question whether such incompatibility exists? Who is to decide whether or no the authority given to Congress has been exceeded, and whether or no the State law contravenes the Federal Constitution or a Federal statute?

In 1787 the only pre-existing courts were the State courts. If a case coming before them raised the point whether a State constitution or statute was inconsistent with the Federal Constitution or a statute of Congress, it was their duty to decide it, like any other point of law. But their decision could not safely be accepted as final, because, being themselves the offspring of, and amenable to the State governments, they would naturally tend to uphold State laws against the Federal Constitution or statutes. Hence it became necessary to call in courts created by the central Federal authority and co-extensive with it — that is to say, those Federal courts which have been already described. The matter seems complicated, because we have to consider not only the superiority of the Federal Constitution to the Federal legislature but also the superiority of both the Federal Constitution and Federal statutes to all State laws. But the principle is the same and equally simple in both sets of cases. Both are merely instances of the doctrine, that a law-making body must not exceed its powers, and that when it has attempted to exceed its powers, its so-called statutes are not laws at all, and cannot be enforced.

In America the supreme law-making power resides in the people. Whatever they enact is universally binding. All other law-making bodies are subordinate, and the enactments of such bodies must conform to the supreme law, else they will perish at its touch, as a fishing smack goes down before an ocean steamer. And these subordinate enactments, if at variance with the supreme law, are invalid from the first, although their invalidity may remain for years unnoticed or unproved. It can be proved only by the decision of a court in a case which raises the point for determination. The phenomenon cannot arise in a country whose legislature is omnipotent, but naturally[1] arises wherever we find a legislature

[1] I do not say "necessarily," because there are countries on the European continent where, although there exists a constitution superior to the legislature, the courts are not allowed to hold a legislative act invalid, because the legislature is deemed to have the right of taking its own view of the constitution. This seems to be the case both in France and in Switzerland. So in the German Empire the Reichskammergericht cannot question an act of the imperial legislature; and in Belgium, though it has been thought that the courts possess such a power, it is now held that they do not possess it.



limited by a superior authority, such as a constitution which the legislature cannot alter.

In England the judges interpret Acts of Parliament exactly as American judges interpret statutes coming before them. If they find an Act conflicting with a decided case, they prefer the Act to the case, as being of higher authority. As between two conflicting Acts, they prefer the latter, because it is the last expression of the mind of Parliament. If they misinterpret the mind of Parliament, *i.e.* if they construe an Act in a sense which Parliament did not really intend, their decision is nevertheless valid, and will usually be followed by other courts of the same rank until Parliament speaks its mind again by another Act. The only difference between their position and that of their American brethren is that they have never to distinguish between the authority of one enactment and of another, otherwise than by looking to the date, and that they have therefore never to inquire whether an Act of Parliament was invalid when first passed. Invalid it could not have been, because Parliament is omnipotent, and Parliament is omnipotent because Parliament is deemed to be the people. Parliament is not a body with delegated or limited authority. The whole fulness of popular power dwells in it. The whole nation is supposed to be present within its walls.[1] Its will is law; or, as Dante says in a famous line, "its will is power."

There is a story told of an intelligent Englishman who, having heard that the Supreme Federal Court was created to protect the Constitution, and had authority given it to annul bad laws, spent two days in hunting up and down the Federal Constitution for the provisions he had been told to admire. No won-

[1] The old writers say that the reason why an Act of Parliament requires no public notification in the country is because it is deemed to be made by the whole nation, so that every person is present at the making of it. It is certainly true that the orthodox legal view of Parliament never regards it as exercising powers that can in any sense be called delegated. A remarkable example of the power which Parliament can exert as an ultimately and completely sovereign body is afforded by the Septennial Act (1 Geo. I. st. 2, cap. 38). By this statute a Parliament in which the House of Commons had been elected for three years only, under the Triennial Act then in force, prolonged not only the possible duration of future Parliaments but its own term to seven years, taking to itself four years of power which the electors had not given it.

der he did not find them, for there is not a word in the Constitution on the subject. The powers of the Federal courts are the same as those of all other courts in civilized countries, or rather they differ from those of other courts by defect and not by excess, being limited to certain classes of cases. The so-called "power of annulling an unconstitutional statute" is a duty rather than a power, and a duty incumbent on the humblest State court when a case raising the point comes before it no less than on the Supreme Federal Court at Washington. When therefore people talk, as they sometimes do, even in the United States, of the Supreme court as "the guardian of the Constitution," they mean nothing more than that it is the final court of appeal, before which suits involving constitutional questions may be brought up by the parties for decision. In so far the phrase is legitimate. But the functions of the Supreme court are the same in kind as those of all other courts, State as well as Federal. Its duty and theirs is simply to declare and apply the law; and where any court, be it a State court of first instance, or the Federal court of last instance, finds a law of lower authority clashing with a law of higher authority, it must reject the former, as being really no law, and enforce the latter.

It is therefore no mere technicality to point out that the American judges do not, as Europeans are apt to say, "control the legislature," but simply interpret the law. The word "control" is misleading, because it implies that the person or body of whom it is used possesses and exerts discretionary personal Will. Now the American judges have no will in the matter any more than has an English court when it interprets an Act of Parliament. The will that prevails is the will of the people, expressed in the Constitution which they had enacted. All that the judges have to do is to discover from the enactments before them what the will of the people is, and apply that will to the facts of a given case. The more general or ambiguous the language which the people have used, so much the more difficult is the task of interpretation, so much greater the need for ability and integrity in the judges. But the task is always the same in its nature. The judges have no concern with the motives or the results of an enactment, otherwise than as these may throw light on the sense in which



the enacting authority intended it. It would be a breach of duty for them to express, I might almost say a breach of duty to entertain, an opinion on its policy except so far as its policy explains its meaning. They may think a statute excellent in purpose and working, but if they cannot find in the Constitution a power for Congress to pass it, they must brush it aside as invalid. They may deem another statute pernicious, but if it is within the powers of Congress, they must enforce it. To construe the law, that is, to elucidate the will of the people as supreme lawgiver, is the beginning and end of their duty. And if it be suggested that they may overstep their duty, and may, seeking to make themselves not the exponents but the masters of the Constitution, twist and pervert it to suit their own political views, the answer is that such an exercise of judicial will would rouse the distrust and displeasure of the nation, and might, if persisted in, provoke resistance to the law as laid down by the court, possibly an onslaught upon the court itself.

To insist upon the fact that the judiciary of the United States are not the masters of the Constitution but merely its interpreters is not to minimize the importance of their functions, but to indicate their true nature. The importance of those functions can hardly be exaggerated. It arises from two facts. One is that as the Constitution cannot easily be changed, a bad decision on its meaning, *i.e.* a decision which the general opinion of the profession condemns, may go uncorrected. In England, if a court has construed a statute in a way unintended or unexpected, Parliament sets things right next session by amending the statute, and so prevents future decisions to the same effect. But American history shows only one instance in which an unwelcome decision on the meaning of the Constitution has been thus dealt with, viz. the decision, that a State could be sued by a private citizen,[1] which led to the eleventh amendment, whereby it was declared that the Constitution should not cover a case which the court had held it did cover.

The other fact which makes the function of an American judge so momentous is the brevity, the laudable brevity, of the

[1] See the last preceding chapter. The doctrine of the Dred Scott case (of which more anon) was set aside by the fourteenth amendment, but that amendment was intended to effect much more than merely to correct the court.

Constitution. The words of that instrument are general, laying down a few large principles. The cases which will arise as to the construction of these general words cannot be foreseen till they arise. When they do arise the generality of the words leaves open to the interpreting judges a far wider field than is afforded by ordinary statutes which, since they treat of one particular subject, contain enactments comparatively minute and precise. Hence, although the duty of a court is only to interpret, the considerations affecting interpretation are more numerous than in the case of ordinary statutes, more delicate, larger in their reach and scope. They sometimes need the exercise not merely of legal acumen and judicial fairness, but of a comprehension of the nature and methods of government which one does not demand from the European judge who walks in the narrow path traced for him by ordinary statutes. It is therefore hardly an exaggeration to say that the American Constitution as it now stands, with the mass of fringing decisions which explain it, is a far more complete and finished instrument than it was when it came fire-new from the hands of the Convention. It is not merely their work but the work of the judges, and most of all of one man, the great Chief-Justice Marshall.

The march of democracy in England has disposed English writers and politicians of the very school which thirty or twenty years ago pointed to America as a terrible example, now to discover that her republic possesses elements of stability wanting in the monarchy of the mother country. They lament that England should have no supreme court. Some have even suggested that England should create one. They do not seem to perceive that the dangers they discern arise not from the want of a court but from the omnipotence of the British Parliament. They ask for a court to guard the British Constitution, forgetting that Britain has no constitution, in the American sense, and never had one, except for a short space under Oliver Cromwell. The strongest court that might be set up in England could effect nothing so long as Parliament retains its power to change every part of the law, including all the rules and doctrines that are called constitutional. If Parliament were to lose that power there would be no need to create a supreme court, because the existing judges of the land



would necessarily discharge the very functions which American judges now discharge. If Parliament were to be split up into four parliaments for England, Scotland, Ireland, and Wales, and a new Federal Assembly were to be established with limited legislative powers, powers defined by an instrument which neither the Federal Assembly nor any of the four parliaments could alter, questions would forthwith arise as to the compatibility both of acts passed by the Assembly with the provisions of the instrument, and of acts passed by any of the four parliaments with those passed by the Assembly. These questions would come before the courts and be determined by them like any other question of law. The same thing would happen if Britain were to enter into a federal pact with her colonies, creating an imperial Council, and giving it powers which, though restricted by the pact to certain purposes, transcended those of the British Parliament. The interpretation of the pact would belong to the courts, and both Parliament and the supposed Council would be bound by that interpretation.[1] If a new supreme court were created by Britain, it would be created not because there do not already exist courts capable of entertaining all the questions that could arise, but because the parties to the new constitution enacted for the United Kingdom, or the British Empire (as the case might be), might insist that a tribunal composed of persons chosen by some Federal authority would be more certainly impartial. The preliminary therefore to any such "judicial safeguard" as has been suggested is the extinction of the present British Parliament and the erection of a wholly different body or bodies in its room.

These observations may suffice to show that there is nothing strange or mysterious about the relation of the Federal courts to the Constitution. The plan which the Convention of 1787 adopted is simple, useful, and conformable to general legal principles. It is, in the original sense of the word, an elegant plan. But it is not novel, as was indeed observed by Hamilton in the *Federalist*. It was at work in the States before the Convention of 1787 met. It was at work in the thirteen colonies before they revolted from England. It is an applica-

[1] Assuming of course that the power of altering the pact was reserved to some authority superior to either the Council or Parliament.

tion of old and familiar legal doctrines. Such novelty as there is belongs to the scheme of a Supreme or Rigid constitution, reserving the ultimate power to the people, and limiting in the same measure the power of a legislature.[1]

It is nevertheless true that there is no part of the American system which reflects more credit on its authors or has worked better in practice. It has had the advantage of relegating questions not only intricate and delicate, but peculiarly liable to excite political passions, to the cool, dry atmosphere of judicial determination. The relations of the central Federal power to the States, and the amount of authority which Congress and the President are respectively entitled to exercise, have been the most permanently grave questions in American history, with which nearly every other political problem has become entangled. If they had been left to be settled by Congress, itself an interested party, or by any dealings between Congress and the State legislatures, the dangers of a conflict would have been extreme, and instead of one civil war there might have been several. But the universal respect felt for the Constitution, a respect which grows the longer it stands, has disposed men to defer to any decision which seems honestly and logically to unfold the meaning of its terms. In obeying such a decision they are obeying, not the judges, but the people who enacted the Constitution. To have foreseen that the power of interpreting the Federal Constitution and statutes, and of determining whether or no State constitutions and statutes transgress Federal provisions, would be sufficient to prevent struggles between the National government and the State governments, required great insight and great faith in the soundness and power of a principle. While the Constitution was

[1] So Mr. Wilson observed (speaking of the State constitutions) in the Pennsylvania Convention of 1788: "Perhaps some politician who has not considered with sufficient accuracy our political systems would observe that in our governments the supreme power was vested in the constitutions. This opinion approaches the truth, but does not reach it. The truth is that in our governments the supreme, absolute, and uncontrollable power *remains* in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions." — Elliot's *Debates*, ii. 432.

Mr. M'Kean, speaking in the same convention, quoted Locke's *Civil Government* (c. 2, § 140, and c. 13, § 152) as an authority for the proposition that the powers of Congress could be no greater than the positive grant might convey.

As to Rigid Constitutions, see Chapter XXXI. *post.*



being framed the suggestion was made, and for a time seemed likely to be adopted, that a veto on the acts of State legislatures should be conferred upon the Federal Congress. Discussion revealed the objections to such a plan. Its introduction would have offended the sentiment of the States, always jealous of their autonomy; its exercise would have provoked collisions with them. The disallowance of a State statute, even if it did really offend against the Federal Constitution, would have seemed a political move, to be resented by a political countermove. And the veto would often have been pronounced before it could have been ascertained exactly how the State statute would work, sometimes, perhaps, pronounced in cases where the statute was neither pernicious in itself nor opposed to the Federal Constitution. But by the action of the courts the self-love of the States is not wounded, and the decision annulling their laws is nothing but a tribute to the superior authority of that supreme enactment to which they were themselves parties, and which they may themselves desire to see enforced against another State on some not remote occasion. However, the idea of a veto by Congress was most effectively demolished in the Convention by Roger Sherman, who acutely remarked that a veto would seem to recognize as valid the State statute objected to, whereas if inconsistent with the Constitution it was really invalid already and needed no veto.

By leaving constitutional questions to be settled by the courts of law another advantage was incidentally secured. The court does not go to meet the question; it waits for the question to come to it. When the court acts it acts at the instance of a party. Sometimes the plaintiff or the defendant may be the National government or a State government, but far more frequently both are private persons, seeking to enforce or defend their private rights. For instance, in the famous case[1] which established the doctrine that a statute passed by a State repealing a grant of land to an individual made on certain terms by a previous statute is a law "impairing the obligation of a contract," and therefore invalid, under Art. i. § 10 of the Federal Constitution; the question came before the court on an action by one Fletcher against one Peck on a covenant contained in a deed made by the latter; and to

[1] *Fletcher* v. *Peck*, 6 Cranch, p. 87.

do justice between plaintiff and defendant it was necessary to examine the validity of a statute passed by the legislature of Georgia. This method has the merit of not hurrying a question on, but leaving it to arise of itself. Full legal argument on both sides is secured by the private interests which the parties have in setting forth their contentions; and the decision when pronounced, since it appears to be, as in fact it is, primarily a decision upon private rights, obtains that respect and moral support which a private plaintiff or defendant establishing his legal right is entitled to from law-abiding citizens. A State might be provoked to resistance if it saw, as soon as it had passed a statute, the Federal government inviting the Supreme court to declare that statute invalid. But when the Federal authority stands silent, and a year after in an ordinary action between Smith and Jones the court decides in favour of Jones, who argued that the statute on which the plaintiff relied was invalid because it transgressed some provision of the Constitution, everybody feels that Jones was justified in so arguing, and that since judgment was given in his favour he must be allowed to retain the money which the court has found to be his, and the statute which violated his private right must fall to the ground.

This feature has particularly excited the admiration of Continental critics. To an Englishman it seems perfectly natural, because it is exactly in this way that much of English constitutional law has been built up. The English courts had indeed no rigid documentary constitution by which to test the ordinances or the executive acts of the Crown, and their decisions on constitutional points have often been pronounced in proceedings to which the Crown or its ministers were parties. But they have repeatedly established principles of the greatest moment by judgments delivered in cases where a private interest was involved, grounding themselves either on a statute which they interpreted or on some earlier decision.[1] Lord Mansfield's famous declaration that slavery was legally impossible in England was pronounced in such a private case. *Stockdale* v. *Hansard*, in which the law regarding the publishing of

[1] The independence of the English judges (since the Revolution) and of the American Federal judges has of course largely contributed to make them trusted, and to make them act worthily of the trust reposed in them.



debates in Parliament was settled, was an action by a private person againt printers. The American method of settling constitutional questions, like all other legal questions, in actions between private parties, is therefore no new device, but a part of that priceless heritage of the English Common Law which the colonists carried with them across the sea, and which they have preserved and developed in a manner worthy of its own free spirit and lofty traditions.

Those err who suppose that the functions above described as pertaining to the American courts are peculiar and essential to a Federal government. These functions are not peculiar to a federation, because the distinction of fundamental laws and inferior laws may exist equally well in a unified government, did exist in each of the thirteen colonies up till 1776, did exist in each of the thirteen States from 1776 till 1789, does exist in every one of the forty-four States now. Nor are they essential, because a federation may well be imagined in which the central or national legislature should be theoretically sovereign in the same sense and to the same full extent as is the British Parliament.[1] The component parts of any confederacy will no doubt be generally disposed to place their respective State rights under the protection of a compact unchangeable by the national legislature. But they need not do so, for they may rely on the command which as electors they have over that legislature, and may prefer the greater energy which a sovereign legislature promises to the greater security for State rights which a limited legislature implies. In the particular case of America it is abundantly clear that if there had been in 1787 no States jealous of their powers, but an united nation creating for itself an improved frame of government, the organs of that government would have been limited by a fundamental law just as they have in fact been, because the nation, distrusting the agents it was creating, was resolved to fetter them by reserving to itself the ultimate and over-riding sovereignty.

The case of Switzerland shows that the American plan is not the only one possible to a federation. The Swiss Federal Court,

[1] It would appear that in the Achæan League the Assembly (which voted by cities) was sovereign, and could by its vote vary the terms of the federal arrangements between the cities forming the federation; although the scantiness of our data and what may be called the want of legal-mindedness among the Greeks make this and similar questions not easy of determination.

while instituted in imitation of the American, is not the only authority competent to determine whether a Cantonal law is void because inconsistent with the Federal Constitution, for in some cases recourse must be had not to the Court but to the Federal Council, which is a sort of executive cabinet of the Confederation. And the Federal Court is bound to enforce every law passed by the Federal legislature, even if it violate the Constitution. In other words, the Swiss Constitution has reserved some points of Cantonal law for an authority not judicial but political, and has made the Federal legislature the sole judge of its own powers, the authorized interpreter of the Constitution, and an interpreter not likely to proceed on purely legal grounds.[1] To an English or American lawyer the Swiss copy seems neither so consistent with sound theory nor so safe in practice as the American original. But the statesmen of Switzerland felt that a method fit for America might be ill-fitted for their own country, where the latitude given to the executive is greater; and the Swiss habit of constantly recurring to popular vote makes it less necessary to restrain the legislature by a permanently enacted instrument. The political traditions of the European continent differ widely from those of England and America; and the Federal Judicature is not the only Anglo-American institution which might fail to thrive anywhere but in its native soil.

[1] See upon this fascinating subject, the provisions of the Swiss Federal Constitution of 1874, arts. 102, 110, and 114; also Dubs, *Das oeffentliche Recht der Schweizerischen Eidgenossenschaft*, and a valuable pamphlet by M. Ch. Soldan, entitled *Du recours de Droit Public au Tribunal Fédéral;* Bâle, 1886. Dr. Dubs was himself the author of the plan whereby the Federal legislature is made the arbiter of its own constitutional powers.

## CHAPTER XXIV

### THE WORKING OF THE COURTS

Those readers who have followed thus far the account given of the Federal courts have probably asked themselves how judicial authorities can sustain the functions which America requires them to discharge. It is plain that judges, when sucked into the vortex of politics, must lose dignity, impartiality, and influence. But how can judges keep out of politics, when political issues raising party passions come before them? Must not constitutional questions, questions as to the rights under the Constitution of the Federal government against the States, and of the branches of the Federal government against one another, frequently involve momentous political issues? In the troublous times during which the outlines of the English Constitution were settled, controversy often raged round the courts, because the decision of contested points lay in their hands. When Charles I. could not induce Parliament to admit the right of levying contributions which he claimed, and Parliament relied on the power of the purse as its defence against Charles I., the question whether ship-money could lawfully be levied was vital to both parties, and the judges held the balance of power in their hands. At that moment the law could not be changed, because the Houses and the king stood opposed: hence everything turned on the interpretation of the existing law. In America the Constitution is at all times very hard to change: much more then must political issues turn on its interpretation. And if this be so, must not the interpreting court be led to assume a control over the executive and legislative branches of the government, since it has the power of declaring their acts illegal?

There is ground for these criticisms. The evil they point to has occurred and may recur. But it occurs very rarely, and