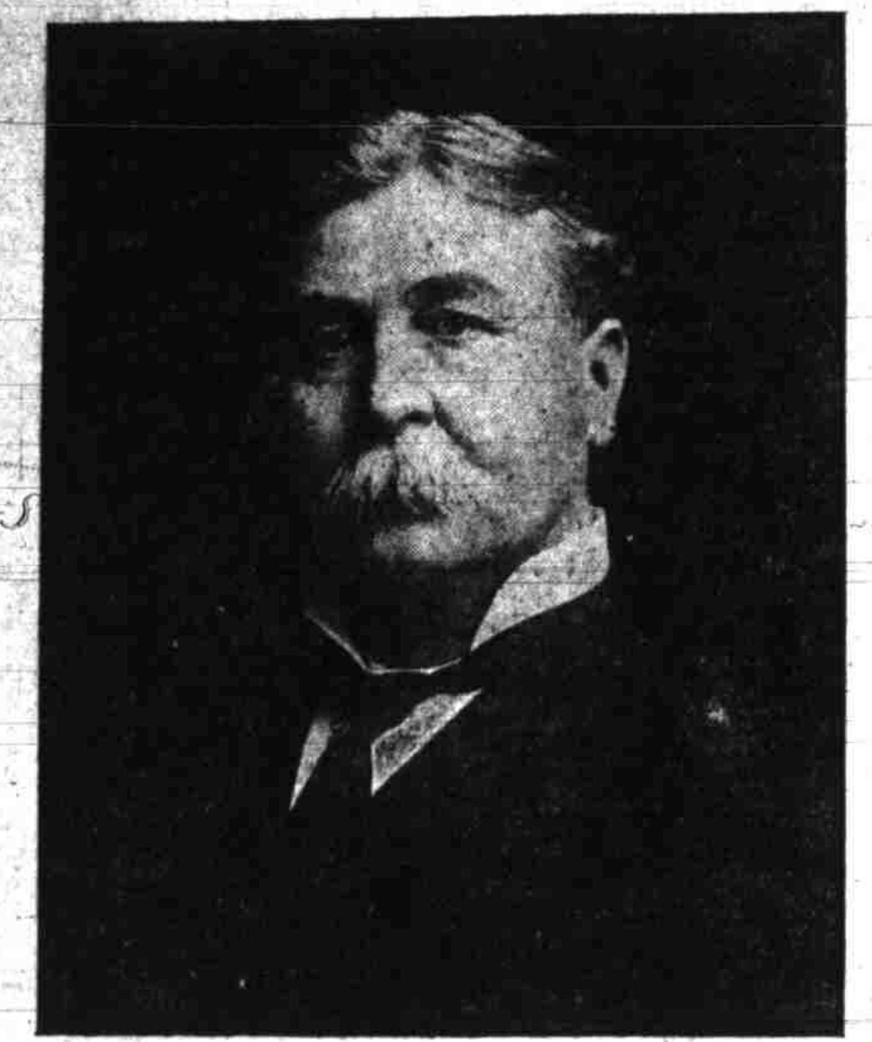
THE LAWYERS UP IN ARMS

(Continued from Page One).

stitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the Legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alternable, when 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.



Judge C. A. Moore, President of the State Bar Association.

FUNDAMENTAL LAW.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the Legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject. If an act of the Legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution, if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty. If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the Legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

WRITTEN CONSTITUTIONS.

"Those, then, who controvert the principle that the constitution is to be considered in courts as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet in practice completely obligatory. It would declare that if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is, in reality, effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

"The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power to say, that, in using it, the constitution should not be looked into?—that a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained."

The constitution of the United States has been the supreme law for more than a century; and during all of this time the Supreme Court has, when the question has been brought before it for determination, exercised the power of declaring the legislation of the Congress of the United States unconstitutional, as well as that of the States, whenever it was found to conflict with the constitution of the United States. The highest courts of the States have followed the Supreme Court of the United States in this construction of the constitution; in fact, the Supreme Court of the United States was not the first to decide that the judiciary is empowered to declare unconstitutional and void legislation which contravened the constitution. The courts of New Jersey were the first, perhaps, to announce this principle, but there shortly followed the courts of Virginia, South Carolina, Rhode Island, Pennsylvania and North Carolina. Nothing can be better settled in our own State than the principle announced in the case of Marbury versus Madison. It was first held in this State, in the case of Bayard versus Singleton, 3 N. C., 48, and has been ever since constantly adhered to, and the power exercised on all occasions where the question has arisen and it was found that legislation contravened the constitution.

IN THE MOTT CASE.

In the case of Mott versus Commissioners, 126 N. C., 866, the Supreme Court of this State said:

"Where an act of the Legislature is in conflict with the terms of the constitution, they cannot both stand; one must give way to the other; and as the constitution is superior to the legislative act, the latter must give way to the former. 'It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it.' Marbury versus Madison, 1 Cranch, 49. But we do not think it necessary at this late day for us to undertake to establish the proposition that the constitution is superior to ordinary legislative acts, and that when they conflict the latter must yield to the former."

Associate Justice C. A. Woods, of the South Carolina Supreme Court.

Mr. Webster, in a speech delivered in the United States Senate, upon this question, most clearly and convincingly said:

"The people, then, sir, erected this government. They gave it a constitution, and in that constitution they have enumerated the powers which they bestow on it. They have made it a limited government. They have defined its authority. They have restrained it to the exercise of such powers as are granted; and all others, they declare, are reserved to the States or the people. But, sir, they have not stopped here. If they had, they would have accomplished but half their work. No definition can be so clear as to avoid possibility of doubt; no limitation so precise as to exclude all uncertainty. Who, then, shall construe this grant of the people? Who shall interpret their will, where it may be supposed they have left it doubtful? With whom do they repose this ultimate right of deciding on the powers of the government? Sir, they have settled all this in the fullest manner. They have left it, with the government itself, in its appropriate branches. Sir, the very chief end, the main design, for which the whole constitution was framed and adopted, was to establish a government that should not be obliged to act through State agency, or depend on State opinion and State discretion. The people had had quite enough of that kind of government under the Confederacy. Under that system the legal action, the application of law to individuals, belonged exclusively to the States. Congress could only recommend—their acts were not of binding force till the States had adopted and sanctioned them. Are we in that condition still? Are we yet at the mercy of State discretion and State construction? Sir, if we are, then vain will be our attempt to maintain the constitution under which we sit.

WISE PROVISION OF PEOPLE.

"But, sir, the people have wisely provided in the constitution itself, a proper, suitable mode and tribunal for settling questions of constitutional law. There are, in the constitution, grants of power to Congress, and restrictions on these powers. There are, also, prohibitions on the States. Some authority must, therefore, necessarily exist, having the ultimate jurisdiction to fix and ascertain the interpretation of these grants, restrictions, and prohibitions. The constitution has itself pointed out, ordained and established that authority. How has it accomplished this great and essential end? By declaring, sir, that, 'the constitution and the laws of the United States made in pursuance thereof shall be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.'

"This, sir, was the first great step. By this the supremacy of the constitution and laws of the United States is declared. The people so will it. No State law is to be valid which comes in conflict with the constitution, or any law of the United States passed in pursuance of it. But who shall decide this question of interference? To whom lies the last appeal? This, sir, the constitution itself decides, also, by declaring 'that the judicial power shall extend to all cases arising under the constitution and laws of the United States.' These two provisions, sir, cover the whole ground. They are, in truth, the keystone of the arch. With these, it is a constitution; without them it is a confederacy. In pursuance of these clear and express provisions, Congress established at its very first session, in the judicial act, a mode for carrying them into full effect, and for bringing all questions of constitutional power to the final decision of the Supreme Court. It then, sir, became a government. It then had the means of self-protection; and but for this it would, in all probability, have been now among things which are past. Having constituted the government, and declared its powers, the people have further said that since somebody must decide on the extent of these powers, the government shall itself decide; subject, always, like other bility to the people."

CLOTHED WITH FULL AUTHORITY

From the foregoing one must conclude, I think, that the Federal courts are clothed by the constitution of the United States and the legislation of the Congress of the United States, enacted in pursuance thereof, with jurisdiction to determine the question of the constitutionality of the act of the North Carolina Legislature, fixing the maximum rates of charges for transportation of passengers and freights. Being clothed with this jurisdiction, a Federal court could not shrink from the duty imposed upon it to decide the question. It could not close its doors to the citizen demanding his rights, because, perhaps, the persons alleged to withhold his rights preferred another tribunal. As said by Mr. Justice Harlan in the "Nebraska Maximum Rate Cases," speaking for the unanimous court: "But despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a State enactment is in harmony with that law simply because the Legislature of the State has declared such to be the case, for that would make the State Legislature the final judge of the validity of its enactment, although the constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. The idea that any Legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State when their jurisdiction is properly invoked, to see that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them, depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

POWER OF STATES LIMITED.

"It is now thoroughly well established that the power of the States to regulate and limit passenger and freight rates "is not a power to destroy, and limitation is not the equivalent of confiscation." In the case of Reagan versus Farmers' Loan & Trust Company, 154 U. S., 362, this doctrine was clearly and distinctly declared by the whole court, Mr. Justice Brewer delivering the opinion of the court; and in the case of Covington, etc., versus Sanford, 164 U. S., 578, Mr. Justice Harlan, speaking also for an unanimous court, said, "there is remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the law."

The Circuit courts of the United States have jurisdiction of controversies between citizens of different States where the jurisdictional amount is involved, or where the case itself arises under the constitution or laws of the United States. Cases are held to arise under the constitution or laws of the United States when it appears from the questions involved that some right will be defeated by one construction of the constitution or sustained by another construction. Unquestionably, then, the United States Court had jurisdiction of the controversy between the railroad companies and the officials of the State. It is true that the railroad companies could have prosecuted their suit in the State courts, as the State courts had jurisdiction concurrent with the United States Circuit Court, but where the jurisdiction of the State and Federal courts is concurrent, the litigant has the legal right, which cannot, upon any ground, be denied him, to institute his action in either court, as he prefers. The court selected cannot exclude him. In fact, the court selected could be compelled, by writ of mandamus, to entertain jurisdiction of the action were it to refuse to exercise it. It will be a calamity, indeed, if the courts of the country, required by the law to be always open, can turn away those who seek the enforcement of their rights in them.

COURTS MUS TFACE ISSUE.

As said by Chief Justice Marshall, in Cohen vs. Virginia, 6 Wheat., 264. "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the Legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty."

This language is quoted in the opinion in the case Ex Parte, Young, known as the "Minnesota Case," reported in Advance Sheets, Opinions United States Supreme Court, No. 10, page 447, adopted by the Supreme Court as the opinion of the court in the case of Hunter vs. Wood. In that case Mr. Justice Peckham rendering the opinion of the court, said:

JURISDICTION A DELICATE MATTER.

"The question of jurisdiction, whether of the Circuit Court or of this court, is frequently a delicate mater to deal with, and it is especially so in this case where the most important objection to the jurisdiction of the Circuit Court is the assertion that the suit is, in effect, against one of the States of the Union. It is a question, however, which we are called upon, and which it is our duty to decide."

The contention that the suit instituted on the equity side of the docket in the United States Circuit Court by the railroads against the officials of the State, was, in effect, a suit against the State, has been so thoroughly answered by the Supreme Court of the United States in the case Ex Parte, Young, above cited, that I only wish to refer to it. It is noteworthy that the opinion written by Mr. Justice Peckham in that case was concurred in by seven of the justices of the court and that it was dissented from by only one of the justices of the court. It is further worth while, as showing the non-political character of the discussion, that the opinion in that case was written by Mr. Justice Peckham, a Democrat, and that it was concurred in by every other member of the court, Democrat and Republican, except Mr. Justice Harlan, a Republican.

No one, it seems to me, after unbiased reflection, can attach blame to the railroad companies for going, as they certainly had the legal as well as the moral right to do, into the Federal court to have their rights adjudicated. No one can attach blame to the Federal court for permitting the case to be instituted in that court; it was its duty to do it, and it could not, besides, prevent it. It made no difference, in fact, to the defendants where the suit was brought, as, in any event, it had to be finally determined in the United States Supreme Court, the arbiter of the controversy, made such by the constitution of the United States, the supreme law of the land; particularly, is this true, as by instituting the action in the United States Circuit Court the final disposition of the case would be quicker reached.

THE YOUNG DECISION.

A careful study of the opinion of the Supreme Court in Ex Parte Young, made the opinion of the court in the case of Hunter, Sheriff, versus Wood, one of the North Carolina rate cases, ought to, and will, I believe, as soon as sufficient time shall have elapsed to permit impartial consideration of it, satisfy the public mind, as well as that of our profession, of the correctness of the principles there decided and applied.

We can, therefore, take it, that the important questions involved in these litigations are forever settled. They have not been settled, it may be, as some of us thought they ought to have been, but I believe as time passes on the people, and more particularly the legal profession, will see that they have been settled right.

REPORT OF COMMITTEE.

Chairman Womack reported for the executive committee that it had met at Raleigh last January and selected Morehead City as the meeting place and had chosen Associate Justice Charles A. Woods, of the South Carolina Supreme Court, to deliver the annual address and that he was present. Applause greeted this announcement. Chairman Womack further stated that Theodore F. Davidson had been selected to speak on "Memories of the Western Bar," and A. M. Waddell on that of the east, but neither could be present and that Z. V. Walser would speak on "Wit and Humor of the Bar." It was announced that Judge Connor would speak in lieu of Colonel Davidson.

JUDGE COONOR SPEAKS.

Judge Connor's theme was the vital importance of a full knowledge of the constitution and the bill of rights and was a powerful plea for the education of young men as to these vital matters. He contended that before the civil war the South was the best informed section of the country on these subjects. He pleaded with the members of the association to in every way inculcate a love of country and its constitution and said that next to the charges to the grand juries, which he regarded as of highest importance are the opportunities for broadening knowledge on these subjects afforded by political speakers in campaigns, to set broadly before their hearers the value of this most important knowledge. He contrasted sharply North Carolina's great bill of rights and the constitution based thereon with the constitution enacted by the last State to enter the Federal Union. He thought the conditions in the South since the civil war had been such that all too few people had been taught these great basic principles of devotion to country and constitutions; that the time is certainly now ripe for impressing upon every citizen these fundamental principles and it ought to be the prayerful duty of every lawyer to say things to deepen the love of the institutions of our government.

The committee to receive the applications of the new members reported the following admitted: Harry McMullan, Junius D. Grimes, Collin H. Harding, H. C. Carter, Jr., Washington; J. H. McMullan, Jr., Edenton; S. A. Williams, Joseph W. Little, Wilmington; P. W. McMullan, Herford; Bennett H. Perry, Henderson; Walter Jones, Swan Quarter; L. H. Allread, Selma; F. H. Calvert, Raleigh.

NEW DIGEST WANTED.

Mr. R. C. Strudwick, of Greensboro, submitted a resolution declaring a new digest of the Supreme Court opinions an absolute necessity, setting out that individual effort is inefficient and Legislature should be asked to memorialize the Supreme Court to have a commission prepare such a digest, the cost to be paid out of the public funds, and pledging the support of the bar of the State to reduce the cost of the work. Mr. Strudwick said he made no reflection on the excellent work done by persons who have made the digest now in use, but it is apparent to all that the remarkable improvement in the digest in recent years is far ahead of anything in North Carolina, and the people and bar are alike entitled to a modern digest.

Judge Biggs said the resolution

(Continued on Page Nine).

CHAMBERLAIN'S COLIC, CHOLERA AND DIARRHOEA REMEDY WOULD HAVE SAVED HIM $100.

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It acts pleasantly and naturally and truly as a laxative, and its component parts are known to and approved by physicians, as it is free from all objectionable substances. To get its beneficial effects always purchase the genuine—manufactured by the California Fig Syrup Co., only, and for sale by all leading druggists.

1
If your hopes are down to "Z"
And you feel like "23,"
Cheer up, friend, quit your pining,
Every cloud has a silver lining.
Get Mrs. Joe Person's Remedy.

2
If you have boils and bumps
'Til you feel like poor "Jim Dumps,"
Or if you have eczema, bad,
Until it makes you almost mad,
Get Mrs. Joe Person's Remedy.

3
When you feel "old rheumatiz"
Until you say, My! Gee Whiz!
Or your stomach's out of tune
With "spring fever" as in June,
You need Mrs. Joe Person's Remedy.

4
When your blood is pink and white
And you've lost your appetite,
Or you itch and cannot sleep,
What's the use to moan and weep?
Get Mrs. Joe Person's Remedy.

5
If you're sick—thin and pale—
And your health is 'bout to fail,
If you are nervous and weak
Until you can scarcely speak,
You need Mrs. Joe Person's Remedy.

6
If you've got a weak lung
And your nerves are all unstrung,
Or you have "old indigestion"
And think a cure out of the question,
Get Mrs. Joe Person's Remedy.

7
If you have a "breaking out"
And cannot tell what's about,
Get this remedy, don't delay!
See the druggist right away.
Use Mrs. Joe Person's Remedy.

8
Mrs. Person's Remedy stands the test,
Of all remedies it is the best.
Can't be beat for time to come,
Cheers the blood of old and young.

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