MESSAGE OF THE

GOVERNOR

RELATIVE TO

THE M'DONOGH ESTATE.

[Feb. 22, 1852.—Referred to Special Committee of three—Messrs. Wickliffe Richardson and Dufour.]

EXECUTIVE OFFICE,
Baton Rouge, Jan. 22, 1852.

President of the Senate:

I have the honor to transmit to your honorable body a copy of a communication from the Attorney General in relation to the origin, progress, present condition and future prospects of the suit instituted by him, in behalf of the State, for one half of the estate of John McDonogh.

I have bestowed on it serious and unbiased consideration of the Legislature, and have become, entirely satisfied of the course of the Attorney General. I concur with him in the general conclusion to which he has been led in regard to the will, and recommend that provision be made for the adequate payment of counsel and for the disposition of the property should it be received.

JOSEPH WALKER.

LETTER OF THE ATTORNEY GENERAL.

To the Governor, relative to the Suit instituted by the State vs. the Executors of John McDonogh.

NEW ORLEANS, January, 12th, 1852.

GOV. JOS. WALKER.—SIR:

In accordance with your predecessor and your Excellency's request I submit the following statement of the suit of the State of Louisiana, vs. The Executors of the late John McDonogh.

A few days after the death of the deceased was admitted to probate, to wit: On the 28th of February, an application was called to the provisions it contained in favor of the State. Owing to the large amount of property involved, and the real or pretended religious scruples growing out of the extraordinary character of the bequest, I retained to my assistance as Associate Counsel, Messrs. Wm. W. Kong and Mac Taylor.

After a careful examination of the provisions of the will, the conclusion was, that in spite of the claims of New Orleans and Baltimore, were null and void, Louisiana and Maryland were entitled to the property, in consequence of the clearly expressed intentions of the Testator.

However the Will, I deemed it my imperative duty, under the Act of one of my predecessors Acts of the Legislature, regulating the office of Attorney General, to bring the proceedings in behalf of the State of Louisiana for the property. Suit was accordingly commenced, and as a conservative measure, a Sequestered in the hands of the Sheriff of the Parish of Orleans.

Maryland intervened, and joined the State of Louisiana in the suit; Pleadings were prepared, it was tried in the District Court, and the decision against the States.

Maryland appealed, as did also the State of Maryland, and the case is now pending in the Supreme Court. It is deemed advisable the trial can be forded to a speedy one.

As the case is of some importance to the State, a brief statement of its nature and the questions involved, which may probably be expected from me. For a full exposition of the points and principles of the case, I beg leave to refer your Excellency to the printed arguments of Counsel for the States, copies of which are herewith. I will however, without trespassing I hope, give you a brief statement of the leading features of the controversy.

The Legacies are attacked mainly upon two grounds.

1. Legacies are made to persons, and Corporations, having no capacity to receive.

2. The will taken, it is confidently believed, that the legacies are void, as public policy, and consequently are absolutely null. In other words, they cannot, except to vest the property in the States immediately on the death of the Testator.

As to the first objection, it is equally clear, as it appears to me under the Act of 1825, p. 175, for it is a positive rule of law, that to constitute a legacy void, it must be in existence at the death of the Testator, and the objects are to be ascertained. Now, therefore, at the Cities of New Orleans and Baltimore, were undoubtedly beneficiary legatees under the will, it is believed that the Legislature never intended those Corporations to be benefitted by the bequest, and emphatically forbids one dollar of his money going into the hands of the various charitable institutions, named in his will, provided those institutions could be founded as he desired, in accordance with his directions. In this state of things he wished to make contributions, and of his property. But if those institutions, as desired, never admitted as desired, or discontinued, then it is very clear, that the Testator, in making bequests with his property, and willed it unconditionally to the States. It is not pretended that the principal legatees of the real estate, are in existence, or have the capacity to accept, and such a construction would be a mere mockery to the States to demand, as connected, and inseparable, the bequests to them are so connected, and inseparable, that the one cannot take unless the others can.

It has been argued that there are no principal legatees, to wit; New Orleans and Baltimore, and of the real beneficiary legatees, to wit; the institutions contemplated, might be removed and remodeled by the Legislature, or if there are very grave, if not insuperable objections to the will, to propose to the Legislature, to remedy, the vital defects of the will, or to legalize that which is illegal in our jurisprudence, that the title to property in the Testator, his property vests immediately in the legal heirs. If there be a valid bequest, it can be said, the special legatees, vest in the residuary legatees, M. M. Donogh his property was either vested in the residuary legatees, or the State, under the residuary clause in their favor, or it was in the heir at law, under the due, future or fixed, at the Federal, and State Constitution. The Testator has no right to be heard in the language quoted: "If, contrary to all my expectations, M. M. Donogh should be the heir, to the estate, I request the Legislature to impart validity to it. If the legacy was void at the death of the Testator, it cannot be made valid by subsequent events, and if it was void at the death of the Testator, it is void, it the legacy is void, because the legatee did not, at the same consequence must follow, if the property of the legacy to the cities and charitable institutions, which are indeed, have failed, or cannot be, or which cannot be, or which exist no longer, the property vests immediately in the legal heirs, and the Legislature cannot impart validity to it. It is, therefore, a mere nullity, and the property would go to the State, as a public policy, and consequently are absolutely null. In other words, it is, except to vest the property in the States immediately on the death of the Testator.

As to the second objection, it is equally clear, as it appears to me under the Act of 1825, p. 175, for it is a positive rule of law, that to constitute a legacy void, it must be in existence at the death of the Testator, and the objects are to be ascertained. Now, therefore, at the Cities of New Orleans and Baltimore, were undoubtedly beneficiary legatees under the will, it is believed that the Legislature never intended those Corporations to be benefitted by the bequest, and emphatically forbids one dollar of his money going into the hands of the various charitable institutions, named in his will, provided those institutions could be founded as he desired, in accordance with his directions. In this state of things he wished to make contributions, and of his property. But if those institutions, as desired, never admitted as desired, or discontinued, then it is very clear, that the Testator, in making bequests with his property, and willed it unconditionally to the States. It is not pretended that the principal legatees of the real estate, are in existence, or have the capacity to accept, and such a construction would be a mere mockery to the States to demand, as connected, and inseparable, that the one cannot take unless the others can.

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