

McCluny v. Silliman.

ing a motion for a new trial. The writ of error must, therefore, be dismissed.

Wheaton, for the defendant in error, moved for costs.

MARSHALL, Ch. J.—The court does not give costs, where a cause is dismissed for want of jurisdiction.

Writ of error dismissed, without costs.(a)

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Mandamus.

This court has not jurisdiction to issue a writ of *mandamus* to the register of a land-office of the United States, commanding him to enter the application of a party for certain tracts of land, according to the 7th section of the act of the 10th May 1800, "providing for the sale of the lands of the United States north-west of the Ohio, and above the mouth of Kentucky river;" which *mandamus* had been refused by the supreme court of the state of Ohio, upon a submission by the register to the jurisdiction of that court, being the highest court of law or equity in that state.¹

March 13th, 1817. *Harper* moved for a *mandamus* in this cause, to the defendant, as register of the land-office of the United States, at Zanesville, in the state of Ohio, commanding him to enter the application of the plaintiff, for certain tracts of land, according to the provisions of the 9th section of the act of congress, of the 10th May 1800, entitled, "an act providing for the sale of the lands of the United States, in the territory of the United States, north-west of the Ohio, and above the mouth of Kentucky river." A rule to show cause had been obtained in the supreme court of the state of Ohio (being the highest court of law or equity of that state); whereupon, the defendant appeared, and excepted to the jurisdiction of the court: but this plea was afterwards waived, and a case agreed between the parties, on which the court ordered the rule to be discharged.

*370] *Harper* now moved for a *mandamus* to issue from this court, upon the ground, that the case was within the appellate jurisdiction of the court, under the equity of the judiciary act of 1789; that although the court had determined, that it had no original jurisdiction to issue writs of *mandamus* to persons holding office under the authority of the United States, yet it might have an appellate jurisdiction to issue a *mandamus* to such persons, where it had been refused by the highest court of law or equity of a state, in a case drawing in question the validity of a statute of, or an authority exercised under, the United States. The motion was denied by the court.

Motion denied.(b)

(a) Costs will be allowed upon the dismissal of a writ of error, for want of jurisdiction, if the original defendant be also defendant in error. *Winchester v. Jackson*, 3 Cranch 515.

(b) In the case of *Marbury v. Madison*, 1 Cranch 137, the court determined, that having, by the constitution, only an appellate jurisdiction (except in cases of ambassadors, &c.), and it being an essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause: that, although a *mandamus* may be directed to courts, yet to issue such a writ

¹ *Kendall v. United States*, 12 Pet. 526.

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to an officer, for the delivery of a paper, was, in effect, the same as to sustain an original action for that paper, and therefore, seemed not to belong to appellate, but to original jurisdiction; and that, consequently, the authority given to this court by the 13th section of the judiciary act of 1789, to issue writs of *mandamus* to "persons holding office under the authority of the United States," was not warranted by the constitution. In *McIntire v. Wood*, 7 Cranch 504, it was decided, that the power of the circuit courts to issue writs of *mandamus*, is confined by the judiciary act of 1789, exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. That case was brought up from the circuit court of Ohio, upon a certificate, that the judges of that court were divided in opinion, upon the question, whether that court had the power to issue a writ of *mandamus* to the register of a land-office in Ohio, commanding him to issue a final certificate of purchase, to the *plaintiff, of certain lands in that state? In delivering the opinion of the court, Mr. Justice JOHNSON stated that, "Had the 11th section of the judiciary act covered the whole ground of the constitution, there would be much reason for exercising this power in many cases, wherein some ministerial act is necessary to the completion of an individual right, arising under the laws of the United States, and the 14th section of the same act would sanction the issuing of the writ for such a purpose. But although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature has not thought proper to delegate the exercise of that power to its circuit courts, except in certain specified cases. When questions arise under those laws in the state courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the supreme court, and this provision the legislature has thought sufficient, at present, for all the political purposes intended to be answered by the clause of the constitution which relates to this subject." The power of the supreme court to issue writs of *mandamus* to the other courts of the United States, has been frequently exercised. *United States v. Peters*, 5 Cranch 115; *Livingston v. Dorgenois*, 7 Id. 577. But in the case of *Hunter v. Martin's Lessee*, 1 Wheat. 304, the court, in pronouncing its opinion upon its appellate jurisdiction, in causes brought from the highest court of law or equity of a state, deemed it unnecessary to give any opinion on the question, whether this court has authority to enforce its own judgments on appeal, by issuing a writ of *mandamus* to the state court, as the question was not thought necessarily involved in the decision of that cause. Id. 362.

THE LONDON PACKET: MERINO, Claimant.

Prize.—Evidence.

It is the practice of this court, in prize causes, to hear the cause, in the first instance, upon the evidence transmitted from the circuit *court, and to decide, upon that evidence, whether it is proper to allow further proof. Affidavits to be used as further proof, in causes of admiralty and maritime jurisdiction, in this court, must be taken by a commission. [*372]

March 5th, 1817. In the argument of this cause, *Winder*, for the claimant, stated, that there was an affidavit annexed to the record, which was taken under the order for further proof, in the court below, but which, not arriving until after the decree of condemnation was pronounced, was ordered by the circuit court, to be transmitted, *de bene esse*, for the consideration of this court. He further stated, that he had additional proofs, taken since that time, to be used in this court; and he asked, whether he should now be permitted to read these proofs, in order to show what was the nature of the evidence which existed, to clear away any former doubts in the cause.

MARSHALL, Ch. J.—The court is of opinion, that the affidavit transmitted