damages which, by the law of South Carolina, he was compelled to pay, and which may, therefore, also be considered as part of the debt due by the defendant, in consequence of the violation of their promise, contained in the letter which has just been mentioned.

The second exception which appears on the record is to the admission of certain interrogatories, which had been propounded to the defendant, Nourse, with his answers to the same, having an indorsement upon the same, purporting to be an acknowledgment of Nourse that the same were correct. In the opinion of this court, this paper was rendered proper evidence, by the conduct of the defendant, Riggs, who had read as evidence for himself, a letter from Nourse to Lindsay, dated the 14th April 1810, containing, as he supposed, some matters favorable to his defence. This letter having been thus produced by Riggs himself, *it was certainly right, to allow Lindsay to discredit the representations made in that letter, by showing that Nourse had himself, at another time, given a very different account of the same transaction. [*504

The other opinions of the court below, to which exceptions were taken, may be comprised in these two; that the court erred, in thinking the defendants jointly liable as copartners, and that the resale of the salt did not destroy the plaintiff's right of action. In both these opinions, this court concur with the circuit court. It is, perhaps, as clear a case of joint liability as can well be conceived. Whatever doubt there might be, independent of the letter of the 4th of January 1810, most certainly, that letter puts this question at rest. Every one of the defendants sign it, and there is now no escape from the responsibility which they all thereby incurred to the plaintiff.

Nor did Lindsay's selling the salt, after he had taken up these bills, destroy his right of action against the defendants. If he has acted irregularly in so doing, he will be liable, in a proper action, for the damages which the defendants have sustained by such conduct, but such sale could not be pleaded or set up in bar to the present suit.

Nor will the defendant, under the circumstances of this case, be injured by the sum which the jury have discounted from Lindsay's demand, if it shall hereafter appear that as much was not allowed the defendants on that account as ought to have been. The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

McIntire *v.* Wood. (*a*)

Mandamus.

The power of the circuit courts of the United States to issue the writ of *mandamus*, is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction.[1]

This case came up from the Circuit Court for the district of Ohio, upon a certificate stating that the judges of that court were divided in opinion

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(*a*) March 9th, 1813. Absent, Washington and Todd, Justices.

[1] Kendall *v.* United States, 12 Pet. 526; Smith *v* Allyn, 1 Paine 453; Graham *v.* Norton, 15 Wall. 427; United States *v.* Smallwood, 2 Am. L. T. Rep. 109.

upon the question, whether that court had power to issue a writ of *mandamus* to the register of a land-office in Ohio, *commanding him to issue a final certificate of purchase to the plaintiff, for certain lands in that state?

*505]

Harper, for the plaintiff, referred the court to the case of *Marbury* v. *Madison* (1 Cr. 137). The constitution of the United States extends the judicial power to all cases in law and equity arising under the constitution and laws of the United States. By the 11th section of the judiciary act of 1789 (1 U. S. Stat. 78), the circuit courts have original cognisance of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds the value of $500, &c. And by the 14th section of the same act, they have power to issue all writs necessary for the exercise of their jurisdiction, and agreeable to the principles and usages of law. This is a suit of a civil nature at common law, and the matter in dispute exceeds the value of $500. The writ of *mandamus* is necessary to the exercise of their jurisdiction, and is agreeable to the principles and usages of law. 3 Burr. 1266. The power given by the constitution is divided between the supreme and the circuit courts. It has been decided, that the power to issue a *mandamus*, in such a case, does not belong to the supreme court; it must, therefore, be in the circuit courts.

March 15th, 1813. JOHNSON, J., delivered the opinion of the court, as follows:—I am instructed to deliver the opinion of the court in this case. It comes up on a division of opinion in the circuit court of Ohio, upon a motion for a *mandamus* to the register of the land-office, at Marietta, commanding him to grant final certificates of purchase to the plaintiff, for lands to which he supposed himself entitled under the laws of the United States.

This court is of opinion, that the circuit court did not possess the power to issue the *mandamus* moved for. Independent of the particular objections which this case presents, from its involving a question of freehold, *we are of opinion, that the power of the circuit courts to issue the writ of *mandamus*, is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. Had the 11th section of the judiciary act covered the whole ground of the constitution, there would be much reason for exercising this power, in many cases wherein some ministerial act is necessary to the completion of an individual right arising under laws of the United States, and the 14th section of the same act would sanction the issuing of the writ for such a purpose. But although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its circuit courts, except in certain specified cases. When questions arise under those laws, in the state courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the supreme court, and this provision the legislature has thought sufficient, at present, for all the political purposes intended to be answered by the clause of the constitution, which relates to this subject.

*506]

A case occurred some years since, in the circuit court of South Carolina, the notoriety of which may apologize for making an observation upon it

here.[1] It was a *mandamus* to a collector to grant a clearance, and unquestionably, could not have been issued but upon a supposition inconsistent with the decision in this case. But that *mandamus* was issued upon the voluntary submission of the collector and the district-attorney, and in order to extricate themselves from an embarrassment resulting from conflicting duties. *Volenti non fit injuria.*

LIVINGSTON & GILCHRIST *v.* MARYLAND INSURANCE COMPANY. (*a*)

Marine Insurance.—Misrepresentation and concealment.—Warranty.—National character.—Notice.—Usage of trade.—Abandonment.—Increase of risk.

To constitute a representation (in making insurance), there should be an affirmation or denial of some fact; or an allegation which would plainly lead the mind to the same conclusion.[2]

If, by the usage of the trade insured, it be necessary that certain papers should be on board, the concealment of those papers cannot affect the plaintiff's right to recover upon the policy.

In general, concealment of papers amounts to a breach of warranty.

A Spanish subject who came to the United States, in a time of peace between Spain and Great Britain, to carry on a trade between this country and the Spanish provinces, under a royal Spanish license, and who continued to reside here, and carry on that trade, after the breaking out of war between Great Britain and Spain, is to be considered as an American merchant, although the trade could be lawfully carried on by a Spanish subject only.

If a letter submitted to underwriters, ordering insurance, refer to another letter, previously laid before them, which letter contained information that the vessel had permission to trade to the Spanish colonies, the underwriters are bound to notice that fact, and to know that the vessel would take all the papers necessary to make the voyage legal.

An usage of trade may be proved by parol, although such usage originated in a law or edict of the government of the country.[3]

The question whether an abandonment were made in due time, is not a question of fact, to be exclusively left to the jury, but to be decided by them, under the direction of the court.

No acts, justifiable by the usage of the trade, and done by the plaintiffs to avoid confiscation under the laws of Spain, can avoid the policy.

If the plaintiffs do any act which increases the risk of capture and detention, according to the common practice of the belligerent, it may avoid the policy. It is not necessary, that the risk thus increased, should be the risk of rightful capture, according to the law of nations.

ERROR to the Circuit Court for the district of Maryland, in an action of covenant, upon a policy of insurance *(against capture only) upon the cargo of the ship Herkimer, "from Guayaquil, or her last port of [*507 departure in South America, to New York," "warranted American property, proof of which to be required in the United States only,"—"and warranted free from seizure for illicit trade." The declaration was on a loss by capture.

The case was stated as follows, by MARSHALL, Chief Justice, in delivering the opinion of the court: Julian Hernandez Baruso, a Spanish subject, having obtained from the crown of Spain, a license to import from Boston into the Spanish provinces of Peru and Buenos Ayres, in South America, in

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(*a*) February 9th, 1813. Absent, LIVINGSTON and TODD, Justices.

[1] Gilchrist *v.* Collector of Charleston, 1 Hall's L. J. 429.

[2] A mere expression of opinion by the assured, cannot amount to a material representation. Clason *v.* Smith, 3 W. C. C. 156. And the omission of certain facts from an application for insurance, is no evidence of a concealment of them. Mercantile Ins. Co. *v.* Folsom, 18 Wall. 237; s. c. 9 Bl. C. C. 201.

[3] S. P. United States *v.* Wiggins, 14 Pet. 334.