admitted by the plaintiff's own showing; for the title set up by him rests upon the authority of the same governor, who adjudicated the second sale, under which the defendant claims; and the first sale being conditional, and the conditions not performed, no doubt can be entertained, but that the second proceeding and sale must be considered, at least, as *primâ facie* evidence of what they purport to have been; and this is sufficient to warrant the judgment or decree of the court below.

The adjudication having been made by a Spanish tribunal, after the cession of the country to the United States, does not make it void; for we know, historically, that the actual possession of the territory was not surrendered, until some time after these proceedings took place. It was the judgment, therefore, or a competent Spanish tribunal, having jurisdiction of the case, and rendered whilst the country, although ceded, was, *de facto*, in the possession of Spain, and subject to Spanish laws. Such judgments, so far as they affect the private rights of the parties thereto, must be deemed valid.

This view of the case supersedes the necessity of considering the question of prescription. *The judgment or decree of the court below is accordingly, affirmed. [*311

This cause came on to be heard, on the transcript of the record from the district court of the United States, for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said district court be and the same is hereby affirmed, with costs.

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*Charles A. Davis, Consul to the King of Saxony, Plaintiff in error, *v.* Isaac Packard, Henry Disdier and William Morphy. [*312

Error in fact.

At a former term of this court, the judgment of the court for the correction of errors of the state of New York, was reversed in this case, this court being of opinion, that Charles A. Davis, being consul-general of the king of Saxony, was exempted from being sued in the state court and that by reason thereof, the judgment rendered against him by the court for the correction of errors was erroneous, and ordered and adjudged that the judgment of the court for the correction of errors should be and the same was thereby reversed; and that the cause be remanded to the court for the correction of errors, with directions to conform its judgment to this opinion. A mandate issued in pursuance of this judgment to the court for the correction of errors, and that court declared and adjudged, "that a consul-general of the king of Saxony is by the constitution and laws of the United States, exempt from being sued in a state court;" and that court further adjudged, that the supreme court of the state of New York from which court this case has been brought, by a writ of error, to the court of errors of New York, is a court of general common-law jurisdiction, and that the court of errors has no power, jurisdiction or authority, for any error in fact, or any error than such as appears upon the face of the record of the proceedings of the supreme court, to reverse a judgment of that court; that no other error can be assigned or regarded as a ground of reversal of the judgment of said supreme court, than such as appears upon the record of the proceedings of the said court, and which relates to questions actually before the justices of the court, by a plea to its jurisdiction or otherwise; and that the court of errors is not authorized to notice the allegations of Davis assigned for error in that court, that he was consul-general of the king of Saxony, or to try or regard said allegation; and there being no error on the face of the record of the proceedings of the supreme court of New York, the defendant in error was entitled to a judgment of affirm-

ance according to the laws of that state, any matter assigned for error in fact to the contrary notwithstanding. The court of errors further declared, that for any error in the judgment of the supreme court or its proceedings, assignable for error in fact, the party aggrieved by such error may sue out a writ of error *coram vobis*, returnable to the supreme court, upon which the plaintiff may assign errors in fact; and if such fact is admitted or found by the verdict of the jury, the supreme court may revoke their judgment, and for any error in the judgment of the supreme court upon the writ of error *coram vobis*, the court of errors has jurisdiction, upon a writ of error to the supreme court, to review the last judgment. The defendants in error having, upon the filing of the mandate to the supreme court, applied to the court of errors to dismiss the writ of error to the supreme court of that state, the same was quashed, and
*313] the *defendants in error adjudged to recover their costs against the plaintiff in error.

The judgment of the court of errors was brought up by a writ of error, and it was argued, that the mandate on the former judgment had been disregarded, and that, consequently, the second judgment ought to be reversed.

The court has felt great difficulty on this question; the importance of preserving uniformity in the construction of the constitution, laws and treaties of the United States must be felt by all; and the impracticability of maintaining this uniformity, unless the power of supervising all judgments in which the constitution, laws or treaties of the United States may be drawn into question, be vested in some single tribunal, is too apparent for controversy; the people of the United States have vested that power in this tribunal, and its highest duty is to exercise it with fidelity. The point of difficulty in this case is, to decide, whether the legitimate exercise of this power has been obstructed by the judgment of the court of errors for New York, now under consideration.

It is not admitted, that the court whose judgment has been reversed or affirmed can rejudge that reversal of affirmance; but it must be conceded, that the court of dernier resort, in every state, decides upon its own jurisdiction, and upon the jurisdiction of all the inferior courts to which its appellate power extends.

Neither the judgment nor mandate of this court prescribed in terms the judgment which should be rendered by the court of errors of New York; this court proceeded to order that the cause be remanded to the said court for the correction of errors, with directions to conform its judgment to the opinion of this court. The opinion expressed therein was, that Charles A. Davis, being consul-general of the king of Saxony, exempted him from being sued in the state court.

The judgment rendered in the court of errors being thus reversed, because of this exemption, it was for the court of errors to inquire and decide in what manner it should conform its judgment to this opinion; had that court re-entered its former judgment, the direct opposition of this proceeding to the mandate would have been apparent; but this was not done; the court of errors admitted the exemption of Charles A. Davis from being sued in the courts of a state, but added, that the fact did not appear in the record of the proceedings of the supreme court of New York; and that its own power did not extend to the reversal of any judgment of that court, for an error of fact, not apparent on the face of the record, though it should be assigned as error in the court for the correction of errors.

The judgment of the court of errors, thus affirming the judgment of the supreme court of the state, stands reversed, and the writ of error to that judgment is quashed, leaving the defendant in the original action at full liberty to sue out and prosecute his writ of error *coram vobis*, for its reversal in the supreme court of New York.

If the jurisdiction of the court for the correction of errors does not, according to the laws by which the judicial system of New York is organized, enable that court to notice errors in fact, in the proceedings of the supreme court, not apparent on the face of the record, it is difficult so perceive how that court could conform its judgment to that of this court, otherwise than by
*314] *quashing its writ of error to the supreme court; had that been its original judgment, it is not believed, that this court would have reversed it, and we do not think that, as now rendered, it can be held to be erroneous.

Davis *v.* Packard, 10 Wend. 51, affirmed.

Error to the Court for the Correction of Errors of the state of New York. This case was before the court on a writ of error, at January term 1832. A motion was made to dismiss the writ of error, on the ground that it did not appear on the record of the proceedings in the case before the

supreme court of New York, from which court it had been taken to the court for the correction of errors, that the plaintiff in error was consul of the king of Saxony. The court refused the motion, considering that the official character of the plaintiff was sufficiently apparent in the proceedings. (5 Pet. 41.) Afterwards, at January term 1833 (7 Pet. 276), this case came on for argument. The court decided, that "the record of the proceedings, brought up with the writ of error to the court for the correction of errors of the state of New York, showed that the suit was commenced in the supreme court of the state of New York, against the plaintiff in error, who was consul of the king of Saxony, and who did not plead or set up his exemption from such suit, in the supreme court; but, on the same cause being carried up to the court for the correction of errors, this matter was assigned for error in fact, notwithstanding which, the court gave judgment against the plaintiff in error. The court of errors having decided, that the character of consul did not exempt the plaintiff in error from being sued in the state court, the judgment is reversed." The following mandate was issued to the court for the trial of impeachments and correction of errors of the state of New York.

"The United States of America, ss. The President of the United States of America, to the president of the senate of the state of New York, the senators, chancellor, and justices of the supreme court of the said state, being the judges of the court for the trial of impeachments and correction of errors, holden in and for the said state of New York, Greeting:

"Whereas, lately, in the court for the trial of impeachments and correction of errors, holden in and for the state of New York, before you, or some of you, in a cause between *Charles A. Davis, plaintiff in error, and Isaac Packard, Henry Disdier and William Morphy, defendants in [*315 error, the judgment of the said court for the trial of impeachments and correction of errors, was in the following words, to wit: 'Therefore, it is considered by the said court for the correction of errors, that the judgment of the supreme court aforesaid be and the same is hereby in all things affirmed. It is further considered, that the said defendants in error recover against the plaintiff in error, their double costs, according to the statute in such case made and provided, to be taxed in defending the writ of error in this cause, and also interest on the amount recovered, by way of damages,' as by the inspection of the transcript of the record of the said court for the trial of impeachments and correction of errors, which was brought into the supreme court of the United States by virtue of a writ of error, agreeably to the act of congress in such case made and provided, fully and at large appears. And whereas, in the present term of January, in the year of our Lord 1833, the said cause came on to be heard before the said supreme court, on the said transcript of the record, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the plaintiff in error, being consul-general of the king of Saxony, exempted him from being sued in the state court; by reason whereof, the judgment rendered by the court for the trial of impeachments and correction of errors, is erroneous. Whereupon, it is ordered and adjudged by this court, that the judgment of the said court for the trial of impeachment and correction of errors be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said court, with directions to conform its judgment to the opinion of this court.

"You, therefore, are hereby commanded, that such further proceedings be had in said cause, as according to right and justice, and in conformity to the opinion and judgment of said supreme court of the United States, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

*316] "Witness the Honorable JOHN MARSHALL, chief justice of said *supreme court, the second Monday of January, in the year of our Lord 1833. WILLIAM THOMAS CARROLL,
Clerk of the Supreme Court of the United States."

At the April session 1833, of the court of errors of the state of New York, the following proceedings took place, as stated in the records of that court.

"The court for the correction of errors having heard the counsel for both parties, and diligently examined and fully understood all and singular the premises, and inspected as well the record and proceedings aforesaid as the mandate of the said supreme court of the United States; it is thereupon declared and adjudged by this court, that a consul-general of the king of Saxony is, by the constitution and law of the United States, exempt from being sued in a state court. It is further adjudged and declared, that the supreme court of the state of New York is a court of general common-law jurisdiction, and that by the laws of this state, this court has no jurisdiction, power or authority to reverse a decision of the said supreme court for any error in fact, or any other error than such as appears upon the face of the record and proceedings of the said supreme court, and that no other errors can be assigned or regarded as a ground of reversal of judgment of the said supreme court, than such as appear upon the record and proceedings of the said supreme court, and which relate to questions which have actually been brought before the justices of that court for their decision thereon, by a plea to the jurisdiction of that court or otherwise; and that this court was not authorized to notice the allegations of the said Charles A. Davis, assigned for error in this court, that he was consul-general of the king of Saxony, or to try the truth of the said allegation, or to regard the said allegation as true; and that, by the laws of this state, the replication of the defendant to an assignment of errors, that there is no error in the record and proceedings aforesaid, or in the giving of the judgment of the supreme court, was not an admission of the truth of any matter assigned as error in fact, or which was not properly assignable for error in this court; and that if there was no error upon the face of the record and the proceedings in the

*317] supreme *court, the defendant in error was entitled to a judgment of affirmance according to the laws of this state, any matter assigned for error in fact, to the contrary notwithstanding. And it is further declared and adjudged, that by the laws of this state, if there is any error in a judgment of the said supreme court, or in the proceedings, which is properly assignable for error in fact, the party aggrieved by such error may sue out a writ of error, *coram vobis*, returnable in the said supreme court, upon which the plaintiff in error may assign errors in fact. And if such errors in fact are submitted, or are found to be true by the verdict of a jury, upon an issue joined thereon, the said supreme court may revoke their said judgment; and that, for any error in the judgment of the said supreme court upon

the said writ of error *coram vobis*, this court has jurisdiction and authority upon a writ of error to the said supreme court, to review the said last-mentioned judgment, and to give such judgment, in the premises as the said supreme court ought to have given. It is, therefore, the opinion of this court, that although the said Charles A. Davis, the plaintiff in error in this cause, might have been the consul-general of the king of Saxony, and as such was not liable to be sued in the state court, yet inasmuch as the fact that he was such consul nowhere appeared in the record of the judgment of the said supreme court, the defendant in error is entitled to the judgment of this court, affirming the said judgment of the said supreme court. But the defendant in error having, upon the filing of the said mandate of the said supreme court of the United States, applied to this court to dismiss the writ of error to the said supreme court of this state, it is, therefore, ordered and adjudged, that the said last-mentioned writ of error be quashed; and it is further ordered and adjudged, that the said defendants in error recover against the plaintiff in error their costs in this court, according to the statute in such case made and provided, to be taxed, and also interest on the amount of the judgment of the court below, by way of damages; and that the proceedings be remitted to the said supreme court of this state, &c." The defendant prosecuted this writ of error.

The case was argued by *White*, for the plaintiff in error; and by *Selden*, for the defendants.

* *White* stated, that the question before this court was, whether the mandate from this court has been carried into effect. It has [*318 been decided here, that a state court cannot take cognisance of a suit against a consul. That his exemption from the jurisdiction of a state court, may be assigned as error in the court of errors of the state of New York. The court of errors have assented to the exemption; but they have left the judgment of the supreme court of the state in force. That court have determined, after the reception of the mandate of this court, that they would dismiss the writ of error to the supreme court of the state; although they had, before the case was brought here, decided not to do so.

In the case of *Cohens* v. *State of Virginia*, 6 Wheat. 264, this court asserted the jurisdiction of the supreme court of the United States to revise a judgment against a foreign minister, entered in a state court. Consuls have the same privileges that belong to ambassadors and other public ministers. In that case, the jurisdiction of the court is declared to be original, "in all cases affecting ambassadors, other public ministers and consuls." This jurisdiction is exclusive. The court of errors of New York should have vacated the judgment entered there, and the party would have obtained his costs. By the mode of proceeding adopted by the court, the plaintiff in error is subjected to the whole of the costs. The question between the parties has become, principally, one of costs, as the greater part of the debt has been paid.

Mr. White cited the Revised Statutes of New York, vol. 5, p. 51; vol. 2, p. 166; 17 Johns. 473; 14 Ibid. 517; 16 Ibid. 353; 8 Cow. 661, 701; Paine & Duer's Practice 475.

Selden, for the defendants, contended, that the court of errors of New York could not exercise any jurisdiction to carry into effect the judgment of this court; and therefore, they remanded the case to the supreme court, where the errors might be, and would be corrected.

The jurisdiction of the court of errors could not be increased by any mandate from this court. All that court could do was, to *allow the *319] party to go before the supreme court, and there plead his privilege; and if, in the proceedings of that court, upon the plea, there should be error in their judgment, the case might be taken again before the court of errors, and there corrected. This court will not undertake to decide what are the powers of a state court. They will not entertain such questions, unless a construction shall be given to the laws establishing or regulating those courts, that will defeat the powers of this court. The state court says, there is a court in which the party may have the benefit of his plea, and if that court decides wrong, the court of errors will correct the decision. Will this court claim to controvert the construction, by the court of errors of New York, of the powers and jurisdiction of the courts of that state? This is not necessary for the full and efficient exercise of its jurisdiction by this court; and the harmony of the judicial system of the federal and state courts will be promoted by avoiding the assertion of such a claim.

Although a consul has, by the decision of this court, a privilege of exemption from suit in the court of a state, and this is the privilege of his government; yet if the consul omits to plead this exemption, he is not entitled to an action of trespass against an officer who may execute process, founded on a judgment rendered in a suit, in which the plea of privilege was omitted. His government may complain, but he cannot. The court of errors have said, the plaintiff in error, as the consul of the king of Saxony, has the privilege he asserts; and if he is not allowed, in the proper court, to do so, it will be done in that court. The court of errors do not, therefore, undertake to controvert the decision of this court. Suppose, this court had said, a *venire de novo* should be issued in the court of errors, and that court should have decided, that no such proceedings could be had before it, and refused to issue the writ. Would the same have been other than what was proper. The decision referred to in 17 Johns. 473, was before the present constitution of the court of errors. It is declared in the present constitution of New York, that the court of errors can never inquire into any fact which arises after the judgment; but must send the case to a court, where the fact may be inquired into.

*Thompson, Justice.—Would not the court of errors obey the *320] mandate of this court, which only required that court to revise their judgment? They are asked to do no more.

Selden admitted, that if the simple action, required by the mandate of this court, of the court of errors, was, to revise their judgment, the proceedings of that court did not conform to it. But they have gone further, they have fully admitted the law, as decided by this court; and have given the party an opportunity to avail himself of it, by claiming his privilege in the proper court. If the court of errors had only revised their judgment, they would have left the judgment of the supreme court to remain before them.

MARSHALL, Ch. J., inquired, whether the court of errors might not, by revising their judgment, which had affirmed the judgment of the supreme court, have revised that of the supreme court, and corrected it.

White, in reply, insisted, that by the constitution and laws of New York, the court of errors had authority to direct an issue of fact to be tried before that court. He suggested, that if the action of the court of errors in this case, shall be sustained by this court, the courts of the states of the Union, may so model their proceedings, as to defeat the supervising authority of this court.

MARSHALL, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment rendered by the court for the correction of errors of the state of New York. The defendants in error had obtained a judgment against Charles A. Davis, in the supreme court of New York, which was removed by writ of error into the court for correction of errors. In that court, the said Davis assigned for error, that he was, when the suit was instituted, and has ever since continued to be, consul-general of his majesty the king of Saxony, in the United States, and ought, according to the constitution and laws of the United States, to have been impleaded in the said supreme court of the United States, or in some district *court of the [*321
said United States, and that the said supreme court had not jurisdiction, and ought not to have taken to itself the cognisance of the said cause. The defendant in error replied, that there was no error; and the court for the correction of errors affirmed the judgment of the supreme court. This last judgment was brought before this court in conformity with the 25th section of the judiciary act, and this court being of opinion, "that the said Charles A. Davis being consul-general of the king of Saxony, exempted him from being sued in the state court, and that by reason thereof, the judgment rendered by the court for the correction of errors, was erroneous; therefore, it was considered, ordered and adjudged, that the judgment of the said court for the correction of errors should be and the same is reversed; and that this cause be remanded to the said court for correction of errors, with directions to conform its judgment to this opinion."

The mandate issued in pursuance of this judgment having been received by the court for the correction of errors, that court declared and adjudged, "that a consul-general of the king of Saxony is, by the constitution and law of the United States, exempt from being sued in a state court;" and did further adjudge and declare, "that the supreme court of the state of New York is a court of general common-law jurisdiction, and that, by the laws of this state, this court [the court of errors] has no jurisdiction, power or authority to reverse a decision of the said supreme court, for any error in fact, or any other error than such as appears upon the face of the record and proceedings of the said supreme court, and that no other errors can be assigned or regarded as a ground of reversal of a judgment of the said supreme court, than such as appear upon the record and proceedings of the said supreme court, and which relate to questions which have actually been brought before the justices of that court for their decision thereon, by a plea to the jurisdiction of the court, or otherwise; and that this court was not authorized to notice the allegations of the said Charles A. Davis assigned for error in this court, that he was consul-general of the king of Saxony, or to try the

truth of the said allegation, or to regard the said allegation as true; and that, by the laws of this state, the replication of the defendant to an assign-
*322] ment of errors, that there is no error in the *record and proceedings aforesaid, or in the giving of the judgment of the supreme court, was not an admission of any matter assigned as error in fact, or which was not properly assignable for error in this court; and that if there was no error upon the face of the record and the proceedings in the supreme court, the defendant in error was entitled to a judgment of affirmance, according to the laws of this state; any matter assigned for error in fact, to the contrary notwithstanding. And it is further declared and adjudged, that by the laws of this state, if there be any error in a judgment of the said supreme court, or in the proceeding, which is properly assignable for error in fact, the party aggrieved by such error may sue out a writ of error *coram vobis*, returnable to the said supreme court, upon which the plaintiff ie error may assign errors in fact. And if such errors in fact are admitted, or are found to be true by the verdict of a jury, upon an issue joined thereon, the said supreme court may revoke their said judgment; and that for any error in the judgment of the said supreme court, upon the said writ of error *coram vobis*, this court has jurisdiction and authority, upon a writ of error to the said supreme court, to review the said last-mentioned judgment, and to give such judgment in the premises as the said supreme court ought to have given. It is therefore, the opinion of this court that, although the said Charles A. Davis the plaintiff in error in this cause, might have been the consul-general of the king of Saxony, and, as such, was not liable to be sued in the state court, yet inasmuch as the fact that he was such consul, nowhere appeared in the record of the judgment of the said supreme court, the defendant in error is entitled to the judgment of this court, affirming the judgment of the said supreme court. But the defendant in error, having, upon the filing of the said mandate of the said supreme court of the United States, applied to this court to dismiss the writ of error to the said supreme court of this state, it is, therefore, ordered and adjudged, that the last-mentioned writ of error be quashed; and it is further ordered and adjudged, that the defendants in error recover against the plaintiff in error their costs, &c."

The judgment also has been brought before this court by writ of error,
*323] and it has been argued, that the mandate on the *former judgment has been disregarded, and that, consequently, this second judgment ought to be reversed. The court has felt great difficulty on this question. The importance of preserving uniformity in the construction of the constitution, laws and treaties of the United States, must be felt by all; and the impracticability of maintaining this uniformity, unless the power of supervising all judgments in which the constitution, laws or treaties of the United States may be drawn into question, be vested in some single tribunal, is too apparent for controversy. The people of the United States have vested that power in this tribunal, and its highest duty is to exercise it with fidelity. The point of difficulty in this case is, to decide, whether the legitimate exercise of this power has been obstructed by the judgment of the court of errors of New York, now under consideration.

It is not to be admitted, that the court whose judgment has been reversed or affirmed, can rejudge that reversal or affirmance; but it must be conceded, that the court of dernier resort in every state, decides upon its own

jurisdiction, and upon the jurisdiction of all the inferior courts to which its appellate power extends. Assuming these propositions as judicial axioms, we will inquire, whether the judgment of the court of errors for the state of New York is in violation of the mandate of this court?

The original judgment of the court of errors, which was brought before this court, was reversed in terms. This reversal was not to depend upon any act to be performed, or opinion to be given by the court of errors; but stood absolute by the judgment of this court. So is the law, and so was the judgment rendered by this court. Its language, after expressing the opinion, that Charles A. Davis, being consul-general of the king of Saxony, exempted him from being sued in a state court, is, "therefore it is considered, ordered and adjudged by this court, that the judgment of the said conrt for the correction of errors be, and the same is hereby reversed." On filing the mandate there, the said judgment stood reversed. Neither the judgment nor mandate of this court, prescribed, in terms, the judgment which should be rendered by the court of errors of New York. This court proceeded to order, that the cause be remanded to the said court for the correction of errors, *with directions to conform its judgment to the opinion of this court. The opinion expressed therein was, that Charles A. Davis, [*324 being consul-general of the king of Saxony, exempted him from being sued in the state court.

The judgment rendered in the court of errors being thus reversed, because of this exemption, it was for the court of errors to inquire and decide in what manner it should conform its judgment to this opinion. Had that court re-entered its former judgment, the direct opposition of this proceeding to the mandate, would have been apparent. But this was not done. The court of errors admitted the exemption of Charles A. Davis from being sued in the courts of a state; but added, that the fact did not appear in the record of the proceedings of the supreme court of New York; and that its own power did not extend to the reversal of any judgment of that court, for an error of fact, not apparent on the face of the record, though it should be assigned as error in the court for the correction of errors. This could only be effected, regularly, by suing out a writ of error *coram vobis*, in the supreme court of the state, whose judgment on that writ might be revised in the court for the correction of errors. The court also added its opinion, that the defendant in error was entitled to its judgment, affirming that of the supreme court, but did not give the judgment of affirmance. Upon filing the mandate, the counsel for the defendant in error moved the court to dismiss the writ of error to the supreme court of the state, and the court ordered it to be quashed.

The judgment of the court of errors, then, affirming the judgment of the supreme court of the state, stands reversed, and the writ of error to that judgment is quashed, leaving the defendant, in the original action, at full liberty to sue out and prosecute his writ of error *coram vobis*, for its reversal in the supreme court of New York. If the jurisdiction of the court for the correction of errors does not, according to the laws by which the judicial system of New York is organized, enable that court to notice errors in fact in the proceedings os the supreme court, not apparent on the face of the record, it is difficult to perceive how that court could conform its judgment to that of this court, otherwise than *by quashing its writ of [*325

error to the supreme court. Had that been its original judgment, it is not believed that this court would have reversed it; and we do not think that as now rendered, it can be held to be erroneous. The judgment is affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the court for the correction of errors of the state of New York, and was argued by counsel: On consideration whereof, it is the opinion of this court, that there is no error in the judgment of the said court for the correction of errors of the state of New York, quashing the writ of error from the supreme court of judicature of New York; whereupon, it is ordered and adjudged by this court, that the said judgment of the said court for the correction of errors be and the same is hereby affirmed, with costs.

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*326] *William King, Appellant, *v.* John Mitchell *et al.*, Appellees.

Creation of a trust.

William King in his will, made the following devise: "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King (the appellant), son of my brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King, or of sister Elizabeth, wife of John Mitchell, and to their issue."

Upon the construction of the terms of this clause, it was decided by this court, in 3 Pet. 346, that William King, the devisee, took the estate upon a condition subsequent, and that it vested in him (so far as not otherwise expressly disposed of by the will), immediately upon the death of the testator. William Trigg having died without ever having had any daughter born of his wife Rachel, the condition became impossible; all the children of William Trigg and Rachel his wife, and of James King and Elizabeth Mitchell, were married to other persons; and there had been no marriage between any of them, by which the devise over, upon the default of marriage of William King (the devisee) with a daughter of the Triggs, could take effect.

The case was again brought before the court, on an appeal by William King, in whom it had been decided the estate devised was vested in trust; and the court *held*, that William King did not take a beneficial estate in fee in the premises, but a resulting trust for the heirs-at-law of the testator.

There is no doubt, that the words "in trust," in a will, may be construed to create a use, if the intention of the testator, or the nature of the devise requires it; but the ordinary sense of the term is descriptive of a fiduciary estate or technical trust; and the sense ought to be retained, until the other sense is clearly established to be that intended by the testator. In the present case, there are strong reasons for construing the words to be a technical trust; the devise looked to the issue of a person not then in being, and, of course, if such issue should come *in esse*, a long minority must follow; during this period, it was an object with the testator, to uphold the estate in the father, for the benefit of his issue; and this could be better accomplished by him, as a trustee, than as a guardian. If the estate to the issue were a use, it would vest the legal estate in them, as soon as they came *in esse*; and if the first-born children should be daughters, it would vest in them, subject to being divested by the subsequent birth of a son; a trust estate would far better provide for these contingencies than a legal estate; there is then no reason for deflecting the words from their ordinary meaning.[1]

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[1] The estate of a trustee is commensurate with the purposes of the trust, and ceases when there are no further duties to perform. McMullin *v.* McMullin, 8 Watts 236; Koenig's Appeal, 57 Penn. St. 352; Poor *v.* Considine, 6 Wall. 458.