American Legal History – Russell

Jacob B. Wheeler, Esq. A PRACTICAL TREATISE on the LAW OF SLAVERY. BEING A COMPILATION of all the DECISIONS MADE ON THAT SUBJECT in the SEVERAL COURTS OF THE UNITED STATES, and STATE COURTS (New York: Allan Pollock, Jr. New Orleans: Benjamin Levy, 1837).

(VII.) OF WARRANTY (A) Of Warranty of Soundness.

1. Thompson v. Milburn, et al. Aug. T. 1823. 13 Martin's Louisiana Rep. 468.

Any disease with which a slave is afflicted at the time of sale, which has progressed so far as to be incurable, may be pleaded as a redhibitory vice.

Per Cur. Porter, J. The petitioners sue to obtain the price of a slave. The defendants resist the demand, on an allegation that the negro was unsound, and afflicted with redhibitory diseases, incurable in their nature, at the time they purchased him; of which diseases he died. Two gentlemen of the faculty, who were called on a consultation on the negro, five weeks after the sale, and a short time previous to his death, state, that they found him laboring under a chronic dysentery of long standing; a disease, which, though it may sometimes be cured by proper regimen, generally terminates in death. Three other witnesses state, that the negro was unwell immediately after the purchase. One called by the plaintiff declared that the negro had been afflicted with the diarrhea, some time previous to the period when the defendant purchased him; that the physician who attended him had reported him well, and that he had quite a healthy appearance when sold. That section of the civil code which treats of the defects in the thing sold, and redhibitory vices, is by no means the most clear and satisfactory of that work; and since its enactment, several embarrassing questions arising out of its provisions, have been presented for decision. It is now, however, the settled doctrine in this court, that by the term "disease incurable in its nature," must be understood any disease of which the slave is afflicted at the time of the sale, that has progressed so far as to be incurable. Our only inquiry, then, is, do the facts, as proved in evidence, bring this case within the rule? The testimony already detailed, appears to us to show beyond doubt, that the negro was diseased on the day of the sale. The evidence of the physicians satisfies us that it was of that disease he died. Whether

it had progressed so far as to be rendered incurable, is the main, and, indeed, the only difficulty which the case presents. The fact is not placed beyond all doubt by the testimony, nor can human testimony ever establish, beyond doubt, at what period a disease is incurable, unless the persons who give it are acquainted with all the means of cure which human knowledge possesses. We, however, have it in evidence here, that the slave sunk under the disease, and it is such as is generally incurable. This we think sufficient to throw the burthen of proof on the other side, and the defendant, aware that it did, has labored to show, that the fact of the disease being incurable, clearly resulted from the testimony. But in this he has completely failed. The evidence, so far from establishing the curableness of the disease, is entirely silent in regard to it. To supply the place of proof, the defendant has resorted to conjecture, and has contended, that we do not know but that if a physician had been called in earlier, the life of the slave might have been saved. We do not know what effect an earlier application to medical aid might have had, and for that very reason we cannot give the plaintiff the benefit of a fact which he has never proved. In the case of St. Romè v. Porè, the same argument was resorted to, and was considered of no weight. The court there held, that it lay on the vendor to show that the disease of which the slave died might, under a different course of treatment, have been cured. 10 Martin's Rep. 215. Every thing in this case rebuts the presumption that the disease would have yielded to medicine, nor do we see that there was such negligence on the part of the vendee as to deprive him of what we conceive a just and conscientious defence. As was said in the case just cited, physicians are frequently not resorted to until family medicines fail. The right of purchasers to resist the payment of an object which turns out to be of no value, should not be made to depend on their medical skill; on their knowledge that a disease on its first appearance is a dangerous one; and that recourse must be instantly had to professional men. That of which the slave died we know to be one that is slow in its progress, and not apt, in its incipient stages, to excite much alarm. The jury have found that the negro was, at the time of sale, afflicted with an *acute* dysentery. We see nothing in the evidence to support the conclusion. Taking it to be correct, it would not affect the decision of the case. Judgment affirmed. 4.. Reynaud & Sucko v. Guillotte & Boistontaine. May T. 1823. 13 Martin's Rep. 227. Prescription in redhibitory actions runs from the time the defects in the slave are known to the purchaser.

Porter, J. The petition sets forth on the 24th Feb. 1821, the defendant sold to the plaintiff a negro boy named Tommy, about 23, years old, for the sum of $900, and warranted him free from all redhibitory vices and diseases. That at the time of the sale the slave was

afflicted with ulcers on his leg, and that the defendants knew it, but made false representations respecting his health; that the said ulcers are of an old standing, and that notwithstanding all the care, trouble, and expense, which the petitioners have been put to, the slave is almost entirely unfit for the work and labor for which he was destined: and finally, that the use of said slave is rendered so inconvenient for them, that had they been informed of his true situation, they would not have bought him. The answer avers, that the negro at the time of the sale was not afflicted with ulcers; that if he was, the sale cannot be rescinded; and that owing to the want of care in the plaintiffs, the slave has been injured in value to the amount of $500. With leave of the court, the plea of prescription was afterwards added.

The first question to be decided, is the plea of prescription. The action was commenced nine months and twenty-four days after the date of the sale. It is the duty of the buyer, who brings this action after six months have elapsed, to prove when the knowledge of the defects of the slave was acquired by him. A question arises out of the evidence in this case, whether the prescription runs from the time the disease was known to exist, or from the time it was ascertained to be such as would form the ground of redhibition. We think from the latter; for until the purchaser was instructed that, he had a right of action, he was not in delay by not bringing it. He cannot be accused of negligence while the nature of the disease was unknown to him, and he was conferring a benefit on the vendor by attempting to cure it. In the case of Theard v. Chretien, we said, that if the plaintiff had proved any circumstance respecting the time when he acquired a knowledge of the vice, we should have held it sufficient to throw the burthen of proof on the seller, to show that he knew it earlier. In that now before us, it is proved by one of the witnesses, that the plaintiff did not seem aware that the disease was incurable in the month of October; and up to the 31st July, the negro was not prevented by sickness from working. So that whether we take as the basis of this action the slave being afflicted with an incurable disease, or having one, which though not incurable was known to the vendor at the time of the sale, and rendered his services so difficult and interrupted, that if the purchaser had been aware of its existence, he would not have made the acquisition. The plea of prescription must be rejected.

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5. Moore’s Assignee v. King et al. Aug. T. 1822. 12 Martin’s Louisiana Rep. 261.

The vendor’s ignorance of a defect in the slave does not protect him in the action *quenti minoris*.

Per Cur. Martin, J. The plaintiff sues on an obligation of the defendants, assigned him by King. The principal in the obligation pleaded it was not a negotiable one; denied having had notice of the assignment, and averred he had an equitable defence. He prayed, that the assignor might be made a party to the suit, and compelled to answer, on oath, whether the sum mentioned in the obligation, was not the price of a negro woman sold by the assignor to him? Whether the woman had not before, and at the time of the sale, a pendulous wen, on the inside of one of her thighs, which, at times, prevented her rendering any service at all; and whether this circumstance was disclosed at the time of the sale? The assignor admitted, that she received the defendant's obligation as the price of a negro woman sold him, and assigned it to the plaintiff; that the woman had, at the time of the sale, a mark on the inside of one of her thighs, which did not injure her, nor prevent her services at any time while she was owned by her; hence this circumstance was not disclosed to the vendee, that she did not know of any pendulous wen, as stated in the answer; but only of the aforesaid mark, which however, she never examined.

The jury found, that the sum mentioned in the obligation was the price of the negro woman named in the answer, who had a pendulous wen, as there stated, which rendered her, at times, incapable of labor; a circumstance which was not disclosed at, or previous to the sale, and that consequently, the plaintiff ought to suffer a diminution of $150 from the price. The plaintiff had judgment accordingly, and appealed. Dr. Elmor deposed, that about eighteen months after the sale he examined the woman, and found she had a pendulous wen, of the size of a duck's egg, attached by a short neck to the inside of her thigh, near the left *labia pudenda*. It was said, she was laid up in consequence of an injury the wen had received while she was crossing a fence. It was wounded and ulcerated; she was relieved. He thinks the wen must have been of ancient origin, as wens do not reach the size of this in less than one or two years. The woman must have had it from her infancy. From its appearance, when the witness saw it, it must have laid up the woman from eight to ten days, and the expense of her cure could not exceed ten dollars. It must ever be subject to injury, and must incommode her in walking. The witness thinks it ought to be amputated, which would not be attended with danger, would confine her for fifteen or twenty days, and would cost about thirty dollars. Were not the witness a surgeon, he would not have given half of the price for her, on account of the wen; and as a surgeon, he thinks he would estimate the diminution in the price, occasioned by it, at $100. Dr. Dixon having heard Dr. Elmor give his evidence, deposed, his opinion was perfectly the same, except that, as an individual, he would think the diminution of the value of the slave, occasioned by the existence of the wen, at two hundred dollars.

Marshall, the defendant's overseer, deposed, that the slave was smart and active. She was sick once or twice with the fever. He never discovered that she limped. The plaintiff's counsel contends, that as it is not proved that the vendor had any knowledge of the existence of the wen, no diminution of the price ought to have to have been made. Civil Code 360, art. 80. The ignorance of the vendor protects him, indeed, against redhibitory action; but it is that action alone of which the *code* speaks, in the part quoted. This ignorance will not avail in the action *quanti minoris*. "If the seller was ignorant of the defect, then the buyer must keep the slave, and the seller restore so much of the price as the value is diminished by reason of the defect;" and so, we say, if the slave was afflicted with any hidden disease. Part 5. 3. 64. Judgment affirmed.

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9. Smith v. Rowzee. Spring T. 1821. 3 Marshall's Rep. 527.

But if on the sale of a slave her state of health is concealed or misrepresented, the purchaser is absolved from the contract.

Rowzee sold a negro girl to Smith. The contract was made at Smith's house, he never having seen the girl. The next evening the girl was sent to Smith's house, from which place she was immediately taken by Bishop, who had purchased her of Smith, to his own house, about eight miles distant. He was obliged to stop with her several times on the road, and finally was compelled to leave her at a neighboring house. She was immediately taken back to Smith's house, and the contract between Smith and Bishop rescinded. The girl remained at Smith's house, under the care of physicians, when she died. And Rowzee sued Bishop for the price agreed upon at the time of the sale. Verdict for the plaintiff. The defendant appealed.

Per Cur. Mills, J. The plaintiff was no doubt acquainted with the debilitated state of the slave when he sold her. She had just recovered from a fit of sickness, and the plaintiff sent her to the house of the defendant veiled, to conceal the loss of part of her hair by fever. He said nothing about her sick or dangerous state. If he concealed these things, he was guilty of concealing the truth, which absolved the appellant from all obligations to pay for her, or if he gave a coloring to the facts relative to her condition, he was guilty of misrepresentation. Judgment reversed.

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10. Executors of Hart v. Edwards. May T. 1831. 2 Bailey's Rep. 306. And there is no implied warranty from the price, where the purchaser is acquainted with the defects.

Assumpsit on a promissory note, given for a slave.

At the sale, the slave looked very ill, and the auctioneer gave notice, that "he had had the venerial, but was well, or nearly well." The defendant gave $460; and if he had been entirely well, would have been worth $30 or $40 more. The slave died seven days after the sale. Verdict for plaintiff. Motion for a new trial, on the ground that there was an implied warranty arising from the price.

Per Cur. Johnson, J. The defendant had notice, at the time he purchased the slave, that he was diseased; and the evidence shows, satisfactorily, that his death was the consequence of that disease, or its incidents. And if he thought proper to purchase, without a warranty against its consequences, he was bound by it. Motion denied.

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4. Owen v. Ford. Nov. T. 1823. 1 Harper's Rep. 25.

In South Carolina there is no implied warranty of the moral qualities of a slave.

Per Cur. Richardson, J. In the case of Richard Smith v. McCall, 1 McCord's Rep. 220, this court decided,that there is no implied warranty of the moral qualities of a slave arising from the mere sale and price paid. As where a slave was sold who had committed burglary, the fact being unknown to both the seller and the purchaser. After the sale the slave was convicted, and his ears were cropped, held, that the implied warranty did not extend to the loss of the value of the slave by the punishment.

5. Ails v. Bowman. March T. 1831. 2 Louisiana Rep. 251. The habit of running away is not made out by proof of one act.

Per Cur. Martin, J. There is only evidence of the slave having ran away once while in the appellee's possession, and this does not constitute a *habit* of running away.

6. Bocod v. Jacobs. May T. 1831, 2 Louisiana Rep. 408.

Even immediately after the sale.

Per Cur. Martin, J. Circumstances posterior to the sale, may have some weight in the scale of evidence, in determining on the existence of a *previous* habit; but we do not think that the *mere* fact of running away immediately after the sale, added to a single instance before, may be received as evidence of an anterior habit. It may be the consequence of the displeasure of being sold, or of his dislike of the owner.

7. Duncan v. Covallus' Ex'rs. January T. 1817. 4 Martin's Louisiana Rep. 571.

If a slave be described, in the bill of sale as a *bon domestique, cochier, et briquetier*, and he be proven to be a good servant, and a coachman, and brickmaker, this will suffice.

Per Cur. Martin, J. The petition states that the plaintiff purchased from the defendants a negro slave for $900, under the assurance they gave him, that he was a *good* domestic, *good* coachman, and *good* brickmaker, and possessed of the confidence of his former owner, whose executors they are; that there has been a gross fraud practised on him by the defendants; that the plaintiff, fully confiding in the assurance they gave him, signed the bill of sale, without reading it; not believing that any thing contained therein would have been inserted contrary to, or in opposition of the formal assurances given him, in relation to the qualities of the slave, in which he avers he was deceived. The petition next sets forth, that the slave has made several attempts to run away, and is by habit a drunkard and thief, and was in the said bad practices long before the sale, at least in the knowledge of one of the defendants. It concludes with a prayer for the recision of the sale. Urquhart, one of the defendants, being interrogated by the plaintiff, answers, that he gave no assurances as to the virtues, vices, or talents of the slave; that he knew nothing of him, except that he called himself a coachman. The bill of sale was introduced as evidence of the assurances stated in the petition; the defendants therein warrant the negro sold, free from redhibitory *diseases only*, as well as of any lien or mortgage, but not as to any redhibitory *vice*, declaring that they do not know the slave. In the description of him, he is stated to be 25 years of age, a *good* domestic, coachman, and brickmaker: *bon domestique, cochèr, et brèquetier*. Four witnesses, introduced by the plaintiff, declared, that the slave was, from the moment he was taken into the family of the plaintiff, that is, immediately after the sale, a worthless, idle, drunken fellow, and knew nothing of the business of a coachman. A witness introduced by the defendants deposed, that he knew the slave, who was the deceased's coachman, and bore a good character; another, the deceased's overseer, deposed he knew the slave during a period of two years, while he belonged to the deceased; that he was at first employed as a brickmaker, was next the deceased's coachman, and afterwards as the driver of his other slave; that

he was a very faithful servant, and had the confidence of his master, who was very severe to his slaves; that he saw the negro drunk but once, and he never attempted to run away; that the deceased gave $1800 dollars for him and his wife. On this the district judge gave judgment for the plaintiff. The defendants appealed.

The statement of facts is composed of the bill of sale, and the depositions of the above witnesses, and the defendant's counsel has waived any objection to the want of an averment in the petition of the falsity of so much of the bill of sale as relates to the slave being a good coachman; he contends, that they are not liable for any but physical or bodily defects, having declared that the warranty did not extend to moral ones, *vices*; and that the plaintiff has failed in the proof of the knowledge, in the defendants, of any circumstance which they were bound to disclose. That the allegation, that the slave was sold as a *good* domestic, a *good* coachman, and a *good brickmaker* is not supported by the proof offered; the bill of sale representing the slave as a *coachman*, not a *good* coachman; that the defendants, knowing the slave to have been the deceased's coachman, might well describe him as a coachman; that in the phrase used, the *adjective*, according to the French language, governs only the substantive, which it immediately precedes, and is not necessarily applicable to others in the phrase, *bon domestique, cochèr briquètier*; that, if it be doubtful whether the adjective is to be extended to the two last substantives, the construction must be in *favorum solutionis*. That these witnesses prove, that the slave was a *good* domestic, since he had been selected to oversee his fellow servants; had a good character; that he never attempted to run away, and was seen drunk but once in two years. The plaintiff's counsel contends, that he has proved that the slave was deficient in the quality which induced him to purchase; that he knew nothing of the business of a coachman; that he was not a *good* domestic, since four witnesses swear that he has been, ever since the purchase, *an idle, worthless*, and *drunken fellow*. This court is of opinion, that the evidence, introduced by the defendants, repels all the allegations of fraud made by the plaintiff, and supports the averment they made, that the slave sold was a *good domestic*, a *coachman*, and *brickmaker*; for we think, with their counsel, that the adjective *bon* does not necessarily attach to any but the immediate substantive, *domestique*, and that if there be any doubt, the construction ought to be made so as to lessen, rather than to increase the obligation. Perhaps a literal translation into the English language might present a different idea. And the rule of the common law of England is in opposition to that which we are to follow. The common law says, *verba fortius accipiunter contra proferentem*; the civil law requires the constructions to be *in favorum solutionis*. Neither is the testimony of defendant's witnesses much weakened by that of those of the plaintiff's, though the latter be more numerous. These swear, that the slave knew nothing of the business of a

coachman, and is an idle, worthless, and drunken fellow. He might conceal his skill from his dislike of a new master; a great indulgence might render him idle, and free access to liquors might induce him to drink to excess; and he consequently would appear idle, drunk, and worthless.

But this does not disprove what is sworn on the opposite side: that, *previous to the sale*, under a *severe master*, he was a faithful servant, bore a good character and possessed the confidence of the deceased; circumstances which strongly justify the assertion of the defendants, that he was a *good domestic*. The depositions of the plaintiff's witnesses do not disprove what is sworn by those of the defendants, that the slave was a coachman and brick maker. Judgment for defendants.

8. Icar v. Suars. January T. 1835. 7 Louisiana Rep. 517.

Craziness or idiocy is an absolute vice, and where it is not apparent, will annul the sale.

This was a redhibitory action to annul the sale of a slave, and recover back the price, on the ground of redhibitory vice of craziness. The plaintiff alleged, that he purchased of the defendant a slave named Kate, for which he paid $500, and in two or three days after it was discovered the slave was crazy, and ran away, and that the vices were known to the defendant.

The witnesses stated she was very stupid; that on being told to do one thing she would do another; and that she was unsafe to be trusted about the house, on account of the danger of setting fire to it; that she wandered off, and was finally put in the parish jail of an adjoining parish, as a runaway.

The district judge gave judgment, that with regard to the mental malady of the slave, the evidence and a personal inspection satisfied him she was so far destitute of mental capacity as to render her either absolutely useless, or the use so inconvenient, that it was to be presumed the buyer would not have purchased had he known of the vice. The defendant appealed.

Per Cur. Bullard, J. It was contended, that Kate was not crazy, but only stupid, and stupidity is not madness; but, on the contrary, an apparent defect, against which the defendant did not warrant. Mere dulness of look is certainly apparent; but that degree of stupidity or want of intelligence, which results from a defective organization, is rather idiocy than stupidity. The code enumerates madness (folie,) among the absolute vices of slaves which give rise to the action of redhibition.

Whether the subject of this action is idiotic from nativity, or is laboring under one of the numberless derangements of an intellect originally sound, is a question which cannot be answered, without further knowledge of her history, than the record affords. Nor do we consider it material, inasmuch as the code has declared, that a sale may be avoided on account of any vice or defect, which renders the thing either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased with a knowledge of the vice. We are satisfied that the slave in question was wholly, and perhaps worse than useless.

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