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of Rights, the Act of Settlement, the Acts of Union with Scotland and Ireland, are merely ordinary laws, which could be repealed by Parliament at any moment in exactly the same way as it can repeal a highway act or lower the duty on tobacco.[1] The habit has grown up of talking of the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.

thing existed in ancient Rome, and everywhere in Europe a century ago. It is, so to speak, the "natural," and used to be the normal, condition of things in all countries, free or despotic.

The condition of America is wholly different. There the name Constitution designates a particular instrument adopted in 1788, amended in some points since, which is the foundation of the national government. This Constitution was ratified and made binding, not by Congress, but by the people acting through conventions assembled in the thirteen States which then composed the Confederation. It created a legislature of two houses; but that legislature, which we call Congress, has no power to alter it in the smallest particular. That which the people have enacted, the people only can alter or repeal.

Here therefore we observe two capital differences between England and the United States. The former has left the outlines as well as the details of her system of government to be gathered from a multitude of statutes and cases. The latter has drawn them out in one comprehensive fundamental enactment. The former has placed these so-called constitutional laws at the mercy of her legislature, which can abolish when it pleases any institution of the country, the Crown, the House of Lords, the Established Church, the House of Commons, Parliament itself.[1] The latter has placed her Constitution altogether out of the reach of Congress, providing a method of amendment whose difficulty is shown by the fact that it has been very sparingly used.

In England Parliament is omnipotent. In America Congress is doubly restricted. It can make laws only for certain purposes specified in the Constitution, and in legislating for these purposes it must not transgress any provision of the Constitution itself. The stream cannot rise above its source.

[1] Parliament of course cannot restrict its own powers by any particular Act because that Act might be repealed in a subsequent session, and indeed any subsequent Act inconsistent with any of its provisions repeals *ipso facto* that provision. (For instance, the Act of Union with Scotland (6 Anne, c. 11) declared certain provisions of the Union, for the establishment of Presbyterian church government in Scotland, to be "essential and fundamental parts of the Union," but some of those provisions have been altered by subsequent statutes.) Parliament could, however, extinguish itself by formally dissolving itself, leaving no legal means whereby a subsequent Parliament could be summoned.

Suppose, however, that Congress does so transgress, or does overpass the specified purposes. It may do so intentionally: it is likely to do so inadvertently. What happens? If the Constitution is to be respected, there must be some means of securing it against Congress. If a usurpation of power is attempted, how is it to be checked? If a mistake is committed, who sets it right?

The point may be elucidated by referring it to a wider category, familiar to lawyers and easily comprehensible by laymen, that of acts done by an agent for a principle. If a land-owner directs his bailiff to collect rents for him, or to pay debts due to tradesmen, the bailiff has evidently no authority to bind his employer by any act beyond the instructions given him, as, for instance, by contracting to buy a field. If a manufacturer directs his foreman to make rules for the hours of work and meals in the factory, and the foreman makes rules not only for those purposes, but also prescribing what clothes the workmen shall wear and what church they shall attend, the latter rules have not the force of the employer's will behind them, and the workmen are not to be blamed for neglecting them.

The same principle applies to public agents. In every country it happens that acts are directed to be done and rules to be made by bodies which are in the position of agents, *i.e.* which have received from some superior authority a limited power of acting and of rule-making, a power to be used only for certain purposes or under certain conditions. Where this power is duly exercised, the act or rule of the subordinate body has all the force of an act done or rule made by the superior authority, and is deemed to be made by it. And if the latter be a law-making body, the rule of the subordinate body is therefore also a law. But if the subordinate body attempts to transcend the power committed to it, and makes rules for other purposes or under other conditions than those specified by the superior authority, these rules are not law, but are null and void. Their validity depends on their being within the scope of the law-making power conferred by the superior authority, and as they have passed outside that scope they are invalid. They do not justify any act done under them forbidden by the ordinary law. They ought not to be obeyed or in any way regarded by the citizens, because they are not law.

The same principle applies to acts done by an executive officer beyond the scope of his legal authority. In free countries an individual citizen is justified in disobeying the orders of a magistrate if he correctly thinks these orders to be in excess of the magistrate's legal power, because in that case they are not really the orders of a magistrate, but of a private person affecting to act as a magistrate. In England, for instance, if a secretary of state, or a police constable, does any act which the citizen affected by it rightly deems unwarranted, the citizen may resist, by force if necessary, relying on the ordinary courts of the land to sustain him. This is a consequence of the English doctrine that all executive power is strictly limited by the law, and is indeed a corner-stone of English liberty.[1] It is applied even as against the dominant branch of the legislature. If the House of Commons should act in excess of the power which the law and custom of Parliament has secured to it, a private individual may resist the officers of the House and the courts will protect him by directing him to be acquitted if he is prosecuted, or, if he is plaintiff in a civil action, by giving judgment in his favour.

An obvious instance of the way in which rules or laws made by subordinate bodies are treated is afforded by the bye-laws made by an English railway company or municipal corporation under powers conferred by an Act of Parliament. So long as these bye-laws are within the scope of the authority which the Act of Parliament has given, they are good, *i.e.* they are laws, just as much as if enacted in the Act. If they go beyond it, they are bad, that is to say, they bind nobody and cannot be enforced. If a railway company which has received power to make bye-laws imposing fines up to the amount of forty shillings, makes a bye-law punishing any person who enters or quits a train in motion with a fine of fifty shillings or a week's imprisonment, that bye-law is invalid, that is to say, it is not law at all, and no magistrate can either imprison or impose a fine of fifty shillings on a person accused of contravening it. If a municipal corporation has been by statute empowered to enter into contracts for the letting of lands

[1] See as to the different doctrine and practice of the European continent, and particularly as to the "administrative law" of France, the instructive remarks of Mr. Dicey in his *Law of the Constitution*.

vested in it, and directed to make bye-laws, for the purpose of letting, which shall provide, among other things, for the advertising of all lands intended to be let, and if it makes a bye-law in which no provision is made for advertising, and under that bye-law contracts for the letting of a piece of land, the letting made in pursuance of this bye-law is void, and conveys no title to the purchaser. All this is obvious to a lay as well as to a legal mind; and it is no less obvious that the question of the validity of the bye-law, and of what has been done under it, is one to be decided not by the municipal corporation or company, but by the courts of justice of the land.

Now, in the United States the position of Congress may for this purpose be compared to that of an English municipal corporation or railway company. The supreme law-making power is the People, that is, the qualified voters, acting in a prescribed way. The people have by their supreme law, the Constitution, given to Congress a delegated and limited power of legislation. Every statute passed under that power conformably to the Constitution has all the authority of the Constitution behind it. Any statute passed which goes beyond that power is invalid, and incapable of enforcement. It is in fact not a statute at all, because Congress in passing it was not really a law-making body, but a mere group of private persons.

Says Chief-Justice Marshall, "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited and to what purpose is that limitation committed to writing, if those limits may at any time be passed by those intended to be restrained? The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like any other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law. If the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable." There is of course this enormous difference between Congress and any subordinate law-making authority in England, that Congress is supreme within its

proper sphere, the people having no higher permanent organ to override or repeal such statutes as Congress may pass within that sphere; whereas in England there exists in Parliament a constantly present supervising authority, which may at any moment cancel or modify what any subordinate body may have enacted, whether within or without the scope of its delegated powers. This is a momentous distinction. But it does not affect the special point which I desire to illustrate, viz. that a statute passed by Congress beyond the scope of its powers is of no more effect than a bye-law made *ultra vires* by an English municipality. There is no mystery so far: there is merely an application of the ordinary principles of the law of agency. But the question remains, How and by whom, in case of dispute, is the validity or invalidity of a statute to be determined?

Such determination is to be effected by setting the statute side by side with the Constitution, and considering whether there is any discrepancy between them. Is the purpose of the statute one of the purposes mentioned or implied in the Constitution? Does it in pursuing that purpose contain anything which violates any clause of the Constitution? Sometimes this is a simple question, which an intelligent layman may answer. More frequently it is a difficult one, which needs not only the subtlety of the trained lawyer, but a knowledge of former cases which have thrown light on the same or a similar point. In any event it is an important question, whose solution ought to proceed from a weighty authority. It is a question of interpretation, that is, of determining the true meaning both of the superior law and of the inferior law, so as to discover whether they are inconsistent.

Now the interpretation of laws belongs to courts of justice. A law implies a tribunal, not only in order to direct its enforcement against individuals, but to adjust it to the facts, *i.e.* to determine its precise meaning and apply that meaning to the circumstances of the particular case. The legislature, which can only speak generally, makes every law in reliance on this power of interpretation. It is therefore obvious that the question, whether a congressional statute offends against the Constitution, must be determined by the courts, not merely because it is a question of legal construction, but because there

is nobody else to determine it. Congress cannot do so, because Congress is a party interested. If such a body as Congress were permitted to decide whether the acts it had passed were constitutional, it would of course decide in its own favour, and to allow it to decide would be to put the Constitution at its mercy. The President cannot, because he is not a lawyer, and he also may be personally interested. There remain only the courts, and these must be the National or Federal courts, because no other courts can be relied on in such cases. So far again there is no mystery about the matter.

Now, however, we arrive at a feature which complicates the facts, though it introduces no new principle. The United States is a federation of commonwealths, each of which has its own constitution and laws. The Federal Constitution not only gives certain powers to Congress, as the national legislature, but recognizes certain powers in the States, in virtue whereof their respective peoples have enacted fundamental State laws (the State constitutions) and have enabled their respective legislatures to pass State statutes. However, as the nation takes precedence of the States, the Federal Constitution, which is the supreme law of the land everywhere, and the statutes duly made by Congress under it, are preferred to all State constitutions and statutes; and if any conflict arise between them, the latter must give way. The same phenomenon therefore occurs as in the case of an inconsistency between the Constitution and a congressional statute. Where it is shown that a State constitution or statute infringes either the Federal Constitution or a Federal (*i.e.* congressional) statute, the State constitution or statute must be declared invalid. And this declaration must, of course, proceed from the courts, nor solely from the Federal courts; because when a State court decides against its own statutes or constitution in favour of a Federal law, its decision is final.

It will be observed that in all this there is no conflict between the law courts and any legislative body. The conflict is between different kinds of laws. The duty of the judges is as strictly confined to the interpretation of the laws cited to them as it is in England or France; and the only difference is that in America there are laws of four different degrees of authority, whereas in England all laws (excluding mere

bye-laws, Privy Council ordinances, etc.) are equal because all proceed from Parliament. These four kinds of American laws are: —

I. The Federal Constitution.
II. Federal statutes.
III. State constitutions.
IV. State statutes.[1]

The American law court therefore does not itself enter on any conflict with the legislature. It merely secures to each kind of law its due authority. It does not even preside over a conflict and decide it, for the relative strength of each kind of law has been settled already. All the court does is to declare that a conflict exists between two laws of different degrees of authority. Then the question is at an end, for the weaker law is extinct, or, to put the point more exactly, a flaw has been indicated which makes the world see that if the view of the court be correct, the law is in fact null. The court decides nothing but the case before it: and any one may, if he thinks the court wrong, bring up a fresh case raising again the question whether the law is valid.[2]

This is the abstract statement of the matter; but there is also an historical one. Many of the American colonies received charters from the British Crown, which created or recognized colonial assemblies, and endowed these with certain powers of making laws for the colony. Such powers were of course limited, partly by the charter, partly by usage, and were subject to the superior authority of the Crown or of the British Parliament. Questions sometimes arose in colonial days whether the statutes made by these assemblies were in excess of the powers conferred by the charter; and if the statutes were found to be in excess, they were held invalid by the

[1] Of these, the Federal Constitution prevails against all other laws. Federal statutes, if made in pursuance of and conformably to the Constitution, prevail against III. and IV. If in excess of the powers granted by the Constitution, they are to that extent invalid. A State constitution yields to I. and II., but prevails against the statutes of the State.

[2] This happened in the Legal Tender question (see next chapter). But in ninety-nine instances out of a hundred, the legal profession and the public admit the correctness, and therewith the authority, of the view which the court has taken. The court has itself declared that its declaration of the unconstitutionality of a statute must nowise be taken as amounting to a repeal of that statute. See *In re Rahrer*, 140 U. S. Rep. p. 545.

courts, that is to say, in the first instance, by the colonial courts, or, if the matter was carried to England, by the Privy Council.[1]

When the thirteen American colonies asserted their independence in 1776, they replaced these old charters by new constitutions,[2] and by these constitutions entrusted their respective legislative assemblies with certain specified and limited legislative powers. The same question was then liable to recur with regard to a statute passed by one of these assemblies. If such a statute was in excess of the power which the State constitution conferred on the State legislature, or in any way transgressed the provisions of that constitution, it was invalid, and acts done under it were void. The question, like any other question of law, came for decision before the courts of the State. Thus, in 1786, the supreme court of Rhode Island held that a statute of the legislature which purported to make a penalty collectible on summary conviction, without trial by jury, gave the court no jurisdiction, *i.e.* was invalid, the colonial charter, which was then still in force as the constitution of the State, having secured the right of trial by jury in all cases.[3] When the Constitution of the United States came into operation in 1789, and was declared to be paramount to all State constitutions and State statutes, no new principle was introduced; there was merely a new application, as between the nation and the States, of the old doctrine that a subordinate and limited legislature cannot pass beyond the limits fixed for it. It was clear, on general principles, that a State law incompatible with a duly enacted Federal law must give way; the only question was: What courts are to pronounce upon the

[1] The same thing happens even now as regards the British colonies. The question was lately argued before the Privy Council whether the legislature of the Dominion of Canada, created by the British North America Act of 1867 (an imperial statute), had power to extinguish the right of appeal from the supreme court of Canada to the British Queen in council.

[2] Connecticut and Rhode Island, however, went on under the old charters, with which they were well content. See as to this whole subject, Chapter XXXVII., on State Constitutions.

[3] In the case of *Trevett* v. *Weeden*, the first case of importance in which a legislative act was held unconstitutional for incompatibility with a State constitution, although the doctrine seems to have been laid down by the supreme court of New Jersey in *Holmes* v. *Walton* (1780), as well as in Virginia in 1782, and in New York in 1784. See Judge Elliott's article in *Political Science Quarterly* for June 1890, p. 233.