INCIDENTAL SUGGESTIONS

HOW TO PULL THE SUPREME COURT'S TEETH.*

Chicago.

It might be well if the Supreme Court's teeth were pulled, but that court has not yet pulled its own teeth. It has not denied itself the power to pass on the Constitutionality of an act of Congress, nor admitted that Congress might deprive it of that power.

Congressman Berger thinks it has. The last clause of his old-age pension bill provides that "the exercise of jurisdiction by any of the Federal courts upon the validity of this act is hereby expressly forbidden." In his speech in support of the bill, he declared that on March 27, 1868, Congress passed a law prohibiting the Supreme Court from passing on the Constitutionality of the Reconstruction laws which it had passed after the Civil War," and that in a case known as the McCardle case the Supreme Court recognized the right of Congress thus to limit its power.

The Congressman has been misinformed as to the contents of the act of March 27, 1868, and of the scope of the decision of the Court in the McCardle case.

In 1789, Congress, under the power conferred by the Constitution, passed a law establishing a system of Federal courts and defining their jurisdiction. Among other things it provided for the issuing of the writ of habeas corpus. On the 5th of February, 1867, an act was passed amending the act of 1789 so far as the habeas corpus provisions were concerned, and in this latter act the right to appeal from the decision of the Circuit to the Supreme Court in such cases was given. The act of March 27, 1868, to which Congressman Berger refers, simply took away this right of appeal, nothing more. It contained no word or clause in any way referring to the power of a Federal court to pass on the Constitutionality of an act of Congress.

In 1867, one McCardle of Mississippi was arrested by the military commander having charge of that district. The arrest was made under the authority of the Reconstruction acts, the charge against McCardle being that certain articles published by him in his newspaper were libelous, and were of a nature to incite disorder. He applied to the Federal Circuit Court for the writ of habeas corpus. Upon hearing the cause, the Circuit Court remanded him to the custody of the military commander. The act permitting appeals from the Circuit to the Supreme Court in habeas corpus proceedings was then in force, and McCardle appealed to the latter court. Before the appeal was heard the act of March 27, 1868, taking away the right of appeal, was passed, and the Supreme Court thereupon entered an order dismissing the appeal. All that was decided in the case was that Congress could, and had, abolished the right of appeal from the Circuit to the Supreme Court in that kind of case.

A reading of portions of the opinions of the Court quoted by the Congressman will show this: "It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this Court is not derived from the acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred 'with such exceptions and under such regulations as Congress shall make.' . . . We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution, but the power to make exceptions to the appellate jurisdiction is given in express words. What, then, is the effect of the repealing act upon the case before us? We can not doubt as to this. Without jurisdiction the Court can not proceed at all in any cause. Jurisdiction is the power to declare the law; and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle. It is quite clear, therefore, that this Court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."

Not a word there as to the power of the Federal courts to pass on the Constitutionality of an act of Congress, is there? Just a holding that under the law the judgment of the Federal Circuit Court in a habeas corpus case was final.

The Supreme Court has never said that it had not power to adjudge the Constitutionality of an act of Congress, and Congress has not said it. The passage of an act denying the Court that power would avail nothing. The Supreme Court claims that power as a power conferred upon it by the Constitution, not expressly, but by implication. If it has the power under the Constitution, Congress cannot take it away. If it has it not, it has it not. It is not necessary that Congress should pass a law to take away from the Court a power it does not possess.

The McCardle case does hold this: That under the Constitution Congress may take away the right to appeal in any case from the lower courts to the Supreme Court. If Congress should exercise this power, of course no case would ever go from the lower courts to the Supreme Court, and the latter court would seldom have opportunity to determine the validity of the acts of Congress. But the lower courts can and do exercise that power, and as they frequently differ in opinion as to the meaning and the Constitutionality of the laws, we would have acts of Congress Constitutional in some parts of the country, and unconstitutional in others.

Perhaps the subject may be made clearer by illustration:

It is declared by the Constitution that the judicial power of the United States shall extend to all cases arising under the laws of the United States, cases affecting public ministers, ambassadors, etc.; that the power shall be vested in a Supreme Court and such inferior courts as Congress shall from time to time establish; that the Supreme Court shall have jurisdiction in all cases wherein a State, a public minister, consul or ambassador

*See The Public, current volume, pages 972, 975.

be a party, and appellate jurisdiction in all cases with such exceptions and under such ations as Congress shall make. The meaning is provision regarding original and appellate liction is, of course, that only cases wherein ıbassador, public minister, consul or State is a can be commenced in the Supreme Court. cases can be taken to the Supreme Court on appeal from a lower court, and then with exceptions and under such regulations as Con- shall prescribe. There is another provision Constitution that the right of the people to rms shall not be infringed.

we will suppose that Congress has concluded ıe Negroes of the District of Columbia are a nt and dangerous people and has passed a bidding any Negro to have in his possession earm; that some Negro, more afraid of a nob than of the law, keeps in his house r, and for this offense he is fined or sent by the lower court. The law permits an o the Supreme Court, and he takes it. The ting attorney presents his case to the Court wise: "Congress has passed a law forbid- groes to keep firearms; this man kept a in his house; he admits this, and the judg- the lower court should be affirmed." "It says the attorney for the Negro, "that passed the act, and my client had a re- but the Constitution says that his right to ıs shall not be infringed, and the Consti- the supreme law of the land."

ıpreme Court must decide the case accord- e law, of course, and therefore it must de- which is the law, the Constitution or the ngress.

estion is difficult, to be sure. John Mar- en he was a lawyer practicing at the bar, court must follow the act of Congress; ecame a judge he said it must follow the n. Each time he was influenced, prob- desire to see the particular case decided ular way.

ifficult question; but would it help any ngress tack on a little clause to the law t the Supreme Court must not meddle uestion of its validity? Would not the Court be bound to determine, anyway, e act of Congress or the Constitution v by which it must decide the case?

, Congress could have passed a law mak- ision of the lower court as to the Ne- final and unappealable. But the ques- act under which the Negro was being would be presented to that court, and hold the act unconstitutional, with the ıppealable, its judgment would be final, mpt of Congress to keep the Negroes uld be as completely frustrated as if the en taken to the Supreme Court and it act invalid.

way in which Congress can limit the ts in the exercise of this power which laimed and exercised for a century is l the courts which it has created. As eave only the Supreme Court (which the Constitution and cannot be abol- gress) with its original jurisdiction in cases only where an ambassador, public minister, a State or consul is a party, its opportunity to pass upon the validity of Congressional enactments would be so infrequent that Congress could feel reasonably sure that its laws would not be set aside by the judicial branch of the government. But that would be a rather drastic remedy.

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When discussing in The Public of September 22nd that clause of the Berger old-age pension bill declaring that "the exercise of jurisdiction by any of the Federal courts upon the validity of this act is hereby expressly forbidden," I had examined neither the Federal statute of July 27, 1868, nor the Supreme Court decision thereon 16 days later, cited by the Milwaukee Congressman as warranting this proposed limitation of Federal Court jurisdiction. Examination of this statute, as also of the two Supreme Court decisions in the McCardle case (6 and 7 Wallace), makes further comment thereon necessary to a full understanding of their force.

The statute of 1868 does not in the words of Mr. Berger, "prohibit the Federal courts from passing on the validity of the Civil War reconstruction acts." It merely so amends the judiciary act as to take from Federal Circuit Courts the right of appeal to the Supreme Court in certain cases. The Federal Circuit Court in Mississippi had refused to release McCardle on habeas corpus; the Supreme Court had refused to dismiss his appeal; but before the hearing on the merits, Congress by amendment of the judiciary act abrogated the right of appeal, the effect being to leave McCardle in the custody of the military authorities to which he had been remanded by the Federal Circuit Court. There is nothing in either the statute or the McCardle decision limiting the jurisdiction of the Circuit or other inferior Federal courts; and the effect of both would seem to make Circuit Court decisions final in cases like McCardle's—and this whether they sustained or reversed the action of the military authorities.

Nevertheless, in the light of the McCardle Supreme Court decision, the Berger contention as to the power of Congress to thus curtail Federal court jurisdiction appears well founded. That decision clearly makes Supreme Court appellate jurisdiction —which includes all matters except "cases affecting ambassadors, other public ministers and consuls, and those to which a State shall be a party" —subject to "such exceptions and regulations as Congress shall make," as directly provided in article 8 of the Constitution. And, as by this same article Congress is given plenary power in establishing inferior Federal courts, the only Constitutional restriction being that the judges thereof shall "hold their offices during good behavior," its legal right to limit the jurisdiction of these inferior tribunals as it sees fit seems indisputable.

But, though the act of Congress of 1868 did not, in terms, "forbid the Supreme Court passing on the validity of the reconstruction laws," Congress did in 1867 pass an act of that scope. Search, however, has so far failed to disclose whether this statute has ever been before the courts. It is entitled "An act to declare valid and conclusive certain proc-