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THE ANCESTRY OF MARBURY v. MADISON

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MARSHALL was not the first judge to hold that the supreme court had power to declare an act of congress unconstitutional. The act of March 23, 1792, 1 Stat. at Large, p. 223, relating to invalid pensions, provided "that any officer, soldier or seaman * * * shall also be allowed such farther sum for the arrears of pension * * * as the circuit court of the district * * * may think just;" and made it the duty of the judges of the circuit courts to remain five days at least, from the opening of the session thereof to give full opportunity for the relief proposed by the act, and further "That in any case where the Secretary (of War) should suspect imposition or mistake, he should have power to withhold the name of the applicant from the pension list and make report of the same to congress at their next session.

The Circuit Court for the District of New York, consisting of Jay, Cushing and Duane, took up this act. Jay was then chief justice of the Supreme Court, Cushing was on that bench and Duane was judge of the district court of New York. They declined to act as a court under the above mentioned statute on the ground that "neither the legislative nor the executive branches [of the federal government] can constitutionally assign to the judicial any duties but such as are properly judicial and to be performed in the judicial manner;" that the duties assigned were not judicial because they subjected the decisions of the court to consideration and suspension by the secretary of war and to the legislature; that no executive officer or even the legislature was authorized "to sit as a court of errors on the acts and opinions of this court." The judges then construed the act as appointing them personally as commissioners and thus took it upon themselves to carry out its provisions.

In Pennsylvania the circuit court, consisting of Wilson and Blair, Justices of the Supreme Court, and Peters, District Judge, addressed a letter to the President to the same effect, except that they declined to act at all. The Circuit Court for the District of North Carolina, consisting of Iredell, Asso-

ciate Justice of the Supreme Court, and Sitgreaves, District Judge, addressed a letter to the President, in which they set forth the same matters, construing, obviously correctly, though contrary to New York, the statute as referring to the court and not to the judges of it. They nevertheless resolved to act as commissioners on account of the serious consequences to "unfortunate and meritorious individuals" if they refused their cause. Thereupon Attorney General Randolph moved for mandamus in the supreme court of the United States against the circuit court for the district of Pennsylvania, to compel that court to obey the act. The supreme court took the matter under advisement but before decision congress repealed the act by the Act of Feb. 28th, 1793, 1 St. at Large, p. 374, *Hayburn's Case and Notes, 2 Dallas, 409.*

The great constitutional question decided in *Marbury v. Madison,* is said by Senator Beveredge not to have been essential to the decision of that case. Whatever may be true as to that, it is certain that the circuit courts of New York and Pennsylvania, with four of the five* supreme justices sitting thereon, in refusing to perform the duties placed upon them by an act of congress on the ground that that act was unconstitutional, did not merely declare but held it to be so; that their colleague, Iredell, agreed with them we know and we know, therefore, that the supreme court of the United States at that time was unanimous upon the point decided by Marshall and his colleagues twenty years later. The importance of this lies not in the fact that it adds the mere authority of these judges to that of Marshall and his colleagues in support of the principle stated in *Marbury v. Madison,* but that it shows that the maintenance of that principle was inevitable, and that it was recognized in what Mr. Dallas, the reporter, says was the first case in which the constitutional question was presented, and was agreed to by all the judges upon exactly the grounds which governed the opinion of the great Chief Justice.

It is interesting also to note that in the Federalist the proposition later declared by the courts is asserted and taken for granted and made the basis of further deductions (Fedst. Nos. 53 and 78).

*Johnson had then been appointed but had not qualified.