ejectment commenced against the defendants in error by the plaintiffs in error for a tract of land situate in the County of Pike. On the trial of the cause the jury found the following special verdict (Here the clerk will please copy the verdict ~~beginning on the 10th page~~ at a place I have marked and ending on the 20th page at a place marked. On this verdict the court rendered judgment for the defendants and the plaintiffs have brought the case to this court by writ of error.

The contract of marriage between Joseph Brazeau and Mary Theresa Delisle was executed at Kaskaskia in Illinois. At that time the French law prevailed at that place. Nothing more appearing than what is stated in the special verdict on the subject we are warranted in saying they were domiciliated in Illinois. They afterwards came to Louisiana where the Spanish law prevailed. ~~[illegible]~~ The ~~only~~ difference between the French and Spanish law of community is not very great. By the Spanish law the husband & wife by the mere act of intermarriage became partners in all the estate real & personal which they respectively possess except what the civil law calls the income & profits of public offices civil or military held by the husband which belong exclusively to him. All that is acquired or purchased during coverture whether real or personal goes into partnership as being presumed to be the fruits of the joint industry & economy of husband & wife. Not so with property acquired by devise, bequest, gift succession or inheritance, they remains the separate property of the party to whom it accrues because not the fruits of the joint industry. This is what the French law calls "les propres" which means separate

property: Acquets & conquets mean the property jointly acquired. In all these respects the custom of Paris is the same with the Spanish law, except that the personal property only possessed by the parties at the time of the marriage enters into the partnership as also "acquets & conquets" acquired during coverture whether real or personal. But real property held by either party at the time of the marriage continues to be held separately unless the contrary is stipulated. ~~[illegible]~~ The result of this community or partnership both at the Spanish & French law is this; that on the dissolution of the partnership, the surviving party & the representatives of the dec^d each take back what was brought on his or their side into the partnership, value or kind, in value, of personal estate, in kind if real estate & what remains being considered as gains or profits is equally divided as between partners.

This I understand to be the law relative to that community which exists between man and wife by operation of law uninfluenced by any contract. If the law itself would not place a gift from the King to either party in community, does it follow, that the law went farther and prohibited a donee from disposing of ~~it~~ a gift in any manner he thought proper. The law of itself would not make a disposition of it, but because this was declined, it does not follow, that he to whom the gift was made could not dispose of it especially as that disposition was not to take effect until after his death: such a restriction would very much impair the value of the gift. This is said upon the supposition that the concession to Jos^h Brazeau was a royal gift. I do not know what should warrant us in saying so: In the absence of all ~~means~~ knowledge as to the means by which the concession was obtained, are we to presume it was purely voluntary. Suppose it was for services rendered or on conditions to be performed are we to pre

cause that they were performed at the expense of the husband alone or may they not have been at the joint expense of the husband and wife.

If then the land conceded to Joseph Brazeau entered into the community established by contract between him & his wife at the time of the Marriage, then the land in controversy at his death belonged one half to his wife & the other half went to his neice Maria Brazeau under the will subject to a life estate of the wife. But this matter of the life estate of Mrs. Brazeau & Maria's the neices half may be thrown out of consideration as it serves only to embarrass & does not otherwise affect the question.

Then Madam Brazeau & Douchonquette & wife conveyed 5/7 of the land to Soulard: As Madam Brazeau owned one half of the land & Douchonquette & wife the other half we must suppose that Madam ~~Douchonquette~~ Brazeau conveyed one half & ~~the other party~~ & Douchonquette & wife one half of what was ~~conveyed~~ granted. This would leave one seventh remaining in M. Brazeau & one seventh in Douchonquette & wife. Then Douchonquette and wife convey 1/7 to Madam Brazeau: Thus all title and interest is out of Mr. Douchonquette under whom the ~~defend~~ plaintiffs claim. Madam Brazeau conveys 1/7 to Mr. Douchonquette.

The counsel for the plaintiffs contended that the land devised by Brazeau to Mrs. Douchonquette did not enter into the community. If it did not enter into the community, then clearly it was paraphernal and if paraphernal it might be conveyed by the husband and wife: Lindel vs McNair 4 Mo Rep 380. But if by the Marriage contract the land entered into the community then the husband & wife by joining passed the title to Madam Brazeau & Soulard. By supposing that the order of the conveyances between Madam Douchonquette & her

husband and Madam Brazeau different from that before stated, that is, that Madam Brazeau first conveyed one seventh ~~and~~ to Douchonquette & wife and they afterwards conveyed one seventh to her, it will appear that one seventh remained in Douchonquette & wife to the half of which Madam Douchonquette would be entitled, and consequently the plaintiffs entitled to recover 1/14. But the order of time in which the conveyances were made is not stated, and as in this Court the presumption is that the ~~[illegible]~~ judgment is for the right party, and he who would gainsay it must show the error of ~~that~~ the judgment below, we will not be warranted in disturbing it unless something is shown which would sustain our action.

It will have been seen that this case depends on the question settled in the case of Lindell vs McNair before cited; Whatever may be thought of that opinion, if the question was now for the first time to be settled, we consider it has been too long determined & too many rights may now rest upon it, to make it expedient to disturb it.

Judge Napton concurring the judgment will be ~~[illegible]~~ affirmed

W. Scott

Cpy. 41.

Honore Picotte et al
vs
Cooley & others

Opinion

Scott

Filed March 16. 1847.
H. L. Boon clk

Honoré Picotte & Therese his wife
John B. Lesperance, John B. Duchouquette
Joseph Duchouquette & Theodore Papin pltffs.
} In Ejectment.
vs
William Cooley, Mary E. Carter Judgt. in Circuit
Walter Coles & Edward Coles. Defts. Court of Pike County
for Defendants.

The Clerk of Supreme Court of Missouri will issue a writ of error on the judgment in above entitled cause on behalf of said plaintiffs returnable to the next term of said court at Palmyra.

B. Allen attoy. for pltffs.

Mr. Batsville please sue out a writ of error as above leave same with Clerk of Cir. Court at Bowling Green frequent that the record with writ be sent to me at St Louis as soon as practicable. B. Allen.

Picatte (60)
vs.
Cooley

Edwin Bates Esq.

2 Febrero. 127.

"The word dowry has divers significations: but among lawyers it is a species of donation which the woman makes of her own property to her husband by reason of the marriage, or, it is all that which the woman brings into the marriage, & which she or another in her name delivers to her husband, to sustain by its revenues the matrimonial charges."

what is Dowry

" page 129.

"The property which the woman brings into the marriage without including them in her dowry, or which falls to her by any lucrative title after the marriage is called paraphernal, & is treated of extensively in the second part to which I refer the reader. It is called paraphernal from the Greek word paraphernia, composed of para which signifies quasi or near, & phirna, which is equivalent to dowry for which reason it is called quasi-dotal or joined to dowry."

what is paraphernal

3. Febrero 132.

"The husband cannot alienate the immoveable dotal property or real estate of the wife, although she verbally consents to it, inasmuch as to make such alienation valid, her assent or permission sworn to, must intervene. She joining personally in the execution of the contract & swearing to it in the form set forth H.C.

Sale of dotal property

" page 133 "In the second place there must be deducted from the general inventoried fund, the property which the woman brought into the marriage besides the dowry, which is called paraphernal or extra-dotal.

" 134. "The husband is not prohibited from

Sale of paraphernal

Sale of paraphernal cont^d - alienating the paraphernal ~~effects~~ effects of the wife with her consent, although she does not swear to the contract; and if both jointly sell them and the price is used to satisfy a debt contracted by the wife before the marriage, she has no right to claim it (the price) for it went to her benefit inasmuch as if the debt had been satisfied at the time of the marriage she would have brought so much less into the marriage; nor shall it be deducted from the general fund, nor from the gains, nor from the separate property of the husband: but on the contrary if the husband should have paid the debt with his own property he could recover the amount from the wife's property.

Sale of paraphernal continued - " 134 Lec 35. It might be said that the wife is prejudiced by her own consent which she has given & therefore she can have no action to claim the price: but such consent is for disabling her from claiming of the buyer or of her husband the property itself which she sold, not to deprive her of the right of claiming the value from the husband, because a new & express consent is necessary to effect this.

Sale of paraphernal continued - " 135. Lec 36. "If the husband sells them (paraphernal effects) without the consent of the wife for their full price, she can recover them from the buyer for she did not lose her property in them, seeing that what belongs to one person is not transferred to another without the consent of the owner; & if she does not wish to disturb the buyer she will recover the full value from the mass of the estate as a fund put into the concern &c.

what is paraphernal continued

" 136. Sect. 40. "After deducting the wife's dotal property and the paraphernal property which she brought in when she was married, & returned or delivered to her husband, there must then be deducted from the general fund, the other paraphernal or extradotal property, which she can prove she inherited by will or ab intestato, from her ancestors, or from any relative or stranger or that has fallen to her by any other lucrative title while she was married, & not by reason of the conjugal partnership, if she delivered ~~the~~ it to her husband as she should have done, there being no stipulation to the contrary in the marriage contract: for it is considered & should be held paraphernal; & it makes no difference whether she brought it into the marriage when she contracted it, or after, provided it came into the power of the husband and is not of that class which the law calls "gains" &c.

what is paraphernal continued

" 158 Sec. 19 "Likewise it is common to both whatever the husband may acquire in war, which is called "peculium castrense" or the King gives in remuneration for services which he renders in it: although this must be understood, when he serves without pay & maintains himself at the expense of the common property: but if he has pay & maintains himself with it & not with the common property, the wife will have no interest in the donation which the King makes him, or in the thing which he has acquired in war. If the husband (says the Recopilacion) shall gain any thing by inheritance from father or mother, or any relative, or by gift of his lord, or of a relative, or of a friend, or in the army of the King or of any other, which is for his pay, let him have

all he gains as his own: & if he were in the army without pay at the expense of himself & wife let all that he may gain in that way belong to himself & wife. For as the expense is common to both let whatever is gained be common to both.

Recolte & others
vs
Cooley & others

Translation of passages from Febrero, showing what is Actual & what paraphernal property & that husband & wife can convey both &c.

McNair
wdsm
Lindell

In Supreme Court
~~Pff~~ Brief of deft

1st The question as to the interest of the Judges is Submitted

2d The proposition to continue this cause untill a decision may be had on the Same point in a case now pending is Submitted with this remark that a continuance can work no injury as ~~the~~ Lindell is in possession of the Land in dispute which by decision below is the Land of Mrs McNair

If under all the circumstances the Court will now proceed to determine this case then Deft insists

1 That the Deed of McNair & wife in 1820 to Stokes is absolutely void as to Mrs McNair

1 Because she was then a Married Woman & unable to convey except by fine or recovery

2. That by the introduction of the Common Law 19 Jany 1816 the Modes of conveyance pointed out by the Common Law so far as not provided for by Statute were introduced also the disabilities of Married Women & infants.

against this position it has been said the Common Law was only so far introduced as the Same was not inconsistent with what was then called the Laws of the Territory of Missouri

and that those laws consisted as well of the unwritten laws usages & customs of Spain as of the act of the Territorial Legislature In reply to this it is insisted that in common parlance & understanding previous to 19 January 1816 a distinction was made between the Territorial laws by which was meant Legislative acts and the laws usages & customs in force in said Territory This distinction may be found in the act for the Government of the Territory passed by Congress in 1804 1805 & 1812

When we consider that in 1816 most of the citizens of Mesquite were those who were accustomed to the Common Law that the laws of Spain were in a foreign language & were unknown to our Judges, our Lawyers, our Legislators and in fact to all the people, when we consider that the Spanish Law & the Common Law each contained a complete system founded in great wisdom & providing a remedy for every injury — that the Common Law was our birthright a System which we had studied & by which we had been governed from infancy & that the Spanish Law & Language was unknown It can hardly be supposed that the Legislature could have had the folly to intend that the people should be governed by the laws of Spain of which the people the Courts & Law Makers were & must be ignorant If it was intended to leave the Spanish Law in force Then the introduction of the Common Law as contended for was nugatory — Because if the Common Law could only govern where the Spanish & Statute Law had made no provision — Then I would like to see any one of course his ingenuity by showing me a case of Murder & Treason where the Spanish Law had not made provision & if so the Common Law could not operate & if it was the intention of the Legislature that the Common Law should not govern where the laws of Spain provided, what was meant by the words used in adopting the Common Law — "any Law, usage or custom heretofore to the contrary not withstanding"

I believe a case cannot be found where the Judges of either our Territorial or State courts have taken, since 1816, the Spanish Law as the rule of their decision where the matter in dispute originated since January 1816 It seems to me then that Lawyers Judges & Legislators have ever since 1816 acted upon the belief that the introduction of the Com Law in 1816 abrogated the unwritten laws of Spain in questions of contracts, concerning the disabilities of Married Women — Infants, Dower Curtesy — Since 1816 our Statutes & the Common Law alone have been appealed to

That principle of the Common Law which considers the legal existence of the wife merged in that of her husband & disables her from contracting except in special cases is of a general Nature & not local to G Britain

We have never to this day declared by any Legislative act that Infants & Married women are disabled from contracting. It is the Common Law alone since 1816 that created these disabilities — And previous to that time the Spanish Law created similar though not the same disabilities. Should it be decided that the Spanish Law regulating Matrimonial gains Infancy — & descents where not regulated by our Statute were in force here since 1816 such a decision would almost tear up the foundations in all of our French villages

It has been decided in N.Y. Mass Penn & N.J. that where the husband & wife joined in conveying the lands of the wife she being privately examined such conveyance being sanctioned by immemorial usage was good — But such usage can not be urged here. A usage against a Statute is not good — The Com Law by us was adopted by Statute & can only be altered by Statute & not usage

Vermont Maryland & Virginia & Kentucky adopted the Com Law by Statute and in these States it has been always held that the lands of a Femme Couvert could only be conveyed by fine or recovery or by some Method pointed out by Statute that all other conveyances by her were void

See 1 Tylers Reports 6, 7, 52, 3d Harris & McHenry Reports Nicholson vs Hensley 409 — Ib Lewis vs Waters 430 1 Peters Rep to 109 Ib from 338 to 340 5 Peters Rep 264 7 Peters Rep 604 —

It has been said that by Spanish Law before 1816 Married women by joining with their husbands might convey their lands & this is admitted.

It is therefore contended that the common Law disability can not apply to a woman who lived here in 1816. because it would deprive her of a vested right that is to say a right she had before of selling her lands

It was answered that such a law would neither impair the obligation of a contract or take away a vested right, that Registry acts — acts pointing out the only way in which property may be conveyed or even used — acts imposing disabilities on Married women & infants are within the just scope of legislative Power & take away no vested right but only restrain individuals from exercising their rights to the injury of Society

It was said the proceeding by fine or recovery was not introduced here & could not be therefore it is to be presumed that it was not the intention of the makers of the Law of 1816 to deprive femmes covert of of the right of alienation

It is answered that by the Introduction of the Comm Law the Com method of alienation by fine & Recovery was also introduced. The proceedings by fine & Recovery have been used although but seldom in most of the old States See Kents Commentaries under the head "Fines"

But if even the proceeding by Fine could not be had here still the Married Woman could only convey by authority of the Legislature & if she wanted to sell & there was no legal mode pointed out for the purpose the Legislature could empower her to sell & wanted it for her interest

And for ~~Of~~ Deft

Mc Nair
adm
~~Hunt~~
Lindell

Authorities cited
Organic Laws for Mo
Ty — Laws of Mo
R. C. 804 to 814 Geyers
Digest head Com Law —
1 Tyler's Rep. 6, 7, 52
3 Harris & Mc Henry's Rep
Nicholson as Hensley 409
Lewis as Coates 430
1 Peters Rep 109 & Do 604
Laws of Vermont adopting
Comm Law vol 1 page 51

Mc Nair
adm
Hunt
William

As this case is to be submitted upon brief without oral argument I think proper to add a few suggestions to the brief which I had made with the expectation of arguing the case at bar.

Beyond all question, the words of the marriage contract between Joseph Brazeau and his wife, are sufficiently comprehensive to embrace the tract of land in question in the community established by that contract; and it will be held to be so embraced, unless the character of the title as a concession prevents its entering the community.

Now whether the title acquired by the concession is to be considered under the French or Spanish law there can be no question that it would be embraced in the community established by this contract unless it was a gift from the King. The fact that the land was acquired from the government does not under either system of law prevent the action of the contract upon it ~~unless it was a gift from the King~~.

Here there is nothing to shew the nature of the concession and I protest that there is no authority for saying that the title by concession is to be presumed to be a gift

But again I say, that under either the French or Spanish law a title acquired by concession as a gift will pass into the community, if there be a contract embracing it; and the authorities cited, only apply to the exclusion from the community of such royal gifts where the community is that which the law itself establishes as an incident of the marriage. There is nothing in either law which prevents the parties from making such stipulation in an express contract

The argument drawn from the confirmation of the title to Brazeau against the operation of the contract upon it is manifestly fallacious.

He as the head of the community was entitled to do all that was necessary for the security of the title, and was under the Spanish law ~~was~~ entitled to sell the property and convey it in his own name. Hence the fact that in Spanish conveyances we never see the wife uniting in a conveyance with her husband in conveying property which belongs to the community.

The exhibition of the claim to the commissioners and the subsequent confirmation of the title, although the name of Brazeau alone was used, had no effect upon the rights or the relation of the wife to the land.

The confirmation, if it had been a distinct and original title to the property would still have been subject to the contract of community even considered as a title made to Brazeau alone: For undoubtedly the marriage contract was just as effectual under the American as under the Spanish or French governments and would operate upon the titles acquired under either.

~~The effect of this~~

Something is said of the finding in the verdict that Brazeau died "seized" of the land, as equivalent to the finding that the whole fee simple ~~as~~ understood at the Common law was in him. I need not say to this Court that the word "seized" is just as applicable to an estate for life as to any higher estate. Nor can it be necessary to do more than to call the attention of the Court to the fact that the verdict finds

the title of Brareau marriage contract and all, and that the finding that he died "seized" is to be understood with relation to that title. it is merely equivalent to the finding that he had not parted with the title.

Upon the death of Brareau the title to one half became vested under the community absolutely in his widow and the other half partly by his will to his widow for life with remainder to his niece Mrs Duchoquette.

The interest thus devised to Mrs Duchoquette went into the community established by the contract between her and her husband, or the property was her paraphernal property; See the accompanying translation from the Spanish of Febrero which was used in the case of McCain vs Lindell.

If the property entered into the community the conveyances which were made by her and her husband passed her title and if it were her paraphernal property it otherwise passed

The counsel on the other side contends that marriage contract between Duchoquette & his wife did not bring this property into the community.

I will show that if it is not a part of the community the whole pretension of the plaintiffs is at an end.

The property on the death of Brareau belongs one half to Mrs Brareau absolutely and the other half to her for life with remainder to Mrs Duchoquette.

On the same day (February 14. 1817) three deeds are executed by the parties for undivided interests in the land and as the interests conveyed are sevenths I will use that fraction in the illustration of my position

Mrs Brazeau owned 3½ sevenths and Mrs Duchoquette was interested in the other 3½ sevenths.

It is not found by the verdict, (as far as I remember) in what order the deeds to Sinlard and to Mrs Brazeau and to Duchoquette were executed. For the purposes of this argument it is immaterial as to the order in which the deed to Sinlard stands.

The deed to Sinlard in which Mrs Brazeau and Duchoquette & Wife unite, convey 5/7 of the land leaving but 2/7 in the other parties.

As this deed is made by all the parties interested in undivided shares it is to be considered as making up the land conveyed, equally out of the shares of those conveying, and leaving them interested in the residue in the same proportions in which they were before interested in the whole

Of the remaining 2/7 Mrs Brazeau owns one share absolutely and in the other has an estate for life with remainder to Mrs Duchoquette.

If the deed from Duchoquette & wife to Mrs Brazeau was made before the deed from Mrs Brazeau to Duchoquette then by that conveyance Mrs Brazeau had the whole of the two shares in her and her subsequent deed conveyed 1/7 to Duchoquette alone. and the plaintiffs claiming under Mrs Duchoquette have no title

If the deed from Mrs Brazeau to Duchoquette was made before the deed from Duchoquette & wife to Mrs Brazeau then by that deed one seventh was vested in Duchoquette and the other seventh was in Mrs Brazeau for life with remainder to Mrs Duchoquette, and the deed from Duchoquette and wife to Mrs Brazeau of 1/7 is to be considered as making up the quantity or interest conveyed out of the shares of those conveying equally. Upon this latter supposition Mrs Duchoquette would have left 1/14 or 504 arpens.

I am aware that this condensed mode of stating the effect of the different conveyances requires a very close attention to comprehend the position assumed -

Let us drop the consideration of the estate for life in Mrs Brazeau in the share in which Mrs Duchoquette is interested and consider the two as each absolutely entitled to 1/7 - this will make the suppositions more simple.

Mrs Brazeau then owns 1/7 and Mrs Duchoquette 1/7 -

Mrs Duchoquette and her husband convey 1/7 to Mrs Brazeau by ~~the~~ Mrs Bowns the whole - then Mrs Brazeau conveys 1/7 to Mr Duchoquette afterwards Mrs Brazeau and Duchoquette unite with Soulard in conveying the whole to Carter Coles & Coles - this operates to vest the whole in the grantees and the plffs claiming as heirs of Mrs Duchoquette have nothing left -

Take the other supposition -

Mrs Brazeau owns 1/7 and Mrs Duchoquette 1/7 - Mrs Brazeau conveys 1/7 to Duchoquette - then Duchoquette owns 1/7 and Mrs Duchoquette owns 1/7. Duchoquette and his wife join in conveying 1/7 to Mrs Brazeau - this 1/7 is to be made up out of the shares of Duchoquette and Mrs Duchoquette then Mrs Brazeau will have 1/7 Duchoquette 1/14 and Mrs Duchoquette 1/14 - after Mrs Duchoquettes death her 1/14 will go to her heirs and the deed of Soulard Mrs Brazeau and Duchoquette to Carter Coles & Coles conveys all the balance of the tract to them -

Now here is one view of the effect of these conveyances depending upon the order in which they were executed in which the plffs would have an interest to the extent of 504 arpens and another in which they would have none - A special verdict is found, and upon the facts found the plffs are not shewn to be entitled therefore

they cant have judgment

If the interest devised by Joseph Brazeau to Mrs Duchoquette came into the community between her and her husband, then she would be entitled or rather her heirs would be entitled to 1/14 as the one half of the interest conveyed by Mrs Brazeau to Duchoquette - for if the community would embrace the interest conveyed by ~~that~~ the deed of Mrs Brazeau -

In no way in which this case can be considered are the heirs of Mrs Duchoquette entitled to more than 504 arpens or 1/14 and a different view just as consistent with the facts found excludes them entirely -

I have no reply to make to the argument upon the right of husband & wife to convey by deed the paraphernal property of the wife - The accompanying translations from the Spanish laws and the case of Lindell vs McKair show the right

A R Gamble for Dft
in Error

Picotte & others

vs

Cooley & others

Brief of Defts in Error

H R Gamble atty

for Deft in Error

Picotte Apl:

" In Error.

Cooley & al:

This was an action of ejectment to recover a tract of land in Pike County. Dec: in usual form & plea not guilty.

On the special verdict found in this case the court below gave judgment for defendants: To reverse that judgt this writ of error is prosecuted.

The pltffs: & Deft. both claim under same original title. The representative character of pltffs: is not questioned:

The question to be decided arises on these facts.

1. The parcel of land in dispute was part of a league square conceded by the Spanish Government to one Joseph Mazeau 18 Dec: 1797.
2. Joseph Mazeau on 5. May 1798 made his last will by which he devised whole of said land to his wife for life & upon death her death to his niece Mary Mazeau absolutely, which will was duly proved after his death.
3. Joseph Mazeau departed this life 26 Nov: 1816.
4. The concession aforesaid was confirmed by the US: 12 April 1814 to said Joseph Mazeau
5. The said Joseph Mazeau & Marie his wife intermarried at Kaskaskia, Ill: 7 Nov: 1769. She dies 3 Feb: 1834.
6. The said Marie Mazeau niece of Jean B. Duchouquette intermarried 3. July 1798, at St Louis Upper Lou: . She died 8 July 1818 the 27 March 1833
7. A marriage contract was had between Duchouquette & wife, previous to their intermarriage, 2. July 1798 at St Louis; which provided "that the

husband & wife should hold in common all estates move-
able & immoveable, purchases & acquisitions "of that" they
take each other with all their rights & estates such as have
come & fallen to them or may fall to them from the
succession of their father & mother with those they
may have of their own either by donation or otherwise."

8. The Pltiffs are descendants from the intermarriage of
Duchesquette Marie, niece of Joseph Marjean.

9. A marriage contract was had between Joseph
Marjean & Marie his wife before their intermar-
riage 8 Nov: 1789 at Kaskaskia, Ills: which pro-
vided "that said husband & wife should hold in com-
mon all the goods & chattels moveable & immo-
veable, acquirements & purchases, although they
should remove into a country where the laws u-
sages & customs should be contrary, which they
do expressly derogate & renounce: they take each
other with all their rights & property whatever, such
as they may have acquired or shall hereafter ac-
~~quire~~ to them by inheritance from their father
& mother; & that the survivor shall have all the
acquisitions moveable & immoveable made dur-
ing coverture.

10 a deed by Jean B. Duchesquette & wife to Marie
widow of Joseph Marjean, expressing to convey to
the latter 1008 arpens or $\frac{1}{7}$ of said league dated
14 Feby 1817.

11 a deed by Marie widow of Joseph Marjean to
J.B. Duchesquette expressing to convey to the
latter 1008 arpens or $\frac{1}{7}$ of said league dated 14 Feby
1817.

12. a deed by Marie widow of Joseph Marjean, J.B.
Duchesquette & wife to A. Sorlard expressing to
convey to the latter 5040 arpens or $\frac{5}{7}$ of said
league dated 14. Feby 1817.

13. a deed by Sorlard & wife, Marie widow of Joseph

Pecatte & others vs ~~Cooley & others~~ } 13 A Deed from Boulard ~~to~~ Decouquette & others to Carter Coles &c — Defts

1 The plaintiffs insist that the land in dispute was at the death of Joseph Brugeau his separate property and as such by his will after his death ~~by his will~~ passed to his widow for her life, and to his niece in fee. So much of the Marriage contract, between Brugeau & wife, is set out, as to leave the Court to judge of its legal effect, by this, the contract appears to have been made at Kaskaskias Illinois, ~~by this contract~~ a community is established in all property real and personal (acquets et conquets) which means purchases & acquisitions made by their joint labor &c — By a subsequent clause they agree to take each other, with all their estates, such as they then have, or shall have, by inheritance donation or otherwise, they make a mutual donation to the survivor, of the separate & common property of the one who shall first die, for life only and declare that this mutual gift in case of ~~[illegible]~~ issue shall be null, & that their issue if any may renounce the community & take back all that the deceased brought in Marriage, or that should descend or be given to him or her during couture, The true construction of this contract, which is in the usual form of contracts made under the Spanish Govt in Louisiana, undoubtedly is, that the contracting parties intended to establish a community only in the property which they should earn by labor, acquire by purchase, or have given to them jointly during couture, The court is referred to the case of Roussin vs Parks where a

A Marriage contract between Joseph Tayon & Pelagie Chauvin, is set out, with very different provisions. There it is declared that the Spouses take each other without estate, & that they shall hold all their property (Not acquits & Conquets) as in this) but all they shall acquire whether by inheritance donation or in any other Manner in Community

1 On the other side it is contended that the Marriage Contract establishes a Community, Secondly that it was made at Kaskaskias, a French colony governed by the customs of Paris, which (~~establishes a community in all the property which the Spouses bring in Marriage or acquire during coverture by any Means whatever~~) must be enforced here ~~and thirdly~~ that Gifts from the King by that law were not excepted from the community — And thirdly that the Terms of the Concession are not found therefore it does not appear that the land conceded was not a purchase

In answer to these objections we say 1st that although Bragean & wife were Married at Kaskaskias it does not appear that that place was the Domicil of either of the Spouses so If a Marriage contract takes place in a foreign "Country in transitu and where the parties had no "intention of fixing their domicil the law of the "actual or intended domicil of the parties governs the "case as to the incidents of Marriage; and it is the "General rule, that if the husband & wife had "different domicils when they ~~were~~ Married "the domicil of the husband became the true "And only Matrimonial domicil Lebreton vs Nauchel "3 Martins Rep Co Fords Curators vs Ford 14 Ibid 574 "This is the opinion of all the Foreign Jurists"

The above is extracted from 2 Kents Com page 94 Note C. not being able to produce the authorities cited

2 We further say that foreign laws are matters of evidence there is no finding as to what was the Law of Marriage contract at Kaskeas when Bragean & wife were married this court then can not regard that law but must be governed by ours See 4 Mo Rep Leak vs Elliott 450

3 by We say a that where there is an express nuptial contract concerning personal property it will be sustained every where unless it contravenes some positive ~~law~~ rule of Law But as to real property it must be made subservient to the Lex rei Sitae. 2 Kents Com 94 Note B – Id 183 Note A —

4 Under this head we say that in Louisiana it has been decided by a series of decisions without a dissenting opinion that where lands were conceded by the King of Spain to either Spouse living in Lou- that the land so conceded belonged to the Spouse to whom it was conceded & did not enter into the Comm- -unity 1 Martins Rep N.S. 351 — 3 Martins Rep 581 4th do 645 & Duponceaus opinion on Humpreads Will If this doctrine did not prevail a grant by by his Catholic Majesty might have fallen into the family of a heretic —

5 We say that the special verdict finds facts that preclude the defendants from denying that the land in dispute was at the death of Bragean his seperate estate. Namely that it was conceded to him only, that it was confirmed to him alone, & that he died Seized & possessed of it in 1816 The word Seizin ex vi Termini imports a complete legal title

The Confirmation in law & according to decisions in this Court & in the U S Supreme Court being Made to Joseph Bragean Must inure to him & not to him & wife If the wife realy had any claim to this Land she should have filed notice of her claim according to Law or it is forfeited It will not do to say that she could only act through her husband, for she might have acted & applied to our courts to compel her husband to protect & assert her rights

It being as we think sufficiently shown that the Land in dispute was the Seperate property of Joseph Bragean at his death & that it passed by his will to his wife for life & to his niece in fee we Insist that Nom of the Deeds read in evidence passed any greater interest in the Lands in dispute than the life estate of Madame Bragean & the life Estate of Duchouquette in right of his wife

2ly

In Maintaing this position we contend first that the Marriage Contract between Duchouquette & wife established a Community only as to their future acquisitions — that it did not include this whole Came to her Seperately by will & was her paraphernal Estate We are aware that in the case of Mc Nair vs Lindell 4 Mo Rep 382 The question came up whether after the adoption of Com Law by us in 1816 and before our act of 1821 a Married woman could by Joining her husband in a Deed of Bargain & Sale Alienate her real Estate It was decided that she could. We venture

most respectfully to ~~review and reconsider~~ ask this court to review and reconsider that opinion —
In 1816 by Statute it was declared that the Common law of England be of a general nature, and not local to that Kingdom & not repugnant to, nor inconsistent with the Constitution & laws ~~of the land~~ of the United States or the laws of this territory shall be the rule of decision in this Territory, any law usage or custom heretofore in use to the contrary notwithstanding. That part of the Common law of England imposing restraints on married women & declaring their disability to contract was of a general nature and it was not local for this law had extended to every part of the U S except Louisiana. By the common law husband & wife were considered one person, the civil existence of the wife was merged in that of her husband that she was declared incapable of conveying her real estate even by joining with her husband in any other manner than by Fine or Recovery. These disabilities were imposed on the wife for her protection. This feature of the Common law has been acknowledged & received as the rule of decision so far as I know in every State in the Union (La excepted) where the same has not been changed by immemorial usage or by Statute. In States where the Common law of England has been adopted by Statute it has therefore been uniformly decided by the courts that a conveyance of the lands ~~of the lands~~ of the wife ~~by~~ is null & void unless made in strict conformity

to same Statute authorizing her to convey —
See
1 Tylers Rep 6, 7 52 Hemmer vs Wentworth
3 Harris & McHenrys Reports Nicholson vs Wensley
409 Ib Lewis vs Waters — 430 1 Peters Rep 109
Ib — from 338 to 340 5 Peters Rep 264 7th Do 604 —
It is true that in Mass — N.Y. Penn & N.J.
it has been decided that husband & wife may
Join in conveying the lands of the wife in
a particular mode the being privately examined
to and that such conveyances being sanctioned
by Immemorial Usage was good But such
usage can not be urged here. Usage & custom
can never be set up against a Statute. And we
in 1816 adopted the Com Law by Statute
I refer to my Brief (herewith handed) in case
of Lindell vs McNair & the cases therein cited
If the Deeds of Duchouquette & wife are void
then plaintiffs are entitled to the whole land
named to be in defts possession 2655 acres

3 If the Deeds of Duchouquette & wife are good
against her & her heirs then she is entitled
to recover one 7th the having Joined with
her husband in conveying 5/7 to Soulard and
one 7th to Madam Boagean this she had
a right to as parapherval Her heirs also are
entitled to one half of one 7th as community
property between her husband & her self being
the amount purchased of Madam Boagean
14 July 1817 So plaintiffs should recover
the 2655 acres described in Special verdict
or —

three equal undivided four tenths of said land
so described Allen & Bond for
Pltffs

Pratt & others

vs

Cooley & others

Brief of Plaintiffs

by

Allen L. Bird

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three equal undivided four tenths of said land
so described Allen & Bond for
Pltffs

Picotte Sothers
Heirs of Duchoquette
vs
Edward Coles Sothers

This was an action of Ejectment for land in Pike County. A special verdict was found & judgment rendered thereon for defendants to reverse which this writ of Error is prosecuted.

Stating the facts found in the special verdict in order they are as follows.

November 6. 1769 Joseph Brazeau & Marie Therese Delisle entered into a marriage contract at Kaskaskia by which they established between them a community of property moveable and immoveable whether then owned or subsequently acquired. and on the next day they were married

December 18. 1797 a concession of a league sq was made to Joseph Brazeau by the Spanish authorities which embraces the land in question

May 5. 1798 Brazeau made his will in conformity to the requirements of the Spanish law by which he devised his real estate embracing the league square to his wife for life with remainder to his niece Marie Brazeau.

July 3. 1798 Marie Brazeau the niece intermarried with Jean B Duchoquette having the day before entered into a marriage contract by which they established a community in all their property moveable and immoveable then owned or subsequently acquired either by succession ~~donation~~ or otherwise

April 12. 1814 The league square was confirmed to Brazeau

November 22. 1816 Joseph Brazeau died having no children

November 26. 1816 The will of Brazeau was proved

February 14. 1817 Marie Therese Delisle widow Brazeau, Jean B Duchoquette and Marie his wife conveyed to Antoine Sonland 5040 arpens or 5/7 of the league square

On the same day Jean B Duchoquette and Marie his wife conveyed to Marie Therese Delisle Widow Brazeau 1008 arpens or 1/7 of the said league

On the same day Marie Therese widow Brazeau conveyed 1008 arpens or 1/7 of the league to Jean B Duchoquette in fee

July 8. 1818 Marie Duchoquette died leaving children who are the plaintiffs in this action

November 25. 1818 Antoine Sonland and Julie his wife Marie Therese widow Brazeau and Jean B Duchoquette made a deed by which they conveyed the whole league square to Mary E Carter Walter Coles & Edward Coles the defendants

March 23d. 1833 Jean B Duchoquette died

February 3. 1834 Marie Therese widow Brazeau died

This statement of the facts is sufficient to shew the points which arise for the decision of this Court

For the defendants in Error it is insisted

1 That the marriage contract between Joseph Brareau and wife embraced the league square in the community which it established.

The parties have adopted the plan of spreading the effect or meaning of conveyances upon the special verdict instead of finding the documents as they exist and leaving the construction to the Court.

This marriage contract is not found as an instrument but its effect is stated.

The effect as found will embrace all property however acquired and of whatever nature it may be.

It is objected on the other side that this land dont enter the community because it is a gift from the King but there are two answers to this

1 That the terms of the concession are not found and therefore it does not appear but that it was a purchase or that it was on a contract for future services of husband & wife or was for their past services.

2 That the law which excepts gifts from the King out of the community applies only to the community as established by law and not to the community made by agreement of the parties

The French and Spanish and Common law profess to regulate all marital rights, but each system permits the parties to make such contracts as they think proper, and when contracts are expressly made, the provisions which the law would make yield to the provisions which the parties stipulate. Story, conflict of laws Section 143, 178

The French law makes no exception from the community which it establishes, of gifts from the King - The Spanish law does except such gifts from its community - But when there is an express contract the only question is whether its terms will embrace such property.

The authorities relied upon by Mr Allen are cases in which the question arose whether certain property entered into the community which the law created and not whether the parties embraced it in their contract of community

This contract was made under the French law and its provisions are to be enforced by that law. Science des Notaires 1 Vol 258

Under that law, gifts of property from the King would pass into the community without a marriage contract Science des Notaire 1 Vol 255-261.

~~He based reply to the objection~~

The objection is also fully answered by the mere statement that the verdict does not find that the land was a gift from the King -

II The effect of the community is that upon the death of Joseph Brareau his wife took one half of the property under the contract and the other passed according to his will that is to his widow for life with remainder in fee to his niece

Science des Notaire 261 - The Spanish law is the same

III The marriage contract between Duchoquette and Marie Brazeau either establishes a community which will embrace the interest devised to her in the will of Joseph Brazeau or that estate was her paraphernal property.

In either case the conveyances made by Duchoquette and his wife to Soulard and to Widow Brazeau convey all the interest which she could claim under the will - Her right under the will was to three & a half sevenths - By the conveyance to Soulard two & a half sevenths passed and by the deed to widow Brazeau the other seventh passed -

If this property as devised by the will of Joseph Brazeau did not enter into the community between Duchoquette & wife then it was her paraphernal property Lindell vs McNair 4 Miss Rep 380 1 Partidas 523. As such it could be conveyed by Husband & wife as was done in this case.

If the marriage contract did not embrace this property as derived by the wife under the will of Brazeau it will not embrace that conveyed by the widow Brazeau to Duchoquette himself and so the whole interest of the wife as her paraphernal property being conveyed by the husband & wife and the interest conveyed to the husband alone not being embraced by the community all claim of the plaintiff is ended.

But if the community between Duchoquette & wife embraced the estate devised by Brazeau their conveyances of it were valid and when the widow Brazeau conveyed to Duchoquette

the 1008 arpens that portion being subject to the community the deed of Duchoquette made after the death of his wife operated only to convey his own interest and the heirs of the wife are entitled to 504 arpens

E Bates & H R Gamble for
Dfts in Error

Picotte & wife
as
Cooley & others

Brief of Dfts in Error
Bates & Gamble
for Dfts

Marriage contract executed 15th Jan 1808.

clause in the contract "Les futurs epoux seront en communauté des biens meuble et immeubles, acquêts et conquêts, laquelle communauté sera reglé selon la loi." that is to say; "The future husband & wife shall hold all their estates real & personal ~~as well~~ as their future acquisitions in partnership between them, which partnership shall be regulated according to law."

"Communauté" is translated "partnership" because it conveys the same idea applying it to real or well as personal property.

"Acquisitions" means what the common law calls estates acquired by purchase whether real or personal, excluding all property acquired by gift, devise, bequest, intestate distribution or inheritance.

The question on this clause is on the word "shall be regulated according to law". The law here meant is the law in force in the country at the time of the contract made.

Louisiana was originally a french colony, in which as in all the french colonies marriage contracts & the civil rights of husband & wife, where no special contract existed were regulated by the custom of Paris, which like the common law of England was derived from the laws of those Teutonic nations which about the 3d & 4th centuries invaded & conquered the western parts of Europe.

The custom of Paris as a part of the French Law remained the law of Louisiana until the year 1769, when Spain to whom the country had been before ceded, thought fit to introduce her own national laws into her new colony. ~~This was done gradually~~ In 1804 the country was under the govt. of the US. Four years after which this contract was made - a few territorial laws were passed, but inasmuch as they were altered & modified by these new enactments, the old laws still remained in full force. Among them was an act directing the Probate of wills, the descent of intestate real estate, the distribution of their personal estate, & for the purposes therein mentioned. This act is dated 4. July 1807.

By the Spanish Law the husband & wife by the mere act of intermarriage become partners in all the estate real & personal which they respectively possess except what the civil law calls the "income & profits of publick offices civil or military held by the husband" which belong exclusively to him. All that is acquired or purchased during coverture, whether real or personal goes into partnership as being presumed to be the fruits of the joint industry & economy of husband & wife. Not so with property acquired by devise, bequest, gift, succession or inheritance - this remains the separate property of the party to whom it accrues because not the fruits of the joint industry. This is what the French law calls "les propres" which means separate property. acquets & conquets means the property

jointly acquired.

In all these respects the custom of Paris is the same with the Spanish law, except that the personal property only, possessed by the parties at the time of the marriage enters into the partnership as also "acquets & conquets" acquired during coverture, whether real or personal. But real property held by either party at the time of the marriage continues to be held separately unless the contrary is stipulated as has been done in the present case.

The result of this community or partnership both at the Spanish & French law is this - that on the dissolution of the partnership, the surviving party & the representatives of the dec^d. each take back what was brought on his or their side into the partnership - value or kind, - value if personal estate, - kind if real & what remains being considered as gains or profits is equally divided as between partners.

"Every thing that husband & wife shall earn or purchase during coverture let it be equally divided between them & if it be a gift of the King or any body else to both of them, it belongs to the husband & wife jointly; if to one of them only then to him or her to whom it is given.

Nueva recopilacion de las leyes de España
vol 5. book 10. Title 4. Law 1. p 25. quoted Law 2. tit 9. lib 5
of the Fuero Real - same book same page proceeds as follows Ley 2. = Ley 2. tit 3. lib 3. del Fuero Real.

If the husband acquires any thing by inheritance of his

father or mother or other relation or by gift from a lord or some relation or friend, or by his own pay in the King's army let all he thus acquires be his own seperate property: if he shall serve in the army without pay at the expence of himself & wife, as the expense is common between them so the gains must be. All that is said above of the gains of the husband, applies in like manner to those of the wife". Heuther same page law 3. title 3. lib 3. of Fueros Real.

although the husband (at the time of marriage) have more than the wife, or the wife more than the husband either of real or personal property, let the rents & profits thereof be common between them - but the real estate itself, or the goods & chattels out of which the profits issue remain the property of him or her to whom they belonged before the marriage, or of his or her heirs.

Heuther same page lib 4. being law 203 of the Estilo of King Philip 2. enacted in the year 1556.-

although the (ancient) law says that all the property of the husband & wife is presumed to belong to the husband until the wife shews that it belongs to her, the usage has been to the contrary, & the property possessed by ~~the~~ husband & wife is considered to be their joint property until either of them shall prove that it belongs to him or her seperately & thus we order that it shall be observed as law. The words in this article "shall prove that it belongs to him or her seperately" refer to the legal distinction above stated between the common & the seperate property of husband & wife.

The same doctrine is laid down by Febrero an eminent

Spanish jurist of the highest authority in his work entitled "Liberia de Escribanos" or the library of notaries lib 4. p 212. Chap 4. entitled the manner of dividing between the sur: husband & wife & the heirs of the dec.d the gains & profits acquired during coverture & of other matters.

The estate which the husband & wife respectively put into the stock of their partnership at the time of their marriage or during coverture being first deducted or set aside as well as the debts contracted during coverture in the form & manner mentioned in the preceding chapter, all the remainder is the increase & profits of the partnership & as such is common & must be divided between them in these kingdoms of castille, if they live together. This is contrary to the ancient Law by which all the estate was presumed to belong to the husband & the wife took only what he proved to be hers. &c.

note - the words during coverture do not mean, real property purchased after marriage for that is considered as gains & profits being acquired by means of or with the proceeds of the joint industry & economy - if they live together means if they have lived together during marriage because by abandoning one another they lose their rights.

article 3 of same section states that the gains & profits are common between man & wife though one of them only works & the other does nothing for they are one person in law.

Elizondo. - his practica universal forense Vol 3 p 99. what we call in Spain gains & profits is the same thing

that is called in France acquets matrimoniaux, that is to say, the property acquired by husband & wife by their labour & industry during coverture".

Don Antonio Xavier Perez y Lopez in his works entitled Teatro de la legislacion Universal de España e Indias Vol 5. p 186. expresses himself as follows

See 5.

Recopilacion lib 5. tit 9. Ley 1. Don Felipe 2. anno de 1556. By virtue of a custom contrary to (the ancient) Law, the estates of husband & wife are common except what either shall prove to be his separate property.

Ley 2. All the gains & profits made or purchased by husband & wife while living together are to be divided between them, except gifts made by the king to one of them.

Ley 3. Property acquired by gift, inheritance or in the Kings army, or any other service by way of pay, is not to be divided ~~between them~~ unless the service was performed at the joint expence

Ley 4. The profits of real & personal estates are common although one prospers more than the other.

Clause of contract. "The said future husband has endowed & does endow the said future wife with the sum of $200 to have & take the said dower as soon as it shall accrue by preference out of all the estate of the future husband which dower shall nevertheless be the proper estate of the children to be born of the said future marriage.

In the French & English law the wife is only entitled to the rents & profits of her dower during life, unless a Marriage the contrary be expressed. In the Spanish law dower is abso-

lute. In both France & Spain the dower may be of personal as well as of real property.

On this subject Perez y Lopez. in the work & vol: above cited says. "The dote or donatio propter nuptias if made by the husband is to be paid out of the gains & profits, that is to say out of his share of the rents & profits of the joint estate, & if there be none out of his separate estate.

If there be no children the widow is in the above class entitled to her dower of $200 absolutely according to the Spanish law.

The next class is the donation to the wife in lieu of or by way of preciput. Preciput is a technical term of the custom of Paris. It means some part of the joint estate of husband & wife to be taken out by one of the parties for his or her separate use. or benefit before a division. It is a donation of so much made by the husband to the wife - has no synonime in the Spanish law - yet its meaning is well understood & may be translated. It is not prohibited by the Spanish Law.

When there is a marriage contract, & the husband dies having made a will & therein made a legacy to his wife, such legacy is in addition to the portion she takes by the marriage contract.

Novisima recopilacion Ley 8. Ley 16. de Toro.

If the husband shall bequeath any thing by his will to his wife, or give her any thing at the time of his death, it shall not be included in her share of the gains & profits made during coverture, but she shall have her moiety of the same & also the said gift or legacy, as far as the law will validate the same.

a donation or bequest made by the husband to his wife is not to be understood to be of the gains & profits.
Perez y Lopez Teatro Vol 5. p 188.

Extract of Opinion.
French & Spanish Law.

Supreme Court
State of Missouri
Honore Pecate & others
vs
Cooley & others

Error to Pike Circuit Court July Term 1846
To the Judges of the Supreme Court of Missouri

Your Petitioners the plaintiffs State that this cause was argued & submitted on the part of the plaintiffs at the same Term of this Court in 1843 as is believed, that the cause was then continued under advisement. that the July Term of this Court in 1844 Beverly Allen Senior deceased being from Sickness unable to attend Gustavus A Bird at the request of said Allen appeared in the cause for the plaintiffs - Not knowing whether any opinion was made up in the cause he enquired of the late Judge Tampkins whether the case had been adjudged or not, to which the Judge replied that he had made up an opinion and written it out reversing the Judgment & giving Judgment for the plaintiff but he was not satisfied with the opinion & wished to hear a argument. He further stated that the plaintiffs were entitled to recover without doubt, but the doubt in his mind was how much, & on this point he wished to hear argument At the July Term of this Court in 1844 the case was again submitted to the Court on written Briefs made out G A Bird for the plaintiffs & H R Gamble for Defts - After the Court had adjourned for that term G A Bird was informed that this cause was not decided but continued under advisement - Mr Allen the attorney of Record has never been able to attend to said cause from sickness since 1844 & G A Bird who acted as counsel in the place of said Allen

has never untill after the last Term of this Court been informed have it was decided when he was informed by E Bates Esquire that the Judgt below was affirmed - Said Bird has inquired for the written opinion of the Court in the case & ascertains that altho there was ~~[illegible]~~ an entry on the Record at Oct Term last that the Judgment of the Circuit Court is affirmed yet no written opinion in the case has yet been filed therein Your Petitioners are strongly impressed with the belief that from the voluminousness of the record, & the new position relied on by Said Bird in 1846 & the length of time the cause was kept under advisement that the Court must have overlooked one Material fact apparent on the Record that is that on the death of the wife of Jean B Duchouquette he and she under her right held an interest in fee of 2/7 ths of the Land named in the verdict 25th Novr 1818 Marie Therese widow of Joseph Bragean Antoine Soulard & wife & Jean Bte Duchouquette after the death of his wife conveyed to Carter Calles & Coles the whole of the Sequa Square mentioned in plaintiffs declaration, And it is believed that the Court by Mistake had assumed that this Bird was executed also by the wife of Duchouquette otherwise your petitioners cannot imagine on what Ground Judgt was given for the plaintiffs Said Bird in his argument believing that there was no doubt that plaintiffs must recover one 14th of disputed premises did not pretend to enforce their right to this but claimed the whole & at all events the half of the disputed premises

This might have misled the court & most probably did — for the Record shows that a League Square of Land was granted & confirmed to Joseph Bragean — that he died in 1816 having made his will which is duly proved & recorded by which he devised all his estate to his wife remainder in fee to his niece the wife of J B Duchouquette that said Joseph Bragean died seized of said League Square that defts were in possession of a certain part of it set out by metes & bounds containing 2655 6/100 acres — The only deed Madam Duchouquette the heiress signed — was one in which she joins her husband to Madam Bragean for one 7th part of said League — which Madam Bragean immediately on the same conveyed back to her husband J B Duchouquette — And one other where Widow Bragean

I Bte Duchouquette & wife Conny to Antoine Soulard 5/7ths of said Land — At the death of Madam ~~Bragean~~ Duchouquette & wife as appears by the

Record Madam Duchouquette by Bragean's will was entitled to one 7th of the League Square aforesaid J B Duchouquette was also entitled to 1/7 by conveyance & if her estate & his were thrown into community as contended for by defts counsel — then the heirs of Madam Duchouquette have a clear right to one 7th of the land described in the verdict It is apprehended that if plaintiffs should bring a new action of ejectment the same case being made out this case might be relied on as a Bar according to the opinion of the Sup Court of the U S in a case of Strother vs Lucas (Second Tract)

Your Petitioners therefore must respectfully ask for a reconsideration & rehearing in this cause

G A Bud atty for
Pltffs

Sup Court Mo
Picotte & others
vs
Cosby & others

Petition for a
Rehearing