repairs, because he did not deem them necessary; and if, by such neglect, alone, the subsequent loss of the ship by worms was occasioned, the underwriters are not liable for any such loss so occasioned." If the loss by worms is not within the policy, as has already been considered under the fourth instruction, it must at once be seen, that the court did not err in giving this instruction. The negligence or vigilance of the master could be of no importance, under the circumstances, in regard to the liability of the underwriters.

The other instructions in the case, relate to the loss of the vessel by worms, and the representation made by the plaintiff; and as they do not raise any distinct point, which has not already been substantially considered, it is unnecessary to enter into a special examination of them. The judgment of the circuit court must be reversed, and the cause remanded for further 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 Massachusetts, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the said circuit court erred in instructing the jury, that in ascertaining what is to be understood as a coppered ship, in application for insurance on a voyage of this nature, the terms of the application are to be understood according to the ordinary sense and usage of those terms, in the place where the insurance is asked for and made, unless the underwriter knows that a different sense and usage prevail in the place in which the ship is then lying, and in which the owner resides, and from which he writes, asking for the insurance; or, unless the underwriter has some other knowledge that the owner uses the words in a different sense and usage from those which prevail in the place where the insurance is asked for and made; but there is no error in the other instructions given by the said circuit court. Whereupon, it is ordered and adjudged, that the judgment of the said circuit court be and the same is hereby reversed for this
*587] error; *and that in all other respects the said judgment be and the same is hereby affirmed. And it is further ordered by this court, that this cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo;* and that further proceedings be had in said cause, according to right and justice, and in conformity to the opinion of this court.

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*588] **Ex parte* Martha Bradstreet: In the Matter of Martha Bradstreet, Demandant, *v.* Henry Huntington, Tenant.

Mandamus.

Motion for an attachment against the judge of the northern district of New York, for a contempt of this court, in refusing to obey its *mandamus*, directing him to reinstate certain suits which had been dismissed from the docket of that court, and to proceed to adjudicate them according to law; the motion also asked for a rule to show cause why *mandamus* should not issue to the district judge. A judge must execise his discretion in those intermediate proceedings which take place between the institution and trial of a suit; and if, in the performance of this duty, he acts opressively, it is not to this court that application is to be made.

A *mandamus*, or a rule to show cause why a *mandamus* should not issue, is asked in a case in

Ex parte Bradstreet.

which a verdict has been given, for the purpose of ordering the judge to enter up judgment upon the verdict; the affidavit itself shows that judgment is suspended for the purpose of considering a motion which has been made for a new trial; the verdict was given at the last term, and we understand it is not unusual in the state of New York, for a judge to hold a motion for a new trial under advisement till the succeeding term. There is then nothing extraordinary in the fact, that the judge should take time till the next term, to decide on the motion for a new trial; this court entertains no doubt of his power to grant it.

The attachment, and the rule to show cause why a *mandamus* should not issue, were refused.

At the January term 1833, of this court, a *mandamus* was awarded, on the application of Martha Bradstreet, to the district judge of the United States of the northern district of New York, commanding him to have the records made up in certain cases depending in that court, in which the said Martha Bradstreet was demandant, and to enter judgments thereon, in order to give the demandant the benefit of a writ of error to the supreme court; and also that, without delay, he should reinstate and proceed to try and adjudge according to the law and right of the several writs of right and the *mises* therein joined in certain cases depending in that court. (7 Pet. 634–50.)

Jones, as counsel for the demandant, now moved the court for a *mandamus* to compel the district judge to permit judgment to be entered, and a writ of seisin awarded upon the verdict of the grand assize, rendered in favor of the said *Martha Bradstreet, against the said Henry Huntington, in the district court, on the 8th day of February 1834; and [*589
to obtain an attachment against the district judge for his prohibiting the demandant from issuing process to assemble the grand assize in each respective cause which was at issue, and which she would otherwise bring to trial at the next stated session of the said district court, to be held at Albany, on the second Tuesday of May then next: and also for a rule on the said district judge, to show cause why a *mandamus* should not be issued, &c.

Mr. Jones, in support of the motion, filed the affidavits of the demandant and her counsel, setting forth the proceedings in the district court in the cases referred to in the motion; and alleging that the district court had not obeyed the *mandamus* of this court, but had, in direct opposition to its injunctions, permitted great delay to take place in bringing the cases to a trial, after they had been reinstated in conformity with the order of this court. He contended, that, upon the affidavits, it was manifest that the proceedings of the district court amounted to a contempt of this court; and that the whole purposes which were to be accomplished by the *mandamus* had, in violation of the commands thereof, been defeated.

Marshall, Ch. J., delivered the opinion of the court.—This motion is for an attachment against the judge of the northern district of New York, for a contempt of this court, in refusing to obey its *mandamus*, directing him to reinstate certain suits which had been dismissed from the docket of that court, and to proceed to adjudicate them according to law. The suits were reinstated and ordered for trial as directed by this court; but delays have taken place, so that a verdict has been given in only one of them, and in that judgment has not yet been rendered. The motion for the attachment is supported by an affidavit of the party, verified by the counsel, giving, at great length, a history of the proceedings which have taken place in these causes, both before and since the *madamus* was awarded. It alleges, that

since the causes have been reinstated, delays have *taken place, which are detailed at great length, and are considered as amounting to a contempt of this court, by disregarding its *mandamus*.

We have only to say, that a judge must exercise his discretion in those intermediate proceedings which take place between the institution and trial of a suit; and if in the performance of this duty he acts oppressively, it is not to this court that application is to be made.

A *mandamus*, or a rule to show cause why a *mandamus* should not issue, is asked in the case in which a verdict has been given, for the purpose of ordering the judge to enter up judgment upon the verdict. The affidavit itself shows that judgment is suspended for the purpose of considering a motion which has been made for a new trial. The verdict was given at the last term, and we understand it is not unusual in the state of New York, for a judge to hold a motion for a new trial under advisement till the succeeding term. There is then nothing extraordinary in the fact, that Judge CONKLIN should take time till the next term to decide on the motion for a new trial. This court entertains no doubt of his power to grant it.

We do not think, that an attachment ought to be awarded, nor do we think, that the present state of the case, in which a verdict has been rendered, would justify this court in directing a rule to show cause why a *mandamus* should not be issued. The motion is dismissed.

Motion dismissed.

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*591] *HENRY WHEATON and ROBERT DONALDSON, Appellants, *v.* RICHARD PETERS and JOHN GRIGG.

Copyright.

From the authorities cited in the opinion of the court, and others which might be referred to, the law appears to be well settled in England, that, since the statute of 8 Ann., the literary property of author in his works can only be asserted under the statute; and that notwithstanding the opinion of a majority of the judges in the great case of Millar *v.* Taylor was in favor of the common-law right, before the statute, it is still considered, in England, as a question by no means free from doubt. [1]

That an author, at common law, has a property in his *manuscript*, and may obtain redress against any one who deprives him of it, or, by obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted: but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

The argument, that a literary man is a much entitled to the product of his labor as any other member of society, cannot be controverted; and the answer is, that he realizes this product in the sale of his works, when first published.

In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged, as long, and perhaps, as usefully to the public, as any distinguished author in the composition of his book; the result of their labors may be equally beneficial to society; and in their respective spheres, they may be alike distinguished for mental vigor. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has

[1] It appears to be settled, at least in this country, that though an author has an exclusive perpetual right in his unpublished manuscript, yet, when once published, his rights in the reproduction of copies, are solely dependent on the statutes. Jefferys *v.* Boosey, 4 H. L. Cas. 815; Bartlett *v.* Crittenden, 5 McLean 32; Clayton *v.* Stone, 2 Paine 395; Stowe *v.* Thomas, 2 Wall. Jr. C. C. 564; Boucicault *v.* Hart, 13 Bl. C. C. 47; Donnelley *v.* Ivers, 20 Id. 383; Dudley *v.* Mayhew, 3 N. Y. 9; Palmer *v.* De Witt, 47 Id. 532.