## INTERNATIONAL JUSTICE.

A great and distinguished fellow-countryman put a question many years ago, which has been partially but not wholly answered by the institutions which have been created from time to time during the past century. Benjamin Franklin put the question in a letter which he wrote on February 6, 1780, to his friend, Richard Price. "We make daily," he said, "great improvements in natural; there is one I wish to see in moral philosophy: the discovery of a plan that would induce and oblige nations to settle their disputes without first cutting one another's throats. When will human reason be sufficiently improved to see the advantage of this? When will men be convinced that even successful wars at length become misfortunes to those who unjustly commenced them, and who triumphed blindly in their success, not seeing all its consequences?"[1]

The first answer that has been given to this question is to be found in one of Franklin's letters, bearing the date of January 27, 1783. In this letter, which should be read in conjunction with the previous one, the distinguished publicist and philanthropist said: "All wars are follies, very expensive, and very mischievous ones. When will mankind be convinced of this, and agree to settle their differences by arbitration? Were they to do it, even by the cast of a die, it would be better than by fighting and destroying each other."[2] The judicial settlement of international disputes by means of a court of justice, is a second answer to the question put by Franklin. Of each of these it is well to treat in turn, considering first the subject of arbitration.

In 1785, shortly after the question had been put and the answer suggested, Mr. John Jay was Secretary of State for Foreign Affairs under the Government of the Confederation. In that year he presented a report to Congress, urging that we settle

[1] Bigelow's Works of Benjamin Franklin, Vol. VII, p. 7 (1888); Smyth's Writings of Benjamin Franklin, Vol. VIII, p. 9 (1906).

[2] Bigelow's Works of Benjamin Franklin, Vol. VIII, p. 255 (1888); Smyth's Writings of Benjamin Franklin, Vol. IX, p. 12 (1906).

by means of mixed commissions the outstanding disputes between Great Britain and the United States; and it is interesting to note in this connection that Franklin was the colleague of Jay, or rather that Jay was Franklin's colleague, in negotiating the treaty of peace which recognized the independence of the United States. These two distinguished men were associated in their life work and in that part of it which may be considered the most important event of their careers as diplomatists and statesmen.

Congress took no action upon this suggestion, but it happened that Jay remained as Acting Secretary of State in Washington's Cabinet, although he had been appointed Chief Justice of the United States, until the return of Mr. Jefferson from Paris, where, as Franklin's successor, he represented the United States, in order to assume the duties of the Department of State, of which he had been appointed Secretary. During the interval between his appointment and the assumption of the duties of his great office, Mr. Jay proposed to President Washington that the report which he himself had drafted and sent to Congress some five years previously should again be transmitted to Congress. Acting upon this suggestion, President Washington sent Jay's report to the first Congress under the Constitution, and in his letter of transmission Washington went so far as to say not only the special disputes between Great Britain and the United States, but all disputes should be settled peaceably. Again Congress took no action.

Four years later, when the relations between the two countries had become strained, and when Great Britain and the United States, unwillingly, as we may believe, were nevertheless surely drifting into war, Washington determined to send a special minister to Great Britain in the hope of settling the disputes which, if not settled, were sure to militate against the peaceful relations of the two countries. His choice fell upon Jay, who, in a confidential and for that reason highly interesting letter to his wife, said that the mission was an honor not to be refused if offered, but not to be courted or lightly assumed. He accepted the mission. He succeeded in his task. He prevented a war between the two countries. He introduced arbitration again into the practice of nations, but he ruined his career as a public man, and it is only

within the last few years that Jay's treaty has been considered anything more than a miserable failure. Indeed, it is doubtful if it be regarded, as it should be, as a masterpiece of statesmanship, as one of the great documents in the history of mankind in the long road from barbarism to civilization, sufficient in itself and by itself to make of John Jay a benefactor of his kind. For in Articles Five, Six, and Seven of the Treaty of 1794 the outstanding disputes between the two countries were to be submitted to mixed commissions for peaceful settlement, disputes concerning the claims of loyalists, disputes concerning boundaries between the two countries, disputes of the merchants of Great Britain and of the merchants of the United States due to alleged wrongful actions of both countries during the French revolutionary wars.

The success of the commission organized under Article Seven showed that nations could safely resort to arbitration. The awards or judgments of the commission organized under this article are the classical examples of arbitration and stand out today as unsurpassed, if not unapproachable, masterpieces. The experience of one hundred years with arbitration has shown that there is no limit to it but the good will of nations and their desire to settle their disputes peaceably. A method, for example, which could settle peaceably the Alabama claims, which at one time threatened war between Great Britain and the United States, a method which could settle such complicated questions as the fisheries dispute, running over well nigh a hundred years, is a method apt and fit to resolve the disputes of nations. The experience had by these two countries, supplemented by the not unlike experience of other countries resorting to arbitration, has convinced even the Doubting Thomases among the nations, of the feasability and of the efficiency of this method with the result that at the First Hague Conference of 1899, arbitration was, as it were, internationalized, a method devised for appointing temporary tribunals for settling disputes particularly of a legal character which might arise between the nations, and a method of procedure adopted.

The agreement of 1899 in favor of arbitration "as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle," devised

by the representatives of twenty-six nations meeting in conference at The Hague, has been solemnly approved by the forty-four nations represented at the Second Hague Peace Conference in 1907.

The method of selecting a temporary tribunal from a panel of judges for the trial and settlement of international disputes, even although the tribunal itself goes out of being with the adjustment of the case, has been tried and not found wanting, and the settlement of some fifteen disputes since the Pious Fund controversy between Mexico and the United States is to the credit of the so-called Permanent Court of Arbitration at The Hague. This is the first answer to the question propounded by our distinguished fellow-countryman: "When will human reason be sufficiently improved to see the advantage of this? . . . When will mankind be convinced of this and agree to settle their differences by arbitration?"

The other method of settling disputes between nations is slowly but surely making its appearance. It is more reasonable even than arbitration. By judicial settlement, in which in a judicial proceeding, with which lawyers of all countries are familiar, the facts in dispute may be ascertained, the principles of law may be found or devised, and may be applied to the settlement of concrete disputes.

This method of settlement, which, to use a familiar expression, may be called "due process of law between nations," had, like arbitration—to which it is already the preferred successor, because it is the more reasonable, the more scientific method—its beginning when, "in the course of human events," the thirteen colonies declared their intention, in an immortal document drafted and proclaimed in the City of Philadelphia, to assume "among the powers of the earth the separate and equal station to which the laws of nature and of nature's God entitle them," and the authority of the mother country, or indeed of any country, over the colonists ceased to exist. There was thereafter no superior to the colonies considered as a whole or as a union, as was the case before their independence, and the colonists or states regarding themselves as equal, there was

no superior power within the union unless created by them to pass upon such disputes as might arise.

And there were many and serious disputes between them because of the vagueness and uncertainty of their boundaries, due to the charters, which overlapped. Between independent states diplomacy would have taken a hand in their settlement, and as a matter of fact the states tried with more or less success to settle their conflicting claims by means of commissioners. It was felt, however, that something more was necessary, for, as the states had renounced or were to renounce war one with another, it was necessary, if controversies were to be got out of the way, to create some method of settlement between the break-down of diplomacy and the outbreak of war.

This something was arbitration by means of temporary tribunals, not unlike that of The Hague, and which developed within a decade into the Supreme Court of the United States, just as we hope and believe that the so-called Permanent Court of Arbitration of The Hague will inevitably, although more slowly, develop into an international judiciary. As judicial settlement is the second answer to Franklin's question, and likely to prove the more important and abiding, it will be of interest to note the progress already made and the steps that must be taken if judicial decision is to settle the justiciable disputes of nations.

The revolt of the colonies against the mother country made, if it did not presuppose, a union, and before the Declaration of Independence the indefatigable Franklin submitted to the Continental Congress, in session at Philadelphia, on the twenty-first day of July, 1775, the outline of a federal government for the colonies. This plan, which Franklin only proposed after consultation with Jefferson and other leading statesmen, defined the powers of the colonies, of the general government, created a congress of one chamber, whose members were to be annually chosen and apportioned according to population of the states, and vested the executive power in a council of twelve, to be chosen by the Congress from among its members and of whom one-third were to be annually renewed.

This plan, however, was not adopted. On the eve of the Declaration of Independence, Congress resolved to appoint a committee to prepare a form of confederation. On June 12, 1776, the committee was selected, consisting of one member from each state. Eight days after the Declaration of Independence the committee reported its draft, which was considered by Congress and amended from time to time until the Articles of Confederation were approved by Congress on November 15, 1777. On July 9, 1778, the Articles were signed on behalf of eight states, including Pennsylvania and Connecticut. Other states followed suit until, on the thirty-first day of March, 1781, the Articles were signed by Maryland, the last of the states to ratify them, and the day thereafter the first congress held under the Articles of Confederation assembled in Philadelphia.

The Articles of Confederation themselves were drafted by one John Dickinson, the chairman of the committee, member of the bar of Philadelphia, at one time a representative of Pennsylvania in the Congress, and President of the Commonwealth itself. It is interesting to examine the first three articles and to analyze the ninth, providing for the settlement of disputes between the states by means of temporary courts.

Article One states that the government is to be known as "The United States of America." In this confederacy each state was to be sovereign and equal and to retain every right of a sovereign and equal state not specifically delegated to the Confederation, as stated by Article Two, which reads:

"Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled."

This article is important as, in proclaiming sovereignty, freedom and independence, it necessarily negatives the idea of superiority and makes the exercise of a power on behalf of the Confederation depend upon an express grant. Article Three provides:

"The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding

themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever."

Now the league of friendship excluded the idea of war, but in order that there could be no doubt about this, Article Six expressly provided that no state shall "engage in war without the consent of the United States, in Congress assembled." As the states renounced the right to enter into "any treaty, confederation, or alliance whatever between them, without the consent of the United States, in Congress assembled," and as they were to live in friendship, renouncing the right to carry on war against one another, some means had to be found to settle disputes that might arise between them in a way consistent with that "firm league of friendship" created by the Articles of Confederation.

The method hit upon to adjust controversies while maintaining the peace of the confederacy is set forth in Article Nine, the material portion of which reads as follows:

"The United States, in Congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever."

The article next proceeds to point out the method to be followed in the settlement of disputes between the sovereign, free and independent states of the Confederation:

"Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question."

That is to say, states in controversy were to inform the Congress of this fact, whereupon the Congress was to assign a day for their appearance, so that, before the Congress and in its presence, the agents of the states might by joint consent create a temporary tribunal for the decision of the controversy.

It was foreseen, however, that the states might not agree, in which case the article further provided that Congress should "name three persons out of each of the United States," and from the list of such persons each party should alternately strike out one, the petitioners beginning, until the number should be reduced to thirteen. From the thirteen thus chosen, names were to be drawn by lot until not less than seven nor more than nine names were left, and from these a temporary tribunal or mixed commission of not less than five was to be formed, to which the dispute was to be submitted for determination.

It was further foreseen that the defendant state might not appear before the Congress and take part in the formation of the court. In such a case the article provided that the Secretary of Congress should represent the defendant state and the court was thus to be constituted as if the agent of the defendant state were present and took part in the proceedings.

The Article, while not popular, was not destined to be a dead letter. Several courts were formed under it by agreement of the parties without the necessity of appointing three persons from each of the states and the selection of the judges in accordance with its provisions. One court was formed in this way; and there is but one judgment of a tribunal formed under this Article, as the states apparently preferred to settle their disputes out of court, even when the tribunal had been created. This one case, however, is very famous. It was a boundary dispute, due to the fact that the same portion of territory was claimed by Pennsylvania and Connecticut under their respective charters, and the colonies or states had been unable to settle the disputes by direct negotiation. They therefore resorted to the procedure under the Ninth Article. A temporary tribunal was constituted, which delivered its judgment on December 30, 1782. After complimenting the attorneys who appeared and argued the case, and after stating that it was equally well argued, the court, following the advice of Lord Chief Justice Mansfield, as timely then as it is today, to give no reasons if the judge were unfamiliar with the law, held:

"We are unanimously of opinion, that the State of Connecticut

has no right to the lands in controversy. We are also unanimously of opinion, that the jurisdiction and pre-emption of all the territory lying within the charter boundary of Pennsylvania, and now claimed by the State of Connecticut, do of right belong to the State of Pennsylvania."

By virtue of this unanimous judgment, without the assignment of reasons, the State of Pennsylvania was awarded the territory which now forms the County of Luzerne. The possession of this territory caused much bitterness. Armed conflicts had taken place and blood had been shed, and yet a temporary tribunal, without the assignment of reasons, settled the controversy.

But the method was not popular. The Ninth Article has but this one judgment to its credit and the states, as previously mentioned, preferred, even after agreeing upon commissioners, to settle their disputes out of court. The method was an improvement upon arbitration, just as the method of the First Hague Conference was an improvement upon arbitration, inasmuch as the machinery was devised for the creation of a temporary tribunal from a list of probable commissioners in the one case, and from a panel of arbiters in the other. But the statesmen of the Confederation, like the statesmen of the society of nations at a later date, took advantage of a revision of the Articles of Confederation to create a permanent court for the United States, just as the statesmen of our own day and generation took advantage of a revision of The Hague Conventions to propose a permanent court for the society of nations. But the analogy does not stop here. The Articles of Confederation were revised and an agreement reached for the establishment of a supreme court, just as the Conventions of the First Conference were revised at The Hague and the proposal made at the Second Conference at The Hague for the creation of a permanent court for the society of nations.

Without further dwelling upon the similitude, which, however, is as striking as it is encouraging, suffice it to say that the committee of detail of the convention which met in Philadelphia in the summer of 1787, and which drafted the Constitution of the United States, proposed to retain the material portion of

Article Nine for the settlement of disputes between the states. But the chairman of this committee, John Rutledge, of South Carolina, and later a Chief Justice of the Supreme Court, objected, stating that this provision (for deciding controversies between the states) was necessary under the Confederation but would be rendered necessary by the national judiciary to be established. He therefore moved to strike it out. James Wilson, of Pennsylvania, and later a Justice of the Supreme Court, urged the striking out, "the judiciary being the better provision." The result was the Supreme Court of the United States, whose jurisdiction under Article III, Section 2, of the Constitution, extends to "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."

Within ten years after the drafting of the Articles of Confederation and their approval by Congress the Articles were replaced by the Constitution of the United States, and the system of arbitration by temporary tribunals passed out of existence with the Articles which gave it birth and was replaced by the system of judicial decision of disputes between the states according to that due process of law which is administered in a court of justice. It is impossible, however, to understand and adequately to appreciate the jurisdiction conferred upon the Supreme Court unless we comprehend that the jurisdiction with which Congress was vested by the Articles of Confederation was carried over into the Constitution, which provided that the Supreme Court of the United States should have original jurisdiction of disputes between the states of the American Union.

The rejection or arbitration by temporary tribunals, which is illustrated by the experience of the United States, is not an isolated case, and it could be shown that in countries claiming to be sovereign, arbitration by means of temporary tribunals has also given way to arbitration, or rather to judicial decision, by means of a permanent tribunal.

When the Swiss cantons issued their declaration of inde-

pendence, in 1291, they adopted a system of arbitration very simple and very primitive, in which the cantons agreed that their disputes were to be decided by a self-constituted arbiter, who, feeling the inner voice and responding to it, offered himself as arbiter in disputes between the cantons. When, a few years later, in 1351, the canton of Zurich joined the confederation, the system of self-proposed arbiters gave way to a system of temporary tribunals chosen for the occasion, called into being to consider a case and passing out of existence when the case had been adjusted. This method subsisted for some five centuries, until, in 1848, the cantons of Switzerland, influenced no doubt in large measure by the experience of the United States, discarded the system of arbitration to which they had been wedded for centuries, and to which they were passionately and indeed obstinately attached, and created a federal tribunal which they invested with the jurisdiction of disputes between the different cantons. The experience which they had in the course of a few years was of such a comforting and an enlightening kind that when the constitution of Switzerland was revised in 1874, the federal tribunal was retained, and it was specifically invested with the jurisdiction of disputes of a public character between the cantons of the confederation.

It thus appears from the examples of these two countries, democracies in fact as well as in theory and composed of citizens drawn from different nations, that in a longer or in a shorter time the temporary tribunal gives way to the permanent court, and the tribunal of arbitration yields to the court of justice, composed of judges "acting under a sense of judicial responsibility."

Let us return to the analogy above suggested, and purposely left imperfect. In 1907, an attempt was made by the American delegation to the Second Hague Peace Conference to "point the moral and adorn the tale" by repeating the experience, on a larger and more impressive scale, of the democracies of the Old and of the New World, by developing arbitration by means of a temporary tribunal into judicial decision by a court composed of permanent judges acting under a sense of judicial responsibility. The proposal was accepted in principle; a draft

convention of thirty-five articles, dealing with the organization, with the jurisdiction and the procedure of the permanent tribunal, to be known as the Court of Arbitral Justice, was adopted; but owing to the pressure of other projects, the lack of time, the difficulty of the problem, and the novelty of the question, the Conference was unable to hit upon a method of appointing the judges satisfactory to all the powers represented at this important international gathering. The court was not definitely constituted. The draft convention, however, was accepted; it was referred to the powers through diplomatic channels to devise a method of appointing the judges and of constituting the court. The world therefore stands upon the threshold of a permanent tribunal, organized in accordance with the principles of the United States and of Switzerland, with the matter of arbitral decision by means of temporary tribunals abandoned in favor of a permanent court composed of judges acting under a sense of judicial responsibility.

The great experiment of the Philadelphia convention—for the Constitution was an experiment and the court which it created was necessarily an experiment, for it had no predecessors, although it is destined to have, as we fondly hope, innumerable successors—emboldens one to consider somewhat in detail the procedure of the Supreme Court of the United States in suits between states of the American Union, because it is frequently said that the Supreme Court is the prototype of the international court of justice. It is indeed the prototype of such a beneficent institution, and it is believed that even a casual examination of the procedure of the court will show that the great and thorny questions involved in the settlement of disputes between nations by due process of law have, unconsciously it may be, been met and answered by the wit and wisdom of the judges of this august tribunal, who, without power to compel a defendant state to appear at its bar and to litigate a dispute, and without power to enforce its decision in the presence or in the absence of the defendant state—for a decision of the Supreme Court of the United States between states of the Union in litigation is in

effect a recommendation, although in form it may de a demand—have nevertheless persuaded the states of the reasonableness of their judgments to appear before the court, to abide by the decision, and to prostrate themselves, as it were, before the majesty of the law.

The Constitution, in so far as the Supreme Court is concerned, says in Section III, Article 1, that "the judicial power of the United States shall be vested in one Supreme Court," and in Section 2, after declaring that the judicial power "shall extend to controversies between two or more states," that the Supreme Court shall have original jurisdiction in all cases "in which a state shall be a party." This is all it is deemed necessary to say on the matter, and the procedure to be followed in the case of a state availing itself of the original jurisdiction of the Supreme Court in order to sue a state of the American Union is apparently left to the discretion of the Justices composing the Supreme Court.

Now it is inherent in the nature of things that a court should determine its jurisdiction unless that question has been specifically regulated by statute, but even in this case it is for the court to interpret the statute and thus to decide the question of jurisdiction in so far as the statute is open to interpretation. It is so with international tribunals and doubtless will be so with an international court of justice when it be established; but it is safe to assume that the judges of this tribunal will act with great wisdom and moderation lest, by an excess of zeal, they draw cases to their court and retain jurisdiction where wisdom and moderation would suggest that they be cautious even to a fault.

In the international world the right of a commission to determine its jurisdiction, as a court would be entitled to do under similar circumstances, arose in the mixed commission, organized under Article Seven of the Jay Treaty. As the commissioners were unable to agree it was referred to the Lord Chancellor of Great Britain, at that time Lord Loughborough, who replied "that the doubt respecting the authority of the commissioners to settle their own jurisdiction was absurd; and that

they must necessarily decide upon cases being within, or without, their competency."[3]

Controversies between states involve matters of law and equity because the judicial power only extends to cases in law and equity. That is to say, to employ an expression in common use, the controversies must be of a justiciable nature; they must not be political. If a court has a right to determine its jurisdiction it necessarily follows that it must decide whether the case presented exists in law or in equity; in other words, if it is justiciable, as if it be not so the court cannot properly assume jurisdiction and render a judgment binding upon the parties in dispute. It becomes, therefore, of importance to ascertain whether a question is justiciable or political, and from what has been said it is apparent that this is a judicial question for the court to determine. This is such a common-place in American jurisprudence that it seems a waste of time to do more than state it; and yet, as the nations of the continent apparently insist upon the right to determine whether a question be political or not, and as it is to be feared they might be unwilling to invest an international tribunal with this power, it is necessary to do more than mention the question in passing.

In the leading case of *Rhode Island* v. *Massachusetts*[4] the right of the court to take jurisdiction in determining the boundary between the two states was questioned by Massachusetts on the ground that sovereignty was involved and that sovereignty was a political, not a judicial, question. In delivering the opinion of the court, Mr. Justice Baldwin said:

"Before we can proceed in this cause, we must, therefore, inquire whether we can hear and determine the matters in controversy between the parties, who are two states of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes."

He then stated:

"Those states . . . adopted the constitution, by which they respectively made to the United States a grant of judicial power

[3] Moore's International Arbitrations, Vol. I, p. 327.
[4] 12 Peters 657 (1838).

over controversies between two or more states. By the constitution, it was ordained, that this judicial power, in cases where a state was a party, should be exercised by this court as one of original jurisdiction. The states waived their exemption from judicial power (6 Wheat. 378, 380), as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified."

The contention of Massachusetts that the settlement of the boundary claimed was a political, not a judicial, question caused the court to consider the distinction between a political and a judicial question, as it was only competent to accept jurisdiction and to render a judgment in a justiciable question. On this point Mr. Justice Baldwin, speaking for the court, said:

"The founders of our government could not but know, what has ever been, and is, familiar to every statesman and jurist, that all controversies between nations, are, in this sense, political and not judicial, as none but the sovereign can settle them. In the declaration of independence, the states assumed their equal station among the powers of the earth, and asserted that they could of right do, what other independent states could do, 'declare war, make peace, contract alliances,' of consequence, to settle their controversies with a foreign power, or among themselves, which no state, and no power, could do for them. They did contract an alliance with France, in 1778; and with each other, in 1781; the object of both was to defend and secure their asserted rights as states; but they surrendered to Congress, and its appointed court, the right and power of settling their mutual controversies; thus making them judicial questions, whether they arose on 'boundary, jurisdiction or any other cause whatever.' There is neither authority of law or reason for the position, that boundary between nations or states, in its nature, any more a political question, than any other subject on which they may contend. None can be settled without war or treaty, which is by political power; but under the old and new confederacy, they could and can be settled by a court constituted by themselves, as their own substitutes, authorized to do that for states, which states alone could do before. We are thus pointed to the true boundary line between political and judicial power and questions. A sovereign decides by his own will, which is the supreme law within his own boundary (6 Pet. 714; 9 *Ibid.* 748); a court or judge decides according to the law prescribed by the sovereign power, and that law is the rule for judgment. The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to

decide according to the appropriate law of the case (11 Ves. 294); which depends on the subject-matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo, sic jubeo,* of political power; it comes to the court, to be decided by its judgment, legal discretion and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires."

After a further consideration of the question, the learned judge thus concluded:

"These considerations lead to the definition of political and judicial power and questions; the former is that which a sovereign or state exerts by his or its own authority, as reprisal and confiscation (3 Ves. 429); the latter is that which is granted to a court or judicial tribunal. So, of controversies between states; they are in their nature political, when the sovereign or state reserves to itself the right of deciding it; makes it the 'subject of a treaty, to be settled as between states independent,' or 'the foundation of representations from state to state.' This is political equity, to be adjudged by the parties themselves, as contradistinguished from judicial equity, administered by a court of justice, decreeing the *equum et bonum* of the case, let who or what be the parties before them. (*Rhode Island* v. *Massachuetts,* 12 Peters, 657, 720, 736-738.)"

The Supreme Court on other occasions has found it necessary to satisfy itself whether a question submitted to it be judicial or political, and in lieu of many references one only need be referred to, the most recent, which examines the question in the light of the precedents as well as in the light of theory. Mr. Chief Justice White, speaking for a unanimous court in the case of *Pacific States Telephone and Telegraph Company* v. *Oregon,*[5] said:

"How better can the broad lines which distinguish these two subjects be pointed out than by considering the character of the defense in this very case? The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised

[5] 223 U. S. 118 (1911).

they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes it not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this Court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form.

"As the issues presented, in their very essence are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction."

But suppose that the court has decided that it has jurisdiction of the general subject matter and of the particular case presented for its consideration? The question arises as to its power to secure the parties litigant to appear before the judges, because if the plaintiff does not appear the court cannot take jurisdiction of the question, and there may be some doubt whether the judges would be willing or able to assume jurisdiction of a dispute of a justiciable nature between states if the defendant were not present by its appropriate and authorized agent. We are not left to decide this question for ourselves, because we have a long line of precedents relieving us of doubt or uncertainty, and we have indeed the authority, than which none can be greater or more unquestioned, of the great Chief Justice Marshall himself. Thus, in the case of *New York* v. *New Jersey*,[6] decided in 1830, the question arose whether the court could take jurisdiction of the bill filed by New Jersey against the State of New York, and whether the State of New Jersey could prosecute the case to judgment if the State of

[6] 3 Peters 461.

New York, properly summoned, refused to appear. On a motion to grant a subpoena, the Chief Justice said:

"As no one appears to argue the motion on the part of the State of New York, and the precedent for granting the process has been established upon very grave and solemn argument, in the case of Chisholm v. State of Georgia, 2 Dall. 419, and Grayson v. State of Virginia, 3 *Ibid.*, 320, the court do not think it proper to require an *ex-parte* argument in favor of their authority to grant the subpœna, but will follow the precedent heretofore established. The court are the more disposed to adopt this course, as the state of New York will still be at liberty to contest the proceeding, at a future time, in the course of this cause, if it shall choose to insist upon the objection."

So much for the authority of the court to issue a subpoena against a state of the American Union. In the case of *Massachusetts* v. *Rhode Island*,[7] Massachusetts asked "for leave to withdraw the pleas filed on the part of that state; and also to withdraw the appearance heretofore entered for the state." The Supreme Court referred with approval to a later phase of the case of *New Jersey* v. *New York*,[8] holding: "If the defendants, on service of the subpoena, shall not appear at the return day therein, the plaintiff shall be at liberty to proceed *ex parte*." The court then stated: "The course of practice has since been to proceed *ex parte* if the state does not appear." After a further consideration of the precedents, the court concluded:

"The practice seems to be well settled that, in suits against a state, if a state shall refuse or neglect to appear, upon due service of process, no coercive measure will be taken to compel appearance; but the complainant or plaintiff will be allowed to proceed *ex parte*. . . . If, upon this view of the case, the counsel for the state of Massacusetts shall elect to withdraw the appearance heretofore entered, leave will accordingly be given; and the state of Rhode Island may proceed *ex parte*."

It is here clearly stated as the settled practice of the Court in suits between states that a subpoena will issue at the request of the plaintiff state; that if the defendant state, properly summoned, appears, proceedings will take their usual course. If, on the contrary, the defendant, properly summoned, does not ap-

[7] 12 Peters 755 (1838).
[8] 5 Peters 287 (1831).

pear, the plaintiff will proceed *ex parte* and judgment duly entered; and the court has no power to enforce the appearance of the defendant.

One further matter is necessary, before passing to a consideration of the nature of a judgment and its execution. This is the matter of procedure, which is dealt with by the Supreme Court in a later stage of *Rhode Island* v. *Massachusetts*.[9] Chief Justice Taney, speaking for the court, thus dealt with the question of procedure:

"The case to be determined is one of peculiar character, and altogether unknown in the ordinary course of judicial proceedings. It is a question of boundary between two sovereign states, litigated in a court of justice; and we have no precedents to guide us in the forms and modes of proceedings, by which a controversy of this description can, most conveniently, and with justice to the parties, be brought to a final hearing. The subject was, however, fully considered at January term 1838, when a motion was made by the defendant to dismiss the bill. Upon that occasion, the court determined to frame their proceedings according to those which had been adopted in the English courts, in cases most analogous to this, when the boundaries of great political bodies had been brought into question. And acting upon this principle, it was then decided, that the rules and practice of the court of chancery should govern in conducting this suit to a final issue. The reasoning upon which that decision was founded, is fully stated in the opinion then delivered; and upon re-examining the subject, we are quite satisfied as to the correctness of this decision (12 Peters, 735, 739).

"The proceedings in this case will, therefore, be regulated by the rules and usages of the court of chancery. Yet, in a controversy where two sovereign states are contesting the boundary between them, it will be the duty of the court to mould the rules of chancery practice and pleading, in such a manner as to bring this case to a final hearing on its real merits. It is too important in its character, and the interests concerned too great, to be decided upon the mere technical principles of chancery pleading. And if it appears that the plea put in by the defendant may in any degree embarrass the complainant in bringing out the proofs of her claim, on which she relies, the case ought not to be disposed of on such an issue. Undoubtedly, the defendant must have the full benefit of the defence which the plea discloses; but at the same time, the proceedings ought to be so ordered as to give the complainant a full hearing upon the whole of her case. In ordinary cases between individuals, the court of chancery has always exercised an equitable discretion in relation

[9] 14 Peters 210 (1840).

to its rules of pleading whenever it has been found necessary to do so for the purposes of justice. And in a case like the present, the most liberal principles of practice and pleading ought, unquestionably, to be adopted, in order to enable both parties to present their respective claims in their full strength."

After a further examination of this question, Mr. Chief Justice Taney concluded:

"The course determined on recommends itself strongly to the court, because it appears to be the only mode in which full justice can be done to both parties. Each will now be able to come to the final hearing, upon the real merits of their respective claims, unembarrassed by any technical rules. Such, unquestionably, is the attitude in which the parties ought to be placed in relation to each other. If the defendant supposes that the bill does not disclose a case which entitled Rhode Island to the relief she seeks, the whole subject can be brought to a hearing by a demurrer to the bill. If it is supposed, that any facts are misconceived by the complainants, and, therefore, erroneously stated, the defendants put these in issue by answering the bill. The whole case is open; and upon the rule to answer which the court will lay upon the defendant, Massachusetts is entirely at liberty to demur or answer, as she may deem best for her own interests."

Without further discussing the question of procedure, it will be sufficient to say that the principles laid down by the court in the case of *Rhode Island* v. *Massachusetts* have prevailed and justified themselves in practice, and that, while conducting the proceedings in accordance with equity practice, the court invariably modifies the procedure if in its opinion it be necessary so to do, in order that substantial justice may be done between state and state.

But supposing that the case begun, either in the presence or absence of the defendant, has been brought to judgment? The question arises whether, in the case of a judgment had in the Supreme Court between states of the Union, the judgment against a state can be executed, by force if need be. In the case of private litigants the defendant is summoned to court, and if he refuses he may be compelled to appear; and in the case of a judgment between private suitors execution will issue and force will be used if necessary to secure obedience to the mandate of the court. But does the same rule obtain between

states of the American Union, which states, for judicial purposes, are to be considered as sovereign and equal?

We have seen that, although a subpoena issues, there is no power to compel the defendant state to appear, so that the action in this case has the force and effect of an invitation, although it may have the form of an order. Such being the case, we would expect that the judgment, however imperative it be in form, would in effect be a recommendation, addressed to the conscience, the discretion, and the good faith of the defendant state; and such is the express holding of the Supreme Court in a leading case, which, although decided many years ago, has been neither questioned nor overruled. In the case of *Kentucky* v. *Dennison*,[10] Chief Justice Taney, speaking for a unanimous court, held that it was the duty of the Governor of the State of Ohio, in accordance with the provisions of the Constitution and with the Act of Congress of 1793, to surrender a fugitive from the State of Kentucky charged with the commission of a crime, upon the request of the State of Kentucky. The language of the Chief Justice should be quoted, as its exact wording places the question beyond controversy and obviates comment or discussion. In speaking of the Act of 1793, Chief Justice Taney said:

"It does not purport to give authority to the State Executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which the State authority is bound to perform. And when it speaks of the duty of the Governor, it evidently points to the duty imposed by the Constitution in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United Sates, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the Act of 1793.

"And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their

[10] 24 Howard 66 (1860).

internal concerns, as well as members of the Union. Hence the use of the words ordinarily employed when an undoubted obligation is required to be performed, 'it shall be his duty.'

"But if the Governor of Ohio refuses to discharge this duty, there is no power delegated in the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him."

It thus appears that, although the Constitution was made by the people "in order to form a more perfect union" than that which existed under the Articles of Confederation, and that its first purpose is declared to be to establish justice, no power is vested in the court or Government, or any department thereof, to secure the appearance of a defendant state, which by the Constitution may be sued in the Supreme Court; that a subpoena, having the force of an invitation, will issue at the request of a plaintiff state, but that the appearance of the defendant is voluntary, as by express decision its presence cannot be compelled; that in the absence of the defendant, properly summoned, the case will proceed *ex parte*, and judgment will be entered according to the case as made out by the plaintiff; that the judgment of the court, whether it be reached in the presence or absence of the defendant state, cannot be executed by force, if the defendant is not minded to comply with its terms.

Looking through the form to the substance, we thus see that the states of the American Union are treated as sovereign and equal states, having no superior; that the creation of a Supreme Court in which they may be sued does not create a body superior to the states but merely an agency by means of which state may sue state in justiciable questions; that the subpoena is in the nature of an invitation, and that the judgment is in the nature of a recommendation.

This matter has been considered somewhat at length and in detail because today we are endeavoring to establish a tribunal for some forty odd states of the Society of Nations, just as the framers of the Constitution, in the summer of 1787, created a supreme court for the judicial settlement of disputes arising between the thirteen states then forming this Union.

These states are now forty-eight in number and we believe that the judicial union established by the Constitution—for, in so far as the states are concerned, it is a judicial union—is indeed the prototype and the great exemplar of the judicial union to be established by the forty odd states forming the Society of Nations, and that the method of procedure consciously adopted by the Supreme Court of the United States in the settlement of justiciable controversies between the states of the judicial union is as applicable to the sovereign and equal states composing the society of nations as to the sovereign and equal states of the American judicial union.

The fathers of the Constitution contented themselves with laying down the broad proposition that controversies between the states involving principles of a justiciable nature could be settled by a due process of law in the Supreme Court which they were about to call into being, leaving it to experience to determine the procedure. Experience has shown the procedure acceptable to the sovereign and equal states of the American Union, because it has been accepted by them, even although they are invited, not summoned, to appear in court and although the judgment, mandatory in form, be in effect a recommendation. It may be that a court with power to compel appearance and to enforce the execution of its judgment would be more perfect than one in which these supposed essentials are lacking. Yet if the desired results are had, we are not justified in insisting that the power to compel appearance should exist, if the states do in fact appear, and that the power to enforce a judgment be present, if indeed the states do, as a fact, comply with the judgments of the Supreme Court, which, however, cannot be enforced against the states.

We cannot, however, dismiss the matter summarily without seeking and finding a reason why judgments of the Supreme Court against states of the American Union are obeyed. There was a time when this was not the case. The judgment of the court in the case of *Chisholm* v. *Georgia*,[11] decided in 1793, was not obeyed. It was believed that a proper interpretation of the

[11] 2 Dallas 419.

Constitution did not permit a citizen of one state to sue a state of the American Union, and the Eleventh Amendment was passed for the express purpose of forbidding a suit "against one of the United States by Citizens of another State or by citizens or subjects of any foreign State." A bill was introduced into the Legislature of Georgia, upon the recommendation of the Governor, threatening with death any official of the state who should comply with the judgment of the Supreme Court, in the case of *Chisholm* v. *Georgia*. It did not pass the Legislature and become a law, but the fact that the Governor took this action, and that the Eleventh Amendment was passed, was conclusive proof that the states did not intend by the Constitution to renounce what they were pleased to call their sovereignty or its exercise, except in certain clearly specified cases.

All are familiar with the decision of the Supreme Court in the case of *Worcester* v. *Georgia*,[12] which President Jackson declined to support, saying: "John Marshall has made his decision; now let him enforce it." Yet the decisions of the Supreme Court of the United States are complied with, because the reasonableness of their judgments have appealed to public opinion, and public opinion insists that they shall be obeyed, not disobeyed.

Deference to public opinion is an American doctrine. It was proclaimed on the fourth day of July, 1776, when the erstwhile colonies declared their independence, in deference to "a decent respect to the opinions of mankind the causes which impel them to separation." A decent respect to the opinions of the people of the United States compels the states of the judicial union we call the United States to observe the judgments of that tribunal which they created to pass upon their controversies of a justiciable nature, and this public opinion, while it may have begun, does not end with the United States. For at the present moment we see the nations of the world at war making their appeal to neutral opinion by the declaration of the causes which impel them to war, to paraphrase the lan-

[12] 6 Peters 522 (1832).

guage of our Declaration of Independence, for the Blue Book of Great Britain, the White Book of Germany, the Yellow Book of France, the Orange Book of Russia are nothing more nor less than "a decent respect to the opinions of mankind," which is regarded as the most powerful incentive to right-doing in the world today. If a supreme court can, by the reasonableness of its judgments, win public opinion to its side and compel compliance with its judgments, must we not believe that the world can select an equal or a larger number of jurists who, in the performance of their judicial duties, will be as learned, as wise, as moderate, as statesmanlike, as have been and are the members of the Supreme Court of the United States?

If these considerations seem to be vague and nebulous, let us close with a practical and constructive suggestion, based upon the practice and procedure of the United States, and which is believed to answer the purpose we have in mind, namely, the establishment and the successful operation of an international court of justice. Just as the United States, formed for the purpose of justice between the states of the judicial union (because one of the purposes of the Constitution is specifically declared to be "to establish justice"), the writer would advocate the formation of a justiciable or a judicial union for the Society of Nations, of which the organ should be an international court of justice, just as the organ of the American judicial union is the Supreme Court of the United States; and that the procedure before this international court of justice should be based upon the procedure of the Supreme Court, because, in one case as in the other, the states are regarded as sovereign and equal in the matter of justice. If the Supreme Court of the United States had been invested with power to compel by force, if necessary, the appearance of states of the American Union before it, and if they had attempted to exercise this power, from the action taken in consequence of the decision of the Supreme Court in the case of *Chisholm* v. *Georgia,* not to speak of the case of *Worcester* v. *Georgia,* it may well be believed that the United States would not have remained a nation.

We must not attempt to do every thing at once. We must

leave something to the future, or, as has been wittily said, we must leave the future to posterity. We must not treat states just as if they were individuals, although we should insist that the principles of justice controlling individuals may govern the conduct of states. We must, as the proverb says, temper the wind to the shorn lamb, and we must remember, as the Supreme Court has reminded us, that states have a temper different from that of the individual. We must endeavor to have due process of law between states, but we must modify our procedure in such a way as to accomplish the purpose we have in mind, without needlessly questioning the sovereignty and independence and equality of the states forming the Society of Nations.

If the American Union, which may well be called a judicial union for the purpose of establishing justice, be considered as too close and too intimate, and as questioning the sovereignty and independence of the states, let us notice one of the many public unions which have been formed within the last fifty years. In the Universal Postal Convention signed at Rome, May 26, 1909, in which not only all members of the Society of Nations are parties, but even self-governing colonies, it is provided that in case of disagreement between the members of the union relating to the interpretation of the convention or to the responsibility of an administration, the question in dispute is to be regulated by an arbitral judgment. The procedure is simple. An arbiter is to be appointed by the disputants and the umpire selected by them conjointly. The agreement to submit disputes of this kind to arbitration cannot affect the sovereignty of the members, because self-governing colonies are parties to the agreement, and if sovereignty were required or involved they could not be signatories of the convention.

For our purposes, we may create a judicial union, just as the powers of the world have created a Postal Union, and, instead of constituting a court when the dispute arises, agree in advance upon the constitution, procedure, and jurisdiction of the court and the appointment of its members. If this can be done after the dispute arises it can surely be done before it arises. The question of time is immaterial, the question of

power and of willingness alone is essential. Suppose that, following the example either of the American judicial union or of the Universal Postal Union, we may provide that a state be invited, not summoned, before the tribunal. If it appears and litigates, well and good; if it appears to deny jurisdiction, well and good; if it does not appear, well and good. Public opinion has been created and has been called into play, and we may leave compliance with the requirements of justice to that "decent respect to the opinions of mankind" proclaimed on the fourth day of July, 1776.

The procedure believed to be adequate for the purposes of the judicial union was drafted by the American delegation to the Second Hague Peace Conference, but it was not laid before that body because it appeared at that time to be too radical to some members whose countries had not had the experience with the judicial settlement of disputes which the United States has had. It is said in this proposal:

"The permanent court of arbitration shall not take any action on any petition or application which it is competent to receive unless it shall be of the opinion that a justiciable case, and one which it is competent to entertain and decide and worthy of its consideration, has been brought before it."

The project continues:

"In which case it may in not less than thirty or more than ninety days after presentation of the petition invite the other sovereign states to appear and submit the matter to judicial determination by the Court.

"In the latter event the state so invited may (a) refuse to submit the matter; (b) refrain from submitting the matter by failing for ..... days to make any response to the invitation, in which event it shall be deemed to have refused to submit the matter; (c) submit the matter in whole, or (d) offer to submit the matter in part or in different form from that started in the petition, in which event the petitionng state shall be free ether to accept the qualified submission or to withdraw its petition or application, and shall signify its election within a time to be determined by the Court; (e) appear for the sole purpose of denying the right of the petitioning state to any redress or relief of the petition or application presented —that is to say, it may accept or demur; in case the Court does not sustain this, it shall renew the invitation to appear and submit the matter.

"In case, however, the states in controversy cannot agree upon

the form and scope at the submission of the difference referred to in the petition, the court of arbitration may appoint, upon the request by either party, a committee of three from the members of the administrative counsel, none of whom shall represent the states involved, without suggestion from either party, and the committee thus constituted shall frame the questions to be submitted and the scope of inquiry, and thereafter if either party shall withdraw it shall be deemed to have refused to submit the matter involved to judicial or arbitral determination."

This procedure makes the administration of justice depend upon the existence of a court and upon the petition filed by the plaintiff state and the presence of the defendant before the court. It was thought best at this time not to force matters, but to provide a method of securing the presence of the defendant state, should it be minded to appear. It was to be invited, not summoned, in the hope that public opinion would persuade where force would not compel. It was hoped that, as the result of experience, the next step could be taken, namely, to allow the plaintiff, in the absence of the defendant, to present the case *ex parte* and to secure a judgment of the court upon the case as presented, leaving it free to the defendant state at some later time, should it so desire, to appear before the court and have the judgment opened, in order that a rehearing could be had upon the testimony which it would present and upon the argument which it would advance. It will be observed that, in any event, the court would be compelled to pass upon its jurisdiction and to decide whether the question presented was or was not justiciable.

It may be possible to follow still more closely the example of the American judicial union by allowing, in the first instance, the plaintiff to proceed *ex parte* and to secure a judgment, provided that the appearance of the defendant state and the execution of the judgment, if one be rendered, is left, as in the case of the American Union, to the good faith of the defendant state under the pressure of public opinion. The experience of the United States is convincing, and we cannot ask that this larger union be vested with greater powers than the people of the United States have been willing to grant to the Supreme Court of its judicial union; and we must not forget that only a frac-

tion of the disputes between individuals are justiciable, that the existence of a court in which disputes of a justiciable nature can be settled by due process of law creates a standard of conduct requiring that disputes of a non-justiciable nature likewise be settled by an appeal to reason, and that the influence of the court is much greater than its decisions. This would necessarily be so in the case of individuals, and if, as the result of experience, it were seen that nations could safely entrust their justiciable disputes to an international tribunal, to be settled by principles of law without resort to force, we would expect to find among nations, as among individuals, that the existence of an international court had created a standard of conduct inconsistent with an appeal to force, and that non-justiciable questions would tend more and more to be adjusted by an appeal to reason instead of by an appeal to the sword.

It is submitted that we are justified in the belief that if there were formed an international tribunal, limited to justiciable cases and based upon the model of the Supreme Court of the United States, there would result from the successful operation of this tribunal a standard of conduct between nations comparable to that which exists between men in civilized society, and that the resort to reason would be the rule instead of being, as at present, the unfortunate exception.

Arbitration and judicial settlement have been justified by their fruits, and in their wider and continuous application we see and feel the hope of a happier future.

*James Brown Scott.*

*Washington.*