not wanted in Washington county, as much before, as after, the hiring in Alexandria. Suppose, the hiring had been for one week, or one day, would any one doubt, that it would have been done with a view to take the case out of the law of 1796, and would have been a fraud upon the law? And who, in *such a case, would judge of the intention? The court, or the jury? The answer cannot admit of a doubt. The time of hiring in the present case, lessens the weight of the evidence, but does not transfer the weight of deciding upon it, from the jury to the court.

*51]

The judgment of the court below is accordingly reversed, and the cause sent back with directions to issue a *venire de novo.*

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo.*

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*52] *Kosciuszko Armstrong, Appellant, *v.* Benjamin L. Lear, Administrator of Thaddeus Kosciuszko and others.

Practice in equity.

A bill was filed in the circuit court of the district of Columbia, claiming a legacy under an alleged codicil made in Paris, to a will made in the United States; the testator was a native of Poland; at the time of the making of the codicil, he resided in France; and when he made the will, to which the instrument, upon which the legacy was claimed was said to be a codicil, he was in the United States; he went to Europe, soon after he made the will, and many years afterwards, he died in Switzerland. The bill alleged, that the instrument on which the legacy was claimed had been duly proved in the orphans' court of Washington county, in the district of Columbia, where the administrator with the will annexed, resided; there was no allegation that the codicil had been established to be a valid will, by the law of France, the place of the domicil of the testator where the same was made. The administrator submitted to the court, whether it would decree the payment of the money to the complainant, "upon an instrument made under the circumstances, and authenticated in the manner that the aforesaid instrument is, and whether the said instrument shall have effect to revoke or alter any part of said testator's will, solemnly executed and left in the hands of his executor in this country," &c. This is certainly a very informal and loose mode of putting in issue (if upon the bill such a question can be tried) the validity of a will made in a foreign country, whose laws are not brought before the court, either by averment or evidence.

The answer contained an allegation, that certain persons residing in Europe had filed a bill in the circuit court of the district of Columbia, against him, the administrator, claiming a large portion of the assets, if not the whole, as creditors, or mortgagees of the testator; and certain persons, also residing in Europe, had filed another bill against him (it was probably meant in the same court), claiming the whole assets, as heirs-at-law of the testator, and therefore, as distributees of the said assets; none of the parties to either of these latter bills are made parties to the present bill. The persons claiming as heirs of the testator should be made parties, that they may have an opportunity to test the plaintiff's title, as the real parties in interest, the administrator being but a mere stockholder.

The heirs and legal representatives of the testator filed a bill in the circuit court, claiming from the administrator of the testator with the will annexed, the funds which had come into his hands; which bill was still pending. The allegations in the bill went to defeat the validity of the will made in the United States, and also asserted other grounds of claim. All the bills ought, if possible, to be brought to a hearing, at the same time, in the circuit court, in order

that a final disposition may, at the same time, be made of all the questions arising in all of them.

If the intention is to put in issue (as it seems to be), not only the construction and operation of the testamentary instrument in favor of the plaintiff, but its validity and effect as a will, it is material, that the law of France, the *place of the domicil of the testator, at the time of its execution, should be brought before the court, and established as matter of fact; for the court cannot judicially take notice of foreign laws, but they must be proved by proper evidence. The present allegations of the bill and answer are quite too loose for this purpose, and they should be amended and made more distinct and direct. [*53

There may arise some nice questions of international law, in which the fact of the domicil of the testator, at the time of his birth, at the time of his making the will made in the United States, and at the time of his death, may become material. The court do not mean to say, what is the rule that is to govern in cases of wills of personalty, whether it be the rule of the native domicil or of the domicil at the time of the execution of the will, or of the domicil at the death of the party, where there have been changes of domicil; these are points, which ought, under the circumstances of this case, to be left open for argument; but the facts on which the argument should rest, ought to be distinctly averred in the bill, and met in the answer.

The place of domicil of the testator, at the time of his death, may also become material, under another aspect of the case, viz., the question, who are his heirs, entitled to the succession, *ab intestato*, or under the other will or wills executed by him, to which reference is made in some of the papers of the case. The persons claiming as such heirs, must establish their title under and according to, the law of his domicil, at the time of his death; so, perhaps, it may become material, if Switzerland was the domicil of the testator, at the time of his death, to bring the law of that country distinctly, as matter of fact, before the court.

Appeal from the Circuit Court of the district of Columbia, for the county of Washington.

On the 1st day of April 1829, the appellant, Kosciuszko Armstrong, filed a bill in the circuit court, setting forth his citizenship of the state of New York, and that Thade Kosciuszko, late an officer in the service of the United States, in the war of their revolution, and of the republic of Poland, on or about the 5th day of May, in the year 1798, placed a large sum in the hands of Thomas Jefferson, Esq., late president of the United States, far exceeding the sum of $10,000, and executed a will and testament, a copy of which was therewith filed, and marked exhibit A, and which the complainant prayed might be taken as a part of his bill. That afterwards, to wit, on or about the 28th day of June, in the year 1806, the said Thade Kosciuszko, being then domiciled in Paris, in the kingdom of France, executed a certain instrument of writing, being in the nature and of the effect of a last will or writing testamentary, whereby he willed and directed, that at his decease, the sum of $3704, *current money, should be possessed by, and delivered over to, the full enjoyment and use of the complainant; and the said testator thereby instructed and authorized his only lawful executor in the United States, the said Thomas Jefferson, to reserve, in trust for that special purpose, of the funds he held belonging to the testator, the aforesaid sum of $3704, in principal, to the complainant, to be paid by him, the said Thomas Jefferson, immediately after his decease, to the complainant, and in case of his death, to the use and benefit of his surviving brothers. That the said testator, on the day and year aforesaid, duly signed and sealed the said instrnment of writing, in the presence of two competent witnesses, who attested the same, and acknowledged the same, on the same day, before Fulwar Skipwith, commercial agent, and agent for prize causes, for the said United States, at Paris; and then delivered the same, under his hand and seal, to John Armstrong, father of the complainant. That afterwards, to wit, on the 15th day of October, in the year 1817, the said Thade Kosciuszko [*54

departed this life, leaving the said instrument of writing unrevoked ; and the same was, after the death of the said Thade Kosciuszko, admitted to probate, and duly proved in the orphans' court of Washington county ; a copy whereof, exhibit B, he prayed might be taken as a part of his bill.

That he was advised, and believed, that the said instrument of writing was, to all intents and purposes, a last will and testament, and must operate as such, and revoked *pro tanto* the bequests and appropriation made in the will first mentioned ; that the said Thomas Jefferson, named as executor in the will first mentioned, refused to take our letters testamentary on the estate of the said Thade Kosciuszko, and renounced all claim and right so to do, according to law ; and Benjamin L. Lear, whom the complainant prayed might be made defendant to his said bill, was duly appointed administrator, with the will annexed, on the said estate ; which had since come into the hands of the said Benjamin L. Lear, far exceeding, as aforesaid, $10,000. That the said Benjamin L. Lear had been frequently applied to by the complainant for the payment of the afore-mentioned legacy of $3704, *55] together with the interest thereon, *which the said Lear refused to pay, until the order and decree of this court had upon the premises ; and the said defendant, combining and confederating with one Major Estho a subject of his imperial majesty, the emperor of all the Russias, and Monsieur Zeltner, formerly minister plenipotentiary of the Helvetic Republic at Paris, and now residing at Soleure, in Switzerland, whom the complainant prayed might be made parties to his said bill of complaint ; the said confederates sometimes pretended, that the said Thade Kosciuszko never executed the said last-mentioned writing testamentary, and sometimes they pretended, that the said Major Estho was the heir-at-law of the said Thade Kosciuszko, and as such, entitled to all his said estate ; and sometimes they pretended, that the said Thade Kosciuszko, during his lifetime, made some disposition of his said estate in favor of the children and other relatives of the said Zeltner, whereas, the said last-mentioned writing testamentary was duly executed as aforesaid ; and that the said Major Estho was not the heir-at-law of the said Thade Kosciuszko, or if he was, that he was not entitled to receive distribution of the said personal estate, and that the said Thade Kosciuszko made no testamentary or other disposition in favor of the said Zeltner, or his children or relatives, which could affect the claim of the complainant under the said writing testamentary. All which actings and doings, and pretences of the said confederates, were contrary to equity and good conscience, and tended to the manifest injury and oppression of the complainant.

Complainant's exhibit A.

I, Thaddeus Kosciuszko, being just on my departure from America, do hereby declare and direct that, should I make no other testamentary disposition of my property in the United States, I hereby authorize my friend, Thomas Jefferson, to employ the whole thereof, in purchasing negroes from among his own or any others, and giving them liberty, in my name ; in giving them an education in trades, or otherwise, and in having them instructed, for their new condition, in the duties of morality, which may make them good neighbors, good fathers or *moders*, husbands or wives, and in their duties as citizens, teaching them to be defenders of their liberty and

country, *and of the good order of society, and in whatsoever may make them happy and useful. And I make the said Thomas Jefferson my executor of this.

5th day of May 1798. T. Kosciuszko.

Complainant's exhibit B.

Know all men, by these presents, that I, Thade Kosciuszko, formerly an officer of the United States of America, in their revolutionary war against Great Britain, and a native of Lilourui, in Poland, at present residing at Paris, do hereby will and direct, that, at my decease, the sum of three thousand seven hundred and four dollars, currency of the aforesaid United States, shall of right be possessed by, and delivered over to, the full enjoyment and use of Kosciuszko Armstrong, the — son of General John Armstrong, minister plenipotentiary of the said states at Paris. For the security and performance whereof, I do hereby instruct and authorize my only lawful executor in the said United States, Thomas Jefferson, president thereof, to reserve in trust for that special purpose, of the funds he already holds belonging to me, the aforesaid sum of three thousand seven hundred and four dollars, in principal; to be paid by him, the said Thomas Jefferson, immediately after my decease, to him, the aforesaid Kosciuszko Armstrong; and in case of his death, to the use and benefit of his surviving brothers. Given under my hand and seal, at Paris, this 28th day of June 1806.

In presence of Thade Kosciuszko. [seal.]

Charles Carter,
James M. Morris.

Commercial Agency of the United States, Paris.

On this 28th day of June, in the year of our Lord 1806, and of the independence of the United States of America, the thirtieth, before the undersigned, commercial agent, and agent of prize causes, for the United States of America, at Paris, personally appeared Thade Kosciuszko, late officer of the said United States, who, in his presence, signed and sealed the foregoing *transfer in favor of Kosciuszko Armstrong, the —— son of General John Armstrong, minister plenipotentiary of the United States at [*57 Paris, and in case of his death, to the use and benefit of his surviving brothers; and did acknowledge it as his own act and deed for the purposes therein specified. In testimony whereof, he, the said undersigned as aforesaid, has hereunto signed his name, and affixed his seal of office, at Paris, the day and year above written.

[L. S.] Fulwar Skipwith.

Orphans' Court, Washington county, District of Columbia, to wit:

Be it remembered, that on this 26th day of September, in the year 1827, Richard Forrest, of the county and district aforesaid, made oath on the Holy Evangels of Almighty God, that he is well acquainted with the handwriting of Fulwar Skipwith, late United States commereial agent at Paris, having often seen him write; and that he verily believes the signature, "Fulwar Skipwith," to the certificate to the annexed instrument of writing, purporting to be the will of Thade Kosciuszko, is the proper handwriting

of said F. Skipwith ; and that he believes the seal attached to said certificate is the official seal of the United States consulate at Paris.

Sworn in open court.

Teste—HENRY C. NEALE, Reg'r Wills.

And now, on this 8th day of May, in the year 1828, in the orphans' court of Washington county and district aforesaid, Joseph C. Cabell, of Nelson county, in the state of Virginia, makes oath on the Holy Evangels of Almighty God, that he is well acquainted with the handwriting of Charles Carter, one of the subscribing witnesses to the annexed paper, purporting to be the will and testament of Thade Kosciuszko, deceased, having often seen him write ; and that he verily believes the signature, "Charles Carter," as witness to said will, to be the proper handwriting of said Charles Carter now deceased ; and that he is well acquainted with the handwriting of Fulwar Skipwith, late commercial agent of the United States at Paris, having often seen him write ; and that he verily believes the signature, "F. Skipwith," to the annexed certificate to the instrument of writing, purporting to be the will of Thade *Kosciuszko, is the proper handwriting of the aforesaid Fulwar Skipwith, who now resides near Baton Rouge, Mississippi.

*58]

Sworn in open court.

Teste—HENRY C. NEALE, Reg'r Wills

District of Columbia, Washington county, to wit :

The 19th day of November 1828, James M. Morris, one of the subscribing witnesses to the aforegoing instrument of writing, purporting to be the last will and testament of Thaddeus Kosciuszko, deceased, made oath on the Holy Evangels of Almighty God, that he did see the testator therein named sign and seal this will ; that he published, pronounced and declared the same to be his last will and testament ; that at the time of his so doing, he was, to the best of his apprehension, of sound and disposing mind, memory and understanding ; and that he, together with Charles Carter, the other subscribing witness, respectively subscribed their names as witnesses to the will, in the presence, and at the request of the testator, and in the presence of each other.

Sworn in open court.

Teste—HENRY C. NEALE, Reg'r Wills.

District of Columbia, Washington county, to wit :

I certify, that the aforegoing last will and testament of Thaddeus Kosciuszko is truly copied from the original, filed and recorded in my office. Witness my hand and seal of office, this 5th day of March in the year 1829.

[SEAL.] HENRY C. NEALE, Reg'r Wills.

The bill prayed a *subpœna* against the defendants, and the marshal returned, that he had summoned B. L. Lear, and "*non sunt*" the rest. Mr. Lear appeared to the bill. The circuit court made the following order of publication as to the absent defendants.

Kosciuszko Armstrong *v.* Benjamin L. Lear, administrator, with the will annexed, of Thade Kosciuszko, Major Estho, a subject of his imperial majesty, the emperor of all the Russias, and Monsieur Zeltner, formerly

minister plenipotentiary of the Helvetic Republic at Paris, and now residing at Soleure, in Switzerland.

*The bill in this case states, that the said Thade Kosciuszko, about the 5th of May 1798, placed a large fund in the hands of [*59 Thomas Jefferson, late president of the United States, exceeding the sum of $10,000 ; and executed a will ; that on or about the 28th of June 1806, the said Kosciuszko executed, at Paris, an instrument of the nature of, and effect of, a last will, or writing testamentary, whereby he willed and directed that, at his decease, the sum of $3704 should be possessed by, and delivered over to, the full enjoyment and use of the complainant, to be paid by the said Thomas Jefferson to the complainant, immediately after the said Kosciuszko's decease, out of the said funds ; that the said Kosciuszko, on the said 28th of June 1806, duly signed and sealed the said instrument of writing, in the presence of two competent witnesses, who attested the same, and acknowledged the same, on the same day before Fulwar Skipwith, commercial agent, and agent for prize causes, for said United States, at Paris, and then and there delivered the same under his hand and seal to John Armstrong, father of the complainant. That afterwards, to wit, on the 15th day of October 1817, the said Kosciuszko departed this life, leaving the said instrument of writing unrevoked, and the same has since been duly admitted to probate, and proved in the orphans' court of Washington county. That the said Thomas Jefferson, named as executor in the will first mentioned, refused to take out letters testamentary on the estate of the said Kosciuszko ; and thereupon, the defendant Lear was duly appointed administrator with the will annexed. The bill further charges, that the said Lear refuses to pay the said sum of $3704, because, among other reasons, a claim to the whole of the funds of said estate has been made by said Major Estho, as heir-at-law of said Kosciuszko, and another claim by the said Monsieur Zeltner, under another will, which he alleges the said Kosciuszko to have made in Europe, in favor of himself or some of his relations ; and the complainant states the object of his said bill to be to enforce a discovery, by said Lear, of the funds and effects which have come to his hands, as administrator as above named, and the payment by him to the complainant, of said sum of $3704, *with interest, &c. And it appearing to the [*60 court that two of the defendants in this case, viz., the said Major Estho and Monsieur Zeltner, are not within the jurisdiction of this court, and do not reside within the United States, but, as far as appears to the court, one of said defendants resides in Poland, and the other in Switzerland: it is, therefore, by this court here, on motion of the complainant's solicitor, ordered, this 3d day of August 1829, that the said absent defendants be and appear before this court here, in person or by solicitor, on or before the second Monday of December next, and answer the complainant's said bill, or show cause why a decree should not be passed as prayed by said bill ; otherwise, the same will be taken for confessed against them : provided a copy of this order be published in the National Intelligencer, twice a week, for six weeks successively, the first publication thereof to be at least four months previous to said second Monday of December next.

By order of the court. *Teste*—William Brent, Clerk.

3d August 1829.

In December 1831, Benjamin L. Lear, as administrator of Thaddeus Kosciuszko, filed an answer, stating, that in the character of administrator of Thaddeus Kosciuszko, with the will annexed, he has assets for such administration amounting to more that $10,000. That on or about the 8th of January 1823, the complainant, by John Armstrong, his next friend, the complainant being then an infant, filed in this court his bill of complaint against the respondent for the same purpose, and in substance the same as his bill in this case. That the respondent, on the 22d of January 1823, filed his answer to the bill, with certain exhibits, which he asks to be considered as part of his answer to the bill.

The answer of Benjamin L. Lear to the bill of complaint of Kosciuszko Armstrong, an infant, under the age of twenty-one years, by his father and next friend, John Armstrong, of the county of Dutchess, in the state of New York: This respondent, saving and reserving to himself, now, and at all times hereafter, all and all manner of benefit and advantage of exception
*61] to the manifold uncertainties and imperfections *in the said complainant's said bill contained, for answer thereunto, or unto so much thereof as materially concerns this defendant to make answer unto, saith, that he is the administrator, with the will annexed, of Thaddeus Kosciuszko; that he has no knowledge of a fund having been placed, by the late General Thade Kosciuszko, in the hands of Thomas Jefferson; and a will having been executed by him, excepting such as he has derived from a letter of said Thomas Jefferson to Mr. Pierre de Poletica, the envoy from Russia to the United States of America, and a copy of the record of the court of Albemarle county, in Virginia; a copy of which letter and record he received, among the other papers, from said Thomas Jefferson, which were put into his hands as relating to the administration of the estate of the said Thaddeus Kosciuszko; and a copy of which letter is herewith exhibited to the court, marked defendant's exhibit A, which this defendant prays may be taken as part of this his answer. That this respondent admits that the instrument mentioned in the complainant's bill, and exhibited to this court by him, marked exhibit B, was executed and authenticated, as it purports to be, at Paris, in the kingdom of France, the said Thade Kosciuszko being domiciled and resident at said Paris, at the time said instrument was executed and bears date; but this defendant submits to this honorable court, and prays its decision thereon, whether it will decree him to pay the said sum of $3704 to the said complainant, upon an instrument made under the circumstances, and authenticated in the manner that the aforesaid instrument is; and whether said instrument shall have the effect to revoke or alter any part of said Kosciuszko's will, solemnly executed, and left in the hands of his executor in this country, to be carried into execution at his death, and especially, when it appears, from this defendant's exhibit A, that the said executor had received, from his testator, a letter of so late date as the 15th of September 1817, in which he says of this fund, "after my death you know its invariable destination." And this defendant submits to the decision of this honorable court, whether, if the instrument aforesaid, being genuine and properly authenticated, is of the nature and effect of a will or testament, the said letter of the testator to his executor does not operate as a revoca-
*62] tion of said instrument, *and a re-establishment and republication of his former will? And this defendant, further answering, saith, that

he believes it to be true, that the said Thomas Jefferson, named as executor in said Kosciuszko's will, refused to take out letters testamentary on his estate, and renounced all claim and right so to do, according to law. And this defendant saith, that he was, on the 14th day of August, in the year 1821, appointed by the orphans' court of the county of Washington, district of Columbia, the administrator, with the will annexed, of the estate of the said General Thaddeus Kosciuszko, and received from the said orphans' court, letters of administration, with said will annexed, a copy of which is herewith exhibited to this court, marked defendant's exhibit C, and which this defendant prays may be taken as part of this his answer. That, after receiving said letters of administration, there came to the hands of this defendant from the said Thomas Jefferson, as the estate of said Kosciuszko, two certificates of the six per cent. stock of the United States—one of $11,363.63, and the other of $1136.36, and one certificate of stock of the Bank of Columbia, of forty-six shares, amounting, at their par value, to $4600. That the appraisers appointed by the aforesaid orphans' court to estimate the value of said stocks, appraised them both at par, taking into consideration the advance of the market price of the one, and the depreciation of that of the other, and their respective amounts, and appraising them both together. That, after the receipts of said certificates, there came to the hands of this defendant, dividends upon said stocks to the amount of $4104, which he invested, with the consent of said orphans' court, in six per cent. stocks of the said United States, and which purchased of said stock of the United States a certificate of $3794.24, and that there have since come to his hands, as dividends upon all of said stocks, $580.82, making the whole amount of the estate of said Kosciuszko, which has come to his hands, $20,894.23 of stocks estimated at their par value, *and $580.82 in cash. This defendant, further answering to the bill of said complainant, saith, that among the papers which came to his hands, as hereinbefore mentioned, is a letter from the aforesaid Mr. De Poletica, to the said Thomas Jefferson, inclosing a copy of a dispatch from the viceroy of Poland to him, a copy of which letter and dispatch is herewith exhibited to this honorable court, marked defendant's exhibit D; and by which this defendant understands, that the whole estate of said Kosciuszko may be claimed by a Major Estho, of Poland, as the heir-at-law of said Kosciuszko. That this respondent communicated to said Poletica, in April last, such information as he possessed in relation to said estate, and was informed by said Poletica, that the same would be transmitted to the said viceroy of Poland. That there were also, among the papers aforesaid, two letters from a Mr. Zeltner to said Thomas Jefferson, copies of which are herewith exhibited, marked "defendant's exhibit E, and defendant's exhibit F," by which this defendant understands, that the said Kosciuszko has disposed of the greater part of his fortune in favor of the children, nieces, brothers and sisters of the said Zeltner, and that his (said Kosciuszko's) parents were living in Poland, at the date of the first of said letters. [*63

Exhibit A.

Monticello, June 12, 18—.

Sir:—I have received your favor of May 27, on the subject of the property of the late General Kosciuszko, vested in our funds, and left under

my care and direction. A little before the departure of the general from America, in 1798, he wrote a will, all with his own hand, in which he directed, that the property he should possess here, at the time of his death, should be laid out in the purchase of young negros, who were to be educated and emancipated; of this will, he named me executor, and deposited it in my hands. The interest of his money was to be regularly remitted to him in Europe. My situation in the interior of the country, rendered it impossible for me to act personally in the remittances of the funds, and Mr. John Barnes, therefore, of Georgetown, was engaged, under a power of attorney, to do that, on commission; which duty he regularly *and faithfully performed, until we heard of the death of the general. We had, in the meantime, by seasonably withdrawing the greater part of his funds from the bank in which he had deposited them, and lending them to the government, during the late war, augmented them to $17,159.63: to wit, $12,499.63 in the funds of the United States, and $4600 in the Bank of Columbia, in Georgetown. I delayed, for a considerable time, the regular probate of the will, expecting to hear from Europe, whether he had left any will there, which might affect his property here. I thought that prudence and safety required this, although the last letter he wrote me, before his death, dated September 15, 1817, assured me of the contrary in these words, "*nous avancons tous en âge, c'est pour cela, mon cher et respectable ami, que je vous prie de vouloir bien (et comme vous avez tout le pouvoir) arranger qu'après la mort de notre digne ami Mr. Barnes, quelqu'un d'aussi probe que lui prenne sa place, pour que je eecoive les inátrêts ponctuellement de mon fonds; duquel, après ma mort, vous savez la destination invariable, quant à présent faites pour le mieux comme vous pensez.*" After his death, a claim was presented to me on behalf of Kosciuszko Armstrong, son of General Armstrong, of $3704, given in Kosciuszko's lifetime, payable out of this fund; and subsequently, came a claim to the whole from Mr. Zeltner, of Soleure, under a will made there. I proceeded, on the advice of the attorney-general of the United States, to prove the will in the state court of the district in which I reside, but declined the executorship. When the general named me his executor, I was young enough to undertake the duty, although, from its nature, it was like to be of long continuance; but the lapse of twenty years more, had rendered it imprudent for me to engage in what I could not live to carry into effect: finding now, by your letter of May 27, that a relation of the general's also claims this property, that it is likely to become litigious, and age and incompetence to business admonishing me to withdraw myself from entanglements of that kind, I have determined to deliver the will and whole subject over to such court of the *64] *65] *United States as the attorney-general of the United States shall advise (probably it will be that of the district of Columbia), to place the case in his hands, and to petition that court to relieve me from it, and to appoint an administrator with the will annexed. Such an administrator will probably call on the different claimants to interplead, and let the court decide what shall be done with the property. This I shall do, sir, with as little delay as the necessary consultations will admit, and when the administrator is appointed, I shall deliver to him the original certificates which are in my possession: the accumulating interest and dividends remain untouched, in the treasury of the United States and Bank of Columbia.

I learnt with much pleasure your return to the United States, and in a character, which enables you to do much good to your own, as well as to our country. The peace and friendly intercourse of nations depend much on the personal characters of their diplomatic agents, whose views of things, in black or in white, cannot fail to tinge that of their respective governments. Your friendly dispositions give us entire confidence, that everything from you will be conciliatory, and its effects the greater, as the proofs we have had of the friendship of your great and good emperor, give us confidence, that whatever seed you sow, will fall "neither by the way-side, nor in stony places, nor among thorns, but on good ground, which will bring forth fruit to a hundred fold." We all recollect with pleasure the favor of your former visit to Monticello, and a repetition will be equally gratifying, should your affairs permit. The country cannot, like the cities, furnish the amusements of varied society; a varied scene is all it can offer to its guests, and a view of the tranquil current of domestic life. In presenting to you the souvenirs of the family, I tender my salutations also, and the assurance of my high respect and consideration.

H. E. M. De Poletica, Ambassador of Russia. TH. JEFFERSON.

Exhibit B.

Red Hook, 4th Jan. 1818.

Dear sir:—Some years before I left Paris, General Kosciuszko put into my hands the paper, of which the inclosed is a copy. *Undertaking that it was not to be used till the general's death, it has been in my [*66 cabinet, unopened, from that day till this, and is now recurred to on the information brought by the mails of the day, that the general had died in Switzerland, on the 15th of October last, and that his funeral was celebrated in Paris, on the 31st of that month. I beg to know from your kindness, whether you have any information from Switzerland or France, in relation to this event, and (if it corresponds with mine) what other steps, if any, besides furnishing the original document, will be necessary or proper to give effect to the general's will, so far as my son is concerned. The young man is now fifteen or sixteen years old. I beg you to accept assurances of my great respect and esteem.

Thomas Jefferson, Monticello. JOHN ARMSTRONG.

The will and probate, as contained in pages *55–8, *ante*, were also annexed as exhibits; together with the following correspondence.

Washington City, le 27 Mai, 1819.

Monsieur:—Peu avant mon départ de Paris en Février dernier j'ai reçu du vice-roi de Pologne, Prince Lajanceck, la lettre dont j'ai l'honneur de vous transmettre ci jointe la copie avec celles des pièces qui l'accompagnoient. Le tout indique clairement la nature des renseignements que me demande le gouvernement de Pologne, et que je n'ai pas hésité de lui promettre, comptant d'avance sur votre obligeance, malgré tous les motifs qui m'engageoient à respecter vos loisirs si précieux par les souvenirs aux quels ils se rattachent. Je saisis avec empressement cette occasion pour vous exprimer, Monsieur, mon vif desir d'obtenir la permission de me présenter

encore une fois à Monticello, pour vous y renouveller de vive voix l'expression de la haute consideration avec laquelle j'ai l'honneur d'être, Monsieur, Votre très humble et très obeissant serviteur,

PIERRE DE POLETICA.
Envoyé de Russie près les U. S. d'Amérique.

Thomas Jefferson, Monticello.

*67] *Copie d'une dépêche du Vice-roi du Royaume de Pologne, à Mr. de Poletica, datée de Varsovie, du 17 Nov. 1818.

Le sieur Estho, ci devant major à l'armée Polonaise, neveu de fue le général Kosciuszko, se trouvant dans le cas d'avoir besoin d'une information exacte sur l'état de la fortune que le dit général a pu délaisser, a reclamé l'intervention de son gouvernement à l'effet de lui procurer les éclaircissements nécessaires à cet égard par l'entremise de la mission de S. M. I. et R. notre Auguste Maitre près la cour de France. La correspondance dont M. le Gl. Pozzo di Borgo a bien voulu se charger à cet effet avec des personnes qui lui sembloient être le plus à meme de connoître les moyens pécuniaires de feu Kosciuszko, a donné pour résultat deux lettres ci-jointes en copies, portant quelques renseignements sur l'objet ci-dessus mentionné. Il conste de ces deux pièces et votre excellence voudra bien s'en convaincre, que le Gl. Kosciuszko, outre les fonds déposés etre les mains de différents banquiers en France et en Suisse en possédoit de plus considerables encore chez MM. Thomson et Bonar, à Londres, et chez Jefferson et Barnes, à Washington. Le sieur Estho met d'autant plus d'interêt à obtenir des notions précises relativement aux fonds de son oncle placés en Amerique, qu'il a tout lieu de supposer qu'ils ne sont point compris parmi les sommes dont de défunt a disposé par son testament.

Faisant par conséquent droit aux plus vives instances du pétitionaire j'ose vous supplier, Monsieur, de daigner faire les démarches nécessaires pour cet effet, auprès des sieurs Jefferson et Barnes, citoyens des Etats Unis, et de vouloir bien m'en communiquer le résultat dès qu'il aura été porté à votre connoissance. Je saisis avec empressement cette occasion pour offrir à V. Ex. l'expression de ma très haute considération.

(Signé) LAJONCECK.

Conforme à l'original—POLETICA.

Copie d'une lettre de Mr. Hottinguer à S. Ex. le Gl. Pozzo di Borgo, datée de Paris, du 2 Juillet, 1818.

*68] En réponse à la lettre que V. Ex. nous a fait l'honneur de *nous écrire le 29 Juin, nous la prévenons qu'aux époques du 5 Avril et du 4 Juin, 1818, les fonds déposés chez nous par feu le Gl. Th. Kosciuszko, s'élevoient en principal à la somme de fr. 99.775, et que le 1er. Octobre 1817, la solde lui revenant sur nos livres, étoit de f. 102.400, à peu de chose prés et intèrêts compris.

D'après quelques renseignements que nous avons reçus et dont nous ne pouvons garantir l'exactitude, il paroit qu' au décès du Gl. Kosciuszko (15 Octobre, 1817), il avoit en depôt environ :

f. 100,000, chez Messrs. T. Thomson, T. Bonar et Cie. à Londres,
6,000, chez Mr. G. Esher, à Zurich,
5,000, chez Mr. Belt en à Soleure,

111,000 ensemble.

Armstrong v. Lear.

Le général Kosciuszko a fait deux testaments : l'un daté de Soleure, le 4 Juin 1816 ; l'autre également daté de Soleure, le 10 Octobre 1817. Par le premier il a légué sur ces fonds en nos mains,

f. 60,000, en faveur de Mlle. Thadea Ernine Wilhelmina Zeltner, sa Filleule,

35,000, en faveur de Mlle. Marie Charlotte Zaïre Marguerite Zeltner,

5,000, en saveur de M. Bonisant père, notaire à Moret exécuteur testamentaire,

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190,000, total portant intérêts à 5 p. c. du jour du décès.

Par l'autre testament le Gl. a disposé de tous ses fonds chez Messrs. T. Thomson, T. Bonar et Cie, F. G. Esher, et Beltin en faveur de divers. Il a aussi disposé du reste de son avoir chez nous et a nommé M. Havier Armetly de Soleure pour exécuteur du 2d testament.

Ces deux exécuteurs testamentaires s'etant mis en règle vis-a-vis de nous, nous avons payé f. 102,430.10, le 9 Avril, dernier à MM. Bonissant, en execution du testament du 4 Juin 1816 ; principal et interêts 2700 ; le 2 Juin à M. Havier Amieth pour balance du compte du Gl. Kosciuszko, chez nous *f. 105,130.10 ensemble, au moyen de quoi nous n'avons plus aucuns fonds appartenant à la succession du général. [*69

Nous avions lieu de croire que les autres Maisons se sont également dessaisies des fonds en leurs mains, en exécution du second testament.

Quant aux fonds que pouvoit avoir le Gl. Kosciuszko en Amérique nous avons su que vers l'année 1810 il avoit :

$12,500, environ placés chez Mr. Jefferson, ancien Président des Etats Unis,

4,500, environ chez un Mr. Barnes à Washington.

$17,000 ——— Soit à peu-pres quatre vingt cinq mille francs, mais nous ignorons entierement s'il en a disposé.

(Signé) HOTTINGEUR.

Conforme à l'original—POLETICA.

Copie d'une lettre de Bonissant père, Notaire à Moret à S. Ex. M. le Gl. Pozzo di Borgo, datée de Moret, du 2 Juillet 1818.

Je n'ai pas été à même de connoitre la fortune de M. le général ; il etoit retiré tout près d'ici dans la famille de Mr. Zeltner dont j'ai la confiance. Voila comme j'ai fait sa connoissance et que par suite il m'a donné des marques d'amitié, et m'a rendu aussi dépositaire de son testament. Environ dixhuit mois avant de mourir il avoit fait un testament dont il m'avoit confié un double ; le testament aussitôt son decés a été ouvert suivant les formes légales ; il a légué à plusieurs personnes les sommes en argent qu'il avoit a Paris entre les mains de la Maison Hottinguer et Comp. Il m'avoit choisi pour son exécuteur testamentaire, et j'ai fait acquitter les legs. Quant à ce qui concerne les autres moyens pécuniaires de ce respectable général, je ne puis vos donner aucun renseignement ; je ne sais même pas s'il avotu d'autres fonds ou des biens ailleurs.

Je présume que vous pourriez le savoir, en vous addressant à M. Zeltner, chez lequel il demeurait : Il serait plus à même de vous satisfaire sur cette demande. Mr. Zeltner est parti il y a environ trois mois pour accompagner les précieux restes de ce digne général à Cracovie, et doit être de retour sous peu de jours. J'ai l'honneur d'être, etc., BONISSANT.

Conforme à l'original—POLETICA.

*Exhibit F.

Soleure en Suisse, le 14 Avril 1819.

Monsieur :—J'ai reçu il y a peu de jours, le lettre que vous m'avez fait l'honneur de m'écrire le 23 Juillet, 1818, et au moment que je me suis addressé à vos autorités pour me faire donner un extrait mortuaire du général Kosciuszko duement légalisé, pour vous l'envoyer par votre Ministre à Paris, j'apprens que votre chargé d'affaires en France, vient d'en faire la demande au nom de Monsieur Gallatin, afin de pouvoir exécuter dans les Etats Unis de l'Amerique, et que cet acte alloit être expédié. Je regrette que le retard qu'éprouve votre lettre ne m'ait pas permis de satisfaire plutôt à votre desir de mettre en execution les volontés bienfaisantes et philantropiques du grand homme, que nous pleurons. J'ai l'honneur de vous remercier du détail interessant que vous me donnez dans votre lettre au sujet de vos émigrés et vous prie d'agréer l'assurance de ma plus haute estime et de mon respectueux dévouement. F. X. Zeltner.

Exhibit E.

Monsieur :—Ayant eu l'avantage de jouir pendant plus de vingt années de l'amitié toute particulière de l'illustre défunt, qui en a passé plus de quinze dans ma maison, je n'ai pu ignorer les relations amicales qu'il cultivé avec vous : une amitié fondée sur l'estime réciproque, ne pouvoit qu'être durable ; aussi suis je bien persuadé des regrets que vous causera la nouvelle de son décès si peu attendu. Il en avoit quitté en Mai, 1815, pour répondre aux desirs que lui avait temoigné l'Empereur de Russie de conférer avec lui a Vienne sur le sort de la Pologne ; de Vienne il est revenu jusqu'é Soleure en Suisse, ou il a demeuré chez mon frère en attendant que les circonstances decident s'il doit aller dans sa patrie ou revenir ici dans l'asile qu'il s'était choisi ; il était sur le point de prendre le dernier parti quand la mort vint l'enlever a sa patrie, il a aussi de nombreux amis parmi lesquels je sais que vous êtes au premier rang. C'est cette considération qui m'a fait un devoir de vous annoncer directement cette nouvelle.

Comme le général Kosciuszko a disposé de la majeure partie de sa fortune
*71] en faveur de mes enfans, dames, nièces, *freres et belle sœur et que je suis en outre très lié avec ses parents que je compte aller voir en Pologne, je vous prie de vouloir donner des renseignements sur le capital qu'il a laissé entre vos mains et autres objets qui pourraient être à votre connaissance : vous obligerés infinement celui qui a l'honneur d'être, avec estime et haute consideration, Monsieur, votre très humble et obéissant serviteur. P. J. Zeltner.

The circuit court dismissed the bill of the complainant, and he prosecuted this appeal.

This case was argued by *Key*, for the appellant ; and by *Wirt* and *Z. C. Lee*, for the appellee.

For the appellant, it was contended, that when this case was before the court in 1817 (12 Wheat. 169), it was then decided without prejudice, in order that probate might be taken, in the proper court, of the testament

exhibited. This having been now done, probate being made in the orphans' court of Washington county, of the paper exhibited as the last will and testament of Thaddeus Kosciuszko, it will be contended for the appellant, that the same is to be considered as a valid testamentary act, and that the appellant was entitled to a decree against the administrator with the will annexed, for the amount of the legacy and interest.

As the court gave no opinion upon the merits, nor on the principles of law governing the facts, of the case, the arguments of the counsel are not reported.

STORY, Justice, delivered the opinion of the court.—This cause was formerly before the court, and the decision then had is reported in 12 Wheat. 169. The bill is now substantially the same with the former bill, except that there is an allegation, that the instrument set forth as a testamentary instrument, executed at Paris, on the 28th of June 1826, in favor of the plaintiff, "has been admitted to probate, and duly proved in the orphans' court of Washington county," in this district. But the bill does not go on to state, that it has been duly established by that court as a valid will, according to the law of France, though that is averred to be the place of *domicil of Kosciuszko, at the time of its execution. The bill, however, does [*72 assert, that the instrument is a last will and testament, to all intents and purposes, and must operate as such, and revoke, *pro tanto*, the bequests and appropriation in the prior will, of which Mr. Jefferson was named executor.

The answer of the administrator (Lear) is substantially the same as his former answer, admitting the execution of the instrument, but submitting to the court (without denying in a formal and direct manner, the validity of the will as such, according to the law of France), whether it will decree the defendant to pay the money to the plaintiff "upon an instrument made under the circumstances, and authenticated in the manner that the aforesaid instrument is, and whether the said instrument shall have effect to revoke or alter any part of said Kosciuszko's will, solemnly executed and left in the hands of his executor in this country," &c. This is certainly a very informal and loose mode of putting in issue, if, upon the bill, such a question can be tried, the validity of a will made in a foreign country, whose laws are not brought before the court, either by averment or evidence. But the answer contains a new allegation, that certain persons residing in Europe have filed a bill in the circuit court of the district of Columbia, against him, the administrator, claiming a large portion of the assets, if not the whole, as creditors or mortgagees of the said Kosciuszko; and certain persons, also residing in Europe, have filed another bill against him (it was probably meant in the same court), claiming the whole assets, as heirs-at-law of the said Kosciuszko, and therefore, as distributees of the said assets. None of the parties to either of these latter bills are made parties to the present bill. And we are of opinion, that the persons claiming as heirs of Kosciuszko, should be made parties, that may have an opportunity to contest the plaintiff's title, as the real parties in interest, the administrator being but a mere stakeholder. Indeed, we think, that all three of the bills ought (if possible) to be brought to a hearing at the same time, in the circuit court, in order that a final disposition may, at the same time, be made of all of the questions arising in all of them.

We wish also to attract the attention of counsel to some other considera-
*73] tions, which may become important in future *stages of the cause; and especially, in the aspect under which the present bill and answer are framed. In the first place, if the intention is to put in issue (as it seems to be), not only the construction and operation of the testamentary instrument in favor of the plaintiff, but its validity and effect as a *will*, it is material, that the law of France, the place of the domicil of Kosciuszko, at the time of its execution, should be brought before the court, and established as matter of fact; for the court cannot judicially take notice of foreign laws; but they must be proved by proper evidence. The present allegations of the bill and answer are quite too loose for this purpose; and they should be amended, and made more distinct and direct. We do not mean to express any opinion, whether this court can examine into the point of the validity of the instrument as a will, according to the law of France, or whether it belongs exclusively to the orphans' court of the county of Washington That is a question, which it may be fit hereafter to examine, if it should be pressed in argument.

In the next place, there may arise some nice questions of international law. in which the fact of the domicil of Kosciuszko, at the time of his birth, at the time of his making the will of which Mr. Jefferson was named executor and at the time of his death, may become material. We do not mean to say, what is the true rule that is to govern in cases of wills of personalty; whether it be the rule of the native domicil, or of the domicil at the time of the execution of the will, or of the domicil at the death of the party, where there have been changes of domicil. These are points, which ought, under the circumstances of this case, to be left open for argument. But the facts on which the argument should rest, ought to be distinctly averred in the bill and met in the answer.

The place of domicil of Kosciuszko at the time of his death, may also become material, under another aspect of the case, viz., the question, who are his heirs, entitled to the succession *ab intestato*, or under the other will or wills executed by him, to which reference is made in some of the papers in the case. The persons claiming as such heirs, must establish their title under, and according to, the law of his domicil at the time of his death. So that, perhaps, it may become material, if Switzerland was the domicil of
*74] Kosciuszko, at the time of his death, *to bring the law of that country distinctly, as matter of fact, before the court. The court have, in another case (*a*) expressed their desire to have the other will or wills made by Kosciuszko, put regularly upon the record, to ascertain, whether they have any bearing upon the merits of the present case.

It is also material to observe, that the answer of the administrator relies on a letter written by Kosciuszko to Mr. Jefferson, in September 1817, as a revocation of the supposed testamentary paper in favor of Armstrong, and a republication of the first will; and yet that letter is not produced in evidence, nor even the extract verified; so that there is a total deficiency of proof as to this most material fact. This defect ought to be supplied. These observations have been thought fit by the court to be suggested to the counsel on both sides, on the present occasion. Under the complicated

(*a*) Estho *v.* Lear, 7 Pet. 130.

circumstances of the present case, and the important bearings of foreign law upon it, it is very desirable, that if it should come again before us, all the facts, and all the lights necessary for a final decision may be furnished, without submitting it to farther embarrassments.

The court decree, that the decree of the circuit court dismissing the bill be reversed, and that the cause be remanded, with leave to make new parties, and for other proceedings.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court, dismissing the bill in this cause, be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with leave to make new parties, and for other proceedings to be had therein, according to law and justice, and in conformity to the opinion of this court.

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*Reuben M. Garnett *et al.*, Heirs of Reuben Garnett, deceased, Appellants, *v.* Henry Jenkins *et. al.* [*75

Land-law of Kentucky.

The following entry of lands in Kentucky is invalid: "May 10th, 1780, Reuben Garnett enters 1164 2-3 acres, upon a treasury-warrant, on the seventh big fork, about thirty miles below Bryant's station, that comes in on the north side of North Elkhorn, near the mouth of said creek, and running upon both sides thereof for quantity."

It is a well-settled principle, that if the essential call of an entry be uncertain as to the land covered by the warrant, and there are no other calls which control the special call, the entry cannot be sustained. In the case under consideration, there are no calls in the entry, which control the call for the "seventh big fork," and that this call would better suit a location, at the mouth of McConnell's, than at Lecompt's run, has been shown by the facts in the case; this uncertainty is fatal to the complainant's entry.

To constitute a valid entry, the objects called for must be known to the public, at the time it was made, and the calls must be so certain as to enable the holder of a warrant to locate the vacant land adjoining; it is not necessary, that all the objects called for shall be known to the public, but some one or more leading calls must be thus known, so that an inquirer, with reasonable diligence, may find the land covered by the warrant.

If an object called for in an entry is well known by two names, so that it can be found by a call for either, such a call will support the entry.

Some of the witnesses say, that being at Bryant's station, with the calls of Garnett's entry to direct them, they could have found his land on Lecompt's run, without difficulty; if this were correct, the entry must be sustained, for it is the test by which a valid entry is known.

If the complainants clearly sustain their entry by proof, their equity is made out, and they may well ask the aid of a court of chancery to put them in possession of their rights; but, if their equity be doubtful, if the scale be nearly balanced, if it do not preponderate in favor of the complainants, they must fail.

Appeal from the Circuit Court of Kentucky. This case was commenced by a bill in chancery filed by Reuben Garnett, a citizen of Virginia, on the 30th of December 1815, against Henry Jenkins and others, citizens of the state of Kentucky, in the seventh circuit court of the United States for the district of Kentucky, for the purpose of asserting his claim to $1164\frac{2}{3}$ acres of land. Since which time, the *complainant died, and the suit had been revived in the name of his representatives. The only [*76