BATH COUNTY *v.* AMY.

The Circuit Courts of the United States have no power to issue writs of mandamus to State courts, by way of original proceeding, and where such writ is neither necessary nor ancillary to any jurisdiction which the court then had.

Hence such writ, on error here, was held to have been wrongly granted in favor of a holder of county bonds, to make the county levy a tax; the creditor not having obtained judgment in the Circuit Court on his claim, nor even put it into suit.

ERROR to the Circuit Court for the District of Kentucky; the case being thus:

The 11th section of the Judiciary Act of 1789, enacts that—

"The Circuit Court shall have original cognizance concurrent with the courts of the several States, of all suits *of a civil nature at common law*, . . . between a citizen of the State where the suit was brought, and a citizen of another State."

The 14th section of the same act, referring to certain courts of the United States, including the Circuit Courts, enacts:

"That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and ALL other writs not specially provided for by statute, which *may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.*"

An act passed in 1813 by the legislature of Kentucky (which State was admitted into the Union A. D. 1792), enacts:

"SECTION 2. That it shall be lawful for the person at whose instance a mandamus may be issued, to traverse the truth of any one or more of the facts asserted in the return made to such writ, the traverser concluding the same by an appeal to the country for the trial of the contested facts upon which issue may have been taken by such traverse. A jury shall be empanelled and sworn by order of the court having jurisdiction thereof, subject to the same rules and regulations, and with power to such courts to superintend and control such jury, by

instructing them in points of law which may arise in the course of such trial, or of granting new trials in the same manner, and to be governed by the same principles which are applicable to the trial by jury in other cases at common law.

"SECTION 3. It shall be the duty of such court upon the result of any such finding as aforesaid, to pronounce judgment thereon in favor of either party according to law, and to award judgment for the costs of suing out or defending such mandamus as the case may be, in favor of the successful party, upon which execution shall and may be issued as in other cases."

And, finally, an act of Congress of May 19th, 1828, enacts:

"That the forms of mesne process, except the style, and the forms and modes of proceeding in suits in the courts of the United States held in those States admitted into the Union since the 29th day of September, in the year 1789, in those of common law, shall be the same, in each of the said States respectively, as are now used in the highest court of original and general jurisdiction of the same."

With those statutes, Federal and State, in force, the legislature of Kentucky incorporated, A. D. 1852, the Lexington and Big Sandy Railroad Company. By the charter of the railroad the county courts of the different counties, through which it was to run, were authorized to subscribe to the stock of the road, and to pay their subscriptions by borrowing money; making the money borrowed payable in the way in which the county courts should deem most advisable. The interest on all such sums borrowed was to be provided for in like manner, provided that all taxes laid to pay either principal and interest, should be sacredly appropriated to such purpose and no other. A subsequent act required the county courts to issue bonds, and to proceed to levy, assess, and collect a tax to pay the interest thereon, according to the true intent and meaning of the previous act.

The county of Bath subscribed $150,000, and issued one hundred and fifty bonds of $1000 each, payable thirty years from date, with interest semiannually, for which coupons were annexed. And the company having indorsed them, sold, and put them into circulation. The county court levied

the tax and paid the interest for five years, and then stopped payment.

In this state of things one Amy, of New York, being the holder of eighty-two of the bonds, with the overdue and unpaid coupons, in November, 1866, made a written demand upon the justices, who composed the county court of Bath County, requiring the court forthwith to levy the necessary tax to pay his coupons, and notified to each of the judges that if they did not do so, he would on the second day of the next term of the Circuit Court of the United States, sitting in the District, move that court for the writ of mandamus requiring them to do it. No tax was levied; and at the next term of the Circuit Court, Amy accordingly filed an affidavit in the nature of an information, setting forth specifically his case, and concluding with a prayer for a mandamus requiring the tax to be levied. The court granted a rule against the county to show cause why the writ should not issue. The county came and craved oyer of the bonds and coupons, which was had, upon which it moved the court to discharge the rule; and also filed a response to the rule setting forth eleven points of defence. By agreement of counsel a general traverse of the facts set out in the response was entered on the record, and the law and facts submitted to the court for trial and decision. Upon the trial, the court found the issues for the plaintiff, and gave judgment awarding a peremptory writ of mandamus. To reverse this judgment the county brought the case here. The chief ground of the argument of their counsel, *Messrs. M. Blair, J. G. Carlisle, and J. B. Beck*, being that under the 14th section of the act of September 24th, 1789, the Circuit Court of the United States had no jurisdiction to issue a writ of mandamus, there having been no previous judgment of the court in favor of the party holding the obligations, and no previous attempt made by it to enforce their payment by its ordinary process.

Messrs. J. W. Stevenson, and H. Myers, contra, and in support of the ruling below:

The argument is that the Circuit Court had no jurisdiction

until the relator had reduced his demand to judgment, and had an execution returned, "no property" thereon. But in no case has this court decided that this was a prerequisite to the jurisdiction.

Mandamus is a common law action, so held by this court.* The act of 1813 of Kentucky, in which State the cause originated, makes the proceedings by mandamus there also a suit of a civil nature at common law; not a mere incident to another suit. The parties plead to issue. Issues of fact are to be tried by jury; issues of law, by the court. Judgment is to be awarded, and execution issued thereon. This act of 1813 was in force when the act of Congress of May 19th, 1828, was adopted, providing that the proceedings in suits at common law, in States admitted to the Union since 1789, shall be the same in the National courts in each of said States, as are now used in the highest courts of original and general jurisdiction of the same.

Now by the course of proceeding in Kentucky, it is not necessary that a party who has a right to have a tax levied by a county court or city council to pay his demand, should reduce the demand to judgment before applying for the writ of mandamus requiring the levy of the tax. This is settled by adjudicated cases,† and that where a party has the right to have a county court levy a tax, upon their refusal, after demand, he may proceed in the first instance for the writ.

Certainly this court, under the act of Congress of 1828, will award to the citizen of another State the same relief that the State court would give one of its own citizens in a case arising upon the statute laws of that State.

Mr. Justice STRONG delivered the opinion of the court.

It must be considered as settled that the Circuit Courts of the United States are not authorized to issue writs of mandamus, unless they are necessary to the exercise of their respective jurisdictions. Those courts are creatures of stat-

* Kendall *v.* The United States, 12 Peters, 615.

† Justices of Clarke County *v.* Turnpike Company, 11 Ben Monroe, 154; Maddox *v.* Graham, 2 Metcalfe, 56

ute, and they have only so much of the judicial power of the United States as the acts of Congress have conferred upon them. The Judiciary Act of 1789, which established them, by its 11th section, enacted that they shall have original cognizance, concurrently with the courts of the several States, of "all suits of a civil nature at common law, or in equity," between a citizen of the State in which the suit is brought and a citizen of another State, or where an alien is a party. While it may be admitted that, in some senses, the writ of mandamus may properly be denominated a suit at law, it is still material to inquire whether it was intended to be embraced in the gift of power to hear and determine all suits at common law, of a civil nature, conferred by the Judiciary Act. At the time when the act was passed it was a high prerogative writ, issuing in the king's name only from the Court of King's Bench, requiring the performance of some act or duty, the execution of which the court had previously determined to be consonant with right and justice. It was not, like ordinary proceedings at law, a writ of right, and the court had no jurisdiction to grant it in any case except those in which it was the legal judge of the duty required to be performed. Nor was it applicable, as a private remedy, to enforce simple common-law rights between individuals. Were there nothing more, then, in the Judiciary Act than the grant of general authority to take cognizance of all suits of a civil nature at common law, it might well be doubted whether it was intended to confer the extraordinary powers residing in the British Court of King's Bench to award prerogative writs. All doubts upon this subject, however, are set at rest by the 14th section of the same act, which enacted that Circuit Courts shall have "power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions and agreeable to the principles and usages of law." Among those other writs, no doubt, mandamus is included; and this special provision indicates that the power to grant such writs generally was not understood to be granted by the 11th section, which con-

ferred, only to a limited extent, upon the Circuit Courts the judicial power existing in the government under the Constitution. Power to issue such writs is granted by the 14th section, but with the restriction that they shall be necessary to the exercise of the jurisdiction given. Why make this grant if it had been previously made in the 11th section? The limitation only was needed.

This subject has heretofore been under consideration in this court, and in *McIntire* v. *Wood*,* it was unanimously decided that the power of the Circuit Courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. The court said: "Had the 11th section of the Judiciary Act covered the whole ground of the Constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under laws of the United States, and the 14th section of the act would sanction the issuing of the writ for such a purpose. But, although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its Circuit Courts, except in certain specified cases." And in *McClung* v. *Silliman*,† this court said, when speaking of the power to issue writs of mandamus: "The 14th section of the act under consideration (the Judiciary Act) could only have been intended to vest the power . . . in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ proposed to be sued out." In other words, the writ cannot be used to confer a jurisdiction which the Circuit Court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired. The doctrine asserted in both these cases was conceded to be correct by both the majority and the minority of the court in *Kendall* v. *The United States*.‡

* 7 Cranch, 504. † 6 Wheaton, 601.

‡ 12 Peters, 584; see also The Secretary *v.* McGarrahan, 9 Wallace, 511.

The power to issue a writ of mandamus as an original and independent proceeding does not, then, belong to the Circuit Courts.

It has been argued, on behalf of the defendant in error, that the writ of mandamus is a civil action in Kentucky; that the proceedings therein were regulated by an act of the legislature of that State, approved January 8th, 1813, still in force, which directed how a traverse to the return shall be tried in the State courts, and what judgment may be pronounced, and that the act of Congress of May 19th, 1828, directed that the proceedings in suits at common law in States admitted to the Union since 1789, of which Kentucky is one, shall be the same in the Federal courts as those used, when the act was passed, in the highest courts of original and general jurisdiction in those States. Hence it is inferred that the law of Kentucky respecting mandamus has been adopted as a part of the rule of practice of the United States Circuit Court for that State. The argument rests on a misapprehension of the meaning of the act of 1828. It was a process act, designed only to regulate proceedings in the Federal courts after they had obtained jurisdiction; not to enlarge their jurisdiction. The purpose was to make the forms of process and forms and modes of proceeding in those courts correspond with the forms and modes in use in the State courts. The words of the act are, "that the forms of mesne process, except the style, and the forms and modes of proceeding in suits in the courts of the United States held in those States admitted into the Union since the 29th day of September, in the year 1789, in those of common law, shall be the same, in each of the said States respectively, as are now used in the highest court of original and general jurisdiction of the same." It is quite too much to infer from this an enlargement of jurisdiction, or an adoption of all the powers which the State courts then had. There is, then, no act of Congress which has conferred upon Circuit Courts authority to issue the writ of mandamus as an original proceeding, or at all, except when necessary for the exercise of the jurisdiction conferred upon them by law.

Statement of the case.

Applying this rule to the present case it is decisive. The relator's claim for payment had not been brought to judgment in the Circuit Court, nor had it been put in suit. His application for a mandamus was, therefore, an original proceeding, neither necessary nor ancillary to any jurisdiction which the court then had. For this reason it should have been denied, and the judgment that a peremptory mandamus should issue was erroneous.

JUDGMENT REVERSED, and the cause remanded with instructions to

DISMISS THE PETITION FOR A MANDAMUS.

UNITED STATES *v.* AVERY.

1. The court cannot take cognizance of a division of opinion under the Judiciary Act of 1802, between the judges of the Circuit Court on a motion to quash an indictment, even when the motion presents the question of the jurisdiction of the Circuit Court to try the offence charged.
2. *United States* v. *Rosenburgh* (7 Wallace, 580), recognized and followed.

ON certificate of division in opinion between the judges of the Circuit Court for the District of South Carolina:

Avery and others were indicted under the act of May 31st, 1870,* known as the Enforcement Act, for conspiracy, with intent to violate the first section of that act, by unlawfully hindering, preventing, and restraining divers males, citizens of the United States, of African descent, from exercising the right of voting; and the second count of the indictment after charging this offence further charged, under the 7th section of that act, that in the act of committing the offence aforesaid, they murdered one Jim Williams, "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of South Carolina." The first count charged the conspiracy without the

* 16 Stat. at Large, 140.