

FEBRUARY TERM, 1803.

WILLIAM MARBURY v. JAMES MADISON, Secretary of State of the United States.

Constitutional law.—Jurisdiction.—Mandamus.—Appointment and removal of officer.—Commission.

The supreme court of the United States has not power to issue a *mandamus* to the secretary of state of the United States, it being an exercise of original jurisdiction not warranted by the constitution.

Congress have not power to give original jurisdiction to the supreme court, in other cases than those described in the constitution.

An act of congress, repugnant to the constitution, cannot become a law.

The courts of the United States are bound to take notice of the constitution.

It seems, that a commission is not necessary to the appointment of an officer by the executive.

A commission is only evidence of an appointment.

Delivery is not necessary to the validity of letters-patent.

The president cannot authorize the secretary of state to omit the performance of those duties which are enjoined by law.

A justice of peace, in the District of Columbia, is not removable at the will of the president.

When a commission for an officer, not holding his office at the will of the president, is by him signed and transmitted to the secretary of state, to be sealed and recorded, it is irrevocable; the appointment is complete.

A *mandamus* is the proper remedy, to compel the secretary of state to deliver a commission to which the party is entitled.

At the last term, viz., December term 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe and William Harper, by their counsel, Charles Lee, Esq., late attorney-general of the United States, *severally moved the court for a rule on James Madison, secretary of state [*138 of the United States, to show cause why a *mandamus* should not issue, commanding him to cause to be delivered to them, respectively, their several commissions as justices of the peace in the district of Columbia.

This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate, for their advice and consent, to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president, appointing them justices, &c., and that the seal of the United States was in due form affixed to the said commissions, by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison, as secretary of state of the United States, at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory explanation has not been given, in answer to that inquiry, either by the secretary of state, or any officer in the department of state; that application has been made to the secretary of the senate, for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate. Whereupon, a

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rule was laid, to show cause on the fourth day of this term; this rule having been duly served—

Mr. Lee, in support of the rule, observed, that it was important to know on what ground a justice of peace in the district of Columbia holds his office, and what proceedings are necessary to constitute an appointment to an office, not held at the will of the president. However notorious the facts are, upon the suggestion of which this rule has been laid, yet the applicants have been much embarrassed in obtaining evidence of them. Reasonable information has been denied at the office of the department of state. Although a respectful memorial has been made to the senate, praying them to suffer their secretary to give extracts from their executive journals *139] respecting the nomination of the applicants to the senate, and of their advice and consent to the appointments, yet their request has been denied, and their petition rejected. They have, therefore, been compelled to summon witnesses to attend in court, whose voluntary affidavits they could not obtain. *Mr. Lee* here read the affidavit of Dennis Ramsay, and the printed journals of the senate of 31st January 1803, respecting the refusal of the senate to suffer their secretary to give the information requested. He then called Jacob Wagner and Daniel Brent, who had been summoned to attend the court, and who had, as it is understood, declined giving a voluntary affidavit. They objected to being sworn, alleging that they were clerks in the department of state, and not bound to disclose any facts relating to the business or transactions in the office.

Mr. Lee observed, that to show the propriety of examining these witnesses, he would make a few remarks on the nature of the office of secretary of state. His duties are of two kinds, and he exercises his functions in two distinct capacities; as a public ministerial officer of the United States, and as agent of the president. In the first, his duty is to the United States or its citizens; in the other, his duty is to the president; in the one, he is an independent and an accountable officer; in the other, he is dependent upon the president, is his agent, and accountable to him alone. In the former capacity, he is compellable by *mandamus* to do his duty; in the latter, he is not. This distinction is clearly pointed out by the two acts of congress upon this subject. The first was passed 27th July 1789 (1 U. S. Stat. 28), entitled “an act for establishing an executive department, to be denominated the department of foreign affairs.” The first section ascertains the duties of the secretary, so far as he is concerned as a mere executive agent. It is in these words, “there shall be an executive department, to be denominated the department of foreign affairs, and that there shall be a principal officer therein, to be called the secretary of the department of foreign affairs, who shall perform and execute such duties as shall, from time to time, be enjoined on, or intrusted to him by the president of the United States, agreeable to the constitution, relative to correspondences, *140] commissions or instructions to or with public ministers or consuls from the United States; or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs as the president of the United States shall assign to the said department; and furthermore, that the said principal officer shall con-

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duct the business of the said department in such manner as the president of the United States shall, from time to time, order or instruct."

The second section provides for the appointment of a chief clerk; the third section prescribes the oath to be taken, which is simply, "well and faithfully to execute the trust committed to him;" and the fourth and last section gives him the custody of the books and papers of the department of foreign affairs under the old congress. Respecting the powers given, and the duties imposed, by this act, no *mandamus* will lie: the secretary is responsible only to the president.

The other act of congress respecting this department was passed at the same session on the 15th September 1789 (1 U. S. Stat. 68), and is entitled "An act to provide for the safe-keeping of the acts, records and seal of the United States, and for other purposes." The first section changes the name of the department and of the secretary, calling the one the department, and the other the secretary, of state. The second section assigns new duties to the secretary, in the performance of which, it is evident, from their nature, he cannot be lawfully controlled by the president, and for the non-performance of which, he is not more responsible to the president than to any other citizen of the United States. It provides, that he shall receive from the president all bills, orders, resolutions and votes of the senate and house of representatives, which shall have been approved and signed by him; and shall cause them to be published, and printed copies to be delivered to the senators and representatives, and to the executives of the several states; and makes it his duty carefully to preserve the originals; and to cause them to be recorded in books to be provided for that purpose. The third section provides a seal of the United States. The fourth makes it his duty to keep the said seal, and to make out and record, and to affix the seal of the United States to all civil commissions, after they *shall have been signed by the president. The fifth section provides for a seal of [*141 office, and that all copies of records and papers in his office, authenticated under that seal, shall be as good evidence as the originals. The sixth section establishes fees for copies, &c. The seventh and last section gives him the custody of the papers of the office of the secretary of the old congress. Most of the duties assigned by this act are of a public nature, and the secretary is bound to perform them, without the control of any person. The president has no right to prevent him from receiving the bills, orders, resolutions and votes of the legislature, or from publishing and distributing them, or from preserving or recording them. While the secretary remains in office, the president cannot take from his custody the seal of the United States, nor prevent him from recording and affixing the seal to civil commissions of such officers as hold not their offices at the will of the president, after he has signed them and delivered them to the secretary for that purpose. By other laws, he is to make out and record in his office, patents for useful discoveries, and patents of lands granted under the authority of the United States. In the performance of all these duties, he is a public ministerial officer of the United States. And the duties being enjoined upon him by law, he is, in executing them, uncontrollable by the president; and if he neglects or refuses to perform them, he may be compelled by *mandamus*, in the same manner as other persons holding offices under the authority of the United States.

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The president is no party to this case. The secretary is called upon to perform a duty over which the president has no control, and in regard to which he has no dispensing power, and for the neglect of which he is in no manner responsible. The secretary alone is the person to whom they are entrusted, and he alone is answerable for their due performance. The secretary of state, therefore, being in the same situation, as to these duties, as every other ministerial officer of the United States, and equally liable to be compelled to perform them, is also bound by the same rules of evidence. These duties are not of a confidential nature, but are of a public kind, and his clerks can have no exclusive privileges. There are, undoubtedly, facts, which may come to their knowledge by means of their connection with the *142] secretary of state, respecting which *they cannot be bound to answer.

Such are the facts concerning foreign correspondences, and confidential communications between the head of the department and the president. This, however, can be no objection to their being sworn, but may be a ground of objection to any particular question. Suppose, I claim title to land under a patent from the United States : I demand a copy of it from the secretary of state : he refuses. Surely, he may be compelled by *mandamus* to give it. But in order to obtain a *mandamus*, I must show that the patent is recorded in his office ; my case would be hard indeed, if I could not call upon the clerks in the office to give evidence of that fact. Again, suppose a private act of congress had passed for my benefit : it becomes necessary for me to have the use of that act in a court of law : I apply for a copy : I am refused. Shall I not be permitted, on a motion for a *mandamus*, to call upon the clerks in the office to prove that such an act is among the rolls of the office, or that it is duly recorded ? Surely, it cannot be contended, that although the laws are to be recorded, yet no access is to be had to the records, and no benefit to result therefrom.

THE COURT ordered the witnesses to be sworn, and their answers taken in writing, but informed them, that when the questions were asked, they might state their objections to answering each particular question, if they had any.

Mr. Wagner being examined upon interrogatories, testified, that at this distance of time he could not recollect whether he had seen any commission in the office, constituting the applicants, or either of them, justices of the peace. That Mr. Marbury and Mr. Ramsay called on the secretary of state respecting their commissions. That the secretary referred them to him ; he took them into another room, and mentioned to them, that two of the commissions had been signed, but the other had not. That he did not know that fact of his own knowledge, but by the information of others. Mr. Wagner declined answering the question, " who gave him that information ; " and the court decided, that he was not bound to answer it, because it was not pertinent to this cause. He further testified, that some of the commissions of the justices, but he believed not all, were recorded. He did not *143] know whether the commissions of the applicants were *recorded, as he had not had recourse to the book, for more than twelve months past.

Mr. Daniel Brent testified, that he did not remember certainly the names of any of the persons in the commissions of justices of the peace, signed by

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Mr. Adams ; but he believed, and was almost certain, that Mr. Marbury's and Col. Hoove's commissions were made out, and that Mr. Ramsay's was not ; that he made out the list of names, by which the clerk who filled up the commissions was guided ; he believed, that the name of Mr. Ramsay was premitted by mistake, but to the best of his knowledge, it contained the names of the other two ; he believed, none of the commissions for justices of the peace, signed by Mr. Adams, were recorded. After the commissions for justices of the peace were made out, he carried them to Mr. Adams, for his signature. After being signed, he carried them back to the secretary's office, where the seal of the United States was affixed to them. That commissions are not usually delivered out of the office, before they are recorded ; but sometimes they are, and a note of them only is taken, and they are recorded afterwards. He believed, none of those commissions of justices were ever sent out, or delivered to the persons for whom they were intended ; he did not know what became of them, nor did he know that they are now in the office of the secretary of state.

Mr. Lincoln, attorney-general, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand, he respected the jurisdiction of this court, and on the other, he felt himself bound to maintain the rights of the executive. He was acting as secretary of state, at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as secretary of state.

The questions being written, were then read and handed to him. He repeated the ideas he had before suggested, and said his objections were of two kinds. *1st. He did not think himself bound to disclose his official transactions while acting as secretary of state ; and 2d. He [*144 ought not to be compelled to answer anything which might tend to criminate himself.

Mr. Lee, in reply, repeated the substance of the observations he had before made in answer to the objections of Mr. Wagner and Mr. Brent. He stated, that the duties of a secretary of state were two-fold. In discharging one part of those duties, he acted as a public ministerial officer of the United States, totally independent of the president, and that as to any facts which came officially to his knowledge, while acting in this capacity, he was as much bound to answer as a marshal, a collector or any other ministerial officer. But that in the discharge of the other part of his duties, he did not act as a public ministerial officer, but in the capacity of an agent of the president, bound to obey his orders, and accountable to him for his conduct. And that as to any facts which came officially to his knowledge, in the discharge of this part of his duties, he was not bound to answer. He agreed that Mr. Lincoln was not bound to disclose anything which might tend to criminate himself.

Mr. Lincoln thought it was going a great way, to say that every secretary of state should, at all times, be liable to be called upon to appear as a

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witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department ; and hoped the court would give him time to consider of the subject.

THE COURT said, that if Mr. Lincoln wished time to consider what answers he should make, they would give him time ; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it ; and if he thought that anything was communicated to him in confidence, he was not bound to disclose it ; nor was he obliged to state anything which would criminate himself ; but that the fact whether such commissions had been in the office or *145] not, could not be a confidential fact ; it *is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections.

Mr. Lincoln then prayed time until the next day, to consider of his answers, under this opinion of the court.

THE COURT granted it, and postponed further consideration of the cause until the next day.

At the opening of the court, on the next morning, *Mr. Lincoln* said, he had no objection to answering the questions proposed, excepting the last, which he did not think himself obliged to answer fully. The question was, what had been done with the commissions ? He had no hesitation in saying, that he did not know that they ever came to the possession of Mr. Madison, nor did he know that they were in the office, when Mr. Madison took possession of it. He prayed the opinion of the court, whether he was obliged to disclose what had been done with the commissions.

THE COURT were of opinion, that he was not bound to say what had become of them ; if they never came to the possession of Mr. Madison, it was immaterial to the present cause, what had been done with them by others.

To the other questions, he answered, that he had seen commissions of justices of the peace of the district of Columbia, signed by Mr. Adams, and sealed with the seal of the United States. He did not recollect, whether any of them constituted Mr. Marbury, Col. Hooe or Col. Ramsay, justices of the peace ; there were, when he went into the office, several commissions for justices of peace of the district made out ; but he was furnished with a list of names to be put into a general commission, which was done, and was considered as superseding the particular commissions ; and the individuals whose names were contained in this general commission, were informed of their being thus appointed. He did not know that any one of the commissions was ever sent to the person for whom it was made out, and did not believe that any one had been sent.

*146] *Mr. Lee* then read the affidavit of James Marshall, who had been also summoned as a witness. It stated, that on the 4th of March 1801, having been informed by some person from Alexandria, that there was reason to apprehend riotous proceedings in that town, on that night, he was induced to return immediately home, and to call at the office of the secretary of state, for the commissions of the justices of the peace ; that as

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many as twelve, as he believed, commissions of justices for that county were delivered to him, for which he gave a receipt, which he left in the office. That finding he could not conveniently carry the whole, he returned several of them, and struck a pen through the names of those, in the receipt, which he returned. Among the commissions so returned, according to the best of his knowledge and belief, was one for Col. Hooe, and one for William Harper.

Mr. Lee then observed, that having proved the existence of the commissions, he should confine such further remarks as he had to make in support of the rule, to three questions: 1st. Whether the supreme court can award the writ of *mandamus* in any case? 2d. Whether it will lie to a secretary of state, in any case whatever? 3d. Whether, in the present case, the court may award a *mandamus* to James Madison, secretary of state?

1. The argument upon the first question is derived not only from the principles and practice of that country from whence we derive many of the principles of our political institutions, but from the constitution and laws of the United States. This is the *supreme* court, and by reason of its supremacy, must have the superintendence of the inferior tribunals and officers, whether judicial or ministerial. In this respect, there is no difference between a judicial and a ministerial officer. From this principle alone, the court of king's bench in England derives the power of issuing the writs of *mandamus* and prohibition. 3 Inst. 70, 71. *Shall it be said, that the court of king's bench has this power, in consequence of its being [147] the supreme court of judicature, and shall we deny it to this court, which the constitution makes the *supreme* court? It is a beneficial, and a necessary power; and it can never be applied, where there is another adequate, specific, legal remedy.

The second section of the third article of the constitution gives this court appellate jurisdiction, in all cases in law and equity arising under the constitution and laws of the United States (except the cases in which it has original jurisdiction), with such exceptions, and under such regulations, as congress shall make. The term "appellate jurisdiction" is to be taken in its largest sense, and implies in its nature the right of superintending the inferior tribunals. Proceedings in nature of appeals are of various kinds, according to the subject matter. 3 Bl. Com. 402. It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress. 3 Bl. Com. 109. There are some injuries which can only be redressed by a writ of *mandamus*, and others by a writ of prohibition. There must, then, be a jurisdiction somewhere, competent to issue that kind of process. Where are we to look for it, but in that court which the constitution and laws have made supreme, and to which they have given appellate jurisdiction? Blackstone, vol. 3, p. 110, says, that a writ of *mandamus* is "a command, issuing in the king's name, from the court of king's bench, and directed to any person, corporation or inferior court, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice. It is a writ of a most extensively remedial nature, and issues in all cases

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where the party has a right to have anything done, and has no other specific means of compelling its performance."

In the *Federalist*, vol. 2, p. 239, it is said, that the word "appellate" is not to be taken in its technical sense, as used in reference to appeals in the course of the civil law, but in its broadest sense, in which it denotes nothing more than the power of one tribunal to review the proceedings *148] of another, either as to law or fact, or both. The writ of *mandamus* is in the nature of an appeal as to fact as well as law. It is competent for congress to prescribe the forms of process by which the supreme court shall exercise its appellate jurisdiction, and they may well declare a *mandamus* to be one. But the power does not depend upon implication alone: it has been recognised by legislative provision, as well as in judicial decisions in this court. Congress, by a law passed at the very first session after the adoption of the constitution (1 U. S. Stat. 80, § 13), have expressly given the supreme court the power of issuing writs of *mandamus*. The words are, "the supreme court shall also have appellate jurisdiction from the circuit courts, and courts of the several states, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution. 2 Dall. 298.

The court has entertained jurisdiction on a *mandamus* in one case, and on a prohibition in another. In the case of *The United States v. Judge Lawrence*, 3 Dall. 42, a *mandamus* was moved for by the attorney-general, at the instance of the French minister, to compel Judge Lawrence to issue a warrant against Captain Barre, commander of the French ship of war *Le Perdrix*, grounded on an article of the consular convention with France. In this case, the power of the court to issue writs of *mandamus* was taken for granted, in the arguments of counsel on both sides, and seems to have been so considered by the court. The *mandamus* was refused, because the case in which it was required was not a proper one to support the motion. In the case of *The United States v. Judge Peters*, a writ of prohibition was granted. 3 Dall. 121, 129. This was the celebrated case of the French *149] *corvette*, the *Cassius*, which afterwards became a subject of diplomatic controversy between the two nations. On the 5th February 1794, a motion was made to the supreme court, in behalf of one John Chandler, a citizen of Connecticut, for a *mandamus* to the secretary at war, commanding him to place Chandler on the invalid pension list. After argument, the court refused the *mandamus*, because the two acts of congress respecting invalids did not support the case on which the applicant grounded his motion. The case of *The United States v. Hopkins*, at February term 1794, was a motion for a *mandamus* to Hopkins, loan-officer for the district of Virginia, to command him to admit a person to subscribe to the United States' loan. Upon argument, the *mandamus* was refused, because the applicant had not sufficiently established his title. In none of these cases, nor in any other, was the power of this court to issue a *mandamus* ever denied. Hence, it appears, there has been a legislative construction of the constitu-

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tion upon this point, and a judicial practice under it, for the whole time since the formation of the government.

2. The second point is, can a *mandamus* go to a secretary of state, in any case? It certainly cannot in all cases; nor to the president, in any case. It may not be proper to mention this position; but I am compelled to do it. An idea has gone forth, that a *mandamus* to a secretary of state, is equivalent to a *mandamus* to the president of the United States. I declare it to be my opinion, grounded on a comprehensive view of the subject, that the president is not amenable to any court of judicature, for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution. The secretary of state acts, as before observed, in two capacities. As the agent of the president, he is not liable to a *mandamus*; but as a recorder of the laws of the United States, as keeper of the great seal, as recorder of deeds of land, of letters-patent, and of commissions, &c., he is a ministerial officer of the people of the United States. As such, he has duties assigned him by law, in the execution of which he is independent of all control but that of the laws. It is true, he is a high officer, but he is not above law. It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer, having public duties to perform, *should be above the compulsion of the law, in the exercise of those duties. As a ministerial officer, he [*150 is compellable to do his duty, and if he refuses, is liable to indictment. A prosecution of this kind might be the means of punishing the officer, but a specific civil remedy to the injured party can only be obtained by a writ of *mandamus*. If a *mandamus* can be awarded by this court, in any case, it may issue to a secretary of state: for the act of congress expressly gives the power to award it, "in cases warranted by the principles and usages of law, to any persons holding offices under the authority of the United States."

Many cases may be supposed, in which a secretary of state ought to be compelled to perform his duty specifically. By the 5th and 6th sections of the act of congress (1 U. S. Stat. 89), copies under seal of the office of the department of state are made evidence in courts of law, and fees are given for making them out. The intention of the law must have been, that every person needing a copy should be entitled to it. Suppose, the secretary refuses to give a copy, ought he not to be compelled? Suppose, I am entitled to a patent for lands purchased of the United States; it is made out and signed by the president, who gives a warrant to the secretary to affix the great seal to the patent; he refuses to do it; shall I not have a *mandamus* to compel him? Suppose, the seal is affixed, but the secretary refuses to record it: shall he not be compelled? Suppose, it recorded, and he refuses to deliver it; shall I have no remedy? In this respect, there is no difference between a patent for lands, and the commission of a judicial officer. The duty of the secretary is precisely the same.

Judge PATERSON inquired of *Mr. Lee*, whether he understood it to be the duty of the secretary, to deliver a commission, unless ordered so to do by the president?

Mr. Lee replied, that after the president has signed a commission for an office, not held at his will, and it comes to the secretary to be sealed, the president has done with it, and nothing remains, but that the secretary per-

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form those ministerial acts which the law imposes upon him. It immediately becomes his duty to seal, record and deliver *it, on demand.

*151] In such a case, the appointment becomes complete, by the signing and sealing; and the secretary does wrong, if he withholds the commission.

3. The third point is, whether, in the present case, a writ of *mandamus* ought to be awarded to James Madison, secretary of state?

The justices of the peace in the district of Columbia are judicial officers, and hold their office for five years. The office is established by the act of congress passed the 27th of February 1801, entitled "An act concerning the district of Columbia" (1 U. S. Stat. 107, § 11, 14). They are authorized to hold courts, and have cognisance of personal demands of the value of twenty dollars. The act of May 3d, 1802 (1 U. S. Stat. 194, § 4), considers them as judicial officers, and provides the mode in which execution shall issue upon their judgments. They hold their offices independent of the will of the president. The appointment of such an officer is complete, when the president has nominated him to the senate, and the senate have advised and consented, and the president has signed the commission, and delivered it to the secretary to be sealed. The president has then done with it; it becomes irrevocable. An appointment of a judge, once completed, is made for ever: he holds under the constitution. The requisites to be performed by the secretary are ministerial, ascertained by law, and he has no discretion, but must perform them; there is no dispensing power. In contemplation of law, they are as if done.

These justices exercise part of the judicial power of the United States: they ought, therefore, to be independent. Mr. Lee begged leave again to refer to the *Federalist*, vol. 2, Nos. 78 and 79, as containing a correct view of this subject. They contained observations and ideas which he wished might be generally read and understood. They contained the principles upon which this branch of our constitution was constructed. It is important to the citizens of this district, that the justices should be independent; almost all the authority immediately exercised over them, is that of the justices. They wish to know whether the justices of this district are to hold their

*152] commissions at the will of a secretary of state. *This cause may seem trivial at first view, but it is important in principle. It is for this reason that this court is now troubled with it. The emoluments or the dignity of the office, are no objects with the applicants. They conceive themselves to be duly appointed justices of the peace, and they believe it to be their duty to maintain the rights of their office, and not to suffer them to be violated by the hand of power. The citizens of this district have their fears excited, by every stretch of power, by a person so high in office as the secretary of state.

It only remains now to consider, whether a *mandamus*, to compel the delivery of a commission by a public ministerial officer, is one of "the cases warranted by the principles and usages of law." It is the general principle of law, that a *mandamus* lies, if there be no other adequate, specific legal remedy. *King v. Barker et al.*, 3 Burr. 1267. This seems to be the result of a view of all the cases on the subject. The case of *Rex v. Borough of Midhurst*, 1 Wils. 283, was a *mandamus* to compel the presentment of certain conveyances to purchasers of burgage tenements, whereby they would be entitled to vote for members of parliament. In the case of *Rex v. Dr.*

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Hay, 1 W. Bl. 640, a *mandamus* issued to admit one to administer an estate.

A *mandamus* gives no right, but only puts the party in a way to try his right. Sid. 286. It lies to compel a ministerial act which concerns the public (1 Wils. 283; 1 Bl. Rep. 640); although there be a more tedious remedy; 2 Str. 1082; 4 Burr. 2188; 2 Ibid. 1045. So, if there be a legal right, and a remedy in equity. 3 T. R. 652. A *mandamus* lies to obtain admission into a trading company. *Rex v. Turkey Company*, 2 Burr. 1000; Carth. 448; 5 Mod. 402. So, it lies to put the corporate seal to an instrument. 4 T. R. 699. To commissioners of the excise, to grant a permit. 2 Ibid. 381. To admit to an office. 3 Ibid. 575. To deliver papers which concern the public. 2 Sid. 31. A *mandamus* will sometimes lie in a *doubtful case (1 Lev. 113), to be further considered on the return. 2 Ibid. 14; [*153 1 Sid. 169. It lies to be admitted a member of a church. 3 Burr. 1265, 1043. The process is as ancient as the time of Edw. II. 1 Lev. 23.

The first writ of *mandamus* is not peremptory, it only commands the officer to do the thing, or show cause why he should not do it. If the cause returned be sufficient, there is an end of the proceeding; if not, a peremptory *mandamus* is then awarded. It is said to be a writ of discretion. But the discretion of a court always means a sound, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court are bound to grant it: they can refuse justice to no man.

On a subsequent day, and before the court had given an opinion, *Mr. Lee* read the affidavit of Hazen Kimball, who had been a clerk in the office of the secretary of state, and had been to a distant part of the United States, but whose return was not known to the applicant until after the argument of the case.

It stated, that on the 3d of March 1801, he was a clerk in the department of state. That there were in the office, on that day, commissions made out and signed by the president, appointing William Marbury a justice of peace for the county of Washington; and Robert T. Hooe, a justice of the peace for the county of Alexandria, in the district of Columbia.

Afterwards, on the 24th February, the following opinion of the court was delivered by the Chief Justice:

OPINION OF THE COURT.—At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to show cause why a *mandamus* *should not issue, [*154 directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shown, and the present motion is for a *mandamus*. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded. These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided: 1st. Has the applicant a right

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to the commission he demands? 2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? 3d. If they do afford him a remedy, is it a *mandamus* issuing from this court?

The first object of inquiry is—Has the applicant a right to the commission he demands? His right originates in an act of congress passed in February 1801, concerning the district of Columbia. After dividing the district into two counties, the 11th section of this law enacts, “that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace, as the president of the United States shall, from time to time, think expedient, to continue in office for five years.

*155] *It appears, from the affidavits, that, in compliance with this law, a commission for William Marbury, as a justice of peace for the county of Washington, was signed by John Adams, then President of the United States; after which, the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out. In order to determine whether he is entitled to this commission, it becomes necessary to inquire, whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The 2d section of the 2d article of the constitution declares, that “the president shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for.” The 3d section declares, that “he shall commission all the officers of the United States.”

An act of congress directs the secretary of state to keep the seal of the United States, “to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the president, by and with the consent of the senate, or by the president alone; provided, that the said seal shall not be affixed to any commission, before the same shall have been signed by the president of the United States.

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations: 1st. The nomination: this is the sole act of the president, and is completely voluntary. 2d. The appointment: this is also the act of the president, and is also a voluntary act, though it can only be performed *156] by and with the advice and consent of the senate. *3d. The commission: to grant a commission to a person appointed, might, perhaps, be deemed a duty enjoined by the constitution. “He shall,” says that instrument, “commission all the officers of the United States.”

1. The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission, will be rendered more apparent, by adverting to that provision in the second section of the second article of the constitution, which authorizes congress “to vest, by law, the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments;”

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thus contemplating cases where the law may direct the president to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.

Although that clause of the constitution which requires the president to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence, the constitutional distinction between the appointment to an office and the commission of an officer who has been appointed, remains the same, as if, in practice, the president had commissioned officers appointed by an authority other than his own. It follows, too, from the existence of this distinction, that if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the president, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised, solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

*This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment, otherwise than by providing the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it. [*157]

But at what stage, does it amount to this conclusive evidence? The answer to this question seems an obvious one. The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done everything to be performed by him. Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still, it would be made, when the last act to be done by the president was performed, or, at farthest, when the commission was complete.

The last act to be done by the president is the signature of the commission: he has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed: he has decided. His judgment, on the advice and consent of the senate, concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken, when the power of the executive over an officer, not removable at his will, must cease. That point of time must be, when the constitutional power of appointment has been exercised. And this power has been exercised, when the last act, required from the person possessing the power, has been performed: this last act is the signature of the commission. This idea seems to have prevailed with the legislature,

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when the act passed converting the department *of foreign affairs into the department of state. By that act, it is enacted, that the secretary of state shall keep the seal of the United States, "and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the president;" "provided, that the said seal shall not be affixed to any commission, before the same shall have been signed by the President of the United States; nor to any other instrument or act, without the special warrant of the president therefor."

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act, supposed to be of public notoriety, the verity of the presidential signature. It is never to be affixed, until the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and is to record it. This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state, to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the president. It is a ministerial act, which the law enjoins on a particular officer for a particular purpose.

If it should be supposed, that the solemnity of affixing the seal is necessary, not only to the validity of the commission, but even to the completion of an appointment, still, when the seal is affixed, the appointment is made, and *the commission is valid. No other solemnity is required by law; *159] no other act is to be performed on the part of government. All that the executive can do, to invest the person with his office, is done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found, which appear of sufficient force to maintain the opposite doctrine. Such as the imagination of the court could suggest, have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed. In considering this question, it has been conjectured, that the commission may have been assimilated to a deed, to the validity of which delivery is essential. This idea is founded on the supposition, that the commission is not merely evidence of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But for the purpose of examining this objection fairly, let it be conceded, that the principle claimed for its support is established.

The appointment being, under the constitution, to be made by the president, personally, the delivery of the deed of appointment, if necessary to its completion, must be made by the president also. It is not necessary, that the delivery should be made personally to the grantee of the office: it never is so made. The law would seem to contemplate, that it should be made to

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the secretary of state, since it directs the secretary to affix the seal to the commission, after it shall have been signed by the president. If, then, the act of delivery be necessary to give validity to the commission, it has been delivered, when executed and given to the secretary, for the purpose of being sealed, recorded and transmitted to the party.

But in all cases of letters-patent, certain solemnities are required by law, which solemnities are the evidences *of the validity of the instru- [*160 ment: a formal delivery to the person is not among them.¹ In cases of commissions, the sign manual of the president, and the seal of the United States are those solemnities. This objection, therefore, does not touch the case.

It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff. The transmission of the commission is a practice, directed by convenience, but not by law. It cannot, therefore, be necessary to constitute the appointment, which must precede it, and which is the mere act of the president. If the executive required that every person appointed to an office should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the president; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter inclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to inquire, whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume, it could not be doubted, but that a copy from the record of the office of the secretary of state would be, to every intent and purpose, equal to the original: the act of congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but not that the original had been transmitted. If, indeed, it should appear, that *the original had been mislaid in the office of state, that circumstance would not affect [*161 the operation of the copy. When all the requisites have been performed, which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labor of inserting it in a book kept for that purpose may not have been performed. In the case of commissions, the law orders the secretary of state to record them. When, therefore,

¹ But a pardon is a deed, to which delivery and acceptance are essential. *United States v. Wilson*, 7 Pet. 150; *Ex parte De Puy*, 3 Ben.

307. And see *Commonwealth v. Halloway*, 44 Penn. St. 210.

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they are signed and sealed, the order for their being recorded is given ; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees to be paid by a person requiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law? Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment, still less is its acceptance. The appointment is the sole act of the president ; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept : but neither the one nor the other is capable of rendering the appointment a nonentity.

That this is the understanding of the government, is apparent from the whole tenor of its conduct. A commission bears date, and the salary of the officer commences, from his appointment ; not from the transmission or acceptance of his commission. When a person appointed to any office refuses to accept that office, the successor is nominated in the place of the *162] person who *has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

It is, therefore, decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made ; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern ; because the act is at any time revocable ; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled : it has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised, until the appointment has been made. But having once made the appointment, his power over the office is terminated, in all cases where, by law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute unconditional power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was appointed ; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country. To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

2. This brings us to the second inquiry ; which is : If he has a right, and that right has been violated, do the laws of his country afford him a remedy ?

*The very essence of civil liberty certainly consists in the right of *163] every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that pro-

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tection. In Great Britain, the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the 3d vol. of his Commentaries (p. 23), Blackstone states two cases in which a remedy is afforded by mere operation of law. "In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded." And afterwards (p. 109, of the same vol.), he says, "I am next to consider such injuries as are cognisable by the courts of the common law. And herein I shall, for the present, only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognisance of either the ecclesiastical, military or maritime tribunals, are, for that very reason, within the cognisance of the common-law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behooves us, then, to inquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress. In pursuing this inquiry, the first question which presents itself is, whether this can be arranged *with that [*164 class of cases which come under the description of *damnum absque injuria*; a loss without an injury. This description of cases never has been considered, and it is believed, never can be considered, as comprehending offices of trust, of honor or of profit. The office of justice of peace in the district of Columbia is such an office; it is, therefore, worthy of the attention and guardianship of the laws. It has received that attention and guardianship: it has been created by special act of congress, and has been secured, so far as the laws can give security, to the person appointed to fill it, for five years. It is not, then, on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy? That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.

By the act concerning invalids, passed in June 1794 (1 U. S. Stat. 392), the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended, that where the law, in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country? What-

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ever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. *No act of the legislature *165] confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone (vol. 3, p. 255), says, "but injuries to the rights of property can scarcely be committed by the crown, without the intervention of its officers; for whom the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice."

By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river (1 U. S. Stat. 464), the purchaser, on paying his purchase-money, becomes completely entitled to the property purchased; and on producing to the secretary of state the receipt of the treasurer, upon a certificate required by the law, the president of the United States is authorized to grant him a patent. It is further enacted, that all patents shall be countersigned by the secretary of state, and recorded in his office. If the secretary of state should choose to withhold this patent; or, the patent being lost, should refuse a copy of it; can it be imagined, that the law furnishes to the injured person no remedy? It is not believed, that any person whatever would attempt to maintain such a proposition.

It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act. If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. In some instances, there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the president is invested with *166] certain important political powers, in the *exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived, by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president: he is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others.

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The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.¹

If this be the rule, let us inquire, how it applies to the case under the consideration of the court. *The power of nominating to the senate, [167 and the power of appointing the person nominated, are political powers, to be exercised by the president, according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed, cannot be made never to have existed, the appointment cannot be annihilated; and consequently, if the officer is by law not removable at the will of the president, the rights he has acquired are protected by the law, and are not resumable by the president. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner, as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which, a suit has been instituted against him, in which his defence had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority. So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment. That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is, then, the opinion of the Court : 1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him [168 a justice *of peace for the county of Washington, in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years. 2d. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

¹ See *Gaines v. Thompson*, 7 Wall. 347.

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3. It remains to be inquired whether he is entitled to the remedy for which he applies? This depends on—1st. The nature of the writ applied for; and 2d. The power of this court.

1st. The nature of the writ. Blackstone, in the 3d volume of his Commentaries, page 110, defines a *mandamus* to be “a command issuing in the king’s name, from the court of king’s bench, and directed to any person, corporation or inferior court of judicature, within the king’s dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king’s bench has previously determined, or at least supposes, to be consonant to right and justice.”

Lord MANSFIELD, in 3 Burr. 1267, in the case of *The King v. Baker et al.*, states, with much precision and explicitness, the cases in which this writ may be used. “Whenever,” says that very able judge, “there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern, or attended with profit), and a person is kept out of possession, or dispossessed of such right, and *169] *has no other specific legal remedy, this court ought to assist by *mandamus*, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government.” In the same case, he says, “this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.” In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, “to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice.” Or, in the words of Lord MANSFIELD, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right. These circumstances certainly concur in this case.

Still, to render the *mandamus* a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1. With respect to the officer to whom it would be directed. The intimate political relation subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received, without much reflection or examination, and it is not wonderful, that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered *170] *by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have

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been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.¹

But, if this be not such a question ; if, so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents ; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control ; what is there, in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a *mandamus*, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress, and the general principles of law ?

If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended, that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process ?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised ; in which he is the mere organ of executive will ; it is *again repeated, that any appli- [*171 cation to a court to control, in any respect, his conduct would be rejected without hesitation. But where he is directed by law to do a certain act, affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore, is never presumed to have forbidden ; as, for example, to record a commission or a patent for land, which has received all the legal solemnities ; or to give a copy of such record ; in such cases, it is not perceived, on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now, for the first time, to be taken up in this country. It must be well recollected, that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional ;² but some

¹ *Gelston v. Hoyt*, 3 Wheat. 247 ; *United States v. Palmer*, Id. 610 ; *Garcia v. Lee*, 12 Pet. 511 ; *Williams v. Suffolk Ins. Co.*, 13 Id. 415 ; *Scott v. Jones*, 5 How. 343 ; *Luther v. Borden*, 7 Id. 1 ; *Kennett v. Chambers*, 14 Id. 38 ; *Clark v. Braden*, 16 Id. 635 ; *Fellows v.*

Blacksmith, 19 Id. 366 ; *United States v. Holiday*, 3 Wall. 407 ; *Georgia v. Stanton*, 6 Id. 50.

² *Hayburn's case*, 2 Dall. 410 n ; *United States v. Todd*, 13 How. 52 n.

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of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act, and to report in that character. This law being deemed unconstitutional, at the circuits, was repealed, and a different system was established; but the question whether those persons who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act, in February 1793, making it the duty of the secretary of war, in conjunction with the attorney-general, to take such measures as might be necessary to *172] obtain an adjudication of the supreme court of the United *States on the validity of any such rights, claimed under the act aforesaid. After the passage of this act, a *mandamus* was moved for, to be directed to the secretary of war, commanding him to place on the pension list, a person stating himself to be on the report of the judges. There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant was deemed, by the head of a department, and by the highest law-officer of the United States, the most proper which could be selected for the purpose. When the subject was brought before the court, the decision was, not that a *mandamus* would not lie to the head of a department, directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a *mandamus* ought not to issue in that case; the decision necessarily to be made, if the report of the commissioners did not confer on the applicant a legal right. The judgment, in that case, is understood to have decided the merits of all claims of that description; and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law, subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list. The doctrine, therefore, now advanced, is by no means a novel one.

It is true, that the *mandamus*, now moved for, is not for the performance of an act expressly enjoined by statute. It is to deliver a commission; on which subject, the acts of congress are silent. This difference is not considered as affecting the case. It has already been stated, that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not re-*173] movable at the will of the executive; and being so *appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by any other person.

It was at first doubted, whether the action of *detinue* was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case, a *mandamus* would be improper. But this doubt has yielded to the consideration, that the judgment in *detinue* is for the thing itself, or its value. The value of a public office, not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to

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nothing. He will obtain the office by obtaining the commission, or a copy of it, from the record.

This, then, is a plain case for a *mandamus*, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired, whether it can issue from this court?

The act to establish the judicial courts of the United States authorizes the supreme court, "to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States." The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of this description; and if this court is not authorized to issue a writ of *mandamus* to such an officer, it must be because the law is unconstitutional, and therefore, absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present *case; because the right claimed [*174 is given by a law of the United States.

In the distribution of this power, it is declared, that "the supreme court shall have original jurisdiction, in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction." It has been insisted, at the bar, that as the original grant of jurisdiction to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court, in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States

If it had been intended to leave it in the discretion of the legislature, to apportion the judicial power between the supreme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage—is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance. Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.¹

It cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it. *If the solicitude of the convention, respecting [*175 our peace with foreign powers, induced a provision that the supreme

¹ See *Gittings v. Crawford*, Taney's Dec. 1.

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court should take original jurisdiction in cases which might be supposed to affect them ; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction ; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing, fundamentally, a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish ; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court, by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases, its jurisdiction is original, and not appellate ; in the other, it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning. To enable this court, then, to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar, that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a *mandamus* should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is, in effect, the same as to sustain an original action for that paper, and therefore, seems not to be long to *appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction. The authority, therefore, given to the supreme court by the act establishing the judicial courts of the United States, to issue writs of *mandamus* to public officers, appears not to be warranted by the constitution ; and it becomes necessary to inquire, whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States ; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion ; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental : and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The

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government of the United States is of the latter description. The powers of the legislature are defined and limited ; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited *and acts allowed, are of [*177 equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it ; or that the legislature may alter the constitution by an ordinary act.

Between these alternatives, there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the constitution, is not law : if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory ; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. *So, if a law [*178 be in opposition to the constitution ; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution ; or conformable to the constitution, disregarding the law ; the court must determine which of these conflicting rules governs the case : this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the prin-

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ciples and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real-omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing, what we have deemed the greatest improvement on political institutions, a written constitution, would, of itself, be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection. The judicial power of the United States is extended to all cases arising under the constitution. *Could it be the intention of those who gave this power, *179] to say, that in using it, the constitution should not be looked into? That a case arising under the constitution should be decided, without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject. It is declared, that "no tax or duty shall be laid on articles exported from any state." Suppose, a duty on the export of cotton, of tobacco or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or *ex post facto* law shall be passed." If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason, unless on the testimony of two witnesses to the same *overt* act, or on confession in open court." Here, the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution *contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear, that I will administer justice, without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as ———, accord-

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ing to the best of my abilities and understanding, agreeably to the constitution and laws of the United States." Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States, generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

*BAILEY E. CLARK v. ROBERT YOUNG & Co.

[*181]

Promissory notes.

In Virginia, it is not absolutely necessary, in all cases, to sue the maker of a promissory note, to entitle the holder to an action against the indorser.

If a promissory note of a third person be indorsed by the purchaser of goods to the vendor, as a conditional payment for the goods: *quere?* whether the vendor is, in any case, obliged to sue the maker of the note, before he can resort to the purchaser of the goods on the original contract of sale.¹

A suit against the defendant, as indorser of the note, and a suit against the defendant, for the goods sold, are upon distinct and different causes of action; and the first cannot be pleaded in bar of the second.

It is not necessary for the plaintiff to offer to return the note, to entitle him to bring suit for the goods sold.

ERROR from the Circuit Court of the district of Columbia, sitting in the county of Alexandria.

This was an action on the case, for goods sold and delivered by Young & Co. to Clark. The declaration had three counts; one for the price of the goods; one on a *quantum valebant*; and one for money had and received. The cause came on to be tried in the court below, on the general issue, at April term 1802.

The facts, on the trial, appeared to be, that on the 9th of September 1794, Young & Co. sold to Clark, 400 bushels of salt, at 4s. 3d. per bushel, amounting to \$283.33. At the time of the sale and delivery of the salt, Clark assigned to Young & Co., a negotiable promissory note, made by one Mark Edgar to Pickersgill & Co., and by them indorsed to Clark, dated September 5th, 1794, for \$289, payable sixty days after date, at the bank of Alexandria. That Young & Co. instituted a suit, in Fairfax county court, in Virginia, against Clark, on his indorsement of this note; upon the trial of which cause, Clark, by his counsel, "prayed the opinion of the court, whether the plaintiffs could maintain their action against him, previous to

¹ See Harris v. Johnston, 3 Cr. 311; Roach v. Hulings, 16 Pet. 326.