CHAPTER XXII

THE FEDERAL COURTS

When in 1788 the loosely confederated States of North America united themselves into a nation, national tribunals were felt to be a necessary part of the national government. Under the Confederation there had existed no means of enforcing the treaties made or orders issued by the Congress, because the courts of the several States owed no duty to that feeble body, and had little will to aid it. Now that a Federal legislature had been established, whose laws were to bind directly the individual citizen, a Federal judicature was evidently needed to interpret and apply these laws, and to compel obedience to them. The alternative would have been to entrust the enforcement of the laws to State courts. But State courts were not fitted to deal with matters of a quasi-international character, such as admiralty jurisdiction and rights arising under treaties. They supplied no means for deciding questions between different States. They could not be trusted to do complete justice between their own citizens and those of another State. Being under the control of their own State governments, they might be forced to disregard any Federal law which the State disapproved; or even if they admitted its authority, might fail in the zeal or the power to give due effect to it. And being authorities co-ordinate with and independent of one another, with no common court of appeal placed over them to correct their errors or harmonize their views, they would be likely to interpret the Federal Constitution and statutes in different senses, and make the law uncertain by the variety of their decisions. These reasons pointed imperatively to the establishment of a new tribunal or set of tribunals, altogether detached from the States, as part of the machinery of the new government. Side by side of the thir-

teen (now forty-four) different sets of State courts, whose jurisdiction under State laws and between their own citizens was left untouched, there arose a new and complex system of Federal courts. The Constitution drew the outlines of the system. Congress perfected it by statutes; and as the details rest upon these statutes, Congress retains the power of altering them. Few American institutions are better worth studying than this intricate judicial machinery: few deserve more admiration for the smoothness of their working: few have more contributed to the peace and well-being of the country.

The Federal courts fall into three classes: —

The Supreme court, which sits at Washington.

The Circuit courts.

The District courts.

The Supreme court is directly created by Art. iii. § 1 of the Constitution, but with no provision as to the number of its judges. Originally there were six; at present there are nine, a chief justice, with a salary of $10,500 (£2100), and eight associate justices (salary $10,000). The justices are nominated by the President and confirmed by the Senate. They hold office during good behaviour, *i.e.* are removable only by impeachment; and have thus a tenure even more secure than that of English judges, for the latter may be removed by the Crown on an address from both Houses of Parliament.[1] Moreover, the English statutes secure the permanence only of the judges of the Supreme court of judicature, not also of judges of county or other local courts, while the provisions of the American Constitution are held to apply to the inferior as well as the superior Federal judges.[2] The Fathers of the Constitution were extremely anxious to secure the independence of their judiciary, regarding it as a bulwark both for the people and for the States against aggressions of either Congress or the President.[3] They affirmed the life tenure by an unani-

[1] 12 and 13 William III., cap. 2; *cf.* 1 George III., cap. 23. The occasional resistance of the parliament of Paris, whose members held office for life, to the French Crown may probably have confirmed the Convention of 1787 in its attachment to this English principle.

[2] The United States judges in the Territories stand on a different footing. See Chapter XLVII.

[3] See Hamilton in *Federalist*, No. lxxviii.: "The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the

mous vote in the Convention of 1787, because they deemed the risk of the continuance in office of an incompetent judge a less evil than the subserviency of all judges to the legislature, which might flow from a tenure dependent on legislative will. The result has justified their expectations. The judges have shown themselves independent of Congress and of party, yet the security of their position has rarely tempted them to breaches of judicial duty. Impeachment has been four times resorted to, once only against a justice of the Supreme court, and then unsuccessfully.[1] Attempts have been made, beginning from Jefferson, who argued that judges should hold office for terms of four or six years only, to alter the tenure of the Federal judges, as that of the State judges has been altered in most States; but Congress has always rejected the proposed constitutional amendment.

The Supreme court sits at Washington from October till July in every year. The presence of six judges is required to pronounce a decision, a rule which, by preventing the division of the court into two or more branches, retards the despatch of business, though it has the advantage of securing a thorough consideration of every case. The sittings are held in the Capitol, in the chamber formerly occupied by the Senate, and the justices wear black gowns, being not merely the only public officers, but almost the only non-ecclesiastical persons of any kind whatever within the bounds of the United States who use any official dress.[2] Every case is discussed by the whole body twice over, once to ascertain the opinion of the majority, which is then directed to be set forth in a written judgment; then again when that written judgment, which one of the judges has prepared, is submitted for criticism and adoption as the judgment of the court.

most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the legislative body."

[1] This was Samuel Chase of Maryland in 1804–5. The other cases were of district Federal judges. Two were convicted (one of violence, apparently due to drunkenness or insanity, the other of rebellion), the third was acquitted.

[2] Save that in some universities the president and professors, and (more rarely) the graduates, wear academic gowns on great occasions, such as the annual Commencement, and that gowns are worn by the judges in Federal Circuit Courts and by the judges of the New York Court of Appeals.

The Circuit courts have been created by Congress under a power in the Constitution to establish "inferior courts." There are at present nine judicial circuits, in which courts are held annually. Each of these has two Circuit judges (salary $6000), and to each there is also allotted one of the justices of the Supreme court. The Circuit court may be held either by a Circuit judge alone, or by the Supreme court Circuit justice alone, or by both together, or by either sitting along with the District judge (hereafter mentioned) of the district wherein the particular circuit court is held, or by the District judge alone. A statute of 1891 has established Circuit Courts of Appeals, to which cases may be brought from District or Circuit courts, a further appeal lying, in some classes of cases, to the Supreme court, to which moreover, in certain cases, a direct appeal from the District or Circuit courts may still be brought. It is hoped that these new courts will relieve the Supreme court of some of its now too heavy business.

The District courts are the third and lowest class of Federal tribunals. They are at present fifty-five in number, and their judges receive salaries of $5000 (£1000) per annum. The Constitution does not expressly state whether they and the Circuit judges are to be appointed by the President and Senate like the members of the Supreme court; but it has always been assumed that such was the intention, and the appointments are so made accordingly.

For the purpose of dealing with the claims of private persons against the Federal government there has been established in Washington a special tribunal called the Court of Claims, with five justices (salary $4500), from which an appeal lies direct to the Supreme court.

The jurisdiction of the Federal courts extends to the following classes of cases, on each of which I say no more than what seems absolutely necessary to explain their nature.[1] All other

[1] "All the enumerated cases of Federal cognizance are those which touch the safety, peace, and sovereignty of the nation, or which presume that State attachments, State prejudices, State jealousies, and State interests might sometimes obstruct or control the regular administration of justice. The appellate power in all these cases is founded on the clearest principles of policy and wisdom, and is necessary in order to preserve uniformity of decision upon all subjects within the purview of the Constitution." — Kent's *Commentaries* (Holmes' edition), vol. i. p. 320.

cases have been left to the State courts, from which there does not lie (save as hereinafter specified) any appeal to the Federal courts.

1. "Cases in law and equity arising under the constitution, the laws of the United States, and treaties made under their authority."

In order to enforce the supremacy of the national Constitution and laws over all State laws, it was necessary to place the former under the guardianship of the national judiciary. This provision accordingly brings before a Federal court every cause in which either party to a suit relies upon any Federal enactment. It entitles a plaintiff who bases his case on a Federal statute to bring his action in a Federal court: it entitles a defendant who rests his defence on a Federal enactment to have the action, if originally brought in a State court, removed to a Federal court.[1] But, of course, if the action has originally been brought in a State court, there is no reason for removing it unless the authority of the Federal enactment can be supposed to be questioned. Accordingly, the rule laid down by the Judiciary Act (1789) provides "for the removal to the supreme court of the United States of the final judgment or decree in any suit, rendered in the highest court of law or equity of a State in which a decision could be had, in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favour of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute or a commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority. But to authorize the removal under that act, it must appear by the record, either expressly or by clear and necessary intendment, that some one of the enumerated questions did arise in the

[1] The removal may be before or after judgment given, and in the latter event, by way of appeal or by writ of error.

State court, and was there passed upon. It is not sufficient that it might have arisen or been applicable. And if the decision of the State court is in favour of the right, title, privilege, or exemption so claimed, the Judiciary Act does not authorize such removal, neither does it where the validity of the State law is drawn in question, and the decision of the State court is against its validity."[1]

The rule seems intricate, but the motive for it and the working of it are plain. Where in any legal proceeding a Federal enactment has to be construed or applied by a State court, if the latter supports the Federal enactment, *i.e.* considers it to govern the case, and applies it accordingly, the supremacy of Federal law is thereby recognized and admitted. There is therefore no reason for removing the case to a Federal tribunal. Such a tribunal could do no more to vindicate Federal authority than the State court has already done. But if the decision of the State court has been against the applicability of the Federal law, it is only fair that the party who suffers by the decision should be entitled to Federal determination of the point, and he has accordingly an absolute right to carry it before the Supreme court.[2]

The principle of this rule is applied even to executive acts of the Federal authorities. If, for instance, a person has been arrested by a Federal officer, a State court has no jurisdiction to release him on a writ of *habeas corpus*, or otherwise to inquire into the lawfulness of his detention by Federal authority, because, as was said by Chief-Justice Taney, "The powers of the general government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.

[1] Cooley, *Constitutional Limitations*, p. 16. For details regarding the removal of suits, and the restrictions when the amount in dispute is small, see Cooley, *Principles of Constitutional Law*, p. 122 *sqq.*; and see also the Act of 3d March 1887.

[2] Federal legislation may however be in a given case needed in order to confer upon Federal courts jurisdiction over cases arising under a treaty. The question arose in the case of the lynching of certain Italians at New Orleans in 1891. The Italian Government in its complaints appealed to the treaty of 1871 between the United States and Italy, but it seems to have been held that Congress had not legislated so as to enable Federal courts to deal with offences in breach of that treaty.

And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State court as if the line of division was traced by landmarks and monuments visible to the eye."[1]

2. "Cases affecting ambassadors, other public ministers, and consuls."

As these persons have an international character, it would be improper to allow them to be dealt with by a State court which has nothing to do with the national government, and for whose learning and respectability there may exist no such securities as those that surround the Federal courts.

3. "Cases of admiralty and maritime jurisdiction."

These are deemed to include not only prize cases but all maritime contracts, and all transactions relating to navigation, as well on the navigable lakes and rivers of the United States as on the high seas.

4. "Controversies to which the United States shall be a party."

This provision is obviously needed to protect the United States from being obliged to sue or be sued in a State court, to whose decision the national government could not be expected to submit. When a pecuniary claim is sought to be established against the Federal government, the proper tribunal is the Court of Claims.

5. "Controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects."

In all these cases a State court is likely to be, or at any rate to seem, a partial tribunal, and it is therefore desirable to vest the jurisdiction in judges equally unconnected with the plaintiff and the defendant. By securing recourse to an unbiassed and competent tribunal, the citizens of every State obtain better commercial facilities than they could otherwise count upon, for their credit will stand higher with persons belonging to other States if the latter know that their legal rights are under the protection, not of local and possibly prejudiced judges, but

[1] *Ableman* v. *Booth*, 21 How. 516.

of magistrates named by the national government, and unamenable to local influences.[1]

One important part of the jurisdiction here conveyed has been subsequently withdrawn from the Federal judicature. When the Constitution was submitted to the people, a principal objection urged against it was that it exposed a State, although a sovereign commonwealth, to be sued by the individual citizens of some other State. That one State should sue another was perhaps necessary, for what other way could be discovered of terminating disputes? But the power as well as the dignity of a State would be gone if it could be dragged into court by a private plaintiff. Hamilton (writing in the *Federalist*) met the objection by arguing that the jurisdiction-giving clause of the Constitution ought not to be so construed, but must be read as being subject to the general doctrine that a sovereign body cannot be sued by an individual without its own consent, a doctrine not to be excluded by mere implication but only by express words.[2] However, in 1793 the Supreme court, in the famous case of *Chisholm* v. *The State of Georgia*,[3] construed the Constitution in the very sense which Hamilton had denied, holding that an action did lie against Georgia at the suit of a private plaintiff; and when Georgia protested and refused to appear, the court proceeded (in 1794) to give judgment against her by default in case she should not appear and plead before a day fixed. Her cries of rage filled the Union, and brought other States to her help. An amendment (the eleventh) to the Constitution was passed through Congress and duly accepted by the requisite majority of the States, which declares that "the judicial power of the United States shall not be construed to extend to any suit commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state."[4] Under the protec-

[1] There are countries in Europe with which foreign merchants are unwilling to do business because they can seldom obtain justice against a native. Local feeling was, of course, much stronger in the America of 1787 than it is now. Englishmen who had claims against American citizens failed to obtain their enforcement from 1783 till the Federal courts were established in 1789.

[2] *Federalist*, No. lxxxi. The same view was contemporaneously maintained by John Marshall (afterwards Chief-Justice) in the Virginia Convention of 1788.

[3] 2 Dall. 419.

[4] It has been held that the amendment applies only when a State is a party

tion of this amendment, several have with impunity repudiated their debts.

The jurisdiction of the Supreme court is original in cases affecting ambassadors, and wherever a State is a party; in other cases it is appellate; that is, cases may be brought to it from the inferior Federal courts and (under the circumstances before mentioned) from State courts. The jurisdiction is in some matters exclusive, in others concurrent with that of the State courts. Upon these subjects there have arisen many difficult and intricate questions, which I must pass by, because they would be unintelligible without long explanations.[1] One point, however, may be noted. The State courts cannot be invested by Congress with any jurisdiction, for Congress has no authority over them, and is not permitted by the Constitution to delegate any judicial powers to them. Hence the jurisdiction of a State court, wherever it is concurrent with that of Federal judges, is a jurisdiction which the court possesses of its own right, independent of the Constitution. And in some instances where congressional statutes have purported to impose duties on State courts, the latter have refused to accept and discharge them.

The criminal jurisdiction of the Federal courts, which extends to all offences against Federal law, is purely statutory. "The United States as such can have no common law. It derives its powers from the grant of the people made by the Constitution, and they are all to be found in the written law, and not elsewhere."[2]

The procedure of the Federal courts is prescribed by Congress, subject to some few rules contained in the Constitution, such as those which preserve the right of trial by jury in criminal cases[3] and suits at common law.[4] As "cases in law and equity" are mentioned, it is held that Congress could not accomplish such

to the record, and therefore does not apply to the case of a State holding shares in a corporation. Neither does it apply to appeals and writs of error.

Very recently (March 1892) the Supreme court have decided (by a large majority) in the case of *United States* v. *Texas* that the United States can sue a State.

[1] The lawyer curious in such matters may consult Story's *Commentaries on the Constitution*, chapter xxxviii., and the judgments of Chief-Justice Marshall in the cases of *Martin* v. *Hunter* (1 Wheat. 304) and *Cohens* v. *Virginia* (6 Wheat. 406).

[2] Cooley, *Principles*, p. 131. [3] Art. iii. § 2. [4] Amendment vii. § 1.

a fusion of law and equity as has been effected in several States of the Union, and was effected in England in 1873, but must maintain these methods of procedure as distinct, though administered by the same judges.

The law applied in the Federal courts is of course first and foremost that enacted by the Federal legislature, which, when it is applicable, prevails against any State law. But very often, as for instance in suits between citizens of different States, Federal law does not, or does only in a secondary way, come in question. In such instances the first thing is to determine what law it is that ought to govern the case, each State having a law of its own; and when this has been ascertained, it is applied to the facts, just as an English court would apply French or Scotch law in pronouncing on the validity of a marriage contracted in France or Scotland. In administering the law of any State (including its constitution, its statutes, and its common law, which in Louisiana is the civil law in its French form) the Federal courts ought to follow the decisions of the State courts, treating those decisions as the highest authority on the law of the particular State. This doctrine is so fully applied that the Supreme court has even over-ruled its own previous determinations on a point of State law in order to bring itself into agreement with the view of the highest court of the particular State. Needless to say, the State courts follow the decisions of the Federal courts upon questions of Federal law.[1]

For the execution of its powers each Federal court has attached to it an officer called the United States marshal, corresponding to the sheriff in the State governments, whose duty it is to carry out its writs, judgments, and orders by arresting prisoners, levying execution, putting persons in possession, and so forth. He is entitled, if resisted, to call on all good citizens for help; if they will not or cannot render it, he must refer to

[1] "The judicial department of every government is the appropriate organ for construing the legislative acts of that government. . . . On this principle the construction given by this (the supreme) court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the courts of the various States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States." — Marshall, C.-J., in *Elmendorf* v. *Taylor*, 10 Wheat. 109.

Washington and obtain the aid of Federal troops. There exists also in every judiciary district a Federal public prosecutor, called the United States district attorney, who institutes proceedings against persons transgressing Federal laws or evading the discharge of obligations to the Federal treasury. Both sets of officials are under the direction of the attorney-general, as head of the department of justice. They constitute a net-work of Federal authorities covering the whole territory of the Union, and independent of the officers of the State courts and of the public prosecutors who represent the State governments. Where a State maintains a gaol for the reception of Federal prisoners, the U. S. marshal delivers his prisoners to the State gaoler; where this provision is wanting, he must himself arrange for their custody.

The European reader may ask how it is possible to work a system so extremely complex, under which every yard of ground in the Union is covered by two jurisdictions, with two sets of judges and two sets of officers, responsible to different superiors, their spheres of action divided only by an ideal line, and their action liable in practice to clash. The answer is that the system does work, and now, after a hundred years of experience, works smoothly. It is more costly than the simpler systems of France, Prussia, or England, though, owing to the small salaries paid, the expense falls rather on litigants than on the public treasury. But it leads to few conflicts or heart-burnings, because the key to all difficulties is found in the principle that wherever Federal law is applicable Federal law must prevail, and that every suitor who contends that Federal law is applicable is entitled to have the point determined by a Federal court. The acumen of the lawyers and judges, the wealth of accumulated precedents, make the solution of these questions of applicability and jurisdiction easier than a European practitioner can realize: while the law-abiding habits of the people and their sense that the supremacy of Federal law and jurisdiction works to the common benefit of the whole people, secure general obedience to Federal judgments. The enforcement of the law, especially the criminal law, in some parts of America leaves much to be desired; but the difficulties which arise are now due not to conflicts between State and Federal pretensions but to other tendencies equally hostile to both authorities.

A word in conclusion as to the separation of the judicial from the other two departments, a point on which the framers of the Constitution laid great stress. The functions of the legislature are more easily distinguished from those of the judiciary than from those of the executive. The legislature makes the law, the judiciary applies it to particular cases by investigating the facts and, when these have been ascertained, by declaring what rule of law governs them. Nevertheless there are certain points in which the two departments touch, certain ground debatable between the judiciary on the one hand and the legislature on the other. In most countries the courts have grown out of the legislature; or rather, the sovereign body, which, like Parliament, was originally both a law court and a legislature, has delivered over the bulk of its judicial duties to other persons, while retaining some few to be still exercised by itself.

America has in general followed the principles and practice of England. Like England, she creates no separate administrative tribunals such as exist in the states of the European continent, but allows officials to be sued in or indicted before the ordinary courts. Like England, she has given the judges (*i.e.* the Federal judges) a position secured against the caprice of the legislature or executive. Like England, she recognizes judicial decisions as law until some statute has set them aside. In one respect she has improved on England — viz. in forbidding the legislature to exercise the powers of a criminal court, by passing acts of attainder or of pains and penalties, measures still legal, though virtually obsolete, in England.[1] In others, she stands behind England. England has practically ceased to use one branch of her Parliament as a court for the trial of impeachments. America still occasionally throws upon one House of Congress this function; which, though it is ill suited to an ordinary court of justice, is scarcely better discharged by a political assembly. England has remitted to the courts of law the trial of disputed parliamentary elections; America still reserves these for Congress, and allows them to be disposed of by partisan votes, often with little regard to the merits.

[1] Neither House of Congress can punish a witness for contempt, after the fashion of the British Parliament (*Kilbourn* v. *Thompson*, 103 U. S. p. 168). See note to Chapter XXXIII. *post*.

Special and local bills which vest in private hands certain rights of the State, such as public franchises, or the power of taking private property against the owner's will, are, though in form exercises of legislative power, really fitter to be examined and settled by judicial methods than by the loose opinion, the private motives, the lobbying, which determine legislative decisions where the control of public opinion is insufficiently provided for. England accordingly, though she refers such bills to committees of Parliament, directs these committees to apply a quasi-judicial procedure, and to decide according to the evidence tendered. America takes no such securities, but handles these bills like any others. Here therefore we see three pieces of ground debatable between the legislature and the judiciary. All of them originally belonged to the legislature. All in America still belong to it. England, however, has abandoned the first, has delivered over the second to the judges, and treats the third as matter to be dealt with by judicial rather than legislative methods. Such points of difference are worth noting, because the impression has prevailed in Europe that America is the country in which the province of the judiciary has been most widely extended.

CHAPTER XXIII

THE COURTS AND THE CONSTITUTION

No feature in the government of the United States has awakened so much curiosity in the European mind, caused so much discussion, received so much admiration, and been more frequently misunderstood, than the duties assigned to the Supreme Court and the functions which it discharges in guarding the ark of the Constitution. Yet there is really no mystery about the matter. It is not a novel device. It is not a complicated device. It is the simplest thing in the world if approached from the right side.

In England and many other modern States there is no difference in authority between one statute and another. All are made by the legislature: all can be changed by the legislature. What are called in England constitutional statutes, such as Magna Charta, the Bill of Rights, the Act of Settlement, the Acts of Union with Scotland and Ireland, are merely ordinary laws, which could be repealed by Parliament at any moment in exactly the same way as it can repeal a highway act or lower the duty on tobacco.[1] The habit has grown up of talking of the British Constitution as if it were a fixed and definite thing. But there is in England no such thing as a Constitution apart from the rest of the law: there is merely a mass of law, consisting partly of statutes and partly of decided cases and accepted usages, in conformity with which the government of the country is carried on from day to day, but which is being constantly modified by fresh statutes and cases. The same

[1] This doctrine, although long since well settled, would not have been generally accepted in the beginning of the seventeenth century. As Sir Thomas More had maintained that an Act of Parliament could not make the king supreme head of the Church, so Coke held that the Common Law controlled Acts of Parliament and adjudged them void when against common right.