

**Armstrong Vs. Lear**

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**Court :** US Supreme Court

**Decided On :** 1834

**Appeal No. :** 33 U.S. 52

**Appellant :** Armstrong

**Respondent :** Lear

**Judgement :**

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**Armstrong v. Lear**

**33 U.S. (8 Pet.) 52**

*APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES OF*

*THE DISTRICT OF COLUMBIA FOR THE COUNTY OF WASHINGTON*

## **SYLLABUS**

A bill was filed in the Circuit Court of the District of Columbia claiming a legacy under an alleged codicil made in Paris to a will made in the United States. The testator was a native of Poland; at the time of the making of the codicil he resided in France, and when he made the will to which the instrument upon which the legacy was claimed was said to be a codicil, he was in the United

states. He went to Europe soon after he made the will, and many years afterwards he died in Switzerland. The bill alleged that the instrument on which the legacy was claimed had been duly proved in the Orphans' Court of Washington County in the District of Columbia, where the administrator with the will annexed resided. There was no allegation that the codicil had been established to be a valid will by the law of France, the place of the domicile of the testator where the same was made. The administrator submitted to the court whether it would decree the payment of the money to the complainant

"upon an instrument made under the circumstances and authenticated in the manner that the aforesaid instrument is, and whether the said instrument shall have effect to revoke or alter any part of said testators will, solemnly executed and left in the hands of his executor in this country,"

&c.;

By the Court:

"This is certainly a very informal and loose mode of putting in issue (if upon the bill such a question can be tried) the validity of a will made in a foreign country whose laws are not brought before the court either by

avermment or evidence."

The answer contains an allegation that certain persons residing in Europe have filed a bill in the Circuit Court of the District of Columbia against him, the administrator, claiming a large portion of the assets, if not the whole, as creditors or mortgagees of the testator, and certain persons, also residing in Europe, have filed another bill against him (it was probably meant in the same court) claiming the whole assets as heirs at law of the testator, and therefore as distributees of the said assets. None of the parties to either of these latter bills is made party to the present bill.

By the Court:

"The persons claiming as heirs of the testator should be made parties, that they may have an opportunity to test the plaintiffs title as the real parties in interest, the administrator being but a mere stockholder."

The heirs and legal representatives of the testator filed a bill in the circuit court claiming from the administrator of the testator with the will annexed the funds which had come into his hands, which bill is still pending. The allegations in the bill go to defeat the validity of the will made in the United states, and also assert other grounds of claim.

By the Court:

"All the bills ought, if possible, to be brought to a hearing at the same time in the circuit court in order that a final disposition may at the same time be made of all the questions arising in all of them."

If the intention is to put in issue (as it seems to be) not only the construction and operation of the testamentary instrument in favor of the plaintiff, but its validity and effect as a will, it is material that the law of France, the

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place of the domicile of the testator at the time of its execution should be brought before the court and established as matter of fact, for the court cannot judicially take notice of foreign laws, but they must be proved by proper evidence. The present allegations of the bill and answer are quite too loose for this purpose, and they should be amended and made more distinct and direct.

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

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

On 1 April, 1829, the appellant Kosciuszko Armstrong filed a bill in the circuit court setting forth his citizenship of the State of New York and that Thade Kosciuszko, late an officer in the service of the United States in the war of their Revolution and of the Republic of Poland, on or about 5 May in the year 1798, placed a large sum in the hands of Thomas Jefferson, Esq., late President of the United States, far exceeding the sum of \$10,000,

and executed a will and testament, a copy of which is herewith filed and marked exhibit A, and which this complainant prays may be taken as a part of this his bill. That afterwards, to-wit on or about 28 June in the year 1806, the said Thade Kosciuszko, being then domiciled at Paris, in the Kingdom of France, executed a certain instrument of writing, being in the nature and of the effect of a last will or writing testamentary, whereby he willed and directed that at his decease the sum of \$3,704

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current money should be possessed by and delivered over to the full enjoyment and use of the complainant, and the said testator thereby instructed and authorized his only lawful executor in the United States, the said Thomas Jefferson, to reserve, in trust for that special purpose, of the funds he held belonging to the testator, the aforesaid sum of \$3,704 in principal to the complainant, to be paid by him, the said Thomas Jefferson, immediately after his decease, to the complainant, and, in case of his death, to the use and benefit of his surviving brothers. That the said testator, on the day and year aforesaid, duly signed and sealed the said instrument of writing in the presence of two competent witnesses, who attested the same, and acknowledged the same on the same day before Fulwar Skipwith, commercial agent and agent for prize causes for the said United States at Paris, and then delivered the same under his hand and seal to John Armstrong, father of the complainant. That afterwards, to-wit on 15 October in the year 1817, the said Thade Kosciuszko departed this life, leaving the said instrument of writing unrevoked, and the same was, after the death of the said Thade Kosciuszko, admitted to probate and duly proved in the Orphan's Court of Washington County, a copy whereof, exhibit B, he prays may be taken as a part of his bill.

That he is advised and believes that the said instrument of writing is, to all intents and purposes, a last will and testament, and must operate as such, and revokes *pro tanto* the bequests and appropriation made in the will first mentioned; that the said Thomas Jefferson, named as executor in the will first mentioned, refused to take out letters testamentary on the estate of the said Thade Kosciuszko and renounced all claim and right so to do, according to law, and Benjamin L. Lear, whom the complainant prays may be made defendant to this his bill, was duly appointed administrator with the will annexed on the said estate, which has since come into the hands of the said Benjamin L. Lear, far exceeding, as aforesaid, \$10,000. That the said Benjamin L. Lear has been frequently applied to by the complainant for the payment of the aforementioned legacy of \$3,704, together with the interest thereon,

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which the said Lear refuses to pay until the order and decree of this Court had upon the premises, and the said defendant combining and confederating with one Major Estho, a subject of his Imperial Majesty, the Emperor of all the Russias, and Monsieur Zeltner, formerly minister plenipotentiary of the Helvetic Republic at Paris, and now residing at Soleure in Switzerland, whom the complainant prays may be made parties to this his bill of complaint; the said confederates sometimes pretend that the said Thade Kosciuszko never executed the said the last mentioned writing testamentary, and sometimes they pretend that the said Major Estho is the heir at law of the said Thade Kosciuszko, and as such entitled to all his said estate; and sometimes they pretend that the said Thade Kosciuszko, during his lifetime, made some disposition of his said estate in favor of the children and other relatives of the said Zeltner, whereas the said last-mentioned writing testamentary was duly executed as aforesaid, and that the said Major Estho is not the heir at law of the said Thade Kosciuszko, or if he is that he is not entitled to receive distribution of the said personal estate, and that the said Thade Kosciuszko made no testamentary or other disposition in favor of the said Zeltner or his children or relatives which could affect the claim of the complainant under the said writing testamentary. All which actings and doings and pretenses of the said confederates are contrary to equity and good conscience, and tend to the manifest injury and oppression of the complainant.

" *Complainant's exhibit A* "

"I, Thaddeus Kosciuszko, being just on my departure from America, do hereby declare and direct that, should

I make no other testamentary disposition of my property in the United States, I hereby authorize my friend Thomas Jefferson to employ the whole thereof in purchasing negroes from among his own or any others, and giving them liberty in my name, in giving them an education in trades, or otherwise, and in having them instructed for their new condition in the duties of morality, which may make them good neighbors, good fathers or mothers, husbands or wives, and in their duties as citizens, teaching them to be defenders of their liberty and country

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

"T. KOSCIUSZKO"

"5 May, 1798"

" *Complainant's exhibit B* "

"Know all men by these presents that I, Thade Kosciuszko, formerly an officer of the United States of America in their Revolutionary War against Great Britain and a native of Lilourui, in Poland, at present residing at Paris, do hereby will and direct that at my decease the sum of \$3.704, currency of the aforesaid United States, shall of right be possessed by and delivered over to the full enjoyment and use of Kosciuszko Armstrong, the son of General John Armstrong, minister plenipotentiary of the said states at Paris. For the security and performance whereof, I do hereby instruct and authorize my only lawful executor in the said United States, Thomas Jefferson, President thereof, to reserve in trust for that special purpose, of the funds he already holds belonging to me, the aforesaid sum of \$3,704 in principal, to be paid by him, the said Thomas Jefferson, immediately after my decease to him, the aforesaid Kosciuszko Armstrong, and in case of his death, to the use and benefit of his surviving brothers."

"Given under my hand and seal at Paris this 28 June. 1806."

"THADE KOSCIUSZKO [SEAL]"

"In presence of"

"CHARLES CARTER"

" JAMES M. MORRIS"

" *Commercial Agency of the United States, Paris* "

"On this 28 June in the year of our Lord 1806, and of the independence of the United States of America the thirtieth, before the undersigned, commercial agent and agent of prize causes for the United States of America, at Paris, personally appeared Thade Kosciuszko, late officer of the said United States, who, in his presence, signed and sealed the foregoing

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transfer in favor of Kosciuszko Armstrong, the son of General John Armstrong, Minister Plenipotentiary of the United States at Paris, and in case of his death, to the use and benefit of his surviving brothers, and did acknowledge it as his own act and deed for the purposes therein specified."

"In testimony whereof, he, the said undersigned as aforesaid has hereunto signed his name, and affixed his seal of office, at Paris, the day and year above written."

"[L.S.] FULWAR SKIPWITH"

" *Orphan's Court, Washington County, District of Columbia, to-wit:* "

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

"Sworn in open court."

"Teste, HENRY C. NEALE, *Reg'r Wills* "

"And now, on this 8 May in the year 1828, in the Orphan's Court of Washington County and district aforesaid, Joseph C. Cabell, of Nelson County, in the State of Virginia, makes oath on the Holy Evangels of Almighty God that he is well acquainted with the handwriting of Charles Carter, one of the subscribing witnesses to the annexed paper, purporting to be the will and testament of Thade Kosciuszko, deceased, having often seen him write, and that he verily believes the signature, 'Charles Carter,' as witness to said will, to be the proper hand writing of said Charles Carter, now deceased, and that he is well acquainted with the handwriting of Fulwar Skipwith, late commercial agent of the United States at Paris, having often seen him write, and that he verily believes the signature 'F. Skipwith' to the annexed certificate to the instrument of writing purporting to be the will of Thade Kosciuszko

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is the proper hand writing of the aforesaid Fulwar Skipwith, who now resides near Baton Rouge, Mississippi."

"Sworn in open court."

"Teste, HENRY C. NEALE, *Reg'r Wills* "

" *District of Columbia, Washington County, to-wit:* "

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

"Sworn in open court."

"Teste, HENRY C. NEALE, *Reg'r Wills* "

" *District of Columbia, Washington County, to-wit:* "

"I certify that the foregoing last will and testament of Thaddeus Kosciuszko is truly copied from the original filed and recorded in my office."

"Witness my hand, and seal of office, this 5 March in the year 1829."

"[SEAL] HENRY NEALE, *Reg'r Wills* "

The bill prayed a subpoena against the defendants, and the marshal returned that he had summoned B. L. Lear, and "non sunt the rest." Mr. Lear appeared to the bill.

The circuit court made the following order of publication as to the absent defendants.

"Kosciuszko Armstrong v. Benjamin L. Lear, administrator, with the will annexed, of Thade Kosciuszko, Major Estho, a subject of his imperial Majesty the Emperor of all the Russias, and Monsieur Zeltner, formerly Minister Plenipotentiary of the Helvetic Republic at Paris and now residing at Soleure, in Switzerland. "

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"The bill in this case states that the said Thade Kosciuszko, about 5 May, 1798, placed a large fund in the hands of Thomas Jefferson, late President of the United States, exceeding the sum of \$10,000, and executed a will; that on or about 28 June, 1806, the said Kosciuszko executed at Paris an instrument of the nature of and effect of a last will or writing testamentary whereby he willed and directed that, at his decease, the sum of \$3,704 should be possessed by, and delivered over to the full enjoyment and use of the complainant, to be paid by the said Thomas Jefferson to the complainant immediately after the said Kosciuszko's decease out of the said funds; that the said Kosciuszko, on the said 28 June, 1806, duly signed and sealed the said instrument of writing in the presence of two competent witnesses, who attested the same and acknowledged the same on the same day before Fulwar Skipwith, commercial agent and agent for prize causes for said United States at Paris, and then and there delivered the same under his hand and seal to John Armstrong, father of the complainant. That afterwards, to-wit on 15 October, 1817, the said Kosciuszko departed this life, leaving the said instrument of writing unrevoked, and the same has since been duly admitted to probate and proved in the Orphan's Court of Washington County."

"That the said Thomas Jefferson, named as executor in the will first mentioned, refused to take out letters testamentary on the estate of the said Kosciuszko, and thereupon the defendant Lear was duly appointed administrator with the will annexed. The bill further charges that the said Lear refuses to pay the said sum of \$3,704 because, among other reasons, a claim to the whole of the funds of said estate has been made by said Major Estho as heir at law of said Kosciuszko, and another claim by the said Monsieur Zeltner under another will, which he alleges the said Kosciuszko to have made in Europe in favor of himself or some of his relations, and the complainant states the object of his said bill to be to enforce a discovery, by said Lear, of the funds and effects which have come to his hands as administrator as above named, and the payment by him to the complainant of said sum of \$3,704,

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with interest, &c.; And it appearing to the court that two of the defendants in this case, *viz.* the said Major Estho and Monsieur Zeltner, are not within the jurisdiction of this court, and do not reside within the United States, but, as far as appears to the court, one of the said defendants resides in Poland, and the other in Switzerland, it is therefore by this Court here, on motion of the complainant's solicitor, ordered this 3 August, 1829, that the said absent defendants be and appear before this court here, in person or by solicitor, on or before the second Monday of December next and answer the complainant's said bill or show cause why a decree should not be passed as prayed by said bill; otherwise the same will be taken for confessed against them, provided a copy of this order be published in the National Intelligencer twice a week for six weeks successively, the first publication thereof to be at least four months previous to said second Monday of December next."

"By order of the court."

"Teste, WILLIAM BRENT, *Clerk* "

"3 August, 1829"

In December 1831 Benjamin L. Lear, as administrator of Thaddeus Kosciuszko, filed an answer stating that in the character of administrator of Thaddeus Kosciuszko with the will annexed, he has assets for such administration amounting to more than \$10,000. That on or about 8 January, 1823, the complainant, by John

Armstrong his next friend, the complainant being then an infant, filed in this Court his bill of complaint against the respondent for the same purpose, and in substance the same as his bill in this case. That the respondent on 22 January, 1823, filed his answer to the bill with certain exhibits, which he asks to be considered as part of his answer to the bill.

"The answer of Benjamin L. Lear to the bill of complaint of Kosciuszko Armstrong, an infant, under the age of twenty-one years, by his father and next friend, John Armstrong, of the County of Dutchess, in the State of New York: "

"This respondent, saving and reserving to himself, now and at all times hereafter, all and all manner of benefit and advantage of exception to the manifold uncertainties and imperfections

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in the said complainant's said bill contained, for answer thereunto or unto so much thereof as materially concerns this defendant to make answer unto saith that he is the administrator with the will annexed of Thaddeus Kosciuszko; that he has no knowledge of a fund having been placed by the late General Thade Kosciuszko in the hands of Thomas Jefferson and a will having been executed by him excepting such as he has derived from a letter of said Thomas Jefferson to Mr. Pierre de Polignac, the envoy from Russia to the United States of America, and a copy of the record of the Court of Albemarle County in Virginia, a copy of which letter and record he received among the other papers from said Thomas Jefferson, which were put into his hands as relating to the administration of the estate of the said Thaddeus Kosciuszko, and a copy of which letter is herewith exhibited to the court, marked defendant's exhibit A, which this defendant prays may be taken as part of this his answer."

"That this respondent admits that the instrument mentioned in the complainant's bill and exhibited to this Court by him, marked exhibit B, was executed and authenticated, as it purports to be, at Paris, in the Kingdom of France, the said Thade Kosciuszko being domiciled and resident at said Paris at the time said instrument was executed and bears date, but this defendant submits to this honorable court and prays its decision thereon whether it will decree him to pay the said sum of \$3.704 to the said complainant upon an instrument made under the circumstances and authenticated in the manner that the aforesaid instrument is, and whether said instrument shall have the effect to revoke or alter any part of said Kosciuszko's will solemnly executed and left in the hands of his executor in this country, to be carried into execution at his death, and especially when it appears from this defendant's exhibit A that the said executor had received from his testator a letter of so late date as 15 September, 1817, in which he says of this fund, 'after my death, you know its invariable destination.' And this defendant submits to the decision of this honorable court whether, if the instrument aforesaid, being genuine and properly authenticated, is of the nature and effect of a will or testament, the said letter of the testator to his executor does not operate as a revocation of said instrument

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and a reestablishment and republication of his former will."

"And this defendant, further answering, saith that he believes it to be true that the said Thomas Jefferson, named as executor in said Kosciuszko's will, refused to take out letters testamentary on his estate and renounced all claim and right so to do, according to law. And this defendant saith that he was, on 14 August in the year 1821, appointed by the Orphan's Court of the County of Washington, District of Columbia, the administrator with the will annexed of the estate of the said general Thaddeus Kosciuszko, and received from the said orphan's court letters of administration with said will annexed, a copy of which is herewith exhibited to this Court, marked defendant's exhibit C, and which this defendant prays may be taken as part of this his answer."

"That after receiving said letters of administration, there came to the hands of this defendant from the said

Thomas Jefferson, as the estate of said Kosciuszko, two certificates of the six percent stock of the United States -- one of \$11,363.63 and the other of \$1,136.36, and one certificate of stock of the Bank of Columbia of forty-six shares, amounting, at their par value, to \$4,600. That the appraisers appointed by the aforesaid orphan's court to estimate the value of said stocks, appraised them both at par, taking into consideration the advance of the market price of the one, and the depreciation of that of the other, and their respective amounts, and appraising them both together."

"That after the receipts of said certificates, there came to the hands of this defendant dividends upon said stocks to the amount of \$\$,104, which he invested, with the consent of said orphan's court, in six percent stocks of the said United States, and which purchased of said stock of the United States a certificate of \$3,794.24, and that there have since come to his hands, as dividends upon all of said stocks, \$580.82, making the whole amount of the estate of said Kosciuszko, which has come to his hands, \$20,894.23 of stocks, estimated at their par value,

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and \$580.82 in cash. This defendant, further answering to the bill of said complainant, saith that among the papers which came to his hands as hereinbefore mentioned is a letter from the aforesaid Mr. De Poletica to the said Thomas Jefferson enclosing a copy of a dispatch from the Viceroy of Poland to him, a copy of which letter and dispatch is herewith exhibited to this honorable court, marked defendant's exhibit D, and by which this defendant understands that the whole estate of said Kosciuszko may be claimed by a Major Estho, of Poland, as the heir at law of said Kosciuszko."

"That this respondent communicated to said Poletica in April last such information as he possessed in relation to said estate, and was informed by said Politica that the same would be transmitted to the said Viceroy of Poland. That there was also, among the papers aforesaid, two letters from a Mr. Zeltner to said Thomas Jefferson, copies of which are herewith exhibited, marked 'defendant's exhibit E,' and 'defendant's exhibit F,' by which this defendant understands that the said Kosciuszko has disposed of the greater part of his fortune in favor of the children, nieces, brothers, and sister of the said Zeltner, and that his (said Kosciuszko's) parents were living in Poland at the date of the first of said letters."

" *Exhibit A* "

"Monticello, June 12, 1818"

"Sir, I have received your favor of May 27 on the subject of the property of the late General Kosciuszko, vested in our funds and left under my care and direction. A little before the departure of the General from America in 1798, he wrote a will, all with his own hand, in which he directed, that the property he should possess here at the time of his death should be laid out in the purchase of young negroes, who were to be educated and emancipated; of this will he named me executor and deposited it in my hands. The interest of his money was to be regularly remitted to him in Europe. My situation in the interior of the country rendered it impossible for me to act personally in the remittances of his funds, and Mr. John Barnes, therefore, of Georgetown, was engaged under a power of attorney to do that on commission, which duty he regularly

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and faithfully performed until we heard of the death of the General. We had, in the meantime, by seasonably withdrawing the greater part of his funds from the bank in which he had deposited them and lending them to the government during the late war, augmented them to \$17,150.63 -- to-wit, \$12,499.63 in the funds of the United States and \$4,600 in the Bank of Columbia, in Georgetown."

"I delayed for a considerable time the regular probate of the will, expecting to hear from Europe whether he had left any will there which might affect his property here. I thought that prudence and safety required this, although the last letter he wrote me before his death, dated September 15, 1817, assured me of the contrary

in these words,"

"nous avancons tous en age, c'est pour cela, mon cher et respectable ami, que je vous prie de vouloir bien (et comme vous avez tout le pouvoir) arranger qu'apre la mort de notre digne ami Mr. Barnes, quelqu'un d'aussi probe que lui prenne sa place, pour que je receive les interets ponctuellement de mon fonds; duquel, apres ma mort, *vous savez la destination invariable*, quant a present faites pour le mieux comme vous pensez."

"After his death, a claim was presented to me on behalf of Kosciuszko Armstrong, son of General Armstrong, of \$3,704, given in Kosciuszko's lifetime, payable out of this fund, and subsequently came a claim to the whole from Mr. Zeltner, of Soleure, under a will made there. I proceeded, on the advice of the Attorney General of the United States, to prove the will in the state court of the district in which I reside, but declined the executorship. When the General named me his executor, I was young enough to undertake the duty, although from its nature it was like to be of long continuance, but the lapse of twenty years more had rendered it imprudent for me to engage in what I could not live to carry into effect; finding now by your letter of May 27 that a relation of the General's also claims this property, that it is likely to become litigious, and age and incompetence to business admonishing me to withdraw myself from entanglements of that kind, I have determined to deliver the will and whole subject over to such court of the

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United States as the Attorney General of the United States shall advise (probably it will be that of the District of Columbia) to place the case in his hands, and to petition that court to relieve me from it, and to appoint an administrator with the will annexed. Such an administrator will probably call on the different claimants to interplead and let the court decide what shall be done with the property. This I shall do, sir, with as little delay as the necessary consultations will admit, and when the administrator is appointed, I shall deliver to him the original certificates which are in my possession; the accumulating interest and dividends remain untouched in the Treasury of the United States and Bank of Columbia."

"I learnt with much pleasure your return to the United States, and in a character which enables you to do much good to your own as well as to our country. The peace and friendly intercourse of nations depend much on the personal characters of their diplomatic agents, whose view of things, in black or in white, cannot fail to tinge that of their respective governments. Your friendly dispositions give us entire confidence that everything from you will be conciliatory, and its effects the greater as the proofs we have had of the friendship of your great and good emperor give us confidence that whatever seed you sow will fall 'neither by the wayside nor in stony places, nor among thorns, but on good ground, which will bring forth fruit to a hundredfold.'"

"We all recollect with pleasure the favor of your former visit to Monticello, and a repetition will be equally gratifying should your affairs permit. The country cannot, like the cities, furnish the amusements of varied society; a varied scene is all it can offer to its guests, and a view of the tranquil current of domestic life. In presenting to you the souvenirs of the family, I tender my salutations also, and the assurance of my high respect and consideration."

"TH. JEFFERSON"

"H. E. M. De Poletica, Ambassador of Russia"

" *Exhibit B* "

"Red Hook, 4 Jan. 1818"

"Dear Sir: Some years before I left Paris, General Kosciuszko put into my hands the paper, of which the enclosed is a copy.

Understanding that it was not to be used till the General's death, it has been in my cabinet unopened from that day till this, and is now recurred to on the information brought by the mails of the day that the General had died in Switzerland on 15 October last, and that his funeral was celebrated in Paris on the 31st of that month. I beg to know from your kindness whether you have any information from Switzerland or France in relation to this event, and (if it corresponds with mine) what other steps, if any besides furnishing the original document, will be necessary or proper to give effect to the General's will so far as my son is concerned. The young man is now fifteen or sixteen years old."

"I beg you to accept assurances of my great respect and esteem."

"JOHN ARMSTRONG"

"Thomas Jefferson, Monticello"

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

"Washington City, le 27 Mai, 1819"

"Monsieur, Peu avant mon depart de Paris en Fevrier dernier j'ai recu du vice-roi de Pologne Prince Lajanceck, la lettre dont j'ai l'honneur de vous transmettre ci jointe la copie avec celles des pieces qui l'accompagnoient. Le tout indique clairement la nature des renseignements que me demande le gouvernement de Pologne et que je n'ai pas hesite de lui promettre, comptant d'avance sur votre obligeance, malgre tous les motifs qui m'engageoient a respecter vos loisirs si precieux par les souvenirs aux quels ils se rattachent."

"Je saisis avec empressement cette occasion pour vous exprimer, Monsieur, mon vif desir d'obtenir la permission de me presenter encore une fois a Monticello, pour vous y renouveler de vive voix l'expression de la haute consideration avec laquelle j'ai l'honneur d'etre, Monsieur,"

"Votre tres humble et tres obeissant serviteur,"

"PIERRE DE POLETICA"

" *Envoye de Russie pres les U.S. d'Amerique* "

"Thomas Jefferson, Monticello "

"Copie d'une depeche du Vice Roi du Royaume de Pologne a Mr. de Poletica, datee de Varsovie, du 17 Nov. 1818."

"Le sieur Estho, ci devant major a l'armee Polonoise, neveu de feu le General Kosciuszko, se trouvant dans le cas d'avoir besoin d'une information exacte sur l'etat de la fortune que le dit General a pu delaisser, a reclame l'intervention de son gouvernement a l'effet de lui procurer les eclaircissements necessaires a cet egard par l'entremise de la mission de S. M. I. et R. notre Auguste Maitre pres la cour de France."

"La correspondance dont M. le Gl. Pozzo di Borgo a bien voulu se charger a cet effet avec des personnes qui lui sembloient etre le plus a meme de connoitre les moyens pecuniaires de feu Kosciuszko, a donne pour resultat deux lettres ci-jointes en copies, portant quelques renseignements sur l'objet ci-dessus mentionne."

"Il conste de ces deux pieces et votre excellence voudra bien s'en convaincre, que le Gl. Kosciuszko, outre les fonds deposees entre les mains de differents banquiers en France et en Suisse en possedoit de plus considerables encore chez MM. Thomson et Bonar a Londres et chez Jefferson et Barnes a Washington."

"Le sieur Estho met d'autant plus d'interet a obtenir des notions precises relativement aux fonds de son oncle places en Amerique, qu'il a tout lieu de supposer qu'ils ne sont point compris parmi les sommes dont le defunt a dispose par son testament."

"Faisant par consequent droit aux plus vives instances du petitionaire, j'ose vous supplier, Monsieur, de daigner faire les demarches necessaires pour cet effet, aupres des sieurs Jefferson et Barnes, citoyens des Etats Unis, et de vouloir bien m'en communiquer le resultat des qu'il aura ete porte a votre connoissance."

"Je saisis avec empressement cette occasion pour offrir a V. Ex. l'expression de ma tres haute consideration."

"[Signe] LAJONCECK"

"Conforme a l'original, POLETICA"

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

"En reponse a la lettre que V. Ex. nous a fait l'honneur de

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nous ecrire le 29 Juin, nous la prevenons qu'aux epoques du 5 Avril et du 4 Juin, 1818, les fonds deposes chez nous par feu le Gl. Th. Kosciuszko, s'elevoient en principal a la somme de fr. 99.775, et que ler. Octobre 1817, le solde lui revenant sur nos livres, etoit de f. 102.400, a peu de chose pres et interets compris."

"D'apres quelques renseignements que nous avons recus et dont nous ne pouvons garantir l'exactitude, il paroît qu' au deces du Gl. Kosciuszko (15 Octobre 1817), il avoit en depot environ:"

"f. 100.000 chez Messrs T. Thomson, T. Bonar et Cie. a Londres,"

"6.000 chez Mr. G. Esher a Zurich,"

"5.000 chez Mr. Beltin a Soleure,"

"-----"

"111.000 ensemble"

"Le General Kosciuszko a fait deux testaments: l'un date de Soleure le 4 Juin 1816; l'autre egalemeut date de Soleure le 10 Octobre 1817. Par le premier il a legue sur ces fonds en nos mains,"

"f. 60.000 en faveur de Mlle. Thadea Ernine Wilhelmina Zeltner sa Filleule,"

"35.000 en faveur de Mlle. Marie Charlotte Za re Marguerite Zeltner,"

"5.000 en faveur de M. Bonisant pere, notaire a Moret executeur"

"testamentaire,"

"-----"

"190.000 Total portant interets a 5 ct. du jour du deces."

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

"Ces deux executeurs testamentaires s'etant mis en regle vis-a-vis de nous, nous avons paye f. 102.430 10, le 9 Avril, dernier a MM. Bonissant, en execution du testament du 4 Juin 1816; principal et interets 2.700; le 2 Juin

f. 105.130 10 ensemble, au moyen de quoi nous n'avons plus aucuns fonds appartenant a la succession du General."

"Nous avons lieu de croire que les autres Maisons se sont egalelement dessaisies des fonds en leurs mains, en execution du second testament."

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

"\$12,500 environ places chez Mr. Jefferson, ancien President des Etats Unis,"

"4,500 environ chez un Mr. Barnes a Washington."

" \_\_\_\_ Soit apeu-pres quatre vingt cinq mille francs, mais"

"\$17,000 nous ignorons entirement s'il en a dispose"

"[Signe] HOTTINGUER"

"Conforme a l'original, POLETICA"

" *Copie d'une lettre de Bonissant pere, Notaire a Moret a S. Ex. M. le Gl. Pozzo di Borgo, datee de Moret du 3 Juillet 1818. "*

"Je n'ai pas ete a meme de connoitre la fortune de M. le General: il etoit retire tout pres d'ici dans la famille de Mr. Zeltner dont j'ai la confiance. Voila comme j'ai fait sa connoissance et que par suite il m'a donne des marques d'amitie, et m'a rendu aussi depositaire de son testament. Environ dix-huit mois avant de mourir il avoit fait un testament dont il m'avoit confie un double; le testament aussitot son deces a ete ouvert suivant les formes legales; il a legue a plusieurs personnes les sommes en argent qu'il avoit a Paris entre les mains de la Maison Hottinguer et Comp. Il m'avoit choisi pour son executeur testamentaire, et j'ai fait acquitter les legs. Quant a ce qui concerne les autres moyens pecuniaires de ce respectable general, je ne puis vous donner aucun renseignement; je ne sais meme pas s'il avoit d'autres fonds ou des biens ailleurs."

"Je presume que vous pourriez le savoir, en vous adressant a M. Zeltner, chez lequel il demeurait: Il serait plus a meme de vous satisfaire sur cette demande. Mr. Zeltner est parti il y a environ trois mois pour accompagner les precieux restes de ce digne General a Cracovie, et doit etre de retour sous peu de jours."

"J'ai l'honneur d'etre, etc.,"

"BONISSANT"

"Conforme a l'original, POLETICA "

" *Exhibit F* "

"Soleure en Suisse, le 14 Avril 1819"

"Monsieur, J'ai recu il y a peu de jours, le lettre que vous m'avez fait l'honneur de m'ecrire le 23 Juillet 1818, et au moment que je me suis adresse a vos autorites pour me faire donner un extrait mortuaire du General Kosciuszko duement legalise, pour vous l'envoyer par votre Ministre a Paris, j'apprens que votre charge d'affaires en France, vient d'en faire la demande au nom de Monsieur Gallatin, afin de pouvoir executer dans

les Etats Unis de l'Amerique, et que cet acte alloit etre expedie. Je regrette que le retard qu'eprouve votre lettre ne m'ait pas permis de satisfaire plutot a votre desir de mettre en execution les volontes bienfaisantes et philanthropiques du grand homme, que nous pleurons. J'ai l'honneur de vous remercier du detail interessant que vous me donnez dans votre lettre au sujet de vos emigres et vous prie d'agreer l'assurance de ma plus haute estime et de mon respectueux devouement."

"F. X. ZELTNER"

" *Exhibit E* "

"Monsieur, Ayant en l'avantage de jouir pendant plus de vingt annees de l'amitie toute particuliere de l'illustre defunt, qui en a passe plus de quinze dans ma maison je n'ai pu ignorer les relations amicales qu'il a cultive avec vous: une amitie fondee sur l'estime reciproque, ne pouvoit qu'etre durable; aussi suis je bien persuade des regrets que vous causera la nouvelle de son deces si peu attendu. Il en avoit quitte en Mai 1815, pour repondre aux desirs que lui avait temoigne l'Empereur de Russie de conferer avec lui a Vienne sur le sort de la Pologne; de Vienne il est revenu jusqu'a Soleure en Suisse ou il a demeure chez mon frere en attendant que les circonstances decident s'il doit aller dans sa patrie ou revenir ici dans l'asile qu'il s'etait choisi; il etait sur le point de prendre le dernier parti quand la mort vint l'enlever a sa patrie, il a aussi de nombreux amis parmi lesquels je sais que vous etes au premier rang. C'est cette consideration qui m'a fait un devoir de vous annoncer directement cette nouvelle."

"Comme le General Kosciuszko a dispose de la majeure partie de sa fortune en faveur de mes enfans dames, nieces, freres,

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et belle soeur, et que je suis en outre tres lie avec ses parents que je compte aller voir en Pologne, je vous prie de vouloir donner des renseignements sur le capital qu'il a laisse entre vos mains et autres objets qui pourraient etre a votre connaissance; vous obligeres infiniment celui qui a l'honneur d' etre, avec estime et haute consideration,"

"Monsieur, votre tres humble et obeissant serviteur,"

"P. J. ZELTNER"

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

MR. JUSTICE STORY delivered the opinion of the Court.

This cause was formerly before the Court, and the decision then had is reported in [25 U. S. 12](#) Wheat. 169. The bill is now substantially the same with the former bill, except that there is an allegation that the instrument set forth as a testamentary instrument, executed at Paris on 28 June, 1826, in favor of the plaintiff, "has been admitted to probate and duly proved in the Orphan's Court of Washington County," in this District. But the bill does not go on to state that it has been duly established by that as a valid will according to the law of France, though that is averred to be the place of domicile

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of Kosciuszko at the time of its execution. The bill, however, does assert that the instrument is a last will and testament, to all intents and purposes, and must operate as such, and revoke *pro tanto* the bequests and appropriation in the prior will, of which Mr. Jefferson was named executor.

The answer of the administrator (Lear) is substantially the same as his former answer, admitting the execution of the instrument but submitting to the court (without denying in a formal and direct manner the validity of the will as such, according to the law of France) whether it will decree the defendant to pay the

money to the plaintiff

"upon an instrument made under the circumstances, and authenticated in the manner that the aforesaid instrument is, and whether the said instrument shall have effect to revoke or alter any part of said Kosciuszko's will, solemnly executed and left in the hands of his executor in this county,"

&c.; This is certainly a very informal and loose mode of putting in issue, if upon the bill such a question can be tried, the validity of a will made in a foreign country whose laws are not brought before the court either by averment or evidence. But the answer contains a new allegation that certain persons residing in Europe have filed a bill in the Circuit Court of the District of Columbia against him, the administrator, claiming a large portion of the assets, if not the whole, as creditors or mortgagees of the said Kosciuszko, and certain persons, also residing in Europe, have filed another bill against him (it was probably meant in the same court) claiming the whole assets as heirs at law of the said Kosciuszko, and therefore as distributees of the said assets. None of the parties to either of these latter bills is made party to the present bill. And we are of opinion that the persons claiming as heirs of Kosciuszko, should be made parties, that they may have an opportunity to contest the plaintiff's title, as the real parties in interest, the administrator being but a mere stake holder. Indeed, we think that all three of the bills ought (if possible) to be brought to a hearing at the same time in the circuit court in order that a final disposition may at the same time be made of all of the questions arising in all of them.

We wish also to attract the attention of counsel to some other considerations which may become important in future

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

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

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

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to bring the law of that country distinctly, as matter of fact, before the court. The court has, in another case, *Estho v. Lear*, 7 Pet. 130, expressed its desire to have the other will or wills made by Kosciuszko put regularly upon the record to ascertain whether they have any bearing upon the merits of the present case.

It is also material to observe that the answer of the administrator relies on a letter written by Kosciuszko to Mr. Jefferson in September, 1817, as a revocation of the supposed testamentary paper in favor of Armstrong and a republication of the first will, and yet that letter is not produced in evidence nor even the extract verified, so that there is a total deficiency of proof as to this most material fact. This defect ought to be supplied.

These observations have been thought fit by the Court to be suggested to the counsel on both sides on the present occasion. Under the complicated circumstances of the present case and the important bearings of foreign law upon it, it is very desirable that if it should come again before us, all the facts and all the lights necessary for a final decision may be furnished without submitting it to further embarrassments.

The Court decrees that the decree of the circuit court dismissing the bill be

*Reversed, and that the cause be remanded with leave to make new parties and for other proceedings.*

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