27 U.S. 417 (____)
2 Pet. 417

JOHN REYNOLDS, TENANT THE UNITED STATES, PLAINTIFF
vs.
DUNCAN M'ARTHUR, DEFENDANT.

Supreme Court of United States.

423 *423 Argued by Mr Scott for the plaintiff in error, and by Mr Mason and Mr Vinton for the defendant. Mr Wirt, attorney general, appeared for the plaintiff by order of the government of the United States, but was prevented taking part in the argument by indisposition.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

This is a writ of error to a judgment rendered by the supreme court of Ohio for the county of Champaign, in an ejectment in which the lessee of Duncan M'Arthur was plaintiff, and John Reynolds was defendant. The plaintiff claimed the land in controversy, under a patent issued on the 12th day of October 1812, founded on an entry made in the year 1810, on a military land warrant granted by the state of Virginia for services during the war of the revolution, in the Virginia line, on continental establishment.

424 *424 The title of the defendant is thus stated. The land was sold by the United States at their land office in Cincinnati, in the year 1805, to Henry Van Meter. It reverted to the United States in the year 1813 on account of the non-payment of the purchase money; and was again sold, during the same year at the same office, to Henry Van Meter, to whom a certificate of sale was issued, which he afterwards transferred to the defendant John Reynolds.

The verdict and judgment were in favour of the plaintiff in the state court. At the trial, the counsel for the defendant moved the court to instruct the jury on several points made in the cause, and excepted to the refusal of the court, to give these instructions. The judgment of the state court, having been against a title set up under several acts of congress, is brought before this Court by writ of error, that the construction put on those acts by that court may be re-examined. The inquiry will be, whether the court ought to have given any one of the instructions which were required. The several prayers for this purpose will be considered in the order in which they were made.

1. The first instruction asked is, that the lands west of Ludlow's line, east of Roberts's line, and south of the Indian boundary line, had been withdrawn from appropriation under and by virtue of military land warrants prior to the year 1810; and that as the same had, pursuant to the acts of congress in such case made and provided, been directed to be surveyed and sold, and had accordingly been surveyed and sold to the defendant, prior to the year 1810; the plaintiff's patent is void, and their verdict ought to be for the defendant.

This motion does not question the bounds of the lands reserved by Virginia for military bounties, but supposing the tract of country west of Ludlow's line, east of Roberts's line, and south of the Indian boundary line to be within that reserve, asks the court to say, that congress had, prior to the year 1810, when M'Arthur's entry was made, withdrawn it from appropriation under and by virtue of military land warrants.

425 *425 Before deciding on the propriety of refusing or granting this prayer, it will be necessary to review the legislation of congress on this subject.

The act of the 9th of June 1794[(a)], taken in connection with the reservation in favour of their officers and soldiers contained in the deed of cession made by Virginia, unquestionably subjected the whole of the military reserve to the satisfaction of those warrants, for which the reserve was made. Had congress, previous to the year 1810, withdrawn that portion of this reserve which lies between the line run by Ludlow, and that run by Roberts, from its liability to be so appropriated?

So early as the year 1785, congress passed "an ordinance[(b)] for ascertaining the mode of disposing of lands in the western territory," in which, for the purpose of securing to the officers and soldiers of the Virginia line on continental establishment, the bounties granted them by that state, it is ordained "that no part of the land between the rivers

called Little Miami and Scioto, on the north west side of the river Ohio, be sold or in any manner alienated, until there shall first have been laid off and appropriated for the said officers and soldiers and persons claiming under them, the lands they are entitled to agreeably to the said deed of cession and act of congress accepting the same."

The scrupulous regard which this clause, in the ordinance of May 1785, manifests to this condition made by Virginia in her deed of cession, is the more worthy of remark, because at that time no suspicion was entertained that the military warrants of Virginia would cover the whole territory; and it was even doubted, as the legislation of congress shows, whether any part of that territory would be required for them. Even under these circumstances, congress declared the determination not to sell or alienate any land between the Scioto and the Little Miami.

In May 1796 congress passed "an act providing for the sale of the lands of the United States in the territory north
426 *426 west of the river Ohio and above the mouth of Kentucky river[(a)]."

The second section enacts that, "the part of the said land which has not been already conveyed," &c. "or which has not been heretofore, and during the present session of congress may not be appropriated for satisfying military land bounties, and for other purposes, shall be divided," &c.

This law then, from which the whole power of the surveyor general is derived, excludes from his general authority all lands previously appropriated for military land bounties and for other purposes; and consequently excludes from it the lands between the Scioto and the Little Miami.

In May 1800[(b)], congress passed an act to amend the act of 1796, which enacts "that for the disposal of the lands of the United States directed to be sold by the original act, there shall be four land offices established in the said territory." The places at which these land offices shall be fixed are designated in the act, and the district of country attached to each is described. One of these is Cincinnati, the place at which the lands in controversy were sold, and the district attached to it is that below the Little Miami.

It is perfectly clear from the language of this act, that it extends to those lands only which were comprehended in the act of May 1796, and that no one of the districts established by it, comprehends the land in controversy. Any general phrases which may be found in the law must, according to every rule of construction, be limited in their application to those lands which the original act authorized the surveyor general to lay off for the purpose of being sold. If he surveyed any lands to which that act does not extend, he exceeded his authority, and the survey is not sanctioned by the law. If land thus surveyed by mistake has been sold, the sale was not authorized by the law under colour of which it was made.

The counsel for the plaintiff in error has pressed earnestly on the Court the grants made to John Cleves Symmes,
427 and *427 to the purchasers under him. We are not sure that the argument on this point has been clearly understood, and have therefore examined that transaction, in order to discover its influence, if it can have any, on the question now under consideration.

In 1787 John Cleves Symmes applied to congress for a grant to himself and his associates of the lands lying within the following limits, viz. "beginning at the mouth of the Great Miami river, thence running up the Ohio to the mouth of the Little Miami river, up the main stream of the Little Miami river to the place where a due west line, to be continued from the western termination of the northern boundary line of the grant to Messrs Sargent, Cutler & Co. shall intersect the said Little Miami river, thence due west, continuing the said western line to the place where the said line shall intersect the main branch or stream of the Great Miami, thence down the Great Miami to the place of beginning."

In consequence of this petition, a contract was entered into for the sale of one million of acres of land to begin on the bank of the Ohio, twenty miles along its meanders above the mouth of the Great Miami, thence to the mouth of the Great Miami, thence up that river to a place whence a line drawn due east will intersect a line drawn from the place of beginning, parallel with the general course of the Great Miami, so as to include one million of acres within these lines and the said rivers, and from that place upon the said Great Miami river, extending along such lines to the place of beginning, containing as aforesaid one million of acres.

The language of this contract does not indicate any intention on the part of congress to encroach on the military reserve, which the ordinance of May 1785, then in full force, had excepted from sale or alienation.

In 1792[(a)], congress, at the request of John C. Symmes, passed an act to alter this contract in such manner that the land sold should extend from the mouth of the Great Miami to the mouth of the Little Miami, and be bounded by the
428 *428 river Ohio on the south, by the Great Miami on the west, by the Little Miami on the east, and by a parallel of latitude on the north, extending from the Great Miami to the Little Miami, so as to comprehend the proposed quantity of one million of acres."

The lands then which might be granted to John C. Symmes, in pursuance of this act of congress, lay between the Great and Little Miami, and were to lie below the Little Miami. The Scioto is above that river; so that congress could not have intended that this grant to Symmes should interfere with the military reserve.

On the 36th of September, in the year 1794, a deed was executed in pursuance of the act of 1792, conveying to John C. Symmes that tract of land beginning at the mouth of the Great Miami river, and extending from thence along the river Ohio to the mouth of the Little Miami river, bounded on the south by the river Ohio, on the west by the Great Miami, on the east by the Little Miami, and on the north by a parallel of latitude to be run from the Great Miami to the Little Miami, so as to comprehend the quantity of 311,682 acres of land.

It is obvious that this patent does not interfere with the military reserve. But John C. Symmes had sold to several persons who purchased in the confidence that he would comply with his contract for one million of acres, and be enabled to convey the lands sold to them.

In March 1799 congress passed an act declaring that any person or persons, who, before the first day of April in the year 1797, had made any contract in writing with John C. Symmes for the purchase of lands between the Great and Little Miami rivers, which are not comprehended in his patent dated the 30th of September 1794, shall be entitled to a preference in purchasing of the United States all the lands so contracted for at the price of two dollars per acre.

In March 1801, congress passed an act extending this right of pre-emption to all persons who had, previous to the first day of January 1800, made any contract in writing with the said John C. Symmes or with any of his associates,
429 for the purchase of lands between the Miami rivers, within the *429 limits of a survey made by Israel Ludlow, in conformity to an act of congress of the 12th of April 1792.

The provisions of this act are supposed to contemplate the survey and sale of the lands which had been sold to John C. Symmes between the Miami rivers; in like manner as had been prescribed for other lands lying above the mouth of Kentucky by the acts of 1796 and 1800. The right of pre-emption was limited to lands within Israel Ludlow's survey; but that survey contained less than 600,000 acres, and the contract of Symmes was for one million of acres; congress therefore resumed the consideration of this subject, and in May 1802 extended this right of pre-emption to all those who had purchased from John C. Symmes, lands lying between the Miami rivers, and without the limits of Ludlow's survey. It cannot be doubted that this right of pre-emption allowed to the purchasers under John C. Symmes, was limited to lands lying between the Miami rivers and lying within his contract. Congress could never have intended that this contract should interfere with the military reserve. That reserve was of lands lying above the Little Miami. The sale to Symmes was of lands lying below that river. It was made while an ordinance was in full force, declaring the resolution of congress not to alienate any part of that reserve. Their contract was made in subordination to that ordinance, and cannot have intended to violate it. The terms of the contract do not purport to violate it. The land sold to Symmes, and the pre-emption rights allowed to the purchasers under him, are so described as to furnish no ground for the opinion that congress could have suspected them to interfere with the military reserve. If the Scioto and the Great Miami, contrary to all probability, should take such a direction as to produce a possible interference between the lands sold to Symmes and the reserve which congress had declared its resolution not to alienate, some difficulty might possibly arise in a case where one of the parties claimed under a military warrant, and the other under a pre-emption certificate. But that is not this case. The title of the plaintiff in error
430 is under a purchase made at a sale of the lands of the United States at Cincinnati, by Henry Van Meter, who is *430 not stated to have held a pre-emption certificate, or to have been a purchaser under Symmes.

The instruction which the court was asked to give is, that the land between the lines of Ludlow and Roberts had been withdrawn from appropriation, under and by virtue of military land warrants, previous to the year 1810. This withdrawal is not in express terms, but is supposed to be implied from a direction to survey the lands between the Great and Little Miami which had been exempted from the operation of the acts of 1796 and 1800, under the idea that they were comprehended in the contract with Symmes. Congress could not suspect that the lands to be

surveyed under this law could interfere with the lands lying between the Little Miami and the Scioto; and consequently, cannot have intended by this act to vary the boundary of the military reserve.

It has been very truly observed, that all the laws on this subject should be taken together. The condition inserted in the deed of cession of Virginia, which reserves the land lying between the little Miami and the Scioto, for the purpose of satisfying the warrants granted to the officers and soldiers of that state; the ordinance of May 1785, declaring that no part of that reserve should be alienated; the contract with Symmes for the sale of lands lying between the two Miami; the acts relative to pre-emptions, and which direct the survey and sale of the lands lying between the Miami; without any allusion to the military district; must be taken into view at the same time.

It is, we think, impossible to believe that congress supposed itself, when directing the survey and sale of lands between the Great and Little Miami, to be abridging or altering the bounds of a district which Virginia had reserved in the deed of cession by which the country north west of the Ohio had been conveyed to the United States.

When congress designed to act on this subject, the purpose was expressed; and overtures were made to the other party to the compact, to obtain her co-operation.

In executing the act of May 1800, the surveyor general had caused a line to be run, from what he supposed to be
431 *431 the source of the Little Miami, towards what he supposed to be the source of the Scioto, which is the line denominated Ludlow's, and surveyed the lands west of that line in the manner prescribed by the act of congress.

In March 1804[(a)], congress passed an act establishing that line as the western boundary of the reserve, provided the state of Virginia should, within two years after the passage of the act, accede to it. Virginia did not accede to it.

In 1812[(b)], congress made another effort to establish this line. The president was authorised to appoint commissioners to meet others which should be appointed by Virginia, who were to agree on the western line of the military reserve, and cause the same to be surveyed and marked out. These commissioners met; and after ascertaining the sources of the two rivers, employed Mr Charles Roberts to survey and mark a line from the source of the one to the source of the other. This line is called Roberts's line. The Virginia commissioners, however, refused to accede to this line.

This act provided, that until an agreement should take place between the commissioners, the line designated in the act of 1804, which is Ludlow's, should be considered and held as the proper boundary line. This enactment is provisional and prospective.

In 1816[(c)], congress passed an act declaring that from the source of the Little Miami to the Indian boundary line, established by the treaty of Greenville, Ludlow's line should be considered as the western boundary of the military reserve, until otherwise directed by law; and that from the said Indian boundary line to the source of the Scioto river, the line run by Charles Roberts shall be so considered.

When we review the whole legislation of congress on this subject, we think the conclusion inevitable, that in the acts of 1801 and 1802, which have been cited, the legislature did not consider itself as altering the bounds of the military district, or as withdrawing before the year 1820 any part of the territory lying between the Little Miami and the Scioto
432 *432 from being appropriated by the military land warrants granted by the state of Virginia. If those acts have this effect, it is one which was not intended.

Before a court can be required to declare the law which would arise between conflicting statutes of this character, the fact that they do conflict, ought to be clearly established. The counsel for the plaintiff in error has argued this part of the case as if the fact was established; as if a line drawn from the source of the Little Miami to the source of the Great Miami would include the land between Ludlow's line and that of Roberts; and this Court has thus far treated the question as it has been argued. But this fact is not established in this case. It is not among the facts agreed by the parties, nor was the state court required to instruct the jury, that if they should find the land west of Ludlow's, and east of Roberts's line to lie between the Little and Great Miami, or within Symmes's purchase, "that it had been withdrawn from appropriation, under and by virtue of said military land warrants, prior to the year 1810," and that M'Arthur's patent was consequently void. The court was not required to state the law hypothetically, as being dependant on the fact; but to assume the fact, and to state the law positively upon that assumption. The record, we think, did not authorise the court to consider this fact as established, and to withdraw it from the jury.

There is no error in refusing this instruction.

2. The counsel for the defendant then asked the court to instruct the jury, that, as the third section of the act of the congress of the United States, of the 11th of April 1818, declares: "That from the source of the Little Miami river to the Indian boundary line, established by the treaty of Greenville in 1795, the line designated as the westerly boundary line of the Virginia tract, by an act of congress passed on the 23d day of March 1804, entitled `an act to ascertain the boundary of the lands reserved by the state of Virginia, north west of the river Ohio, for the satisfaction of her officers and soldiers on continental establishment, and to limit the period for locating the said lands', shall be considered and
433 held as such until otherwise directed by law;" and as said *433 boundary line was run by Ludlow, under the directions of the surveyor general, pursuant to an act of congress, entitled "An act to extend and continue in force the provisions of an act entitled `an act giving a right of pre-emption to certain persons who have contracted with John Cleves Symmes, or his associates, for lands lying between the Miami rivers, in the territory north west of the Ohio, and for other purposes,'" approved May 1st, 1802; and offered for sale at public auction, at the Cincinnati land office, pursuant to the act, entitled "An act making provision for the disposal of public lands in the Indiana territory, and for other purposes," approved March 26th, 1804, must be construed as having relation back to the time the above recited act, entitled "An act to ascertain the boundary of the lands reserved by the state of Virginia, north west of the river Ohio, for the satisfaction of the officers and soldiers on continental establishment, and to limit the period for locating said lands," approved 23d of March 1804; was passed, and took effect; and as the plaintiff's patent covers lands west of that line, and south of the Greenville treaty line, and is based on an entry made in 1810, on a Virginia continental land warrant, which land had been surveyed and sold to the defendant, pursuant to the acts of congress prior to the year 1810, the plaintiff's patent is void: and their verdict ought to be for the defendant.

The prayer for this instruction is founded on the assertion that Ludlow's line was run under the direction of the surveyor general, pursuant to the act of congress of the 1st of May 1802, granting pre-emption rights to purchasers from John Cleves Symmes; and that the land in controversy was sold, pursuant to the act of the 26th of March 1804, making provision for the disposal of public lands in the Indian territory, and for other purposes.

If by the words "pursuant to an act of congress," as used in this prayer, it is intended to say that the boundary line run by Ludlow was correctly run as required by the act of May 1st, 1802; and that the sale of the land in controversy was authorized by the act of the 26th of March 1804, then the court is required to decide facts not admitted by the parties,
434 *434 which are proper for the consideration of the jury; and then to declare the law arising upon those facts. If those words mean no more than that the line was actually run under the authority of the surveyor general, and that the land in controversy was actually sold at the land office in Cincinnati by the officers of government, the question fairly arises, what influence have these facts on the rights of the parties? Do they, taken in connexion with the acts of the 23d of March 1804 and of the 11th of April 1818, justify the inference which the court is asked to draw, that the act of 1818 relates back to the act of 1804, and takes effect from its date, so as to avoid a patent issued in October 1812, on an entry and survey made in 1810.

It has already been stated that the act of the 23d of March 1804 establishes Ludlow's line, not absolutely, but on condition that Virginia should assent to it; and that Virginia never did assent to it.

It has also been stated that in 1812, congress authorized the president to appoint commissioners who should proceed in concert with such as might be appointed by Virginia, to run a line which should constitute the western boundary of the Virginia military reserve. These commissioners did meet, and did cause a line to run from the source of the Little Miami to the source of the Scioto. This is called Roberts's line. The commissioners of Virginia did not assent to this line. Consequently it is of no operation.

The act of April the 11th, 1818, declares that Ludlow's line shall be considered and held as the true western boundary of the Virginia military reserve until otherwise directed by law. But from what time shall it be so considered and held? The language of the law is entirely prospective. It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively unless the language of the act shall render such construction indispensable. No words are found in the act of 1818 which render this odious construction indispensable. The language is that Ludlow's line
435 shall be considered and held, that is, shall in future be considered and held as the *435 true western boundary of that reserve. That this was the understanding of the legislature, is rendered the more probable from the clause which relates to patents. It does not annul patents already issued, but declares that no patent shall be granted on any

location and survey that has been or may be made west of this line. Patents which have been granted are not affected directly by the words of this law, and must depend on the pre-existing act of congress.

The argument is, that this act declaring that Ludlow's line shall be considered and held as the westerly boundary line of the reserve until otherwise directed by law, proves that, according to the true construction of the deed of cession, this line is in reality the true boundary, and therefore that all titles previously acquired to lands lying west of this line are invalid.

We cannot admit the correctness of this argument.

That in the state of things which existed in 1812 and 1818, congress might establish the western boundary of the military reserve, so as to affect titles thereafter to be acquired, is not questioned. Congress might fix a reasonable time within which titles should be asserted, and might annex conditions to the extension of this time. But to look back to titles already acquired, to declare by a law what was the meaning of the compact under which those titles were acquired, is to construe that compact and to adjudicate in the form of legislation. It would be the exercise of a judicial, not of a legislative power. This construction can never be admitted by the Court unless it be rendered indispensable by the language of the act. We do not think that the language of this act does require it.

If the language of the statute does not require this construction, neither do the facts that Ludlow's line was run by order of the surveyor general, and that the land in controversy was sold by the regular agents of government. These facts cannot we think carry back the act of 1818 to 1804, and give it a retrospective operation.

We do not inquire into the power of congress to pass such an act. There is undoubtedly much force in the argument
436 suggested at the bar, that the general power of legislation, *436 which congress could exercise over the territory north west of the Ohio, passed to the new government when the territory was erected into a state; and that congress retained only the power of a proprietor with a capacity "to dispose of and make all needful rules and regulations respecting the property." But it is unnecessary to pursue this inquiry, because we are of opinion that this construction is inadmissible.

The Court therefore did right in rejecting this prayer.

The third instruction asked by the defendant is in these words; that according to the true intent and meaning of the act and deed of cession from Virginia to the United States, the land lying between the rivers Scioto and Little Miami, is bounded by a line extending from the source or point of land farthest removed from the mouths of these rivers, from which the rain descending on the earth runs down into their respective channels, along the tops of the ridges, dividing the waters of the Scioto from the waters of the Great Miami, which empties into the Ohio below the mouth of the Little Miami, as delineated on the diagram returned by the county surveyor for the defendant in this case; and as the plaintiff's patent covers land west or without the boundary of the district so bounded as aforesaid, and is based on an entry on a Virginia continental land warrant, which entry was made in the year 1810, and which said entry and patent cover land which had, pursuant to the acts of congress, been surveyed and sold to the defendant prior to the date of the plaintiff's said entry, the plaintiff's patent is void: and their verdict ought to be for the defendant.

In the case of Doddridge vs. Thompson, 9 Wheaton, 469, this Court said that the territory lying between two rivers is the whole country from their sources to their mouths; and a straight line drawn from the source of one river to the source of the other was considered, in that case, as furnishing the western boundary of the lands lying between them. One or both of the rivers may pursue such a course, that a straight line from the source of one to the source of the other may cross one or both of them. Such a case may form an exception to the universal application of the
437 straight line, *437 and may go far in showing that no general rule can be laid down which will fit every possible case. But this obvious and reasonable rule has been adopted by congress as well as by this Court. The act of 1804 adopts the straight line. The act of 1812 obviously contemplates a straight line, and the act of 1818 adopts Ludlow's line, from the source of the Little Miami to the Indian boundary line established at the treaty of Greenville, and the line run by Roberts from the Indian boundary to the source of the Scioto.

The counsel for the defendant in the state court abandoned the rule adopted by congress and by this Court, by taking for his commencement "that point of land which is farthest removed from the mouths of the respective rivers, and from which the rain descending on the earth runs down into their respective channels;" and to draw a line from that point along the top of the ridges dividing the waters of the Scioto from the waters of the Great Miami.

We feel some difficulty in comprehending the principle which has suggested and can sustain this rule. Why should a line drawn along the top of the ridges which divide the waters of the Scioto from those of the Great Miami, constitute the true boundary of the country lying between the Great and Little Miami? Would such a line certainly lead to the source of the Scioto or to that of the Little Miami? We can give no satisfactory answer to these inquiries. It is some objection too to this instruction, that the jury would be much and unnecessarily perplexed in finding the point of land farthest removed from the mouth of each river, and from which the rain descending on the earth runs down into their respective channels. If any point exists which would fit all parts of the description, and could be found by the jury, it is by no means certain that such point would be in a line which would mark the boundary of the country between the two rivers.

The rule which the court was asked to lay down appears to us to be entirely arbitrary; and this prayer was properly rejected.

4. The fourth instruction has been abandoned by the plaintiff in error.

438 *438 5. The proposition on which the fifth prayer depends, is that the sources of the two rivers must be at that point in their respective channels at which, from the union of several streams, sufficient water flows at an ordinary stage on which to navigate small vessels laden."

This rule for ascertaining the source of a river is entirely new in this country. A stream may acquire the name of a river which is not navigable in any part. A river which is navigable, may retain that name above the highest navigable point. The meaning of words as commonly used must be changed before the source of a river can be confounded with its highest navigable point.

The Court did not err in rejecting this prayer.

6. The proposition on which the sixth prayer depends is, "that the sources of the two rivers must be considered as commencing at that point in their respective channels from which the water flows at all seasons of the year."

Is this proposition so invariably true as to become a principle of law? We think it is not. A stream may acquire the name of a river, in the channel of which, at some seasons of extreme drought, no water flows. For a great portion of the year parts of a stream may flow in great abundance, in which, during a very dry season, we may find only standing pools. It would be against all usage to say that the general source of the river was at that point in its channel from which the water always flows.

This prayer we think ought not to have been granted.

7. The seventh prayer depends on the proposition, that the sources of the two rivers must be fixed at that point in their respective channels, farthest removed from their respective mouths, at which water is found at all seasons of the year.

If the terms of this proposition be taken according to their most obvious import, it would seem to vary from the sixth only in this: that the sixth fixes the source of a river at the point in the channel from which water flows at all seasons in the year; while the seventh fixes it at that point which is farthest removed from its mouth, at which water is found at all
439 seasons. Understanding it in this sense, the *439 proposition would not raise the question, which of several was the main branch; but at what point the source of that main branch was to be found. The remarks made on the sixth prayer would apply with equal propriety to this; and the Court would come to the same conclusion on both. But we understand from the argument, that the counsel for the plaintiff in error, intended, by this prayer, to furnish a rule by which the main branch might be designated. That rule is, that the branch in whose channel water might be found furthest removed from the mouth of the river, is its main branch.

Is this proposition universally true. That branch of a river, which is entitled to the appellation given to the main river, is a conclusion of fact to be drawn from the evidence in the cause. Consequently no general rule can be laid down, which will, in all cases, guide us to a correct conclusion. One of the forks may have retained the name of the main river, in exclusion of the others. The Scioto and Miami are both Indian names, and if any one branch of either had received from the natives, and retained exclusively, the name given to the main river, that would have been the stream referred to in the reserve, contained in the deed of cession; although water might have been found in a dry season of the year, in the channel of some other, at a greater distance from the mouth of the river; or the white men,

who explored the country before the deed of cession was executed, may have fixed the name on some one of the branches of the respective rivers.

When France ceded to Great Britain all her pretensions to the country lying east of the Mississippi, "from its source to the river Iberville," no man could have been so extravagant as to assert, that the source of the Mississippi was to be looked for through all its branches, and fixed at that point in the channel of either in which water might be found farthest removed from the mouth of the river.

The size of the rivers, and the notoriety of the names by which they were designated, place the unreasonableness of such a pretension in so strong a point of view, that we can scarcely bring ourselves to suppose that there is any
440 resemblance *440 between the case put by way of illustration, and that under consideration. And yet, what is the real difference in principle? If one branch of a small river has by consent retained the name of the main river, in exclusion of the others, that branch must be considered, in the absence of other circumstances, as the true boundary intended by the parties, in a deed which calls for the stream by its name. The fact may be less certain and less notorious; but, if it exists, it must be followed by the same consequences.

If neither branch had notoriously retained the name of the river, the main branch is entitled to it. But the main branch is not necessarily that in whose channel water might be found at all seasons of the year, at the point farthest removed from its mouth. The largest volume of water is certainly one indication of the main stream, which does not necessarily accompany that which the counsel for the plaintiff in error has selected as the sole criterion by which it is to be determined. The length of the stream is another. It is obvious, that two branches may pursue such a course that the source of the longest may be nearer the mouth of the river than that of the shortest.

We think the rule proposed in this prayer does not furnish a certain guide to conduct us to the source of the river; and therefore the instruction ought not to have been given.

8. The eighth prayer requires the court to instruct the jury, that the source of each river is at that point farthest removed from its mouth, from which the rain runs down into its channel.

We cannot perceive in the rule which this instruction proposes, any principle which will conduct us to the source of the main stream. Every objection to granting the seventh prayer, applies with equal force to this. They need not be repeated.

The court did not err in rejecting it.

The instructions to the jury, for which the plaintiff applied to the state court, are some of them mixed questions, involving fact with law, and requiring the court to decide the fact, and then to declare the law upon that fact. Others
441 propose a rule, as of universal application, to ascertain the main *441 branch of a river, and the source of that main branch, which would unquestionably, in many cases, mislead us. They propose one single circumstance, in exclusion of all others, as being the infallible evidence of a complex fact depending on a number of varying circumstances.

The court very properly refused to give any of these instructions.

This Court is of opinion that there is no error in the judgment of the state court, and that it ought to be affirmed with costs.

[(a)] 2 United States Laws, 440.

[(b)] 1 United States Laws, 563, 569.

[(a)] 2 United States Laws, 533.

[(b)] 3 United States Laws, 385.

[(a)] 2 United States Laws, 270.

[(a)] 3 United States Laws, 592.

[(b)] 4 United States Laws, 455.

[(c)] 6 United States Laws, 282.