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CONCERNING THE REVIEW

With this number the REVIEW begins publishing signed subject comments submitted by contributors who are not members of the Editorial Boards. The first of these, found herein at page 238, has been contributed by B. H. Hartogensis, Esq., of the Baltimore City Bar. The REVIEW will also continue to carry unsigned subject comments (and also casenotes) prepared by members of the Boards. Ex-

amples of these are found in the present number following Mr. Hartogensis's comment and in the February number at the beginning of the casenote and comment section.

The REVIEW believes that such subject comments of factual and informational nature will prove as useful to the readers as the analytical and interpretational leading articles. The hope is expressed that members of the Bar can be induced to contribute material of each sort. In distinguishing between leading articles and subject comments along the lines set out just above the REVIEW is following the examples of several of the established legal journals.

NEWS OF THE LAW SCHOOL

Dean Howell has been appointed to serve for another year as Chairman of the Special Committee on Non-Member Schools of the Association of American Law Schools.

The University of Pennsylvania Law Review, in its March and April, 1937 numbers, has published an article in two installments by Professor Strahorn entitled "A Reconsideration of the Hearsay Rule and Admissions."

AN EARLY MARYLAND DECISION ON JUDICIAL REVIEW OF LEGISLATION.*

The current controversy over President Roosevelt's recent proposal to enlarge the Supreme Court of the United States has focussed attention on the general problem of judicial review of legislation and on the case of *Marbury v. Madison*,¹ which was the first case in which the Supreme Court, then speaking through Chief Justice John Marshall,

* The REVIEW is indebted to G. Ross Veazey, Esq., of the Baltimore City Bar for calling attention to the *Whittington* case and the other materials and for suggesting that they be presented to the readers. The matter of the history of judicial review of legislation has been extensively treated at various times in the past. No effort has been made herein to incorporate the whole literature of the problem. The local materials are presented because of the possible current interest to the members of the Maryland bar.

¹ 1 Cranch 137, 2 L. Ed. 60 (1803).

exercised the power to declare statutes unconstitutional. While the REVIEW refrains, for reasons of policy, from taking either side of the controversy over the merits of the President's proposal, yet it is felt that the readers on both sides of the question may be interested in an early Maryland case, decided less than a year before *Marbury v. Madison*, which also asserted the doctrine of judicial power to hold statutes unconstitutional. Although no actual coincidence of language appears yet the reasoning² foreshadows that of Marshall's famous opinion, and, because of the identity of the participants in the case, it may throw some light on the interpretation of the United States Constitution itself.

The case was *Whittington v. Polk*,³ decided in the Maryland General Court⁴ by Chief Judge Jeremiah Townley Chase. In that case the plaintiff, William Whittington, had been appointed and commissioned Chief Justice of the County Courts of the Fourth District (Caroline, Dorchester, Somerset, and Worcester Counties) under the statute of 1796⁵ which provided that the terms of the justices should last during good behavior. The then current state constitution provided⁶ that all judges should hold their commissions during good behavior. By a later Act of 1801⁷ the former statute was repealed and under the later one the defendant, William Polk, was commissioned by the Governor to serve in place of the plaintiff.

Luther Martin then brought an action of novel disseisin on behalf of the plaintiff against the defendant, on the

² Beveridge says that in the Maryland case the opinion employs "precisely the same reasoning" as was used by Marshall in *Marbury v. Madison*. Beveridge, *Life of John Marshall*, III, 612, app. c.

³ 1 H. & J. 236 (1802).

⁴ The General Court, like the Chancery Court, was a central trial court of state-wide jurisdiction. Although legally inferior to the Court of Appeals yet it was, until abolished in 1806, very highly regarded, as much so as the Court of Appeals. To this effect and in general concerning the General Court, see Bond, *The Court of Appeals of Maryland—A History*, Ch. III, 58-98. It is interesting to note that both Judge Chase, who wrote the opinion, and William Polk, who was defendant, later served together on the Court of Appeals after its reorganization in 1806. The former served as Chief Judge and the latter as one of the Associate Judges.

⁵ Acts 1796, Ch. 43 as amended Acts 1797, Ch. 69.

⁶ Md. Const. (1776), Form of Government, Sec. 40.

⁷ Acts 1801, Ch. 74.

ground that the defendant had unjustly disseised the plaintiff of his freehold in the office. The plaintiff relied on the provision of the state constitution and contended that he had a vested interest in his office during good behavior and that the later Act could not constitutionally deprive him of his life tenure.

While the Court held for the defendant both on the ground⁸ that the constitutional provision protected only "judges" and not "justices", and because the writ of novel disseisin was not the proper method by which to raise the question⁹ yet it discussed the question of its power to hold a statute unconstitutional if it found a statute to violate some constitutional provision. Although the correctness of both the following propositions was conceded by counsel, yet the court discussed¹⁰ at great length whether it is correct:

"1. That an act of assembly repugnant to the Constitution is void," and

"2. That the Courts have a right to determine an act of assembly void, which is repugnant to the Constitution."

The Court pointed out¹¹ that the State Constitution, composed of the Bill of Rights and the Form of Government, was a compact between the people of Maryland which established that all government, of right, originates from the people, who through the compact had distributed governmental powers to the several departments of government subject to the restrictions the people had seen fit to impose. Said the Court:¹²

"The legislature, being the creature of the constitution and acting within a circumscribed sphere, is not omnipotent, and cannot rightfully exercise any power, but that which is derived from that instrument.

"The constitution having set certain limits or landmarks to the power of the legislature, whenever they

⁸ 1 H. & J. at 248-9.

⁹ 1 H. & J. at 249-50.

¹⁰ 1 H. & J. at 241 et seq.

¹¹ 1 H. & J. at 242.

¹² *Ibid*, et seq.

exceed them they act without authority, and such acts are mere nullities, not being done in pursuance of power delegated to them: Hence the necessity of some power under the constitution to restrict the acts of the legislature within the limits defined by the constitution.

“The power of determining finally on the validity of the acts of the legislature cannot reside with the legislature, because such power would defeat and render nugatory, all the limitations and restrictions on the authority of the legislature, contained in the bill of rights and form of government, and they would become judges of the validity of their own acts, which would establish a despotism and subvert that great principle of the constitution, which declares that the powers of making, judging, and executing the law, shall be separate and distinct from each other. . . .

“ . . . It is the office and province of the court to decide all questions of law which are judicially brought before them, according to the established mode of proceeding, and to determine whether an act of the legislature, which assumes the appearance of a law, and is clothed with the garb of authority, is made pursuant to the power vested by the constitution in the legislature; for if it is not the result or emanation of authority derived from the constitution, it is not law, and cannot influence the judgment of the court in the decision of the question before them. . . .

“The oath of a judge is ‘that he will do equal right and justice according to *the law of this state*, in every case in which he shall act as judge.’

“To do right and justice according to the law, the judge must determine what the law is, which necessarily involves in it the right of examining the constitution. (which is the supreme or paramount law, and under which the legislature derive the only authority they are invested with, of making laws), and considering whether the act passed is made pursuant to the constitution, and that trust and authority which is delegated thereby to the legislative body.

“The three great powers or departments of government are independent of each other, and the legislature, as such, can claim no superiority or pre-emi-

nence over the other two. The legislature are the trustees of the people, and, as such, can only move within those lines which the constitution has defined as the boundaries of their authority, and if they should incautiously, or unadvisedly transcend those limits, the constitution has placed the judiciary as the barrier or safeguard to resist the oppression, and redress the injuries which might accrue from such inadvertent, or unintentional infringements of the constitution.'

The *Whittington* case was decided on June 12, 1802, and *Marbury v. Madison* on February 24, 1803. Senator Beveridge, in his *Life of John Marshall*,¹³ lists the *Whittington* case as one, among others, of which Marshall may have heard before he delivered his opinion in *Marbury v. Madison*. Beveridge admits that the report of the *Whittington* case was not published until 1821 but suggests that Marshall may have heard of it through Chase. Beveridge said: "Marshall was surely informed of this case by Chase who, as Chief Justice of Maryland, decided it." This is an obvious error on Beveridge's part for he apparently confused the Samuel Chase¹⁴ of Maryland who sat on the Supreme Court with Marshall and the Jeremiah Townley Chase who wrote the opinion in the *Whittington* case. Incidentally, the latter was "Chief Judge" and not "Chief Justice". This is a distinction which is all the more important because of the detail of the *Whittington* case.

Regardless of whether Marshall had ever heard of the *Whittington* case, it is seemingly relevant on the question of judicial review by the Federal Courts for another reason, viz., Luther Martin's connection both with the case and the Constitutional Convention of 1787. Martin's connection with the *Whittington* case, as counsel for the plaintiff who asserted the applicability of the doctrine of unconstitutionality of legislation, shows his agreement with the propositions announced in the language of the opinion, which agreed with the major premise of his client's case, although not with the minor.

¹³ Beveridge, loc cit., supra note 2.

¹⁴ Samuel Chase had sat on the General Court prior to his appointment to the Supreme Court of the United States in 1796.

It was Martin who, in the Constitutional Convention of 1787, introduced the resolution¹⁵ which, as shortened, became the "Supreme law of the land" clause of the Constitution, reading:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding."¹⁶

The insertion of the substance of the Luther Martin resolution in the Constitution goes far to show that the framers had in mind that *state judges* might not willingly enforce statutes passed *in pursuance of* the Constitution. It was generally thought that Federal judges would not hesitate to follow Federal law. The effort was to make certain that any legislative act, State or Federal, should be gauged by the State judiciary by applying the Constitution as the Supreme Law of the land.

Luther Martin's acceptance of the doctrine of judicial review of legislation as shown by his position in the *Whittington* case may throw some light on the meaning of the "Supreme law of the land" clause of the Constitution which, in substance, he introduced. It may go to show that the framers of the Constitution contemplated that the courts should have the power to declare legislation unconstitutional.

¹⁵ Mr. Brinton Coxe, in his *Essay on Judicial Power and Unconstitutional Legislation* (1893) points out that on July 17, 1787 Luther Martin offered this Resolution in the Constitutional Convention:

"Resolved, That the legislative acts of the United States, made by virtue and in pursuance of the Articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, as far as those acts, or treaties, shall relate to the said states, or their citizens and inhabitants:—and that the judiciaries of the several states shall be bound thereby in their decisions—anything in the respective laws of the individual states to the contrary, notwithstanding."

¹⁶ United States Constitution, Art. VI, Sec. 2.