[?]ace 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 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.

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 many as 12, 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.

The argument upon the 1st 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 superintendance 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 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 supposed, to be consonant to right and justice. It is a writ of a most extensively remedial nature; and issues in all cases where the party has a right to have any thing 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 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 recognized 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, vol. 1, p. 58, sec. 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 herein after 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 usuages 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. Dal. Rep. 298.

This 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. Dal. Rep. 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 Capt. 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. Dal. Rep. 121,129. This was the celebrated case of the French Corvette the Cassius, which afterwards became a subject of diplomatic controversy between the two nations—On the 5th Feb. 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, vs. Hopkins at Feb. 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 constitution upon this point, and a judicial practice under it, for the whole time since the formation of the government.

2d. The 2d 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 controul, 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 law in the exercise of those duties. As a ministerial officer he 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, vol. 1, p. 43, 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 enquired of Mr. Lee whether he understood it to be the duty of the Sec[?]ry 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 perform those ministerial acts which the law imposes upon him. It immediately becomes his duty to seal, record, and deliver it on demand. In such a case the appointment becomes complete by the signing and sealing; and the Secretary does wrong if he withholds the commission.

3d. 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 Feb. 1801, entitled "An act concerning the district of Columbia," ch. 86, sec. 11 and 14; page 271, 273. They are authorized to hold courts and have cognizance of personal demands of the value of 20 dollars. The act of May 3d, 1802, ch. 52, sec. 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, No. 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 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 it the general principle of law that a mandamus lies, if there be no other *adequate, specific, legal* remedy—3 Burrow, 1067, King, v. Barker, &c. 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. Hay, 1. Com. Bl. Rep. 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. Wilson, 283. 1. Bl. Rep. 640—although there be a more tedious remedy. [illegible]. 1082. 4 Bur. 2188. 2. Bur. 1045—[illegible] there be a legal right and a remedy [illegible] 3. Term rep. 652. [illegible] to obtain admission into a trading company. Rex. vs. Turkey Company 2. Bur. 1000—Carthew 448. 5 Mod. 402—So it lies to put the corporate seal to an instrument 4. Term rep. 699—to commissioners of the excise to grant a permit 2. Term rep. 381—to admit to an office, 3 Term rep. 575—to deliver papers which concern the public, 2. Sid. 31. A mandamus will sometimes lie in a doubtful case, 1. Levinz 123, to be further considered on the return, 2 Levinz 14, 1 Siderfin, 169.

It lies to be admitted a member of a church 3. Bur. 1265. 1043.

The process is as ancient as the time of Ed. 2d.—1 Levinz 23.

The first writ of mandamus is not peremptory, it only commands the officer to do the thing or shew 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 till 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 peace for the county of Alexandria, in the district of Columbia.

Afterwards, on the 24th of Feb. 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 shew cause why a Mandamus should not issue, directing him to deliver to William Marbury his commission as a justice of peace for the county of Washington, in the district of Columbia.

No cause has been shewn, 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 to the commission he demands?

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3dly. If they do afford him a remedy, is it a Mandamus issuing from this court?

The first object of enquiry is,

1st. 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 U. States shall, from time to time, think expedient, to continue in office for five years.

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 enquire 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 U. 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, 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."

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 2d section of the 2d article of the constitution, which authorises 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;" 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 U. 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 removeable 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 shew an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment; though conclusive evidence of it.

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 shewn that he has done every thing 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 furthest, 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 was 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.

*[To be continued.]*


## NOTICE.

TAKEN up as a stray by the subscriber in the city of Washington, on the 3d inst. a sorrel HORSE, with saddle and bridle on: the horse is about fourteen hands high, the near hind foot white. The owner is desired to come prove property, pay charges, and take him away.

CHARLES NEVETT,
Near the Navy Yard.

March 18. 3t