

Kendall Vs. Stokes

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Decided On : 1838

Appeal No. : 38 U.S. 607

Appellant : Kendall

Respondent : Stokes

Judgement :

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At the January term of the Supreme Court in 1333, the following dissenting opinion was delivered by MR. JUSTICE CATRON, in the case of [Kendall v. Stokes](#), 12 Pet. 527. This opinion was not received from the clerk of the Supreme Court with the opinions delivered at the January term, 1838; it was received by the reporter, from MR. JUSTICE CATRON on 6 March, 1839. It is inserted in the present volume with the consent of MR. JUSTICE CATRON, and the reporter avails himself of this occasion to record his regret that it had not its place in the twelfth volume of the reports.] [*](#)

MR. JUSTICE CATRON dissenting.

In this proceeding of the United States against the Postmaster General at the relation of Stockton, Stokes & Company, I had intended not to intimate that I differed in any respect from the majority, having an aversion to dissenting opinions save on constitutional questions. But my two brethren, with whom I agree, having determined to do so; it follows I must express a concurrence with the one side or the other.

On the merits, I think the Senate of the United States, and the Solicitor of the Treasury, construed the special act of Congress correctly, and that the solicitor's award is a final adjudication and conclusive of the rights of the relators.

But the question whether the circuit court of this district had power to compel the Postmaster General, by mandamus, to enter a credit for the amount awarded lies at the foundation of our institutions; a question more grave or important rarely arises.

Coercion by the writ of mandamus of the officers and agents of a government, is one of the highest exertions of sovereignty known to the British constitution and common law; it is truly declared to be one of the flowers of the King's Bench, 3 Black.Com. 110, note, and in England can only be enforced by that court, where the King formerly sat in person and is now deemed to be potentially present.

It is his command, in his own name, directed to a court, person, or corporation, to do a particular thing therein specified which appertains to their office or duty, as a means of compelling its performance, 3 Black.Com. ch. 7. The proceeding there, as here, is in the name of the government, and not that of the relators; it stands on

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the foot of contempt, and is intended to reform official delinquency.

By the act of independence, this prerogative and portion of sovereignty, unimpaired, devolved on the different states of this Union, and by the Constitution of the United States, such portion of it as was necessary to coerce the courts,

officers, and agents of the general government was withdrawn from the states and conferred on the federal sovereignty. Here the power lay dormant until Congress should act. On the legislature was imposed the duty to give it effect; it was wide as the land, and extended to every portion of it, and by the Judiciary Act of 1789, section 13, Congress attempted to invest the Supreme Court of the United States with the power to issue writs of mandamus to persons holding office under the authority of the United States. But the Constitution having restricted this Court to the exercise of certain original powers, and this not being amongst them, it was holden in [Marbury v. Madison](#), 1 Cranch 137, so much of the act was void. The decision was made in 1803; up to that time, Congress and the country did not question that a law existed proper and necessary to give effect to the prerogative through the instrumentality of this Court, and that it was properly vested in the highest tribunal in the land, exercising a jurisdiction coextensive with our whole territory. So the matter stood when the Act of 27 February, 1801, was passed, organizing the Circuit Court for the District of Columbia. And the question is did Congress by implication confer or intend to confer this high prerogative, within the ten miles square, on the circuit court? That concurrent power with the Supreme Court was intended to be given it is difficult to believe. The power is claimed by the first, third, and fifth sections of the act.

The first section adopts and declares in force the laws of Maryland as they then existed on the north side of the Potomac.

By the Constitution of the United States, the prerogative to coerce by mandamus federal officers had passed from the State of Maryland to the government of the Union. Her laws and courts, in 1801, were denuded of the power, and as it did not remain with the courts of Maryland, so it was not transferred to the Circuit Court of the District of Columbia. This is deemed settled by [McClung v. Silliman](#), 6 Wheat. 598.

And substantially the same answer may be given to the argument which relied on the 11th section of the Judiciary Act of 1789, providing that the circuit courts should have original cognizance, *concurrent* with the courts of the several states, of all suits of a civil nature at common law or in equity.

Take it that Congress did not distinguish between the *cognizance* of the courts to draw to them controversies to be litigated and their *powers* to coerce obedience to judgments or decrees, and to compel the performance of duties where ascertained rights existed; still the section cited cannot help the relators.

Suppose the circuit court of the district, in 1801, did have conferred on it powers "concurrent" with the courts of Maryland, these

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having been deprived, on the adoption of the Constitution of the United States, of the prerogative to coerce by mandamus officers of the United States, the concurrent powers of the circuit court of the district, could rise no higher than those of the Maryland courts. The argument is easily met by separating the prerogatives and powers passed to the federal government by the Constitution from those reserved to the states.

The third section of the Act of 27 February, 1801, provides:

"And the said court and the judges thereof shall have all the *powers* by law vested in the circuit courts and the judges of the circuit courts of the United States."

Power to issue the writ of mandamus to coerce obedience to a sovereign command on the petition of a citizen to the sovereignty is one thing: *jurisdiction* to try a case at law or in equity is the exercise of a very different authority. The first enforces the performance of an official duty by an independent writ against a person not sued where the relator shows an ascertained right, as in this instance where the writ is asked to enforce a decree. The second tries and ascertains the right and establishes it by a judgment. But to enforce the judgment by process is the exercise of power, being the means employed to carry the jurisdiction into execution. So the Judiciary Act of 1789 and subsequent ones conferring jurisdiction and powers on the courts of the United States declare, and so they have been uniformly construed, as the cases of [*Marbury v. Madison*](#), 1 Cranch 137, [*McIntyre v. Wood*](#), 7 Cranch 504, and [*McClung v. Silliman*](#), 6 Wheat. 598,

distinctly show without going further. They treat of the subject before us, and need no collateral aid.

What then are the powers to issue writs and coerce the performance of duties vested in the circuit courts of the United States, referred to and adopted by the third section of the District Act of 1801?

By the fourteenth section of the Judiciary Act of 1789, they are declared to 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 which are agreeable to the principles and usages of law.

The antecedent section having vested in the Supreme Court the prerogative and power to issue writs of mandamus to persons holding office under the authority of the United States, of course the power was not vested or intended to be vested in the circuit courts further than might be necessary for the exercise of the jurisdiction conferred by the eleventh section, and so it was settled by this Court in *McIntyre v. Wood*.

But, it is insisted, the power is derived from the Judiciary Act of 13 February, 1801, to which the act of 27 February establishing the circuit court of the District must also have had reference, and although the act of 13 February was repealed on the coming in of Mr. Jefferson's administration in March, 1802, still, as the District Act of 27 February was not repealed, the act adopted by it became a part thereof so far as

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it was adopted, and within the District of Columbia, the powers and jurisdiction conferred by that of 13 February, continued in force, notwithstanding the repeal, in all other parts of the Union.

Suppose we imply parts of the Act of 13 February, 1801, not to have been repealed within this District, can we found on this implication the additional one

that the act conferred on the circuit court of the District the high prerogative power to issue writs of mandamus, coercing the secretaries and other officers of the United States to perform their various duties? Did the power exist in the court of this District in 1803, when the Supreme Court brought Mr. Madison, the Secretary of State, before it? That no department of the government, judicial tribunal, or law officer of the United States so apprehended at that time or for more than thirty years thereafter has been abundantly established during the progress of this investigation.

It is admitted, and was so decided in *McIntyre v. Wood*, that none other of the circuit courts of the United States, holden by the judges of the Supreme Court have the power claimed for the court in this District, and that throughout the twenty-six states of the Union this high prerogative writ cannot be exerted, because Congress, since the decision in 1803 in the case of *Marbury v. Madison*, has not seen proper to vest it in these inferior tribunals; nor is it matter of surprise when we recollect to what extent the executive departments would have been subjected to the judicial power.

Should we then, by doubtful implication and a strained construction, apply this highest of judicial powers, in its nature broad as the Union, to this ten miles square?

That the power can only be maintained to exist by implication, and not express enactment is admitted on all hands. It never was attempted to be conferred in express terms save on the Supreme Court, and is the construction that invokes it for the circuit court of this District a strained one? The tenth section of the repealed Act of 13 February, 1801, declares

"that the circuit courts [then established] shall have and are hereby invested with all the powers heretofore granted by law to the circuit courts of the United States unless otherwise provided by this act."

There is no repealing clause to the act. The section quoted refers directly to the fourteenth section of the act of 1789, for the *powers* common to all the circuit

courts of the Union. They have stood unaltered, and been recognized, with slight exceptions, as the sole powers by which the jurisdiction of the circuit courts has been enforced, from the year 1789 to this time.

It is insisted, however, that the *jurisdiction* conferred on the circuit courts by the eleventh section of the repealed Act of 13 February, 1801, is much broader than that given to them by the eleventh section of the act of 1789; that the act of 1801 covers the whole ground of the Constitution. This is certainly true, but the fifth section of the Act 27 February, 1801, declaring what matters shall be cognizable in the Circuit Court for the District of Columbia, confers jurisdiction quite as comprehensive. Its cognizance,

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or jurisdiction "to hold plea," extends to all crimes and offenses, and to *all cases* in law and equity, provided the defendant be found in the district. Thus, as the eleventh sections of the act of 1759, and 13 February, 1801, each have reference to the exercise of jurisdiction in suits or actions between litigant parties, or over matters in some form brought before the court to try and ascertain a contested right; it would be a most unnatural construction to hold (as I think) that the phrase "*cognizance of all cases in law and equity* " authorized the court to assume the high power of coercing by mandamus one of the secretaries or the Postmaster General to the performance of some specific public duty in case of an ascertained right by force of the strong arm of sovereign power because he was a public officer, and who was not a suitor in court or party to a case in law or equity.

What is this proceeding? The relators applied to a tribunal where a portion of sovereignty was supposed to have been vested, stated their ascertained right, and made their complaint that an ordinary remedy was wanting to enforce the right, and asked the representative of sovereignty for the aid of the writ, and an exertion of its power, in the name of the United States, on one of its great officers, to compel him to do his duty, to prevent a failure of justice. This is the nature of the demand and the writ awarded for its enforcement. [5 U. S. 1](#) Cranch 168.

In no just sense can this writ of mandamus be deemed a case at law between the United States and the Postmaster General. It differs in no material feature from a writ of attachment issued by a court against one of its officers, where he refuses to perform an official duty. That it is not "a case" between the relators and the Postmaster General was decided by this Court in *McClung v. Silliman*. There, the relator set forth that he was a citizen of one state, and the Register of the Land Office in Ohio, of another, and therefore proper parties were before the court, "who under the *description of person* were entitled to maintain suits in the courts of the United States." To which the court responded that the application in that instance for the writ of mandamus, as in the one referred to of [*McIntyre v. Wood*](#), 7 Cranch 504, "were wholly uninfluenced by any considerations drawn from the want of personal attributes of the parties." Holding in substance, as the undoubted truth is that the mandamus was not a *private remedy* to the relator; but the exertion at his request of a prerogative and attribute of sovereignty through the instrumentality of a court of justice for the sake of good government and to prevent an abuse of its authority by those acting at its command.

Taken in this sense, the decision in *McClung v. Silliman* is easily understood; viewed in any other, it is involved in all the confusion attributed to it by the argument and the opinion of the court below.

Another consideration prominently presents itself. Congress has jurisdiction, exclusive of the several states, over this district of ten miles square, and so Congress has exclusive jurisdiction over the territories of the United States, and upon the courts of these, as

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upon the courts of this District, the jurisdiction and powers of the state courts, of which the territories were formerly a part, have been conferred, and in addition thereto the territorial courts have been invested with the jurisdiction and powers of the circuit courts of the United States. There are two territories the courts of which are now exercising such general jurisdiction and powers -- Florida and Wisconsin. These courts having coextensive powers with that of the District of Columbia; it

follows, if the sovereign prerogative to exert the writ of mandamus to coerce executive officers of the United States, pertains to the one court, it must to the others, and that Congress has, by implication, entrusted to the courts of the two territories named, as well as to the court of this District, powers that have been unquestionably withholden from the federal circuit courts of the twenty-six states. To say Congress never so intended, and if the power exists it was conferred by an oversight in the legislature, is perhaps asserting what few would be found to deny. The truth (there can be little room for doubt) is that Congress has been unwilling to expose the action of the government in the administration of its vast and complicated affairs, and its officers, who have charge of their management, to the danger and indignity of being coerced and controlled, at the ill-defined discretion of the inferior courts, by the writ of mandamus, and that after the decision of *Marbury v. Madison* in 1803, holding that the Supreme Court had not the power thus to coerce an officer of the United States, it has been permitted to lie dormant, awaiting the action of the legislature. The supposition is rendered highly probable when we consider the delicacy its exercise would necessarily involve and the difficulty of vesting so high and extensive a power in the inferior courts, and especially in those of this District, in a modified and safe form.

Such being my own opinion, I think the order awarding the mandamus against the Postmaster General should be reversed for want of jurisdiction in the court below to issue the writ.

* The words in this opinion which are printed in italic are done so in conformity with the "List of Errata" put forth in First Howard's Reports by direction of MR. JUSTICE CATRON.