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IS *MARBURY v. MADISON* OBITER?

By CHARLES W. BUNN*

ONE of the points decided in *Marbury v. Madison*¹ was that the act of Congress creating the office there in question gave the officer the right to hold it for five years independent of the executive.

In *Myers v. United States*,² October 25, 1926, Chief Justice Taft speaking for the majority of the court held this ruling obiter dictum.

Considering that *Marbury v. Madison* was decided without argument for the defendant it would not be surprising if the court now thought one of the points in that case was erroneously decided. But after *Marbury v. Madison* has stood for over a hundred years as a landmark of the law it is startling to be told that the court in that case decided questions beyond its jurisdiction.

Mr. Beveridge and some other writers have taken the view that because the act of Congress giving the court original jurisdiction of mandamus was held invalid in *Marbury v. Madison* (thus showing that the court was without jurisdiction) its decision on whether *Marbury* was an officer was extrajudicial. This view is evidently that of the majority of the court in *Myers v. United States*. But is it right?

It must be admitted that at first blush it seems difficult to maintain that the court had jurisdiction to decide whether *Marbury* was an officer in a case of which it had no jurisdiction.

But it is impossible that this so obvious view should have escaped Chief Justice Marshall and his associates. When the case is more carefully considered it becomes apparent that the court regarded both *Marbury's* title to office and whether mandamus was an appropriate remedy as jurisdictional questions. And is not this the true view?

Undoubtedly where a court has no jurisdiction its decision on questions of merits is obiter. But undoubtedly it has a right to decide every question going to the jurisdiction and its decision on any such question is not obiter.

Marbury v. Madison will be misunderstood unless it is borne in mind that it was an action sought to be brought under the original jurisdiction of the Supreme Court. The constitution confers such jurisdiction "in all cases affecting ambassadors, other

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¹(1803) 1 Cranch (U.S.) 137, 2 L. Ed. 60.

²(1926) 47 Sup. Ct. 21.

public ministers and consuls, and those in which a state shall be a party." An act of Congress added original jurisdiction "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."

Marbury not having a case within the original constitutional jurisdiction was obliged, in order to come within that jurisdiction at all, to state a case described by the act of Congress; that is he was obliged to allege some right of person or property, infringed by an officer of the United States, and according to the principles and usages of law enforceable by mandamus. Had he failed to state any property or personal right his proceeding would have been dismissed for want of jurisdiction, not for want of merits. Had he failed to state a right appropriately enforceable by mandamus his proceeding would have been dismissed for want of jurisdiction.

Each of these elements was necessary, not alone to the merits of the case, but to the original jurisdiction of the court. If Marbury had not pleaded his right to office his action would not have come within the original jurisdiction as defined in the act of Congress. There would have been left a moot case, one where a plaintiff without showing a right infringed asked the court to pass on the constitutionality of an act of Congress.

As Marbury's pleading of his right to office was the allegation of a jurisdictional fact the court was considering a jurisdictional question in determining whether that allegation was well founded. In this view whether Marbury had a title to office was as much a jurisdictional question as whether the act of Congress was invalid and whether, if so, it would be disregarded by the court.

This was undoubtedly the view of Chief Justice Marshall and his associates.

If Marbury's right to office was a jurisdictional question it will not be doubted that the court was entirely right and within its jurisdiction in passing on that before taking up the constitutional power of Congress to pass the act. The power of Congress was a vastly important constitutional question and it involved the most mooted unsettled question of that day; viz., whether the court would apply the constitution or the act of Congress if the two disagreed. When the importance and novelty of these questions are considered can there remain a doubt that it was the duty of the court not to pass on them

before it was necessary? And it was not necessary unless Marbury was an officer. If he was proceeding on an ill-founded right the court would not allow him to force its decision on important constitutional questions. The court, perceiving that it had no original jurisdiction unless Marbury had a right to office, inquired into that right and was driven to decide the constitutional question, only because it found he had the right.

Had the court *assumed* Marbury's right and without particular inquiry on that head passed on to the constitutional questions, it would seem to have been passing on the validity of an act of Congress as an abstract question—in a case where it did not appear to be required by rights of litigants in actual controversy.

Had the court assumed the plaintiff's right and proceeded to hold the act of Congress invalid and therefore ineffectual, would it not justly have been chargeable with going out of its way to annul an act of Congress in what was apparently a moot case? And had the court done this, its decision might justly be called obiter, because we now learn from the opinion in *Myers v. United States* that Marbury was not an officer.

This puts the court in *Marbury v. Madison* in what is indeed a sad dilemma. On one hand where it inquired first whether Marbury was really an officer its decision on that point is said to be obiter dictum by the majority opinion in *Myers v. United States*, because the court had no jurisdiction of mandamus. But on the other hand it is submitted that a decision solely on the constitutional question would have been universally regarded as obiter because rendered in a case where the right of the plaintiff to invoke the original jurisdiction of the court was more than doubtful and not passed upon.

There is no escape from this absurd supposed dilemma of the court except in the view that Marbury's right to office was a jurisdictional question; just as much jurisdictional as whether the act of Congress was valid. It seems certain that this must have been the view of Chief Justice Marshall and his associates. They state the order in which the questions were to be considered and in that order they said they were first to decide whether Marbury was an officer.³ They were not oblivious to so plain a proposition, as that they could not decide merits in a case of which they had no jurisdiction. Conceding that they recognized this very obvious principle they must have regarded Marbury's allegation of right to an office as a jurisdictional averment.

³*Marbury v. Madison*, (1803) 1 Cranch (U.S.) 137, 154, 2 L. Ed. 60.