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International Justice

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INTERNATIONAL JUSTICE*

BY JOHN W. DAVIS**

There could be no better proof of the generosity of the legal profession in general and of the bar of the state of New York in particular than the fact that at one and the same moment you admit a newcomer to the fellowship of your Association and to the privileges of your floor. I beg to assure you that I do not lack appreciation of this double honor. To enter one's name upon the roll that bears and has borne the names of so many who have led both their profession and the nation, and to speak from a platform which of itself gives distinction to its occupant, are honors indeed. In such circumstances to speak of duty seems lacking in graciousness, and yet the thought of reciprocal obligation is not wholly absent from my mind; for I cannot think that any American lawyer has fully met the rightful demands of his profession until he has made himself an active member of his local, state and national bar associations.

We are a scattered folk, we American lawyers. We issue from a multitude of law schools after diversified courses of study, and are admitted to the bars of our several jurisdictions under regulations as multiform as legislative ingenuity forty-eight times multiplied can devise. Each for himself becomes speedily immersed in subjects that in their variety run the whole gamut of human experience, and random discipline is administered to us by a legion of independent and disconnected tribunals. So far as I am aware,

* Address delivered before the New York State Bar Association, January 20, 1922.
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this situation is not paralleled among the lawyers of any other country. The sole tie which unites us is that in a common language we serve a common law and inherit from those who have gone before common traditions of loyalty, of service and of honor.

The duty to maintain and transmit these traditions unimpaired stands in the forefront of those debts which every lawyer owes to his craft; and since it is a thing only to be performed effectively by concerted action, it forms in and by itself a sufficient reason for the formation of bar associations and makes the call to membership in them imperative. Not only have the bar associations of the United States done a vital work in guarding the standards of professional training and conduct, but they offer the only avenue to solidarity, and in the last resolve the most effective means of inspiration and of discipline. The profession should not rest content until every lawyer worthy of the name is inscribed upon their rolls.

But grave as these things are, and great as is the service which a bar association can render to the law as a vocation, there are other functions even more exalted. The excelling call upon both law and lawyers must forever be the pursuit of justice and the advancement of jurisprudence,—that justice which Justinian defines as "the set and constant purpose which gives every man his due," and that jurisprudence which he describes as "the knowledge of things divine and human, the science of the just and the unjust". In the scales of God and man we are to be weighed by our success or failure in this pursuit, and in this field, unlimited by any bounds save those of time and space, there is labor enough for us all.

It is the fashion to charge against lawyers that they are over fond of fixed rules and precedents, and too greatly immersed in the study of the past to give proper heed to present and future demands. But who better than the lawyer should know that jurisprudence, if it is to be the handmaid of justice, must be a living thing, growing, expanding and developing with the living things which it serves; that it must constantly adapt itself to the changing modes and manners and ideas of men; and that while it need not forget the accumulated experience of the past, it must strive untiringly to clear the path for the oncoming future. I should like in what I have to say to you tonight to demonstrate that the American lawyer has not been insensible to these considerations; and that by a very notable contribution to the jurisprudence of his day

he has set forward the coming of justice between both men and nations.

The incidents of which I wish to speak begin at the old City Hall in Philadelphia in the year of 1793, when the case of *Oswald, Administrator* v. *State of New York,*[1] was called in the new-born Supreme Court of the United States. New York furnished both the scenario and the principal actors. The Chief Justice who presided was a New York lawyer, and the Marshal, Matthew Clarkson, is reputed to have been the only person in behalf of whose appointment to office John Jay ever interested himself. Upon the calling of the case, he was directed to proclaim that "any person having authority to appear for the State of New York is required to appear accordingly"; and when no one had come forward in response, it was ordered by the Court that "unless the State appears by the first day of the next Term to the above suit or show cause to the contrary, judgment will be entered by default against the State."

Who was Oswald, who was his decedent, what the claim against the state, and for what reason a different counsel appeared in his behalf each time that the case was noted by the Court—these things, as well as the terms of the settlement which removed it from the docket, are not entered in the volumes of the reports; but though the actors and their memories have long since passed away, the event in which they participated was nothing less than the first assertion by the newly established Court of its jurisdiction over the sovereign states of the Union, and its right to adjudicate against them. True, at a still earlier term notice was taken of a suit by one *Vanstophorst and others* v. *State of Maryland,*[2] in which the illustrious names of Luther Martin and Edmund Randolph appear as opposing counsel; but the voluntary discontinuance of this case without costs to either party, leaves to the Oswald Case the distinction of being the first in which the power of the Court to render judgment *in invitum* was boldly avowed.

One wonders whether any of those who were present on that occasion sensed its significance or realized how great a force had entered the life of the nation. Certainly Jay himself did not, or he could never have written eight years later that he

> "left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight and dignity which were essential to its affording due support to

[1] 2 Dall. 415 (1793).
[2] 2 Dall. 401 (1792).

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> the national government; nor acquire the public confidence and respect which, as a last resort of the justice of the nation it should possess."[3]

Perhaps it seemed to him and others a wholly natural occurrence. Judicial controversies to which states were parties were of course not new in history or unknown in America. Classical scholars as were so many of the men of that day, they had read of Greece and her Amphictyonic Councils, and knew that under the Holy Roman Empire the Imperial Chamber and the Aulic Council had quarreled down the centuries over their respective jurisdictions. Disputes between the colonies had been more than once submitted to the king sitting in council[4] and some which existed in 1776 were still in being when the Constitution itself was adopted. Under the Articles of Confederation, Congress as 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",[5] had proceeded to set up its Court of Commissioners and to adjudicate between disputant states.[6] In the Convention itself the judicial power had been extended without serious debate to such controversies, and Hamilton in the Federalist[7] dismisses the subject with little more than a paragraph and the conclusion that "whatever practices may have a tendency to disturb the harmony between the states, are proper objects of federal superintendence and control." But we who stand at greater distance and can observe the beneficent working of this institution throughout one hundred and thirty years cannot contemplate the beginning of its functions without some sense of awe.

What was it, after all, which made the creation of the court so great a departure that DeTocqueville felt warranted in declaring that he was not aware that any nation of the globe had theretofore constituted a judicial power in the same manner as the Americans; and which evoked from Sir Henry Maine the expression that

> "The success of this experiment has blinded men to its novelty. There is no exact precedent for it, either in the ancient or the modern world."

In the connection which we are now considering, the novelty was

[3] Letter to President Adams, January 2, 1801, in PELLEW, LIFE OF JAY, 338.
[4] Colony of Rhode Island *v.* Colony of Connecticut, 1727, 3 Acts of the Privy Council, COLONIAL SERIES, 10; Colony of Rhode Island *v.* Colony of Massachusetts, 1746, 3 Acts of the Privy Council, COLONIAL SERIES, 436.
[5] Article IX.
[6] Pennsylvania *v.* Connecticut, 131 U S., Appendix xii (1782).
[7] THE FEDERALIST, no. 80.

this—that the Supreme Court of the United States was the first permanent court for the administration of international justice; a court composed, not of judges or commissioners selected for the event, but of permanent judges holding office by fixed tenure, and indifferent to smile or frown from the mighty litigants whose claims they were to be called upon to weigh; a fixed and continuing tribunal to whose arbitrament the states, having laid aside the power to make war and even the independent right to negotiate, covenanted in perpetuity to submit.

"The Supreme Court of the Federation", says John Stuart Mill in his "Representative Government", "dispenses international law, and is the first great example of what is now one of the most prominent wants of civilized society, a real International Tribunal."

I shall not ask you tonight to plod with me through the reported cases. Were the subject less serious and the tribunal less august, you might remind me, did I attempt it, of the irreverent soul who borrowed Byron's language to describe law reports, all and sundry, as

> "Smooth, solid monuments of mental pain,
> The petrifactions of the plodding brain."

I invite you, however, to a hurried survey of the journey which the court has come and of some of the questions with which it has been called upon to deal. Brave as was the opening more than half a century was to elapse before any final judgment was given against a litigant state; practically a century before a state should sue the Union or the Union sue a state; and at the end of one hundred and thirty years the limits of the court's mighty power are still unmarked and the catalogue of possible controversies is still incomplete. Indeed, the court itself has said that

> "It would be objectionable, and indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court."[8]

It is interesting to observe that the first six cases in which states were impleaded were all suits by private persons based upon money demands, with New York, as I have said, at the head of the list. The rapidity with which they followed one another is suggestive of what would have happened if the decision in *Chisholm* v.

[8] Shiras, J., in Missouri *v.* Illinois, 180 U. S. 208, 241 (1900).

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Georgia[9] had not roused the country to its danger and provoked the Eleventh Amendment in time to prevent a further growth. New York again signalized herself by instituting in 1799 the first case in which two states confronted each other, when she vainly petitioned[10] for an injunction against the State of Connecticut and her citizens to suspend actions of ejectment for lands in the so-called Connecticut Gore. Not until the decision in 1846 between Rhode Island and Massachusetts[11] was final judgment rendered in such controversy; and not until Kentucky sought in 1860 to compel by mandamus the State of Indiana, or rather, its Governor, Dennison, to surrender a fugitive freedman to justice[12] did anything other than a boundary dispute engage the attention of the Court.

In this part of the federal domain, however, as in so many others, the Civil War marked the end of the period of quiescence. Cases have trodden upon each other's heels since that day, until no less than thirty-eight states of the Union—Alabama, Arkansas, Colorado, Connecticut, Georgia, Florida, Indiana, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming—have appeared before the court as plaintiffs or defendants or both in suits with their sovereign sisters. Three times has the Union brought its own suit against a state; and five times, at the suit of a state, has it appeared as defendant of record in its own highest tribunal. Nor should one in summing up the toll of litigants pass over without notice the two occasions in which the grant of jurisdiction over suits by a foreign nation against a state has been invoked. The first of these, of course, was the case of the *Cherokee Nation* v. *The State of Georgia*,[13] which failed upon the ground that the Cherokee Tribe was not a foreign state; and the other was the recent suit filed by *The Republic of Cuba* v. *The State of North Carolina*[14] to recover on some of the defendant's repudiated bonds and which Cuba, of its own volition, elected to withdraw.

But even more imposing than the roll-call of parties is the

[9] 2 Dall. 419 (1793).
[10] New York *v.* Connecticut, 4 Dall. 1 (1799).
[11] 4 How. 591 (1846).
[12] Kentucky *v.* Dennison, 24 How. 66 (1860).
[13] 5 Pet. 1 (1831).
[14] 242 U. S. 665, 37 Sup. Ct. 695 (1916).

variety of subjects which they have sought to litigate; subjects which have involved the welfare of the contending states and of their citizens, which had their appeal both to ambition and to pride, and which in not a few instances had already kindled the hot fires of passion and resentment. Some of these quarrels have had a territorial, some a financial, some a political basis; and for many a lesser cause, as history demonstrates, nations have not infrequently plunged headlong into war.

Numerically, territorial differences stand at the head of the list. Inaccuracies in charters, mistakes by surveyors, ambiguities in descriptions, have bred their crop of difficulties; and in more than one instance the forces of nature have lent their aid to controversy by turning great rivers from their ancient beds. The attendant circumstances make three of these territorial controversies especially notable.

The great case of *Rhode Island* v. *Massachusetts,*[15] is more than a landmark; it is a beacon light. The territory involved was not extensive—only some eighty or a hundred square miles on the south side of the River Charles with perhaps five thousand inhabitants—but the issues discussed went far beyond the interests of the contending states, perhaps in their influence even beyond the confines of the nation, for here it was that the Court defended the wide sweep of its jurisdiction and laid down the principles by which it has since been governed. Smallest of all the sisterhood of states, there is something suggestive in the fact that Rhode Island has litigated in turn her boundaries upon the west, the north and the east, and doubtless only the fact that the Atlantic Ocean is not amenable to process has debarred her from litigation to the south as well. But what, one may ask, are courts for if not to protect the small against the great, the weak against the strong, and to administer justice to all upon equal terms?

Massachusetts put forward in her defense Austin, her Attorney General, and Daniel Webster, the leader of her bar, who moved to dismiss the bill of Rhode Island on the ground that the question involved was not judicial, but "in its character political; in the highest degree political; brought by a sovereign, in that avowed character for the restitution of sovereignty". It was a motion which struck at the whole future usefulness of the court; and Hazard, for Rhode Island, answered in ringing sentences:

"Suppose the controversy is political in its nature; what

[15] Decision dismissing bill on the merits, 4 How. 591 (1846).

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> then? Is there any reason in nature why it should not be subjected to judicial investigation and decision as much as any other controversy? Suppose the parties to it are two states; what then? Is there any reason in nature why they should not be governed by the laws and principles of justice as much as any other parties?"[16]

Over the dissent of Chief Justice Taney, the Court rejected the narrow construction contended for by counsel for Massachusetts. It held in effect that there is no lasting magic in the word "political", but that all questions may be made judicial if quarreling states will have it so. Said Mr. Justice Baldwin:

> "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 . . . . 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; 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."[17]

The second case, unique in its dramatic setting, is the suit of Virginia to regain the picturesque and fertile counties of Berkeley and Jefferson from the warborn state of West Virginia.[18] It came while the embers of civil war still smouldered. When the ordinance of secession was passed at Richmond, the people of the northwestern part of the state refused to acquiesce and organized themselves to defend the Union. A convention was called which undertook to elect a "Restored Government of Virginia", composed of Union sympathizers, and this "Restored Government" came ultimately to give its consent to the separation of the state. An ordinance was passed creating the new state and providing that in addition to the counties expressly included, others, among them Berkeley and Jefferson, might be joined after

[16] 12 Peters 657, 692-3 (1838).
[17] *Ibid.,* 737.
[18] 11 Wall. 39 (1870).

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a popular plebiscite. To all this the legislature of the "Restored Government", and later, the Congress of the United States, said amen; although the consent of Congress did not run in express terms to the inclusion of the two disputed counties. Things were happening, however, in the Valley of Virginia at the time which made the holding of a plebiscite directed against the Old Dominion a hazardous undertaking; visitors, whose presence much disturbed the normal life of the inhabitants, were coming and going in most unexpected, not to say abrupt, fashion. Nothing could be done, therefore, until 1863 when, in the language of the court, "elections of some sort" were held with the assent of the legislature of the "Restored Government", and West Virginia extended her jurisdiction to the counties in question. Then—Appomattox; and in December following a legislature of Virginia sitting at Richmond which repealed all the acts by which the "Restored Government" had sought to give consent to the transfer of the counties. Check! by Virginia; but, three months later, countercheck by a joint resolution of Congress recognizing the transfer of the counties to West Virginia and consenting thereto. Here was all the setting for an American Alsace-Lorraine, a Virginia Irredenta, a controversy to be settled only by the sword, had not the Court been there to cut the knot by holding that there was adequate evidence of consent both by Virginia and by Congress before the Virginia Act of Repeal was passed.

Things had gone even further in a physical sense in the quarrel between Louisiana and Mississippi[19] over the delimitation of their oyster beds; for both had sent out their armed patrols to the disputed region, and only an agreement upon a neutral zone or no-man's land averted a clash until resort could be had to the Court.

In the class of cases which I have called financial are embraced those seeking recovery on the public debts of the states or brought to adjust the accounts between the states and the Federal Government. Such were the great cases of *South Dakota* v. *North Carolina*[20] for recovery upon bonds issued by the latter in the roaring days of Reconstruction, and the second suit of *Virginia* v. *West Virginia*[21] to collect the proportion of the debt of the original common-

[19] 202 U. S. 1 (1905).
[20] 192 U. S. 286 (1904).
[21] 206 U. S. 290 (1907); 209 U. S. 514 (1908); 220 U. S. 1 (1911); 222 U. S. 17 (1911); 231 U. S. 89 (1913); 234 U. S. 117 (1914); 238 U. S. 202 (1915); 241 U. S. 531 (1916); 246 U. S. 565 (1918).

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wealth assumed by the latter at the time of separation, of which case I shall have something to say in another connection.

But the cases which are at once the most novel and suggestive are those which may as well be frankly called political, being those in which the plaintiff state, suing either in its own right or as *parens patriae,* seeks redress because of injury due to the governmental action of the defendant state. Here the power of the Court reaches its full majesty and it becomes in the largest sense an arbiter of national destiny. It is not surprising that such responsibilities have not been lightly assumed and that this was the last domain which the Court was called upon to enter. It is, as the Court has said,[22] a jurisdiction of so delicate and grave a character as not to be exercised save when the necessity is absolute and the matter itself properly justiciable. True, the complaint of the Cherokee Nation against Georgia,[23] in 1831, was of this character. It attacked, as contrary to treaties and Acts of Congress, certain laws passed by the legislature of Georgia and sought to prevent the assertion of rights and powers under them. Finding, however, that the Cherokees were not in fact or in law a foreign state, the Court was not compelled to decide the broader question of its jurisdiction over the subject matter. But Chief Justice Marshall, in closing his opinion, felt it necessary expressly to reserve the point by saying:

> "A serious additional objection exists to the jurisdiction of the Court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a state from the forcible exercise of legislative power over a neighboring people asserting their independence, their right to which the State denies. . . . The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the Court may well be questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question."[24]

It is a far cry from such cautious utterance to the bold declaration in *Missouri* v. *Illinois,*[25] the Chicago Drainage Canal Case, that the jurisdiction and authority of the Court to deal with a situation which, if it arose between independent sovereignties, might lead to

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[22] Fuller, C. J., in Louisiana *v.* Texas, 176 U. S. 1 (1900).
[23] 5 Pet. 1 (1831).
[24] *Ibid.*, 20.
[25] 200 U. S. 496, 518 (1906).

war, is not open to doubt; and to the equally sweeping assertion in *Kansas* v. *Colorado*,[26] a bill brought to prevent Colorado and those licensed by her from appropriating the waters of the Arkansas River, that

> "Whenever the action of one state reaches through the agency of natural laws into the territory of another state, the question of the extent and limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establishing justice between them."[27]

and again:

> "As Congress cannot make compacts between the states, as it cannot, in respect to certain matters by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force under our system of Government is eliminated. The clear language of the Constitution vested in this Court the power to settle those disputes."[28]

No doubt statements so general as these must not be pressed too far, and the facts of a particular case, or even the predilection of individual judges will lead to their qualification; but undeniably they indicate the general trend and temper of the court.

The case of *Louisiana* v. *Texas*,[29] can hardly be treated as marking a reverse tendency. The bill in that case alleged that the state of Texas through her governor and health officer, under guise of quarantine regulations against yellow fever, had imposed an absolute embargo upon intercourse with the city of New Orleans and had virtually declared commercial war against Louisiana, her principal port and its citizens. If one may judge by the opinions filed, the Court was not without difficulty in agreeing upon the true reason for dismissing the bill. Mr. Chief Justice Fuller was of opinion that the state of Texas had not made the action of her governor or health officer her own, and that a controversy between states did not arise merely because the citizens of one were injured by the maladministration of the laws of another; a position which should be compared with the holding in *Kentucky* v. *Dennison*,[30] that a suit against a governor of a state in his official ca-

[26] 206 U. S. 46 (1907).
[27] *Ibid.*, 97.
[28] *Ibid.*
[29] 176 U. S. 1 (1900).
[30] *Supra*, note 12.

pacity is a suit against the state. Mr. Justice Harlan held that as no property right of the state was invaded and Congress alone was vested with authority over interstate commerce, Louisiana could not sue in her sovereign or corporate capacity. Mr. Justice Brown put forward the still narrower and more debatable ground that since only the citizens of New Orleans and not those of the state of Louisiana in general were interested, the state was not the proper party complainant, while Mr. Justice White contented himself with a concurrence "in the result."

Further light may be expected from the decision of some of the eight or ten cases which are now pending before the Court. Three of these are especially interesting since they raise, albeit under very different circumstances, the fundamental question of the power of a state over its own natural resources. In *Wyoming* v. *Colorado,*[31] dealing with the flow of the Laramie River, it is the contention of Colorado that she enjoys a prior right to utilize all the water that falls upon her soil; and the court is thus faced again with the issue of relative right in the water of interstate streams which it evaded in the earlier case of *Kansas* v. *Colorado:*[32]

The other two cases are those of the states of Ohio and Pennsylvania against the state of West Virginia;[33] and since it becomes necessary to introduce once more the name of the state of my own nativity as a litigant, it seems a filial duty, at the risk of some digression, to point out to you that her frequent appearances in that role have not been of her own seeking. Sued as she has been in turn by Virginia, Maryland, Pennsylvania and Ohio, and shot at occasionally across the Kentucky border, let me assure you that she asks on behalf of the simple, peace-loving and law-abiding mountaineers who make up her population, nothing more than that her litigious neighbors may leave her in peace.

Faced by a steady depletion of her natural gas, her legislature passed three years ago a statute requiring all natural gas companies operating within the state to furnish to her citizens a reasonably adequate supply of gas, to the extent of their several resources, with power in the public service commission of the state to direct companies having a surplus production to furnish gas to those whose supply was insufficient to meet the demands of their customers. For Ohio and Pennsylvania, appearing as consumers in their governmental institutions and as *parens patriae* for their

[31] Oct. Term, 1921.
[32] *Supra,* note 26.
[33] Oct. Term, 1921.

citizens, it is said that such an act by increasing consumption in West Virginia will diminish the quantity available for export to them from the common reservoir, with resultant damage to their citizens; and they pray that the Act may be declared invalid as a restriction upon commerce and its enforcement by the state of West Virginia enjoined. Since the cases having been argued last December are now restored to the docket for reargument, comment upon them would be improper; but the implications flowing from such suits are obvious and far-reaching.

We need not endeavor upon this occasion to do what the court has expressly refused to attempt, and seek out the bounds and limits of its jurisdiction. It is enough for the present to mark the steady advance in its scope and power; the increasing resort to its umpirage by the states, and the healthful habit of peaceful settlement which has thereby come to make its abode with us. To quote the court again, it sits as an international as well as a domestic tribunal, applying Federal law, state law and international law, as the exigencies of the particular case may demand;[34] and by its successive decisions is practically building up what may not improperly be called interstate common law.[35]

Through all the opinions by which this process is being accomplished there runs like a golden thread the consciousness of the Court's great responsibilities and a realization of the august character of the litigants before it. No technical rules of practice or of pleading have been permitted to leave room for the slightest inference that "anything but the largest justice after the amplest opportunity to be heard has in any degree entered into the disposition of the case."[36] So far from grasping at jurisdiction it has been declared that before the Court should intervene "the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the Court is prepared deliberately to maintain against all considerations on the other side."[37] While more than once action has proceeded upon the deliberate theory that "great states have a temper superior to that of private litigants."[38]

Most notable of all, however, is the great fact that the power and influence of the Court rests upon no appeal to force or resort

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[34] Fuller, C. J., in Kansas *v.* Colorado, 185 U. S. 125, 146 (1902).
[35] Brewer, J., Kansas *v.* Colorado, 206 U. S. 46, 97 (1907).
[36] White, C. J., in Virginia *v.* West Virginia, 234 U. S. 117, 121 (1914); Taney, C. J., in Rhode Island *v.* Massachusetts, 14 Pet. 210, 257 (1840).
[37] Missouri *v.* Illinois, 200 U. S. 496, 521 (1906). See also New York *v.* New Jersey, 41 Sup. Ct. Rep. 492, 496 (1921).
[38] Holmes, J., Virginia *v.* West Virginia, 220 U. S. 1, 36 (1911).

to coercion. Indeed, it has been slow to assert that such a resort was possible. On the contrary, it has preferred to presume that no state

> "which holds prerogative rights for the good of its citizens, and by the Constitution has agreed that those of any other state shall enjoy rights, privileges and immunities in each, as its own do, will either do wrong or deny right to a sister state or its citizens, or refuse to submit to those decrees of this Court rendered pursuant to its own delegated authority."[39]

It was in such language that the Court disposed of the contention put forward by Webster and Austin in *Rhode Island* v. *Massachusetts,* that the Court had no jurisdiction to decide, since it lacked the power to enforce.

This objection had been heard before; it was to recur again. The Court had already decided that if a state should fail or refuse to appear in answer to its process, no coercive measures would be taken to compel its appearance, but the complainant would be allowed to proceed *ex parte.*[40] Edmund Randolph had mooted the question upon argument in *Chisholm* v. *Georgia,*[41] and had receded from it, in the lurid rhetoric of the day, as too awful for contemplation.

> "Still," said he, "we may be pressed with the final question: 'What if the State is resolved to oppose the execution?' This would be an awful question indeed! He to whose lot it should fall to solve it would be impelled to invoke the God of Wisdom to illuminate his decision. . . . I will not believe that in the wide and gloomy theatre over which his eye should roll, he might perchance catch a distant glimpse of the Federal arm uplifted. . . . Rather, let me hope and pray, that not a single star in the American Constellation will ever suffer its lustre to be diminished by hostility against the sentence of a court, which itself has adopted."

In *Kentucky* v. *Dennison,*[42] the Court declared the general government without any coercive means to compel the governor of Ohio to honor a requisition from Kentucky for a fugitive from justice. In *South Dakota* v. *North Carolina,*[43] on the other hand, enforcement was attained by the foreclosure of a mortgage on specific property. It was left, I regret to say, for litigation between

[39] Rhode Island *v.* Massachusetts, 12 Pet. 657, 751 (1838).
[40] Grayson *v.* Virginia, 3 Dall. 320 (1796); Rhode Island *v.* Massachusetts, *supra,* note 39, page 755.
[41] 1 Dall. 419, 427 (1793).
[42] 24 How. 66 (1860).
[43] 192 U. S. 286 (1904).

Virginia and West Virginia to raise the question in a form which brooked no evasion.

The facts were these. Upon the severance of the state of Virginia and the formation of West Virginia, it was ordained that the new state should assume an equitable proportion of the public debt of the original commonwealth; and for more than fifty years thereafter, the subject was a bone of contention between the mother state and her daughter. Negotiations for settlement proved abortive, a new generation grew to manhood, and there spread abroad in West Virginia—at least among the less informed—a fixed conviction that upon a fair accounting no sum would be found due from her to the parent state. There is no counsel, as perhaps this audience can attest, more eagerly embraced by any debtor than that which assures him that his debt is no longer due or owing. The ritual observed upon the opening of each biennial session of the West Virginia legislature became, first, prayer; second, roll-call; and third, the adoption of a resolution denying all liability on the "Virginia Debt". It was something of a shock, therefore, to find the state haled before the Supreme Court in 1906, and even more when after ten years of litigation a decree went against her for over twelve millions of dollars. She had insisted at the outset that the Court was without power to compel payment; she remained of that opinion after the decree had been entered, and so in 1917 the state of Virginia woke the question which had been slumbering for a century by praying for a mandamus requiring the legislature of West Virginia to levy a tax to pay the judgment.[44]

That the court should decline so direct a challenge, at this date in the life of the Republic, was perhaps impossible; whether it would have done so at an earlier day is mere matter of speculation. It held, unequivocally, that there rested in the Court the certain duty to enforce its judgment by appropriate remedies, even though their exertion might operate upon the governmental powers of the state. It must be said that the discussion of the appropriate remedy is less convincing; for after suggesting the possibility of Congress coming to the aid of the Court and hinting at the power of the Court itself to decide the amount and method of taxation to be put into effect, the Court with a call for further argument postponed its decision and threw itself back once more upon the sense of duty and the suggestions of self-interest of the contending

[44] 246 U. S. 565.

parties. It is gratifying to reflect that this last appeal was not made in vain, and that an amicable adjustment by the states themselves proved once more the moral power of the Court and vindicated its confident reliance upon "a decent respect to the opinions of mankind" as the ultimate sanction of its judgments.

And now, gentlemen, with the history of the Supreme Court before us, what lesser place can be assigned to it in the structure of our country than that given it by Washington himself as the "chief pillar upon which the National government must rest", the "keynote of our political fabric". Four long and bloody years of fratricidal strife warn us, it is true, against overconfidence or boasting; but they only prove that no barrier has yet been built that can withstand the full floodtide of human passion. Who of us would tear away the breakwater because it has been overleapt by a single storm; who would not rather as a prudent man labor to strengthen and extend it?

A further question presses for its answer: How far do we as a nation believe that our experiment in the administration of international justice under judicial forms is worthy of imitation? To what extent are we willing to make a like attempt in wider fields? If either our example or our precept is to be relied upon, there would seem to be no doubt of the reply. More than a score of times in our national life have we submitted disputes with foreign powers to judicial arbitrament. Again and again our legislative bodies and our chiefs of state have declared themselves in favor of what President McKinley in his first inaugural called "the leading feature of our foreign policy throughout our entire national history—the adjustment of difficulties by judicial methods rather than force of arms". Our delegates to the Peace Conference at the Hague in 1899 and again in 1907 went expressly charged to propose the creation of a permanent international tribunal; and we hailed as a laudable advance the halting steps of the First Conference in setting up, and of the Second Conference in improving, a permanent Court of Arbitration, even though it fell far short of the instructions given by Secretary Root in 1907 to the effect that:

> "If there could be a tribunal which would pass upon questions between nations with the same impartial and impersonal judgment that the Supreme Court of the United States gives to questions arising between citizens of the different states or between foreign citizens and the citizens of the United States, there can be no doubt that nations would be more

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ready to submit their controversies to its decision than they are now to take the chances of arbitration. It should be your effort to bring about in the Second Conference a development of the Hague tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries. who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility. . The Court should be made of such dignity, consideration and rank that the best and ablest jurists will accept appointment to it, and that the whole world will have absolute confidence in its judgments.''[45]

Of the tribunal thus established, however, it has been said that

> "The Permanent Court is not permanent, because it is not composed of permanent judges; it is not accessible, because it has to be constituted for each case; it is not a court, because it is not composed of judges.''[46]

It was the "phantom of a court, an impalpable ghost, or to speak more plainly, it created a clerk's office with a list." Nevertheless, the United States and Mexico, in the Pious Fund Case, gave evidence of their faith by making themselves the first to avail of its services.

But at last a Permanent Court of International Justice has appeared; the dream of the ages is fulfilled within our day! Forty-five states have approved it, its judges have been selected, its labors are about to begin. Future ages may well say of us as we do of those who witnessed the beginnings of the Supreme Court, that we little appreciated the magnitude of the event. At least the record of the bar of the state of New York will stand clear and will furnish to you and your successors just pride in the fact that he who was not only the first Chief Justice of the United States, but first to negotiate a treaty of arbitration in the name of the United States came from your ranks; that the chairman of the delegation to the Second Hague Conference and the Secretary of State who sent him were New York lawyers; that a leading member of the Committee of Jurists who devised the plan for the present Permanent Court, was once more a New York lawyer; and finally, that a member of this bar, diplomat, scholar, statesman and jurist, has by the suffrage of sovereign states been elevated to a place upon its bench.

One year ago you evidenced your approval of the plan for the

[45] INSTRUCTIONS TO THE AMERICAN DELEGATES TO THE HAGUE PEACE CONFERENCES AND THEIR OFFICIAL REPORTS, Edited by James Brown Scott, 79.

[46] Address of James Brown Scott, Technical Delegate to the Second Hague Conference, in 2 PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, 319.

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Court by an appropriate resolution in which you recommended that suitable provision might be made to enable the United States to take part in the organization of the Court, and to be represented on its membership. I take it you are of the same opinion still. Nevertheless by some strange inconsistency, the word of American approval remains still to be spoken. In the light of all our past professions, how shall we explain our silence? Is it that we have come to disapprove or distrust the principle of judicial settlement of international disputes? Our whole history refutes it. Is it that we dislike permanency in a court created for the purpose? To those who so declare let us reply in the language of the prophet,—"Ye have not looked unto the maker thereof; neither had respect unto him that fashioned it long ago." Or is it that we wish for some mere fancy of our own to raze the structure to its foundations in order to follow the painful process of its slow re-building? Do we supinely wait for the coming of that impossible day, which never was on sea or land, when a scheme can be devised to win universal consent?

Let us speak plainly to one another. Discussions of the foreign relations of the United States have not only cut to the quick in the last three years; they have also touched many on the raw. Without design to apportion either praise or blame, is it not true that much thinking during that time has been colored by prejudice, and many utterances have been inspired by passion? Perhaps it is inherent in democracy that emotion shall play a large part in popular decision. But soon or late, passion and partisanship must have their day and realism—the only realism that is lasting—realism inspired by great ideals and lofty purposes—realism resting not alone on finite reason but on faith—must come into its own. For if we, the fathers, have eaten sour grapes, let not our children's teeth be thereby set on edge.

When the hour of calm reflection strikes, who will deny that the place of America is by the side of the Permanent Court of International Justice, to which by example and precept she has been so great a contributor? Will not sentiment, reason and self-interest then show the way to her full participation and support? And when revolving years have brought the Court to its full development and fruition, when it numbers upon its rolls all the nations that go to make civilized society, and when sovereign states bow to the moral force of its decrees,

"Yea, truth and justice then
Shall down return to men."

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