there is error in so much of the decree of the said circuit court as subjects Elisha R. Potter to the payment of interest from the 16th of October 1820, and that said decree be reversed and annulled: and this cause is remanded to the said circuit court, with directions to enter a decree that the said Elisha R. Potter pay into the registry of the circuit court, within thirty days from the next term of that court, the sum of $3929.62, with interest from the 25th of March 1822—to be paid over to the complainants, or to the creditors of Peleg Gardner, under the directions of that court; and unless payment be made within thirty days, that the complainants have execution thereof: and that the said court also enter a decree, that Ezekiel W. Gardner do pay into the registry of the court, subject to its order, within thirty days as aforesaid, the sum of $1751.74, with interest from the 25th of March 1822, for which he is in the first instance liable, and the said Potter ultimately; and in default thereof, that execution issue against the said Ezekiel; and if such execution shall be returned unsatisfied, then the amount shall be immediately paid into the registry aforesaid, by the said Potter; and on his failing to pay it, the circuit court are directed to award an execution against him for the same.

RULE, No. 37. [*724

1. In all cases, the clerk shall take of the plaintiff a bond, with competent security, to respond the costs, in the penalty of two hundred dollars; or a deposit of that amount, to be placed in bank subject to his draft.

2. In all cases, the clerk shall have fifteen copies of the records printed for the court; provided the government will admit the item in the expenses of the court.

3. In all cases, the clerk shall deliver a copy of the printed record to each party; and in cases of dismission (except for want of jurisdiction) or affirmance, one copy of the record shall be taxed against the plaintiff; which charge includes the charge for the copy furnished him. In cases of reversal and dismission for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy.

Baldwin, Justice.—I concurred with the court in the first and second items of this rule, but I dissent on the third.

By the common law, costs were not recoverable in any action, real, personal or mixed. They were first given by the statute of Gloucester, 6 Edw. I., c. 1, and subsequently, by various statutes; but courts do not allow them, when not given by some statute. 3 Com. Dig. 205, Costs, A. 1; 210, A. 2; 6 Vin. 321; 2 Bac. Abr. 33, 10; 116, A; 1 Str. 615, 617. By the statute of Hen. III., c. 10, costs were given on an affirmance of a judgment on a writ of error brought by defendant. Where the plaintiff in the court below brought the writ of error, he paid no costs on affirmance, until the statute 8 & 9 Wm. III., c. 11, which gave them to the defendant on affirmance, discontinuance or nonsuit. None were given, where the writ of error was quashed, for variance or other defect, till the statute 4 & 5 Ann., c. 16; 3 Com. Dig. 230, B, Costs in Error, and cases cited. There is no statute giving costs in cases of reversal, and therefore, they are never allowed. 1 Str.

615, 617 ; 3 Com. Dig. 232 ; 6 Vin. 339. In the case in Strange, the court
*725] say, *it would be wrong to make a party pay costs for the error of the court below. The reason is obvious ; a court of error can only give such judgment as the court below ought to have given. If the judgment is affirmed, it relates only to the one rendered in the inferior court, and can include nothing more than was recovered there ; if it is reversed, and the cause goes back for a new trial, the effect is merely to annul the erroneous judgment and leave the case open. If the case goes up on a demurrer, case stated or special verdict, and the superior court, on a reversal, proceed to render judgment, it is only such an one as ought to have been rendered by the inferior court, which could, on no principle, be authorized to tax costs, which were to accrue only in another court, which was to revise the first judgment, but are necessarily confined to costs incurred in the original action. 12 East 668, 671 ; 1 Ld. Raym. 10 ; 1 Salk. 403 ; Carth. 180 ; 2 Tidd's Pr. 1243–4. Costs are considered as a penalty ; and though the courts in England may think it agreeable to natural justice to allow them, they never do it, unless in cases provided for by law. It is with them a settled and established rule, that all acts which give costs are, and ought to be, construed strictly, and according to the letter. 3 Burr. 1286–7 ; 4 Binn. 13, 14 ; s. p. 9 Mass. 372.

In cases of reversal, the English rule has been adopted in the state courts. 5 Binn. 204 ; 1 Mass. 85 ; 4 Ibid. 436 ; 1 Serg. & Rawle 436 ; 7 T. R. 468. The judiciary act gives costs on affirmance. (1 U. S. Stat. 85.) But no law gives them on reversal. In 4 Cranch 467, this court decides that they are not allowed ; and affirms the same rule in 6 Ibid. 86. Where a writ of error is dismissed for want of jurisdiction, costs are not allowed (2 Wheat. 368 ; 9 Ibid. 650), unless the plaintiff in error was the plaintiff below. 3 Cranch 514. In 3 Dall. 338, this court refused to allow the cost of a printed statement of the case for the use of the judges ; observing, that however convenient it might be, there was no rule authorizing the charge.
*726] *In 7 Cranch 276, the court stated their opinion to be, that each party was liable to the clerk for his fees for services performed for each party ; and it is immaterial to the clerk, which party recovers judgment Duvall, Justice, stated this to be the rule in Maryland ; that if either party requires a copy of the record, he must pay for it, as for any other service, but it is not a part of the costs which are to be taxed against the other party as costs of suit.

I can find but one case in which this court have ever allowed costs on a reversal, which is *Clerke* v. *Harwood*, 3 Dall. 342, where a judgment of the court of appeals of Maryland, reversing a judgment of the general court was reversed, the judgment of the general court affirmed, and the mandate for execution issued to that court, which expressly included the costs in this court. This was done, without argument, or reasons assigned ; but it has never been followed up in any reported case ; on the contrary, all the subsequent cases adopt the rule of the English and state courts, of allowing no costs on reversal. It may fairly be considered as an exception to the general rule ; as, though the judgment of the court of appeals was reversed, that of the general court was affirmed, and costs recoverable, under a liberal construction of the 23d section of the judiciary act ; at all events, a special order in this case is no precedent for a standing rule of court.

Rule, No. 37.

As to costs and expenses, in proceedings in courts of admiralty, "they are not matters positively limited by law, but are allowed in the exercise of a sound discretion of the court." And no appeal lies from a mere decree respecting costs and expenses. 3 Pet. Cond. 319. But neither of these rules apply to writs of error or appeals, in any other cases. The rules of courts of admiralty in England and here are peculiar as to costs and expenses; having no analogy to costs in courts of common law; and not being governed by the same rules.

The fees of the clerk of the supreme court are declared by the act of May 1792, § 3, to "be double the fees of the clerk of the supreme court of the state where the supreme court of the United States shall be holden." (1 U. S. Stat. 277.) *The only discretion given to the court as to the clerk's [*727
fees, is in the same section, which provides, that where any clerk performs any kind of service which is not performed in the courts of the state, and for which the laws of the state make no allowance, the court may allow a reasonable compensation. (Ibid.) This law can have no application to this rule, for the laws of the states all allow fees for copies of records, and the clerks of their courts of appellate jurisdiction do perform the same kind of services provided for by this rule. Besides, this rule does not profess to allow a reasonable compensation for services not embraced in state laws; but directs and orders which party shall, in the specified cases, pay for the copy of the record. It does not say what those fees shall be; that having been ascertained by the rules in the court of the state where this court is holden. The clerk is not ordered to make out a copy of the record, but the costs of a copy shall be taxed against the plaintiff. His right is as complete under the rule, whether the copy is made at the request of defendant, or not made at all, as if actually done at the request of party charged with it; or whether the cause is argued or dismissed, for a cause unconnected with the merits, so as to dispense altogether with the necessity of a copy for either party or the court. This is not the exercise of a discretion over cases not provided for by law, to be used as exigencies may occur; it is a general summary order or decree, extending to all cases depending. The cost of a copy is not a compensation for services rendered, in the nature of fees; but in the nature of a penalty imposed on suitors, which forms a legal item of taxed costs. If the court had allowed what was, in their opinion, a reasonable compensation for superintending the printing of the records, to be ascertained after the service had been performed; there might have been some justice in enacting it, as well as some color of authority for it, under the law of 1792. Even then, the court would have no power to order that compensation to be paid by a party not liable to costs; or in a case where none were recoverable—as on a reversal or dismission for want of jurisdiction.

The imposition of costs on a party litigant is, in England, in all the states, and by congress, considered as the subject of *legislation, as much [*728
regulated by laws, and as binding on courts as rules of decision on questions of costs, as of damages or property. There is no more authority to change the rules of law on this subject than any other. The federal courts may make rules of practice; process and other proceedings may be in the forms they prescribe (1 U. S. Stat. 83, 276, 335); but fees are to be regulated by those in the state courts, with only the one exception where services are

performed by clerks, for which state laws made no allowance, or where specially regulated by congress.

I know of no principle which empowers courts to regulate questions of costs by a standing rule, more than questions of evidence, under a law giving them power to make rules respecting practice, process or proceedings. Costs are in their nature penal; to impose them, without a law for their allowance, in cases where none are taxable, for want of jurisdiction in the court over the parties, or the subject-matter in controversy, or on parties not liable, is the infliction of a penalty, without the scope of the judicial power, under any principle of common, statute, state law, or act of congress. It is, in its effect, the imposition of a fine, for the benefit of the clerk, on one party, for the right of prosecuting; and on the other, for defending his interest on a writ of error in this court.

As the rule does not profess to be founded on any pre-existing law, written or unwritten; on any usage or practice established by the decisions of this court; but prescribes and enacts a new one, in direct opposition to all previous law and usage; I view it as a direct act of judicial legislation over a subject not embraced in the judicial power, unless expressly conferred by congress.