CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1810.

Scott *v.* Negro Ben.

Slavery.

The right to freedom, under the act of Maryland which prohibits the bringing of slaves into that state, is not acquired by the neglect of the master to prove to the satisfaction of the naval officer, or collector of the tax, that such slave had resided three years in the United States, although such proof be required by the act.

Negro Ben *v.* Scott, 1 Cr. C. C. 407, reversed.

Error to the judgment of the Circuit Court for the district of Columbia, sitting at Washington, upon a petition for freedom, filed by Negro Ben, against Sabrett Scott, who claimed the petitioner as his slave.

The ground upon which the petitioner claimed his freedom was, that he had been imported into the state of Maryland, contrary to the act of assembly of that state, passed in the year 1783, entitled "an act to prohibit the bringing of slaves into this state," by which it is enacted, "That it shall not be lawful, after the passing this act, to import or bring into this state, by land or water, any negro, mulatto or other slave, for sale, or to reside within this state; and any person brought into this state as a slave, contrary to this act, if a slave before, shall thereupon immediately cease to be a slave, and shall be free; provided, that this act shall not prohibit any person, being a citizen of some one of the United States, coming into this state with a *bonâ fide* intention of settling therein, and who shall actually reside within this state for one year at least, to be computed from *and next succeeding his coming into the state, to import or bring in [*4
any slave or slaves which before belonged to such person, and which slave or slaves had been an inhabitant of some one of the United States, for the space of three whole years next preceding such importation; and the residence of such slave in some one of the United States, for three years as aforesaid antecedent to his coming into this state, shall be fully proved, to

the satisfaction of the naval officer, or collector of the tax, by the oath of the owner, or some one or more credible witness or witnesses."

Upon the trial, the defendant below took two bills of exception. The first was to the opinion of the court, that it was incumbent on the defendant (Scott), in order to bring himself within the proviso contained in the first section of the act of 1783, to show to the jury that it had been fully proved to the satisfaction of the naval officer, or collector of the tax, by the oath of the owner, or some one or more credible witness or witnesses, that the petitioner was a resident of some one of the United States for three years antecedent to his coming into the state of Maryland; and that it was not sufficient for the defendant to prove, on the trial, to the satisfaction of the jury, that the defendant, being a citizen of some one of the United States, and coming into the state of Maryland with a *bonâ fide* intention of settling therein, and who actually resided within the said state for one year at least, computed from and next succeeding his coming into the state, imported the petitioner, who then belonged to the defendant, and that the petitioner had been an inhabitant of some one of the United States for the space of three whole years next preceding such importation.

The second bill of exception was to the refusal of the court to admit, as evidence, two certificates, made during the trial, the one by the collector of
*5] the customs and naval officer of the United States, *for the district and port of Georgetown, in the district of Columbia, and the other by a collector of taxes, appointed by the levy court for the county of Washington, in that district; the purport of which certificates was, that Scott had, on that day (16th June 1807), by his own oath, proved, to the satisfaction of each of those officers, respectively, that Ben "was a resident of the state of Virginia, one of the United States, three whole years next preceding the time when the said mulatto Ben was brought into the state of Maryland."

The cause was argued by *C. Lee* and *Jones*, for the plaintiff in error, and by *Swann* and *F. S. Key*, for the defendant.

February 7th, 1810.—MARSHALL, Ch. J., delivered the opinion of the court, as follows, viz.—In this case, three opinions were given by the circuit court, to each of which the defendant in that court excepted. These opinions were, in substance:

1. That the master of a slave imported into the state of Maryland, while the act, passed in the year 1783, entitled, "an act to prohibit the bringing slaves into this state," was in force, could not be admitted to prove the fact that such slave had resided three years, previous to his importation into Maryland, in some one of the United States, unless he could show that this fact had been proved to the satisfaction of the naval officer, or collector of the tax.

2. That a certificate made by the naval officer and collector of the port of Georgetown, dated on the 16th day of June, in the year 1807, certifying that this fact was proved to his satisfaction on that day, did not satisfy the law.

*6] 3. That a similar certificate given by the collector *of the tax for the county of Washington, did not satisfy the law.

The correctness of these opinions is to be tested, by comparing them with

the act under which the plaintiff in the court below claimed his freedom. The enacting clause of that law prohibits the importation of slaves into the state of Maryland, and gives freedom to such as shall be imported contrary to that act. A proviso excepts from the operation of the enacting clause those slaves which, having resided for three years within some one of the United States, and being the property of the importer, should be imported into the state of Maryland, by a person intending to become a resident thereof, and who should actually reside therein for the space of twelve months thereafter. The act then adds, "and the residence of such slave in some one of the United States for three years as aforesaid, antecedent to his coming into this state, shall be fully proved to the satisfaction of the naval officer, or collector of the tax, by the oath of the owner, or some one or more credible witness or witnesses.

By the plaintiff in error, it is contended, that this part of the law is directory; that it prescribes a duty to the importer of a slave within the description of the proviso, but does not make his title to that slave dependent on the performance of this duty.

By the defendant, it is contended, that this clause forms a part of the proviso, and that the fact of previous residence within some one of the United States can be proved by no other testimony, if that which is here prescribed be wanting.

The act, in its expression, is certainly ambiguous, and the one construction or the other may be admitted, without great violence to the words which are employed.

The great object of the proviso certainly was, to *permit persons, [*7
actually migrating into the state of Maryland, to bring with them property of this description, which had been within the United States a sufficient time to exclude the danger of its being imported into America for the particular purpose. The great object of the provision was, that the fact itself should accord with this intention. The manner in which that fact should be proved was a very subordinate consideration. Certainly, the provisions of the law ought not to be so construed as to defeat its object, unless the language be such as absolutely to require this construction.

It would be a singular and a very extraordinary provision, that a naval officer, or the collector of a tax, should be made the sole judge of the right of one individual to liberty, and of another to property. It would be equally extraordinary, that the oath of one of the parties, probably, in the absence of the other, should be conclusive on such a question. It would be not less strange, that the manner in which this *quasi* judge should execute his duty, should not be prescribed, and that not even the attempt should be made to preserve any evidence of his judgment. These considerations appear to the court to have great weight; and the language of the law ought to be very positive, to deprive them of their influence.

Upon an attentive consideration of that language, the majority of the court is of opinion, that the property of the master is not lost, by omitting to make the proof which was directed, before the naval officer, or the collector of the tax, and that the fact on which his right really depends may be proved, notwithstanding this omission.

The words of this part of the section do not appear to the court to be

connected, either in their sense, or in their mode of expression, with the proviso. It is a distinct and a substantive regulation. In legislation, the conjunction "and" is very often used, when a provision is made in no degree
*8] dependent *on that which precedes it; and in this case, no terms are employed which indicate the intention of the legislature, prescribing this particular duty, to made the right to the property dependent on the performance of that duty.

It is, then, the opinion of the majority of the court, that the fact of the residence of the plaintiff below within the United States was open for examination, even had his master omitted entirely to make the proof of that residence before the naval officer, or collector of the tax, and consequently, that the circuit court erred in refusing to admit testimony respecting that fact. The opinion of the court on this point renders a decision on the other exceptions unnecessary.

Judgment reversed.

FIELD and others *v.* HOLLAND and others.

Equity practice.—Auditors.—Issue.—Effect of answer.—Application of payments.

A report of auditors, appointed, by consent of parties, in a suit in equity, is not in the nature of an award by arbitrators, but may be set aside by the court, although neither fraud, corruption, partiality nor gross misconduct on the part of the auditors, be proved.

Without expressly revoking an order of reference to auditors, the court may direct an issue to be tried.

A court of equity may ascertain the facts themselves, if the evidence enables them to do it, or may refer the question to a jury, or to auditors.

After an issue ordered, a court of equity may proceed to a final decree, without trying the issue, or setting aside the order.

The answer of a defendant is evidence against the plaintiff, although it be doubtful whether a decree can be made against such defendant.

The answer of one defendant is evidence against other defendants claiming through him.

The plaintiffs cannot avail themselves of the answer of a defendant, who is substantially a plaintiff; it is not evidence against a co-defendant.

If neither the debtor, nor the creditor, has made the application of partial payments, the court will apply them to the debts for which the security is most precarious.[1]

ERROR to the Circuit Court for the district of Georgia, in a chancery suit, in which Field, Hunt, Taylor and Robeson were complainants, and Holland, Melton, Tigner, Smith, Cox and Dougherty were defendants. The decree of the court below dismissed the bill as to all the defendants.

The bill stated, that on the 21st of July 1787, Micajah Williamson obtained from the state of Georgia a grant of 12,500 acres in Franklin county, in that state. On the 9th of July 1788, Williamson conveyed to Sweepson, who, on the 23d of July 1792, conveyed to Cox, who, on the 3d of September 1794, conveyed to Naylor, who, on the 18th of December
*9] 1794, conveyed to the complainant Field, and one *Harland, as tenants in common, and that Harland afterwards conveyed his undivided interest to the other complainants.

That the defendants Melton, Tigner and Smith claimed title to the land

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[1] Pierce *v.* Sweet, 33 Penn. St. 151; Ege *v.* Watts, 55 Id. 321; Foster *v.* McGraw, 64 Id. 464; Woods *v.* Sherman, 71 Id. 100.