APPENDIX.

I.

Argument of Mr. Call, the Counsel for the United States, in the Supreme Court, in the cases of the United States *v.* George J. F. Clarke, John and Antonio Huertas, Joseph H. Hernandez, *et al.*

The right which Spain acquired by discovery and conquest on this continent, was universally acknowledged and acquiesced in by all the nations of Europe, and has never been denied by the government of the United States. According to the laws and policy of Spain, as well as the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is declared to reside in the crown, as a branch of the royal prerogative. (White's Compilation 41.) The fee of the crown could only be divested by the king himself, or by the persons to whom his power was specially delegated, and in the form and manner prescribed for their government. The exercise of the granting power by any other person, or in any other manner, would convey no estate in the land to the nominal grantee; it would not divest the fee of the crown, and would be, to all intents and purposes, an absolute nullity.

The 6th section of the act of 1828, gives jurisdiction to the superior courts over all claims to land in Florida, embraced by the treaty. The terms "embraced by the treaty," as employed in the statute, can include only those claims which the treaty imposes an obligation on this government to confirm. The English version of the 8th article has been rejected, and the Spanish version of the treaty has been adopted by the court; and from a proper translation of the language used by the Spanish minister, without regard to the language, understanding and obvious intention of the American negotiator, we must determine, on the one hand, the rights secured to the people of the ceded territory, and on the other, the obligations and responsibilities imposed on the United States.

According to the translation of the 8th article of the treaty, as made *by the translator of foreign languages for this government, "all grants of land made [*706 by his Catholic Majesty, or by his lawful authorities, before the 24th of January 1818, in the said territories, which his majesty cedes to the United States, shall remain ratified and confirmed to the persons who are in possession of them, in the same manner that they would have been, if his majesty had continued in the dominion of the said territories." This clause of the treaty contemplates perfect titles; titles given after the performance of all the conditions of the grant, either expressed or implied in law; grants which, previous to the date of the treaty, had been confirmed and ratified by the king, or by his lawful authority. Any grant, not ratified and confirmed before the date of the treaty, could not remain ratified and confirmed after the date of the treaty. Until it had been ratified and confirmed, it could not remain ratified and confirmed; the confirmation must have had being, before it has continuance and remainder. This appears to be the plain and natural interpretation of the first clause of the 8th article. But for a more perfect illustration of the intention of the Spanish negotiator (and we will at present consider his intentions alone, without regard to

the intentions of the other party to the contract), it is only necessary for one moment to examine the laws and ordinances, rules and regulations, provided by the Spanish government, for the disposal of the royal domain.

Until after the date of the royal order of 1815, there was neither law, ordinance nor local regulation in East Florida, which authorized a grant of land for any other purpose than that of habitation and cultivation. This opinion is advanced with confidence, because the united efforts of numerous and learned counsel, in behalf of the claimants, in this and in the court below, have been unable to produce any authority; and the judge, although he decides otherwise, has been unable to refer to any such law, although specially required to do so in his decree, by the act of 1824.

The laws of the Indies, authorizing grants of land, forbid the investment of title in the grantee, until he shall have inhabited and cultivated the land during four years. (Land Laws, law 1, lib. 4, tit. 12, p. 967; Ibid. law 2, p. 968.) If the grantee failed to comply with the condition of his grant, he acquire no right, and the land was granted to some other individual. (Ibid. law 2, p. 969.) One of those conditions was, that the grantee should take possession of the land, within six months from the date of the grant, and on failure to do this, he lost his right of occupancy. When the condition was not expressed in the grant, it was nevertheless always understood: "That all concessions in which no time is specified, shall become extinct, and shall be considered as null, if the persons to whom they are made do not take possession, and cultivate the same, within six months." (Land Laws, p. 1001, 4th article of the regulations of the 12th October 1803.) That this was the rule governing the grants in
*707] East Florida, is fully *shown by the opinion of Don Ruperto Saavedra, judge of the province, given on the 27th October 1818, at the instance of the agent of the duke of Alagon. In the seventh article of his report, found at page 252 of White's Compilation, he says, "that the concessions made to foreigners or natives, of large or small portions of land, carrying their documents with them (which shall be certificates issued by the secretary), without having cultivated, or even seen the land granted them; such concessions are of no value or effect, and should be considered as not made, because the abandonment has been voluntary, and they have failed in complying with the conditions prescribed for the encouragement of population." Had Florida remained under the dominion of Spain, the grant to the duke of Alagon would have been invalid, and other grants within its limits would have been subjected to the rule above mentioned.

The first article of the instructions given to the surveyor, George Clarke, found at p. 1003 of the Land Laws, shows the distinction taken between perfect and imperfect titles to land in East Florida: "The possessors of lands in this province shall be considered under three classes; 1st, as proprietors; 2d, as grantees; and 3d, as grantees and proprietors. The first are those who hold lands by titles not obtained by grants from the government. (These were English inhabitants who remained in the province after the treaty of 1783, and who held lands by patent from Great Britain.) The second are they who, on compliance of certain conditions of time and labor, will get titles of property. And the third are those who have acquired those titles." The following opinion of the notary of government of the royal domain, whose duty it was to countersign all complete grants, under his official seal, will further show the distinction between a complete and incomplete grant, and will show the usage and custom of tho province, until the month of October 1818, the time when it bears date. It will be found at p. 250 of White's Compilation.

"As I best can and ought to do, I certify and attest, that the conditions prescribed by this government for grants of land to which the decrees of the 2d inst. placed on the proceedings refer, are the same which appears in the foregoing title delivered in favor of Don John McQueen, dated on the 12th of March 1804, which conditions subsisted in all their force until the year 1815, when the then governor of this place, Brigadi Don Sebastian Kinderlan altered them, at his discretion, granting lands under the single circumstance, that when the grantee proves that he has cleared them, built houses, fences, and other things necessary for the improvement of a plan

tation, the title of proprietorship should be delivered to him, as has been done to several who have not passed the ten years' possession poin'ed out in said title of McQueen, as appears from the different proceedings in the archives in my charge, to which I refer; and in compliance with orders in said decree, I sign and seal these presents in St. Augustine, &c., October 1818."

The regulations of Governor White required ten years' residence to *enable [*708
the grantee to obtain a perfect title. Governor Kindelan, in 1815, altered this regulation, and granted the land in absolute property, in proportion to the working hands each family possessed, whenever they could prove satisfactorily that they had performed the conditions of "clearing land, building houses, fences and other things necessary for the improvement of a plantation." This alteration appears to have been the only one made by Governor Kindelan, as the largest grant confirmed by him or his predecessors, up to and inclusive of the year 1815, was the grant of McQueen, for 3275 acres, and that on proof of the number of his family and slaves, and of his having complied with the conditions of cultivation and improvement.

The royal order of 1735 required, that all perfect titles should be given by the king, after the grantee had performed the four years' residence and cultivation required by the laws of the Indies. To remedy the inconvenience arising from this regulation, the royal order of 1754, found at p. 973 of the Land Laws, was issued, which vested the power of appointing sub-delegates and judges for the disposal of the royal domain, in the presidents and viceroys of his American dominions. The fifth article of the royal order authorizes the confirmation of all imperfect grants, where the grantee had complied with the conditions of the grant, and where the quantity claimed was no more than the party was entitled to. By the 81st article of the ordinance of 1768, the power of granting and confirming titles to land was vested in the intendents. (See Land Laws 972.) The royal order of 1774 repealed this article of the ordinance of 1768, and conferred the granting power on the civil and military governors. The royal order of the 22d of October 1798, so far as it regards the provinces of Louisiana and West Florida, invested the intendent with full and exclusive power to grant "all kinds of lands" (see White's Compilation 218). In East Florida, the royal order of 1774 remained unrepealed in every particular, and the granting power continued to be exercised by the governors of that province.

From the preceding laws, ordinances, royal orders and official reports, the court will readily perceive the difference between a title in full property, and an inchoate title, where the fee is yet in the crown, and to be divested only on the performance of a condition precedent of the estate; the difference in the language of the treaty between a grant ratified and confirmed, and a grant to be ratified and confirmed after the performance of the conditions of habitation and cultivation. This difference will be still more fully illustrated by a comparison of the form of the imperfect title, which was always given in the first instance, with the perfect, or "ratified and confirmed" title, given after the performance of all the conditions of the grant. The imperfect title consisted always of the petition of the grantee, and the order or decree of the governor, under which the party was permitted to take possession of the land, and to enjoy its use and possession, until by his habitation and cultivation during the time prescribed, he became entitled to have his *grant confirmed. The petition [*709
and decree or order of the governor, found at pages 6 and 7 of the record, in the case of the United States *v.* John Huertas, No. 82, presents the ordinary form of an inchoate title, or a title intended afterwards to be confirmed, when the conditions should have been performed, with the exception of the following words, which are altogether unusual. "With the precise condition, to use the same for the purpose of raising cattle, without having the faculty to alienate the said tract, either by sale, transfer, contract of retrocession, or by any other title, in favor of a stranger, without the knowledge of this government." These unusual and extraordinary restrictions prove the intentions of the governor to have been, only to grant the use and occupation for the purpose of "raising cattle," and not to give the incipient title, afterwards to be matured into a perfect grant. At page 8 of the same record, will be found the

form of a perfect title, or a "ratified and confirmed" title, such as could only be given, after the performance of the conditions, either expressed in the imperfect grant, which it is intended to confirm, or implied in law. The court will perceive, by comparison, that the concluding part of this instrument conforms almost literally to the latter clause of the fifth article of the royal regulation of 1774, found at p. 974 of the Land Laws, which provides, that "the confirmation of the patents of the possessors of these lands shall be given in my royal name, by which their property and claim in the said lands shall be rendered legal." That this royal order and the several laws of the Indies, to which it relates in the second article, and found from p. 967 to p. 971 of the Land Laws, were in force in East Florida, we have the most conclusive proof, furnished by the royal order of the 8th June 1814, found at p. 1010 of the Land Laws. By the latter order, the king commands the royal order of 1754, and the laws of the Indies, to be observed and obeyed.

The court is respectfully referred to those laws and those royal orders, which, with the royal orders of 1790 and 1815, and the local regulations founded upon them, formed the entire code and system for granting lands in East Florida. All grants made and confirmed according to these laws, royal orders, and local regulations, are, according to the decision of the court in the case of Arredondo and Son, confirmed by the Spanish version of the treaty. All grants made in contravention of these laws, royal orders, and local regulations, are made without authority. They are not made by the "lawful authorities of his Catholic Majesty," and were, therefore, void before, and cannot have been ratified and confirmed by the treaty.

Having shown that the terms, "shall remain ratified and confirmed," as expressed in the first paragraph of the eighth article of the treaty, can be applicable only to those grants which have been confirmed by the Spanish government, before the time limited in the treaty; and having shown from the laws and usages of Spain, what is the nature and form of such a grant; we are now the better enabled to discuss the nature of an imperfect title, and to decide what rights the grantee had under it, *and what responsibility was imposed on the United States to confirm these grants.

*710]

The following is the language of the last clause of the eighth article, which expresses, very clearly, the intention of the Spanish negotiator; at the same time it shows the nature of the imperfect titles, intended to be confirmed on the occurrence of the contingency, on which the right of confirmation might be claimed by the grantee. "But the proprietors who, in consequence of the circumstances in which the Spanish nation has found itself and the revolutions of Europe, have not been able to fulfil all the obligations of their grants, shall be obliged to fulfil them according to the conditions of their respective grants from the date of this treaty, in default of which they shall be null and void." Without perverting the terms employed, and distorting the obvious intention of the negotiator, this clause of the treaty cannot be made to apply to any other than imperfect titles, grants made on conditions which remained to be performed, at the date of the treaty, and which, until the performance of those conditions, entitled the grantee to no estate in the land. It cannot be so construed as to confirm any imperfect grants, by its own action, but imposes an obligation on this government to confirm them, provided the conditions shall have been performed by the grantee, within the time specified in the same clause of the treaty. It proves, as do the laws, ordinances and royal regulations of the Spanish government, that all these grants depended on conditions precedent, and with them, as with us, the condition must be performed, the contingency must occur, before the estate can arise or take effect. If all the conditions be performed, within the time specified in the treaty, an obligation is imposed on the United States, by the treaty, to confirm the title. If all the conditions be not performed, within the time stipulated, then the grant is, by the force and effect of the laws of Spain, no less than by the express provision of the treaty, for ever "null and void."

The first and second clause of the 8th article of the treaty, when taken and construed with each other, according to the translation of the Spanish version, ratifies and confirms all grants ratified and confirmed by his Catholic Majesty, or his lawful

authority, before the 24th of January 1818, and it imposes an obligation on the American government to ratify and confirm all imperfect grants made by his Catholic Majesty, or his lawful authorities, before the 24th of January 1818, to the same extent that they would have been valid, or in the "same manner that they would have been" (ratified and confirmed), "if his majesty had remained in the dominion of the territories." If the Spanish word, "*concesiones*" be translated concession, instead of grant, it cannot vary, in the most remote degree, the construction given to this article of the treaty. In technical phrase, there is with us a difference between concession and grant. The one generally implies an imperfect, the other a perfect grant. But the term, as expressed in the first and second clause of the 8th article, can only mean the grant or the title which the claimant may have. If rendered "concession," in English, and understood to mean imperfect titles which had not been *confirmed by the [*711
Spanish government, then they could not remain ratified and confirmed, because they must have been confirmed and ratified, before they can so remain. If they are ratified and confirmed concessions, they are perfect grants, by which the crown has been divested of the fee, and they remain ratified and confirmed by the treaty. The court will then perceive, that the language of the 8th article of the treaty, gives the best explanation of the term "*concesiones*," and shows that it was intended by the Spanish negotiator, to signify grant or title, perfect or imperfect, or the land granted, as its meaning is varied by other terms with which it is associated in the first and second clause of the treaty. When it speaks of a concession which shall remain confirmed, it means a title which has been confirmed; and when it speaks of a concession to be confirmed on the performance of certain conditions, it means an imperfect or inchoate grant or title.

With this understanding of the 8th article of the treaty, and the distinction and manifest difference between confirmed grants or titles in full property, by which the crown was divested of the fee, and imperfect titles, where the party had obtained only the first decree by which he went into possession of the land, when he was merely progressing in the performance of those conditions imposed by law, and where the fee still continued in the crown, as we have shown by the laws and usages of Spain, and the form of the respective titles given in either case, we shall be prepared to decide, what lands were conveyed to the United States, and what lands were confirmed to the inhabitants of the ceded territory, by the stipulations of the 8th article of the treaty.

The treaty conferred no new or additional right of soil on the inhabitants of the ceded territory, it only secured those rights, to the same extent that they had been conferred by the government of Spain. The United States found them as they had been left by Spain. Some with perfect titles to the soil, granted by the lawful authority of his Catholic Majesty. Some with inchoate titles, to be perfected after proof of performance of the conditions of the grant; and others with titles formal an informal, not made by the lawful authorities of his Catholic Majesty, or any other than the self-created authority of the officer by whom they were made, in anticipation of the change of government, and his relief from responsibility. If then, as we think, we have abundantly shown, that in no case, the fee of the crown was divested, until after the performance of the conditions of the grant, and then, only by that formal deed or grant prescribed by the 5th section of the royal order of 1754, found at p. 974 of the Land Laws; and, according to the 18th article of the regulations of Morales, found at p. 984 of the Land Laws, which refers to other preceding articles that contain the same provision, and declares, that no one of those who have obtained the first decree or imperfect title, "notwithstanding, in virtue of them, the survey has taken place, and that they have been put in possession, can be regarded as owners of land, until their real titles are delivered, complete with all the formalities before recited;" it must follow, as a natural result, that the fee in all *lands within [*712
the ceded territory, not embraced in real titles or formal and complete titles, passed to the United States by virtue of the treaty. The estate must rest somewhere. The king had not conveyed it to the claimant, he held it as a security for the faithful

performance of the conditions on which it was to be given; and if it did not vest in the United States, by virtue of the treaty, the king of Spain is yet the proprietors of millions of acres of land in a territory, which he declares, in the 2d article of the treaty, he cedes in full property and sovereignty to the United States.

We think, then, that the United States is vested with the fee in all lands claimed by imperfect titles, or illegal titles from the government of Spain; that when the claimant under these imperfect titles made by the lawful authority of his Catholic Majesty shall prove a compliance with the conditions of his grant, within the time prescribed by the laws of Spain, and the treaty, the United States will be bound to confirm his title, to the same extent that such title would have been valid under the government of Spain.

The nature of those conditions, and the time within which they must be performed, can only be determined by the laws under which they are imposed, and the provisions of the treaty by which they are recognised and required to be performed. A treaty is a contract between two nations, and may, in many respects, be construed by the rules which govern contracts between individuals. The intention and understanding of the parties, is to be sought in the language in which they have contracted with each other; and they are only bound to the extent of their understanding and intention in creating the obligation. The 8th article of the treaty imposes an obligation on the United States. She contracted, in her own language, and is responsible to the full extent of the obligation which she created, and to which she assented in the negotiation. But can she be responsible under a contract not understood, and to which her consent was never given? On this subject, Vattel observes, at page 310: "But it is asked, which of the contracting parties ought to have his expressions considered as most decisive, with respect to the true sense of the contract; whether we should stop at those of the power promising, rather than at those of him who stipulates? The force and obligation of every contract arising from a perfect promise, and he who promises being no further engaged than his will, is sufficiently declared; it is very certain, that in order to know the true sense of the contract, attention ought principally to be paid to the words of him who promises; for he voluntarily binds himself by his words, and we take for true against him what he has sufficiently declared."

It is provided in the English version of the 8th article of the treaty, that "all grants of land made before the 24th of January 1818, by his Catholic Majesty, or by his lawful authorities in the said territories ceded by his majesty to the United States, shall be ratified and confirmed *to the persons in possession of the land, *713] to the same extent that the same grants would be valid, &c." This is the obligation imposed by the contract, and which, in good faith, she is bound to observe. That which is sought to be enforced against her, is written in a language which she did not comprehend, and to which her assent was never given. It is according to the translation of the Spanish version of the eighth article of the treaty, "all grants of land made by his Catholic Majesty, or by his lawful authorities, before the 24th of January 1818, in the said territories which his majesty cedes to the United States, shall remain ratified and confirmed to the persons who are in possession of them, in the same manner, &c." The term "them" refers to the "grants of land," and it is contended, that the United States are bound, under this stipulation, to confirm the grants to the persons in possession of them (the grants), instead of the persons who are "in possession of the lands;" according to the express stipulation made in the English language. If thus understood, they are separate and distinct obligations; they impose responsibilities essentially different from each other. The United States are not bound by both, and the question arises, which of them her national faith is pledged to redeem? She can only be required to execute her contract: her contract is to confirm the "grants of land" to the persons in possession of the "lands," and not to confirm the grants of land to the persons in possession of the *grants* or title papers. It is believed to be a rule in diplomacy, and one invariably observed by all civil nations, to negotiate in their own language, and to be bound only by the contract expressed in that language. If this principle be correct, then it is obvious, that the

United States are not bound to confirm the grants or titles to the persons in possession of "them;" but to confirm the grants to the persons in "possession of the land."

The eleventh article of the treaty provides, that the United States shall pay to our merchants, on account of spoliations committed on our commerce, a sum not exceeding $5,000,000. This obligation is clearly expressed in the English language, and shows the will and intention of the negotiator, by which the nation is bound. Suppose, in the Spanish version of the same article, when translated into English, it should be found that the stipulation was to pay the five millions to the king of Spain, would any one seriously contend that the United States are bound to pay this money to the king of Spain, or to pay it to any other person, or in any other manner than she had promised to pay it? The cases are parallel, and the reasons the same. The government has the same legal right, in a controversy with individuals, that it would have in a controversy with a foreign nation, and the treaty must be construed according to the same rules.

There are other reasons why the English version of the treaty should prevail, and be in force. It expresses, beyond doubt, the understanding and intention of both the contracting parties, at the time of the negotiation; as is fully shown by the following extract from the correspondence of Mr. Adams, Don Onis and M. de Neuville. Executive Papers, vol. 1, p. 46, 68, 69; 1819–20.

*"The minutes upon the eighth article, compared with the draft in the project of M. de Onis, with that of the counter-project by the secretary of state, and with the article as finally expressed in the treaty, fully elucidate the understanding of the parties, that the grants of land dated before as well as after the 24th of January 1818, were annulled, excepting those upon which settlements had been commenced; the completion of which had been prevented by the circumstances of Spain, and the recent revolutions in Europe. M. de Neuville's particular attention is requested to the difference between the two projected articles, because it will recall particularly to his remembrance, the point upon which the discussion concerning this article turned. By turning to the written memorandum drawn up by Mr. de Neuville himself, of this discussion, he will perceive that he has noted that M. de Onis insisted, 'that this article could not be varied from what was contained in the chevalier's project, as the object of the last clause therein, was merely to save the honor and dignity of the sovereignty of his Catholic Majesty.' [*714

"It was then observed by Mr. Adams, that the honor and dignity of his Catholic Majesty would be saved by recognising the grants prior to the 24th of January, as 'valid to the same extent as they were binding on his Catholic Majesty,' and he agreed to accept the article as drawn by M. Onis, with this explanation (see M. de Neuville's memorandum). It was on this occasion, that M. de Neuville observed, that if the grants prior to January 24th, 1818, were confirmed only to the same extent that they were binding on the king of Spain, there were many *bonâ fide* grantees, of long standing, in actual possession of their grants, and having actually made partial settlements upon them, but who had been prevented by the extraordinary circumstances in which Spain had been situated, and the revolutions in Europe, from fulfilling all the conditions of the grants; that it would be very harsh, to leave these persons liable to a forfeiture, which might, indeed, in rigor, be exacted from them, but which very certainly never would be, if they had remained under the Spanish dominion. It will be well remembered by M. de Neuville, how earnestly he insisted upon this equitable suggestion, and how strongly he disclaimed for M. de Onis every wish or intention to cover, by a provision for such persons, any fraudulent grants. And it was then observed by M. de Neuville, that the date assumed of 24th of January 1818, was not sufficient for guarding against fraudulent grants, because they might be easily antedated. It was with reference to these suggestions of M. de Neuville, afterwards again strenuously urged by M. de Onis, that the article was finally modified as it now stands in the treaty, declaring all grants subsequent to the 24th of January 1818, absolutely null, and those of prior date valid to the same extent only, that they would have been binding upon the king, but allowing to *bonâ fide* grantees, in actual possession, and

having commenced settlements, but who had been prevented by the late circumstances of the Spanish nation and the revolutions in Europe, from fulfilling *all* the conditions of their grants, time to *complete* them. It is needless to observe, that as these incidents
*715] do not apply to either of the grants to Alagon, *Punon Rostro, or Vargas, neither of those grants is confirmed by the tenor of the article as it stands; and that it is perfectly immaterial in that respect, whether they were dated before or after the 24th of January 1818, it being admitted on all sides, that these grants were not binding upon the king, conformably to the Spanish laws. The terms of the article accord precisely with the intentions of all the parties to the negotiation and the signature of the treaty. If the dates of the grants are subsequent to the 24th of January 1818, they are annulled by the date; if prior to that date, they are null, because not included among the prior grants confirmed."

This shows the sense in which the term grant was expressed and understood by Don Onis, and it shows the persons who were intended to be embraced by the treaty. It was not those persons who had obtained conditional grants, who held "them" in possession, and had not settled on, or even seen the land granted to them; but *bonâ fide* grantees of long standing, in actual possession of their grants and having actually made partial settlements upon them, but who had been prevented by the extraordinary circumstances in which Spain had been situated, and the revolutions in Europe, from fulfilling all the conditions of their grants. No one can read this correspondence and resist the conviction, that it was the intention of both parties to the negotiation, to provide for the confirmation of grants to the persons in possession of the land, and that by the possession of the *grants* was meant the *possession of the land.* To use the expression in any other sense, would involve an absolute absurdity. In propriety of speech, we could not say, that a person had actually made partial settlements upon the grants, unless we understand by the term grants, the lands granted, instead of the title-papers. As this is evidently the sense in which it was understood in the correspondence, we may naturally infer, that the same terms were understood in the same manner, when afterwards adopted by the same parties in the treaty.

The letter and spirit of the whole of the eighth article of the treaty, both in the English and Spanish languages, give further proof that such was the intention of the parties. The terms of the treaty, as well as the laws of Spain, to which we have already invited the attention of the court, show that the grants were made on conditions precedent. These conditions were, that the grantees should, according to the fourth article of the regulations of 1803, found at p. 1001 of the Land Laws, take possession of and cultivate the land granted to them, within six months from the date of the grant, and on failure to do so, that the grant should be void. Habitation and cultivation being the condition required by the laws of Spain, as well as by the treaty; and as the grantee could not inhabit or cultivate, without being in possession of the land, it is self-evident, that the treaty required the claimant to have been in possession of the land, and in progress with the performance of the conditions on which his confirmation of title might be acquired.

Except in the few cases where grants were made for military services, under the
*716] royal order of 1815, all grants made in the *province of East Florida were, in consideration of habitation and cultivation, to be performed by the grantee. Under the government of Spain, those persons would not be entitled to the land, until they proved a performance of all the conditions of the grant. The treaty places them under the government of the United States, on the same conditions; and to say, the possession of the title-papers or grants, shall be substituted for the possession, habitation and cultivation of the land, required no less by the treaty than by the laws of Spain, is to defeat both the treaty and the law, and to confirm titles to millions of acres of land, which, under the Spanish government would never have been confirmed. There is now, and has been, in suit in the courts of Florida, more than ten times the quantity of land to which confirmed titles were given by the Spanish government, and where the claimants are in possession of the grants or title-papers, without ever having seen the land which they claim.

The conditions imposed by the laws and usages of Spain, and enforced by the treaty, were not, that the claimant should have possession of his grant or title-papers, for copies of those, duly certified, were always given to him, at the time of making the concession; but that he should enter into possession of the land, should cultivate and improve it, and make it his home for four years at least; to entitle him to a grant in fee-simple. The truth of this proposition is fully shown by the following laws of the Indies, found at p. 968 of the Land Laws: "To those who shall have lands and lots in the new settlement of any province, there shall not be granted or distributed any lands in another province, unless they shall have left their first residence, and proceeded to reside in the new settlement, except they shall have continued the four years, necessary to acquire property in the lands, &c.;" "and we declare the allotment of lands made contrary to this our law, to be null." As a further evidence that the conditions required to be performed by the treaty, were possession, habitation and cultivation, the court is respectfully referred to law 1, tit. 12, book 4, of the Laws of the Indies, Vol. 2, a translation of which is found at p. 967 of the Land Laws, which provides, that "after a residence in those settlements (referring to the settlements required by the preceding part of the same laws to be made on the land by the grantees) for four years, and labor therein, we grant them power thereafter to sell their possessions, or dispose of them at pleasure, as their own property."

We have already shown, by the royal order of 1814, that these and other laws containing the same provisions, were in force in Florida. That until after the receipt of the royal order of 1814, ten years' habitation and cultivation were invariably required, before the grantee could acquire a title to the land in full property. That in the year 1815, according to the statement of Entralgo, notary of government, found at p. 250 of White's Compilation, Governor Kindelan altered the regulations of Governor White, of the year 1803, which required ten years' habitation and cultivation, and "granted lands, under the single circumstance, *that when the grantees [*717
proved that they had cleared them, built houses, fences and other things necessary for the improvement of a plantation, the title of proprietorship should be delivered to them." This appears to have been the custom ever after, until 1818. Entralgo states, that this alteration was made at the discretion of Governor Kindelan; but the court will perceive, from the time when the alteration was made, that it was under the royal order of the 8th of June 1814, addressed to the governor of St. Augustine (the same Sebastian Kindelan), who made the alteration, commanding him to obey the laws of the Indies and the royal order of 1754, in all things relative to the distribution of lands. This royal order shows, not only that the laws above referred to, were in force in East Florida, but it shows the limited discretion of the governor; and the laws themselves show the limited power conferred on him in making grants of land.

In the case of Percheman, 7 Pet. 87, the court remarked, "had Florida changed its sovereignty, by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government, would have been unaffected by the change." This just and equitable principle is not controverted by the counsel for the United States; on the contrary, it is that for which they contend. We receive the people of the ceded territory with the same "right of property," and none other than that which they possessed under the former government. And the question arises, what is the nature of that right? This court has ever decided that the right of property in lands must be determined by the laws of the country where the land is situated. The law, therefore, must be produced, and by the law individual rights must be determined. We have already referred the court to the laws of Spain, and we have endeavored to show from those laws, that no grants of land in Florida, other than those authorized for military services, by the royal order of 1815, could have been made, except in proportion to the ability of the grantee to cultivate and improve them, and on condition of actual habitation and cultivation. We have endeavored to show by those laws, and we think, not without success, that no "right of property" in land, was conferred on the grantee, until after the performance of all the conditions of the grant, on proof of

which, a title in full property, or "real title," divesting the crown of the fee, was made out and executed, under the hand and seal of the proper officer, and delivered to the grantee. The grant or concession given in the first instance, was ever on conditions precedent, leaving the fee still in the crown, and not to be divested until after the performance of all the conditions. We have shown, that the practice of the province conformed to these laws, at least until the year 1816, without the least variation; that it was continued after that time, until October 1818 (see White's Compilation, p. 250), which creates the strongest presumption against the validity of any grant not made in conformity to those laws, and the long-continued practice under them: a presumption only to be rebutted by producing the authority of the officer by whom the grant is alleged to have been made, not in conformity with that practice.

*718] *With this understanding of the laws of Spain, and the unvaried practice of the provincial government under those laws, until after Don Onis had been commissioned by the king of Spain, to negotiate with the American government for the cession of the Floridas, we cannot be at a loss in understanding what was ceded to the United States, and what is meant by the term "vacant lands" in the second article of the treaty. The term "vacant lands" is well understood to mean the lands of the crown. Law 14, tit. 14, book 4, vol. 2, p. 42, of the Laws of the Indies, a translation of which is found at p. 969 of the Land Laws, declares "that all lands and soil that have not been granted away by the kings our predecessors, or by us in our name, belong to our patrimony and royal crown."

No land or soil was granted, in cases of imperfect titles, where the right of property and of soil was withheld, until after the performance of the conditions prescribed by law, and the lands in all such cases were vacant lands, and passed to the United States; but the claimant came with the lands under this government, with the same right to consummate his title, by a performance of the conditions imposed by law, that he had under the government of Spain. According to the decision of this court in the case of Percheman, p. 87, without the stipulated protection of the treaty, his right of property would "have been unaffected by the change." "It would have remained the same as under the former government." It does remain the same as it was under the former government, by the eighth article of the treaty, which provides, that such claims shall be ratified and confirmed to the persons in possession of the land, to the same extent that the same grants would have been valid, if the territories had remained under the dominion of his Catholic Majesty." The fee not having vested in the grantee, before the treaty, it must have passed to the United States as vacant land, charged with the incipient right of the claimant, under an obligation to perfect that right, and convey the estate in fee-simple, after the performance of the conditions; or the fee is still in the crown of Spain. Nor is this view of the subject changed in the smallest degree, by the enumeration of what is ceded in the second article; "the adjacent islands, dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings that are not private property." It never has been contended, that private property was conveyed by the treaty. The king professes to cede only that which belonged to him, and the government claims nothing more. Private property, reserved in the enumeration, refers not to vacant lands, public lots and squares, public edifices, fortifications and barracks; these, from their very terms, show that they were not private property; that they were public property, or property of the crown. But "private property" refers to "buildings." The king ceded all that he had, either of soil or sovereignty, and among other things, "all buildings" that were not "private property."

In the case of Percheman, 6 Pet. 88, the court, in remarking on the difference between the English and Spanish versions of the eighth article of the treaty, observe, "if the English and Spanish parts can, without violence, be made to agree, that con-

*719] struction which establishes *this conformity ought to prevail." From what we have already observed on the subject, it will be shown, that this conformity of construction may be given in all points presented under that article, which affect

materially the interest of the parties. We make this qualification, because we deem it quite unimportant, whether the complete grants, executed with all the legal formality necessary to convey the fee in the land, be considered as ratified and confirmed by the action of the treaty, or whether the treaty requires them to be confirmed. In either case, if the grant was made before the 24th of January 1818, by his Catholic Majesty or his lawful authority, the land was private property, at the date of the treaty, and the government has no interest in it. And in neither case, can the right of inquiry be denied, whether the officer had power to make the grant. This is the first question presented in every case, and if the court is satisfied, that the power has been legally exercised, it must give a decree of confirmation; and if it be not satisfied, the claim must be rejected.

But the other technical variance suggested, is of a more important character; and which, if not reconciled, must operate with peculiar injustice to the government, and defeat the spirit and design of the 8th article, as expressed in both languages. That article was intended to save the validity of grants made by the government of Spain, to the same extent, and no further, than the same grants would have been valid under that government, if Florida had not passed under the dominion of the United States. The English version requires a confirmation to that extent, to the persons in possession of the *land;* the Spanish version requires a confirmation to the same extent, to the persons in possession of the *grants.* By considering the term *grants*, as signifying the land granted, as it was most certainly considered by the negotiators of the treaty, as shown by their correspondence, then the English and Spanish versions of the treaty will correspond with each other, and impose the same obligation on the government of the United States. Both will require the confirmation of grants made by his Catholic Majesty or his lawful authorities, to the same extent that they would have been valid under the former government. If, however, we construe the "possession of the grants" to be the mere possession or custody of the *title-papers*, as contended, then the grants must be confirmed to a greater extent than they would have been valid under the former government. The treaty, in requiring the performance of conditions, evidently contemplates the conditions prescribed by the laws of Spain, and the performance of which must have been precedent to an estate in land. Those conditions were not, as we have shown, the possession of the grants, unless we understand by that term the possession of the land granted. It was not one of the conditions, that the claimant should be in possession of the title-papers, but that he should be in the actual occupancy and cultivation of the land. In common speech, the term *grant* is a figurative expression, from which, in one sense, we understand the land granted; nothing is more common, and nothing better understood; and the sense in which it is intended to be regarded, is to be sought in the expressions with which it is associated. On this subject, Vattel, at p. 315, § 278, remarks, "there are figurative expressions, become so familiar in the common use of language, that *they take place, on a thousand occasions, of the proper terms, so that we ought to take them in [*720 a figurative sense, without paying any attention to the orignal, proper and more direct signification. The subject of the discourse sufficiently indicates the sense that should be given to them." According to this rule of interpretation, the possession of the *grant* in the Spanish version of the eighth article of the treaty can, without "violence," be construed to agree and correspond with the possession of the land granted, as expressed in the English version of the same article. "The subject of discourse," as expressed in that article, in both languages, shows this to have been the sense in which it was understood. The condition required to be performed by both, was habitation and cultivaiion. Actual possession of the land was an essential pre-requisite to habitation and cultivaiton. If we dispense with the first, we cannot require the second, although it constitutes the entire condition required by the language of both the contracting parties, and without the performance of which, both declare the grant to be null and void. If we reject this interpretation, then we depart from all the well-established rules of construction, we do not arrive at the intention and understanding of the parties, from what they have said on the subject; but we take one isolated expression of one of the parties, and give it a meaning by which the whole

force and character of the contract were perverted. If we construe the term, "possession of the grant," in the translation from the Spanish version of the 8th article, to mean the possession of the title-papers, then that term not only defeats the stipulation of the English version, which requires the possession of the land, but it destroys the spirit and letter of the residue of the article, in the language in which it is written.

The interpretation for which we contend, restores harmony and correspondence between the Spanish and English versions of the 8th article of the treaty, and agrees with the letter and spirit of both. We believe it will be adopted by the court, and that in all cases in which the crown of Spain had not been divested of the fee, by a grant in fee-simple, made by his Catholic Majesty or his lawful authority, the first inquiry will be, was the party in possession of the land, at the time contemplated by the treaty; and secondly, has he performed all the conditions required by the treaty and the laws of Spain? if he has, his title must be confirmed, if not, it must be rejected.

When the party had acquired a perfect title, after the performance of all the conditions expressed or implied, the laws of Spain did not require him to remain in possession. The land was his in full property, and he could do with it as he thought proper. The treaty requires no more than was required by the laws of Spain, and the United States require no more than is required by the treaty. The law and the treaty are the tests by which the rights of the United States, and the rights of her adopted citizens are to be determined. The court will administer the law, and the law will dispense justice. But if the fixed and stable principles of the law are to yield to the vague and uncertain presumption drawn from the exercise of power unknown to the law; if we are to presume the law to which we have *referred the court, repealed, because the act of the office is contrary to the law; if we are to presume the existence of other laws, in order to sustain the exercise of the granting power; then the law may not be administered, and justice may not be done. If the law, as known and understood, commands one thing, and another be done, apparently contrary to law, we ask, whether the natural presumption, arising from such premises, be not in favor of the supremacy of the law, and against the validity of the act? If it be, as we believe it is, we respectfully submit to the court, whether both the presumption and the law be not opposed to the claim of each of the present petitioners. We further most respectfully ask of the court, whether the royal order of 1790, which constituted the only authority, and under which all grants professed to have been made, except those for military services, and which authorized "grants of land to be made in proportion to the working hands each family may have," will authorize a grant for fifteen, twenty, and twenty-six thousand acres of land, when the petitioners, by their own showing, prove that the grants were not made "in proportion to the working hands they had." And we ask, whether any other authority, save the apparently illegal act of the officer making the grant, has been produced in favor of the claims presented, and professing to have been made under this royal order?

*721]

We make the same inquiry with regard to the claims presented for military services, all of which expressly profess to have been made under the royal order of the 29th of March 1815, which appears to have been the only authority delegated by the king for that purpose, and we ask, whether the provisions of this order, which effectually limits the exercise of the granting power in favor of the soldiers of the three companies of white militia, of the city of St. Augustine, and the married officers and soldiers of the third battalion of Cuba, can be extended so as to include persons who, by their own showing, prove, beyond the existence of doubt, that they were not soldiers, or married officers, of either of those corps? And we ask, whether the royal order, providing in express terms for a grant of only "a certain quantity of land, as established by regulation in this province, agreeably to the number of persons composing each family," can be so construed, as to confer authority on the governor of the province to grant 25,000 acres of land to one not embraced in this royal order, and who shows that he did not receive the grant agreeable to the number of persons composing his family, and according to the quantity established by regulations in

this province? The regulation referred to is found at p. 1001 of the Land Laws, and authorizes a grant of fifty acres of land to each head of a family, and twenty-five acres for each child or slave above the age of sixteen years, and fifteen acres for each child or slave between the age of eight and sixteen years. To have authorized a grant of land for 25,000 acres, under the royal order of 1790 and 1815, the family of the grantee must have consisted of 998 persons above the age of sixteen years. This extraordinary possession is a fact, in the absence of all proof, which cannot be presumed, to sustain the *granting power, which appears, independently of this, to have [*722
been illegally exercised. The royal order of 1815 proves, that the regulation of the province to which it refers, was in force, and must have continued in force, so long as the royal order by which it was adopted, for it became, and by adoption constituted an essential part of that order. The grants themselves, by referring to this royal order, as the source of power under which they were made, prove that it was in force at their respective dates, and that the governor who made the grant, considered that he had neither power nor discretion beyond that conferred by this order, to make a grant for military services. This proves, most conclusively, that no other law, ordinance or royal order could have been in force at the same time, inconsistent with the provisions of the royal order of 1815. The same remarks are applicable to the royal order of 1790, and the same results ensue. The court will find, on examination, that each of the grants refer to one or the other of these royal orders, as constituting the power of the governor to make the grant. His express reliance on this source of power, repels the presumption that these orders were repealed, or that there were other grants of power which he might legitimately have exercised. We have, then, the evidence of Governor Coppinger himself, to prove, that these royal orders were in force; that in making the grants, he acted under them; and if, according to the ordinary rules of construction, these royal orders do not sustain the authority of the governor in making the grant; then it must follow, that they were made without authority, and are, therefore, void.

In the case of Soulard and others, the court observed, it was important, in order to make a satisfactory decision of the case, that the power of the officer to make the grant, should be produced. That case has been postponed three years, for the production of this authority. The cases now under consideration have been pressed on the court by the learned counsel of the petitioners, and a decision required. If, after the unremitted researches of ten years, with all the facilities and assistance given by the government, they have been unable to find the least authority for making grants of this magnitude, and they still persist in having a decision, it would seem that the decision should be against the validity of the grants.

The time when made, no less than the quantity of the land embraced in the grant, and the persons to whom they were made, all concur in creating a presumption of fraud, designed against this government. They were made in anticipation of the transfer of the province to the United States. They were made about the same time with those of the Duke of Alagon and others, which Don Onis admits were fraudulent and a disgrace to his country. When we have detected the fraudulent design of the monarch himself, in exercising the granting power; when we have compelled him to revoke the grants which he had fraudulently made; can we give greater faith and credit to the acts of his subordinate officers than we give to his, and greater than we are required, by the treaty, to give to the requisitions of the laws and ordinances of Spain? The court will find, on examination, that Don Onis was commissioned *by the king to negotiate with the American government, in September 1816. [*723
And it will find, by an examination of the transcript from the archives of East Florida, that there was near ten times the quantity of land granted, in the year 1817, and from that time until the year 1821, that had been granted, previously, during the whole period of the occupation of that province by Spain, commencing in the year 1783.

The position taken by the learned counsel, in the several cases now before the court, is worthy of remark. He says, "the grantees whose names are herein stated,

and whose cases are now before the court, did not belong to either of the corps mentioned; and in referring to that article, as one of the motives for giving the grants, only intended to indicate the royal sanction to gifts of lands to soldiers for their fidelity in the recent insurrection. It does not say, that his majesty forbids his governors to grant to any other portion of his loyal and faithful subjects; it does not limit the quantity, nor indicate the loyal will that no larger quantity shall be given to those who suffered losses, advanced money, or rendered distinguished services. The recital, therefore, in these grants, that, "whereas, his majesty has been pleased to grant the favors and gratifications proposed by Governor Kindelan to certain officers and soldiers, in land," does not change that pre-existing power under the laws of Spain, nor confine it to that class of subjects alone. It will not be denied, that those embraced by the royal order, are restricted by its provisions, and that they are entitled to no more land than the order authorizes to be granted to them.

Now, if the learned counsel is correct in his conclusions, what an unparalleled instance of injustice and inconsistency is presented by the royal order of 1815! The claimants under the provisions of that order are admitted not to be embraced by the same, and it is, therefore, contended, that they are not restricted to the quantity which the order authorizes to be granted for military services. It is further argued, that the governor had unlimited power, before the date of the order, although no such power has been shown, and yet he has requested grants to be made to the gallant officers and soldiers who served in a protracted and harassing siege, for a few acres of land only, when, without the order, he might, in his own discretion, have rewarded each according to his merit, by giving him such quantity of land as he thought proper. The natural conclusion resulting from these erroneous premises, is, that in consequence of the fidelity, gallantry and patriotism of those who rendered important services during the siege, the governor made a suggestion by which his power to reward them was restricted; and that they are, therefore, entitled to a less reward than others who rendered less important services. This proposition, we think, involves an absolute absurdity, and cannot be sustained by the court. It is evident, there was no power vested in the governor, before the date of the royal order of 1815, to grant lands for military services. If that unlimited power existed before, why should it have been restricted? Why should the soldiers of the three companies of militia of the city of St. Augustine, and *the married officers and soldiers of the third battalion of Cuba, by royal order, be denied the same reward, which, it is contended, the governor had power, both before and after the order, to bestow on others; particularly, when the order professes to grant a reward for their fidelity, and not to deprive them of a bounty, which, before the date of the order, they might have received under the power of the governor?

*724]

*II.

Wheaton *v.* Peters.

Circuit Court. In Equity.

OPINION OF JUDGE HOPKINSON.

It is not necessary, at this time, to set forth all the details contained in the bill of complaint. It is sufficient, for the present purpose, to say, that the complainants claim to have a copyright, under the statutes of the United States, or by the common law thereof, in and to the twelve books or volumes of the reports of cases argued and adjudged in the supreme court of the United States, commonly known as Wheaton's Reports; and they charge, that the defendants have violated their rights, by printing and publishing a certain book or books, entitled "Condensed Reports of Cases in the Supreme Court of the United States;" in consideration whereof, the complainants pray, among other things, that the defendants may be restrained from the further threatening to print and publish, and from the further printing, publishing, and selling, or exposing to sale the said Condensed Reports; that they may be decreed to account and pay to the complainants what shall be found coming to them; and generally for further relief, &c.

The defendant, R. Peters, denies that the book called Condensed Reports is any violation of the complainants' rights; he further denies, that the Condensed Reports contain anything that is the exclusive property of the complainants, or which, being also in Wheaton's Reports, is susceptible of being made the subject of literary property. He further avers, that by an act of congress, passed on the 31st of May 1790, it is enacted, that no person shall be entitled to the benefit thereof, unless he shall deposit a printed copy of the title of his book in the clerk's office of the district where he shall reside; shall publish it in one or more newspapers for four weeks; and shall, within six months after the publishing thereof, deliver or cause to be delivered to the secretary of state, a copy of the *same, to be preserved in his office. He [*726
calls for proof from the complainants that these requisites of the act have been complied with.

In the bill, as well as the answers, many circumstances are set forth which it is not necessary to repeat. Connecting the pleadings with the argument of the case, it may be generally stated, that the complainants claim a copyright in the twelve volumes of Wheaton's Reports, under the statutes of the United States and at common law. The defendants deny that their book is a violation of the complainants' rights, if they have any, in Wheaton's Reports. They further deny, that they have any such right, because they have not performed the requisites of the acts of congress of the United States on the subject of copyrights; because there is no common-law copyright in the United States; and because Wheaton's Reports is not a work entitled to the benefit of copyright, either by the statute or by the common law.

I shall first consider the complainant's right, under a statute of the United States. The deficiency in their title most relied upon is, that they did not, according to the requisition of the fourth section of the act of 1790, deliver or cause to be delivered to the secretary of state, a copy of their book, to be preserved in his office; other omissions as to some of the volumes are also alleged. The question is, whether this injunction or direction to an author of a work seeking to obtain a copyright for it, is an essential part of his title, so that he cannot claim the benefit of the act, unless he has complied with it? This is not a new question in this court. It arose in the case of Ewer *v.* Coxe, decided in 1824, on the construction of the third section of the law of 1790, which stands, in this respect, on the same footing with the fourth section of the same act, now under consideration. In that case, the fact was admitted by the

plaintiff, that a copy of the record of the title of his work had not been published as the acts of congress required, but insisted, that it was not necessary, to vest a copyright in the proprietor of the work. In that case, therefore, the mere question of law was presented to the court, on the construction of the acts of congress.

In the case now before the court, the fact, as well as the law, has been a subject of controversy between the parties; and the complainants have endeavored to show by evidence, that they have complied with the terms and directions of the section of law in question. This question of fact must be first disposed of. Have the complainants made satisfactory proof that they did, within six months of the publication of their work, deliver or cause to be delivered, a copy thereof, to the secretary of state, to be preserved in his office? No official certificate, no record of any such delivery has been produced, nor could such record be required, as we cannot say that any such record was kept, and the act of congress does not require it. The fact of delivery is open for proof by any legal and satisfactory testimony. With a view to establish it, the complainants have produced two witnesses, Mr. H. C. Carey, examined at the bar of this court, and Daniel Brent, Esq., whose disposition was taken at the city of Washington. In substance, Mr. Carey has testified, that, in 1816, the first volume of Wheaton's Reports was published by his father, who then did business alone; the witness then did his *father's business as his clerk; in 1821, he became a partner with him. When he did his business as his clerk, he, the witness, was conversant with his business as to copyrights; says they were in the constant habit of advertising, but not of keeping a copy or record of the advertisements, until within the last ten years; he says, the next step towards securing a copyright was to deposit a copy in the office at Washington. "We were always accustomed to do it, but never deemed it necessary to have a certificate from Washington, because we had never seen one. We supposed, a record was kept at the office, of the deposit of books, and could always be furnished, if necessary. The earliest certificate we have, is dated in 1820. I don't doubt, that a copy was deposited, although we have no evidence of it." On his cross-examination, he says, that he has no recollection at all of a deposit of a copy of this work in the office of the secretary of state; that nine-tenths of the books they have deposited were put in the post-office, addressed to the department of state; does not pretend to recollect, that this was the course in 1816. He cannot positively say, that with regard to all publications made by them, a copy was sent to the department of state. Does not know whether there was or was not a record kept in the department; has never inquired there, nor had any occasion to make the inquiry. He adds, that it was always their intention to send a copy of all works to the department of state, whose titles were recorded in the clerk's office, but he won't pretend to say, that it was always done.

*727]

In regard to the books in question, there is no direct proof of the delivery of any one of them to the secretary of state; there is no circumstantial proof of it—there is no proof of such an uniform custom of the trade in general, or of Mr. Carey's business in particular, from which we can infer it, with that degree of certainty which constitutes proof in a court of justice. As to the books in question, Mr. Carey has no knowledge; he pretends to none. He has no more proved, or even conjectured, the delivery of Wheaton's Reports, in the manner and for the purposes prescribed by the act, nor in any manner, or for any purposes, than he has proved the same thing for all the many hundred works, in mass, published by him in the same period of more than ten years. But he does show us, that the most satisfactory proof was in his power, and in the power of the complainants, and could be had simply by asking for. He got a certificate of the delivery of a work for copyright, as early as 1820, seven years before the conclusion of Wheaton's Reports. He further says, that until Mr. Clay came into the office, there was no order in it as to sending certificates. This was in 1825; after which, we are to presume, that order did exist in the office on this subject; but no certificates are shown for the volumes of Wheaton's Reports published after this period. We may advert here to the certificates produced by the defendants, some of them of a very high number, upwards of one thousand; from which we

may infer, that these certificates were not unknown or unusual, when the copy was actually delivered to the secretary of state.

The complainants ask what evidence they are to produce of this fact? If the law makes the delivery of the volume to the secretary a requisite, *a necessary part [*728
of a plaintiff's title, he must prove it by legal and satisfactory evidence, when he founds a claim on this title in a court of justice. In this case, however, nothing is required of him, that is impossible, unreasonable or difficult; nothing but what has been done by others, at least, in a thousand cases, and by Mr. Carey himself, in many. He has obtained and produced evidence of the same nature as to the delivery of eighty copies under another law; he might have had the same evidence of the delivery of the one copy under the copyright law. If he chose to rely on transitory and uncertain testimony, it was at his peril. He got the certificate in the one case, to obtain his salary; he should have gotten it in the other, to secure his copyright.

The deposition of Mr. Brent serves the complainants no better in this part of their case. He proves the regular deposit of the eighty copies, under the direction of the reporter's law; but says, that there does not appear any evidence that the successive volumes of said reports, or copies of them, were deposited in the department of state, by the maker or publisher of the same, agreeable to the provisions of the laws of congress for securing copyrights to authors, &c., though the memorandum of similar deposits was kept in the patent-office, a branch of the department of state, and not at the department. The deponent believes that, for several of the first years, the memorandum and giving receipts were often neglected, during the period referred to. So far as a negative may be proved, I should conclude from this testimony, that no copy ever was delivered in conformity with the provisions of the act of 1790; no evidence of it appears in the department, either by record, or by finding the book there, or of any other kind, although the memorandum of similar deposits was kept in the patent-office, a branch of the department of state. I will add, on this subject, that as the law makes it the duty of the secretary of state to preserve the copy delivered to him in his office, we are bound to presume, in the absence of contradictory evidence, that he did perform his duty, and that the mere circumstance that the book is not found there, is *primâ facie* evidence that it was never delivered there.

This view of the evidence brings us to the conclusion, that the complainants have failed to prove, that within six months, or indeed, at any time, they did deliver to the secretary of state, a copy or copies of the work in which they claim a copyright, according to the provisions of the fourth section of the act of 1790, and it must now be taken, that they did not so deliver a copy. I will here notice an argument which has been pressed on the court with great ingenuity and force. It is, that after so long an enjoyment of the right, after so long a possession undisturbed, it should be presumed, that everything was done which was necessary to be done, to make it perfect; and that the evidence may have been lost by the lapse and accidents of time. Any presumption of this sort is much weakened by the negative testimony of Mr. Brent; it is also weakened, if not destroyed, by another circumstance. If the deficiency existed only in the earlier volumes of the work, which were published fourteen, fifteen and sixteen years ago, the argument might receive *some favor, although the [*729
lapse of time is not very considerable; but we find the same defect in relation to the last, as the first volumes of this work; the same in 1827, as in 1816, which gives rise to another presumption, that the same course was pursued as to all of them, and a copy of none delivered, according to the fourth section of the act. However the possession may have aided the complainants, in their application for an interlocutory decree of injunction, until hearing, the parties now stand on their legal rights.

This view of the evidence brings us to a much more important and difficult question, that is, to the very question decided in the case of Ewer *v.* Coxe, and if that decision was right, it must prevail now. The counsel on both sides have accordingly directed their most strenuous efforts, on the one side to sustain, on the other to overthrow, the authority of that decision. In that case, the plaintiff claimed a copyright in a certain book, under the acts of congress of 1790 and 1802 for securing copyrights

to authors, &c. The third section of the act of 1790 enacts, that no person shall be entitled to the benefit of the act, unless he shall, before publication, deposit a printed copy of the title of his book in the clerk's office of the district court; the section, after giving the form of the record to be made in the office, proceeds, "and such author or proprietor shall, within two months from the date thereof, cause a copy of the said record to be published in one or more newspapers printed in the United States, for the space of four weeks." The plaintiff admitted, that he had not thus published a copy of the record of the title of his book; and the question was, whether it was a matter essential to this title—whether he could have a copyright without it? The question in the present case arises on the fourth section of the same act, but the principle of decision is the same in both cases.

In deciding the case of Ewer *v.* Coxe, the learned judge thought it material to settle whether the requisitions of the third and fourth sections of the act are merely directory, or whether their performance is essential to the vesting of a title to the copyright secured by the law; he recites the several sections of the act, and reasons upon them severally. He says, "it is perfectly clear, from the language of the second section, that the proprietor can acquire no title to the copyright, for the term of the first fourteen years, unless he shall deposit in the clerk's office a printed copy of the title of the book; for the section declares, that he shall not be entitled to the benefit of this act, *unless* he shall make such deposit." The judge, therefore, considers this to be a condition of the grant of the right; but he thinks that this condition cannot, "upon any grammatical construction, be extended to the requisition (he cannot avoid calling it a requisition) contained in the last sentence of the section, to publish a copy of the record, within the time and for the period prescribed." From this reasoning, the judge concludes, that if the title of an author to a copyright depended altogether upon this act, he should be of opinion, that it would be complete, provided he had deposited a printed copy of the title of the book in the clerk's office, as directed by the second section; and that the *publication of a copy of the same would only be necessary to enable him to sue for the forfeitures created by the second section. The judge then passes to the act of April 1802, which is a supplement to the former act, and declares, that every author or proprietor of a book who shall thereafter seek to obtain a copyright for the same, before he shall be entitled to the benefit of the act to which this is a supplement, shall, in addition to the requisites enjoined in the third and fourth sections of the said act, give information, by causing a copy of the record, which by the said act he is required to publish, to be inserted at full length in the title page, or in the page immediately following the title. As to this additional requisite, the judge remarks, that it is obvious, the proprietor can acquire no title to the copyright, unless it is complied with. He then reasons, that as this new requisite is an addition to those prescribed by the third and fourth sections of the act of 1790, he must perform the whole, before he can be entitled to the benefit of the act. This reasoning appears to be logical enough, and, as we shall see, the objection to it is, that it is not legal—it is not technical. The judge says, that the act—that is, the act of 1802 (which we must observe)—will admit of no other construction; and that the meaning could not have been more clear and intelligible, if the act, that is, the supplement, had declared, "that the proprietor, before he should be entitled to the benefit of the act of 1790, should cause a copy of the record of the title to be published; and shall deliver a copy of the book to the secretary of state, as directed by the third and fourth sections of that act; and shall also cause a copy of the said record to be inserted in the title page, &c." The judge proceeds, "that this was the intention of the legislature, is strongly illustrated by the second section of this act," &c. Of what act? what intention? Certainly, the intention of the act of 1802, not of the act of 1790. The whole of the judge's reasoning is on the act of 1802, and its meaning, and not the act of 1790. If this be so, the objection made to his opinion entirely fails in point of fact. The objection is, that he was not authorized to give a construction to the first act of congress, by the enactment of the second; that the legislature cannot give constructions to their own laws; that if, in a second

*730]

act, the legislature has supposed the first had a meaning which, in truth, it has not this opinion of the legislature could not give such meaning to the first. To sustain this objection, a single sentence in the case of the Postmaster-General *v.* Early, 12 Wheat. 148, has been relied on: the chief justice there says, "it is true, that the language of the section indicates an opinion that the jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning a law does not make law." There is nothing but what is perfectly reasonable and familiar in this principle, and we can hardly suppose that it was unknown to, or disregarded by, Judge WASHINGTON, in the case of Ewer *v.* Coxe. When he assented to it in the supreme court, he never imagined that he had overlooked or violated it on his circuit. Did he, in Ewer *v.* Coxe, adjudge, that the publishing of the record of the title was essential to the right, under and by the act of 1790, because congress, in 1802, had indicated *that such was their opinion of its meaning? [*731
Did he adopt their meaning of the provisions of that act, and surrender his own? By no means. He says not a word about the meaning or construction of the first act, nor what congress had thought or indicated about it; he leaves it with the construction he had just before given to it. His opinion proceeds on his construction of the law of 1802, and of what was enacted by that law; he thinks that this law, not the law of 1790, makes the requisites of the third and fourth sections of the act of 1790 conditional and indispensable to the copyright; he finds that these requisites, by the law of 1802, are connected to, and put upon the same footing with a newly-created requisite, which is clearly essential to the right, and then and therefore says, the whole must be performed, before the author shall be entitled to the benefit of that act. But why must the whole be performed? Is it by virtue of a construction different from his own, which he puts upon the first act, in deference to the indication of the opinion of the legislature? Not at all. He says, that it seems to him, that the act, that is, the supplemental act, will admit of no other construction. That the meaning would not be more clear, if the act, still the supplemental act, had declared, &c.; that is, had re-enacted the third and fourth sections of the original act, giving them the same force, effect and character which is given to the new and additional requisite, of which it is expressly declared, that it must be performed by the proprietor, "before he can be entitled to the benefit of the act of 1790." In the whole argument of the judge, he confines himself strictly to the meaning and construction of the act of 1802, looking only to its own provisions and language for that meaning. He asserts, that the intention of the legislature in passing the second act, was, to re-enact the third and fourth sections of the first, with the additional force given to the additional requisite, which he illustrates, by a reference to the second section of the supplement. His reasoning on this subject is quite satisfactory to my mind, and does not interfere with the opinion of the supreme court in the case of the Postmaster-General *v.* Early.

In this endeavor to show that Judge WASHINGTON has grounded his judgment in Ewer *v.* Coxe entirely on his construction of the law of 1802, I would not be understood to indicate an opinion, that he would not have been perfectly correct, if he had taken both acts together in forming his opinion of either. They are both on the same subject; the latter is a declared supplement to the former. We may consider them, to many purposes, as one act, and look to the whole, in judging of the intention of any part; and in doing this, we should not fall under the interdiction of the principle, that "a mistaken opinion of the legislature concerning a law, does not make the law."

This being my understanding of the opinion of Judge WASHINGTON, I might rest upon it for my judgment on this part of the case, until it is overruled by a higher authority; but it is proper, at least, it is not a work of supererogation, to proceed one step farther on this subject. If Judge WASHINGTON was mistaken in his construction of the act of 1802, and I am so in following him, how would the case stand on the law of 1790? *May not the judge have been too strict in his grammatical construction of the provisions of that act? [*732

When a statute creates a right, confers a benefit, a privilege on any individual, and

at the same time, although not grammatically connected, by being in the same sentence or clause, enjoins upon him to do certain things in relation to the right or privilege granted, can we separate them, unless they are expressly or clearly separated by the donor? May we sustain the one, and suppress the other? Shall we do this, by mere use of phrases? Is it enough, to say, that the first is a grant, and the other directory, and therefore, they are independent of each other? Because it is true, that such cases may occur; that a statute may be so worded, that we may clearly see, that something is directed to be done, which may be well separated from other enactments or provisions in the law, shall we, therefore, be allowed to get up a rule of construction for every case of a direction in a statute, and make a severance between a grant and everything directed to be done in relation to it, but not grammatically joined to it, merely by saying it is directory? May the favored individual take the benefit and neglect the duty? May he claim the grant as a vested right, and refuse to do that which the donor, in the same instrument, enjoins upon him to do? To distinguish between an immaterial disjoined direction in a statute, and one which is truly not so, we should look not so much to their positions in the statute, to a strict grammatical construction, for Lord HARDWICKE, in 2 Atk. 95, disclaims it—but to the whole scope and design of the legislature, as manifested by all the provisions of the statute. If the several parts form one whole, create a system, are members of one plan and design, they should all be taken together, to be of equal importance, to be dependent one on the other, to co-exist as one body or being. The duty imposed on the grantee is as imperative, is as much a part of the creation, as the grant to which it relates; it is a modification, a limitation, a regulation of the grant, by and according to which only it can be claimed or enjoyed. The public, the citizens of a community, acting by their representatives, confer upon an author certain privileges or rights for his exclusive benefit, and to protect him in the enjoyment of them, they impose certain penalties, or give certain remedies against any person who shall violate these rights. But some protection is also due on the other side, that innocent and ignorant invaders of the privilege may not be involved in suits and penalties, by the want of accessible means of information of the subject and extent of the grant. With this wise and just object in their view, the legislature, at the same time, and in the same instrument by which they confer the privilege, enjoin or direct the person who would enjoy it, to do certain things on his part, and among others, to deliver a copy of his work to the secretary of state, to be preserved in his office, that all may know where to go to be correctly and precisely informed of what it is he claims, what is his right, and that thus they may avoid any infringement of it. This is an essential part of the scheme for the encouragement of authors, so as not to bring others innocently into trouble, or, it may be, ruin. If this be so, shall we defeat or change the whole design, because the different parts of it
*733] are not grammatically *connected in one clause or sentence or section; or by calling one part of it a grant, and the other directory? Could it have been intended, that the author should take and enjoy the benefit, and omit to do on his part what he is clearly and expressly enjoined to do, and this because it is called directory, and does not stand in this or that part of a section? Judge WASHINGTON thinks, that to deposit a printed copy of the title of the book in the clerk's office is essential to the right, because it is grammatically connected with the words, "that no person shall be entitled to the benefit of this act unless," &c. In a subsequent part of the same section, it is declared, that the author shall cause a copy of the record to be published; and the next section enacts, that he shall deliver a copy of his book to the secretary of state. The first requisite the judge thinks essential, for the reason given; and the last two not to be so, but to have reference only to the remedy, by reason of a grammatical construction of the clauses, and their disconnection, by position, from the condition expressed in the preceding part of the section. I would rather look at the subject-matter of all the clauses, and their connection with each other as component portions of one object or design. In this point of view, the publication in the newspapers, and the delivery of a copy of the book to the secretary of state are, at least, as important, and more exact and diffusive in their information to the public, as the deposit of a

printed copy of the title in the clerk's office. In answer to the obvious reason and justice of this view of the law, it is said, that these provisions or requisites are but directory. How did this term get the restricted interpretation which seems to be fastened on it? How came the enactment of a statute to be thought less obligatory, because it is directory, or directs something to be done? Blackstone says, "the directory part of a statute is that whereby the subject is instructed and enjoined to observe." &c. In the case of the Postmaster-General *v.* Early, the chief justice refers not merely to the several parts of the same statute, in construing a provision in it, but to the whole course of legislation on the subject, and he says, he would avoid a construction which is opposite to the whole spirit of that legislation. He does not confine himself to sections or to single acts, but takes the whole of what the legislature have done on the subject, to come at the meaning. The rule I would adopt in expounding the act of 1790, is the same that is taken by the court of king's bench in the case of the University of Cambridge *v.* Bryer. Lord ELLENBOROUGH says, "I think the sound rule of construing any statute, as indeed it is of construing any instrument, whether it be a statute, will or deed, is to look into the body of the thing to be construed, and to collect, so far as may be done, what is the intrinsic meaning of the thing." I would observe, in relation to the case of Ewer *v.* Coxe, that Lord ELLENBOROUGH admits that he would be obliged, by subsequent statutes, to put a perverse, and, what he should consider, an unnatural interpretation on the statute as originally passed; but he would endeavor to maintain the integrity of the original text, unvitiated by subsequent misconstructions. LE BLANC says, "that construction may be materially aided and explained by the language of other statutes." He does not agree with Lord ELLENBOROUGH that he would follow a legislative *misconstruction of a statute. For myself, I would deny that a legislature has a right to impose upon a court their [*734
construction of their statutes previously passed; it is for the court to construe the law; but it is, nevertheless, the right and duty of a judge to look into all the statutes made upon the same subject, to discover what was the intention and meaning of any of their provisions, thus to ascertain the true meaning and construction, by his own judgment, and not by any subsequent legislative declaration of intention or construction.

In the statute of 8 Ann., c. 19, the requisition of a registry with the Stationers' Company is what is called directory, and is contained in a different section from that which confers the right; but the lord chancellor, in 2 Atk. 95, thought it was, nevertheless, essential to the right. The object of the registry, as declared by the statute, was to give such notice and information of the right, as to prevent an infringement of it through ignorance; but the connection of this direction with the forfeitures is direct and explicit, which it is not in our act of 1790. I am aware, that the king's bench, in Beckford *v.* Hood, 7 T. R. 620, held a different opinion as to the necessity of the registry. They consider it not to be essential to the right, but as only affecting the remedy, or forfeitures given by the statute. This seems to me to place the court and the parties in that suit in a singular predicament. The right claimed was under the statute, and not at common law, and since the passing of the statute, could not be claimed according to the common law. But the party who had the right given by the statute, had lost the remedy. He is, therefore, sent for this back to the common law. The statute, therefore, which has confessedly modified, restrained, limited the common-law right, has, nevertheless, left his common-law remedy as it was before, entirely unimpaired, unaffected by the statute. He comes, therefore, into court with the statute in one hand and the common law in the other, having a perfect right under neither; that is, his common-law right is curtailed by the statute, and his statute remedy is taken away by the common-law construction of the statute. These are technical refinements which would occur only to learned ingenuity. The author has forfeited his claim to the remedies of the statute by virtue of which he claims the right, by virtue of which he makes out that he has been wronged, because he has not obeyed the injunctions of the statute by which both the right and the remedy are given; but still he is allowed to retain the right, and enforce it in another way,

notwithstanding such a disobedience of the injunctions of the statute as have forfeited its remedies. I agree, that all this, be it incongruous or not, may be done by the legislature, if they choose, but I do not see why judges have so labored their wits to come to such a result, by forced constructions, doubtful implications and tortuous reasoning. Would it not be more consonant with reason and convenience, to send the party to his common-law right, if he wishes a common-law remedy, and to enforce his statute rights only by the means provided for it by the statute; and not permit
*735] him by this curious machinery to take all that is granted to him by the statute, and disregard all that is required of him by the same statute. It is agreed, *that his common-law right, if he had any, is cut down by the statute but yet there is no limit to its remedies; he may recover under all and any circumstances, whatever he may persuade a jury has been his damages by the violation he complains of; thus depriving the citizens of that part of the statute which was enacted for their benefit and protection.

Can we believe, that such distinctions, introduced by the ingenious learing of judges, sometimes prone to be law-makers, sometimes desirous of favoring some strong case of conscience, ever occurred to the legislature who made these statutes? Did they suppose, that parts of their enactments, when they had not said so, were to be strictly carried into effect, and other parts were to be called directory, and therefore, to be obeyed or not, at the option of the party enjoined to perform them? When they declared, that an author shall have a certain right, they also declared that he shall do certain things, which are explicitly described. Did they suppose, he might take the one and reject the other; that the only consequence of his disobedience would be to deprive him of the remedy provided for him by the statute, and leave him one which perhaps he likes better? Did they not believe, that when he took the grant, he bound himself to do all that was enjoined upon him by the same authority and the same instrument that created the grant? unless they were clearly separated and made independent of each other by the unequivocal language of that instrument. I have been tedious on this subject, but as I have ventured in this part of the case, I mean the construction of the act of 1790, to differ with the learned, careful and excellent judge whose opinion in Ewer *v.* Coxe, has been so frequently referred to, as well as from the judgment of a majority of the judges of the supreme court of errors in the case of Nichols *v.* Ruggles, 3 Day 145, I have thought myself bound to explain my reasons as I have done. As to Judge WASHINGTON, I would observe, that having made up his opinion on the act of 1802, he may not have bent the force of his mind to that of 1790, or have come to a certain conclusion how he would have considered the case if it had stood on that act alone. The case of Nichols *v.* Ruggles was very fully argued by the counsel; but the opinion of the court appears to have been given *instanter;* no argument or reasons accompany it; and in one particular, to wit, that "the copy to be delivered to the secretary of the state appears to be designed for public purposes, and to have no connection with the copyright," it seems to me, that the court are clearly mistaken. This will be a subject of remark hereafter.

The complainants have contended, with great earnestness and plausibility, that if there has not been a literal compliance with the requisitions of the fourth section of the act, they have been substantially performed, for all the beneficial purposes intended by their enactment. In support of this position, that part of the deposition of Mr. Brent is relied on, in which he has testified, that eighty copies of each of the volumes of Wheaton's Reports, beginning with February term, 1817, were delivered to the department of state; he further testifies, that all of the said eighty volumes were
*736] received under the act of congress giving a salary to the reporter for preparing and furnishing the said reports. He further says, that *according to his recollection, there has always been one or more complete sets of said reports, from the time or their publication, in the said department of state. The argument assumes, that the object of the act of 1790, in directing one copy of a book to be delivered to the secretary of state, is the same with that of the reporter's act of 1817, in directing eighty copies of the reports to be delivered there, one of which is for the secretary of

state, and that that object was to form a library for the government, just as the statute of Anne imposes it on authors to present copies of their works to the universities; and that if this object is accomplished, it matters not whether it is done under and according to the fourth section of the law of 1790, or to the directions of the act of 1817. This construction of these laws has many difficulties to overcome. In the first place, it would not be a little singular, that two acts of congress should direct the same thing to be done, for the same purpose; and as both acts are unquestionably in force, the consequence would be, that it is the duty of the author or proprietor of those reports to deliver two copies of each volume, for the supposed library, one under each act, and his delinquency will not be relieved by the argument. But, in truth, the differences in the provisions and objects in these acts are manifest on the first inspection. The act of 1817 has nothing to do with the copyright, either of books in general, or of the particular works mentioned in it; nor has the provision of the fourth section of the act of 1790 any reference to a public library. The law of 1817 was passed for a special work and a special object, "to provide for the reports of the decisions of the supreme court." It gives to the reporter an annual compensation for his services of one thousand dollars, and one of the conditions of this grant is, that he shall deliver to the secretary of state eighty copies of the decisions, to be distributed in the manner, and to the public officers, designated by the act. One of these copies is to be given "to the secretary of state," and "the residue of the said copies shall be deposited in and become part of the library of congress." When a library is intended, it it thus expressly mentioned, and the library is not for the government or the department of state, but the library of congress, an establishment or institution well known to have no connection with the department, and to be kept in the capitol, at the distance of more than a mile from the office of the department of state.

The reporter is bound to deliver these eighty copies, not in consideration of his copyright, as in England, where it is so much complained of, but in consideration of the salary paid to him by the United States. It is a purchase of his books. It has no connection with his copyright; he must deliver them, whether he has a copyright or no. As to the object or purposes of these deliveries of a copy to the secretary, under the respective acts; the one copy out of the eighty to be given to the secretary of state, is for his personal use and accommodation, as the copies are that are to be distributed to the other secretaries, to the judges and other officers named in the act. He may take and use it, where he finds it most convenient, and not in his office exclusively, being bound only to transmit it to his successor, who will hold it as he had done. Again, *the reporter is not bound to see that the secretary, or any other [*737
of the officers named, gets the copy designed for him. He sends the whole to the department of state, and the due and proper distribution of them must be there attended to. Very different in all respects are the provisions of the copyright law. By them, it is incumbent on the author or proprietor of the book to deliver one copy to the person designated to receive it, to wit, the secretary of state. The copy so delivered is to be preserved in the office; not as a gift to him, nor for his use, nor to be at his disposal beyond the limits of his office, but for an object connected with the grant of the copyright, and with nothing else. This copy must remain in the office; the secretary has no more right to remove it than any other person. It seems to me, to be intended for the same purposes as the drawings and models of machines in the patent-office; that our citizens may know where to go to be correctly informed what it is that is patented, and not to be led into an infringement of the right, by an ignorance of what it is. I am confirmed in this view of the case, by the testimony of Mr. Brent, who says, that the memorandum of the deposit of books for securing copyrights was kept in the patent-office, a branch of the department of state, and it is fair to presume, that the books were kept in the same place. This negatives the suggestion, that these books were for the use of the secretary, or to form a library for the public. The patent-office could hardly be selected as the place for a public library. The use

or purpose I have assigned to the delivery of this book, is not only reasonable, but necessary for the safety of the citizens against the penalties of the act.

There are numerous publications, of which no information would be derived from the titles deposited in the clerk's office and published in the newspapers; such as, extracts from poets or eminent prose writers, collections or abridgements of voyages, selected letters, &c. The materials are common property, and exist in great masses; and it is only by an examination of the work, that any one can know in what manner, or to what extent, the copyright author has appropriated them to himself. The intention of this provision is, at least, much more likely to be that which I have suggested, than that it should have been for the use of the secretary or his department. The injunction is laid on the proprietors of all books for which a copyright is claimed, not only for the reports of the decisions of the supreme court, which we may believe would be a desirable acquisition for that officer. But how can we make this supposition of many other books which have been or may be deposited for copyright? Was it intended to give so dignified a destiny to a spelling-book, a Greek grammar, an edition of Hoyle's games, an apothecary's manual—as in the case of Ewer *v.* Coxe, a cooking book, a song-book, a jest-book? We cannot, without something more than a smile, imagine that congress directed such works to be delivered to the secretary of state, for his special use, or for the formation of a public library. The delivery of the copy under our copyright law, as I have said, is analogous to that required by the statute of Anne, to be sent to the Stationers' Company, and not to the copies to be given to the libraries of the *universities. It is true, that nine copies of every work are to be sent for the universities, to a stationers' company, as well as that which is to be preserved there, but none are sent to the universities but such as they shall demand; and they will not, therefore, have their shelves loaded with such stuff as I have alluded to, which will, perforce, be crowded into our public library and must be preserved there, on the construction given to this provision by the complainant.

*738]

Nor is it enough to say that if a copy be, in fact, in the office of the secretary of state, it is a compliance with the law for all the purposes of the law; it must be delivered in pursuance of the act, to be preserved there, as the act directs, or the court cannot know that it is there, how long it has been there, or how long it will remain there. It may have been there, at the period the witness speaks of—it may not be there the next day, for there is no obligation to keep it there, unless it were brought there by and in conformity with the act of congress, which makes it the duty of the secretary to preserve it in the office. I know that courts of equity have gone very far, and very frequently, in substituting what they have deemed to be a substantial compliance with the requisitions of a statute, for the actual requisitions. This has been especially done in relation to the recording acts, and the statute of frauds. As to the first, they have felt authorized to accept proof of notice in fact, of an actual personal knowledge, for the recorded notice called for by the law. I think, I shall be supported by the profession, in saying, that it is regretted that these departures from the enactments of the statutes were ever indulged. It has thrown into uncertainty that which the law had made certain; it has left to floating, transitory and fallible evidence, what the law had provided for by permanent immutable testimony. Nor can I perceive how it is that the legislature had not the same absolute authority to prescribe the kind of notice that shall be received by the courts of any fact, as that any notice should be given of it; nor how judges can dispense with the one more than with the other. What has been decided and done in such cases, must remain; but I will never add another step to it.

If the complainants have failed to sustain their case by and under the acts of congress, the question occurs, are they supported in it by the common law? The question of the existence of a common law in the United States was particularly noticed, I believe, for the first time, judicially, in the case of the United States *v.* Worrall, 2 Dall. 384. In that case Judge CHASE, a most learned constitutional as well as common-law lawyer, said, in page 394, "in my opinion, the United States, as

a federal government, have no common law; if, indeed, the United States can be supposed, for a moment, to have a common law, it must, I presume, be that of England; and yet it is impossible to trace when or how the system was adopted or introduced. With respect to the individual states, the difficulty does not occur. When the American colonies were first settled by our ancestors, it was held, as well by the settlers as the judges and lawyers of England, that they brought hither as a birthright and inheritance, so much of the common law as was applicable to their local situation and change of circumstances. But each colony judged for itself *what parts of the common law were applicable to its new condition; and [*739 in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some and rejected others. The whole of the common law has nowhere been introduced; some states have rejected what others have adopted; and there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application;" he adds, as the result of these positions, "that the common law will always apply to suits between citizen and citizen, whether they are instituted in a federal or a state court." As regards a common law of the United States, as such, he says, "the United States did not bring it with them from England; the constitution does not create it; and no act of congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England; or modified as it exists in some of the states; and of the various modifications, what are we to select? the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?"

In general, it seems to me, that these principles and arguments cannot be controverted; they have never been judicially repudiated. When in a suit in the courts of the United States, the common law has been received as the rule of decision, it has been received, not as a law of the United States, prevailing with authority through all, equally and alike, but as the law of some particular state, by which the particular case was governed. The court does not adopt it as the common law of England, or of the United States, but as the law of the state which has adopted it and made it tis own.

The question, however, discussed by Judge Chase is much broader than that we have to entertain. It has not been contended, it could not be, that the whole common law of England, as it exists there, has ever been received in the United States, or in any one of them. Parts of it only have been adopted, and the evidence of such adoption is to be sought in "legislative acts, in judicial decisions or constant usage." Has any such evidence—has any evidence of any description, been produced, to show that what is asserted to be the common-law copyright in England, has ever been adopted by any one of the United States? Was it brought hither by our ancestors? Was it applicable to their local situation and change of circumstances? Or has it ever been so considered? A question meets us here at once—was it, at the period of the migration of our ancestors, a known, recognised and settled right, even in England? What is its history—its judicial history? It is wrapt in obscurity and uncertainty. The general question was first discussed in 1760, long after the settlement of these colonies, in the case of Tonson *v.* Collins, and no decision was given. In 1769, the celebrated case of Millar *v.* Taylor was argued, in which the subject was examined at great length. The great question was, whether the right of an author in his works, after publication, was a common-law right which always existed, and did still exist, independent of, and not taken away by the statute of Anne? Three of the judges were in favor of the plaintiff's copyright; but their judgment was shaken violently, if not to the foundation, by the opposing argument *of Judge Yates. Some [*740 years after this decision, that is, in 1774, the question came before the house of lords, in the case of Donaldson *v.* Beckett. Of eleven judges, eight to three were in favor of the common-law right. Seven to four held, that printing and publishing did not deprive the author of the right. Five thought that the action at common-law was not taken away by the statute, and six were of an opposite opinion. Judge Kent, speaking of the judgment in Millar *v.* Taylor, says, "the court was not unanimous;

and the subsequent decision of the house of lords in Donaldson *v.* Beckett, in February 1774, settled this litigated question against the opinion of the king's bench, by establishing that the common-law right of action (if any existed) could not be exercised beyond the time limited by the statute."

Can we believe, that this common-law copyright was a known, understood and settled thing, in these colonies, brought here by our ancestors as their birthright, when down at least to 1774, the greatest lawyers in England where disputing about its existence there; and when even those who held that it did exist, could not agree as to what it was, nor how far it was, or was not, modified by the statutory provisions? Did our forefathers ascertain, adopt and regulate a right, which MANSFIELD, YATES and CAMDEN could not agree about, or understand alike? Judge KENT adds his doubt on the question, when he says, "if any existed." As to its reception and adoption as part of the law of the United States, we cannot but observe, that this learned and searching jurist, although treating very fully on the subject of copyright, gives no suggestion of the existence of a common-law right in the United States, or in any of them, nor of any other right than that which is granted by the acts of congress, to be enjoyed on complying with the terms prescribed by them. He particularly notices the agitation of the question in England, and, as we have seen, does not seem to consider it certainly settled there. Here, he was directly upon the subject; and although he thinks the laws of congress afford an inadequate protection, he does not intimate that an author has any beyond them.

The efforts of those judges in England who have labored to preserve to an author the common-law right, together with that given to him by the statute, seem to me not to have sufficiently considered the uncertainty and inconvenience which would grow out of such a system. If these two rights are co-existent, the question occurs, who would take for a limited period, under the statute, what he may enjoy in perpetuity, by the common law? or what is there to prevent an author from using the privileges and remedies of the statute for the term prescribed, and then going back to his common-law right? The injustice and incongruity of such a proceeding was admitted; and how is it avoided? These judges have said, and such was the final disposition of the question, if it be finally determined, that they would confine this common-law within the limits of time prescribed by the statute. And where do they find their authority for this arrangement? The statute gives no warrant for it; the common law gives none. The limits imposed by the statute have relation expressly and only to the rights derived from it, and not to any *right which was vested in an author, *741] independent of the statute. If they may fetter the common-law right with this enactment, why did they not impose upon it all the other conditions of the law; and, in short, bring the whole right under and within the statutory provisions, and take the statute as a modification or substitute of any pre-existent rights; as a legislative declaration of what should be the whole law on the subject for the future? The judges themselves made themselves legislators, when they thus regulated the enjoyment of a right by their own authority. We shall keep ourselves free from such embarrassments, and from the necessity of resorting to such expedients to escape from them, by resting the protection of authors upon the statutes expressly enacted for that purpose, and in believing that our legislature has done that which is just to them, and without inconvenience and danger to the public. This is the only right, the only protection that I can recognise, and I do not find that any other has ever been recognised here. No judicial decision or *dictum* of any court of the United States, or of any court of a state, before or since the adoption of our present constitution, before or since the revolution, has been produced on this argument, which recognises the common-law right now claimed; on the contrary, before the whole power of legislating on this subject was surrendered to the federal government, many of the states did pass laws for the protection of authors; and if, as is unquestionable, the acts of congress have superseded all the state statutes on the subject, why have they not also superseded the state common law, if it ever existed? It certainly never had a more sacred and intangible character than the statute law; and the same policy which

abrogated the latter and transferred the whole subject to federal legislation, has swept away every other law inconsistent with that policy and legislation. It was intended to put the whole subject under the regulation of congress, and of congress only. But I have found, the counsel have found, no common law, such as is now set up, in the colonies, in the states, or in the United States, and if I am now to recognise it, I must first make it. As I have mentioned the state statutes on this subject, I should notice an argument much pressed from the use in them of the word *securing* and not *vesting* the right. This is too slender a foundation to raise an acknowledged, pre-existing right upon. The same term is used in the act of congress 1790, but was it an acknowledgment by congress that the United States, as such, had a common law which vested the right, and that they passed their law only to secure it? Holding the opinion that the complainants have not entitled themselves to the aid and benefit of the statutes of the United States, for the protection of authors, and that they have no right at common law, which this court can recognise and protect, it is not necessary for me to give any opinion on the remaining question argued at the bar, whether the reports in question may or may not be the subject of literary property. Let the complainants go to the law side of the court, and if they shall establish their right there, they may return and claim the aid of this court to protect that right. As it now stands, or were it even more doubtful, equity cannot interpose her extraordinary powers between the parties.

*I am conscious of the importance of the questions which have been discussed in this cause, to the parties and to the public; and it is a real satisfaction [*742
to me to know that my opinion may be, and I presume will be, reviewed by another tribunal. Injunction dissolved, and the bill dismissed.

503