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by

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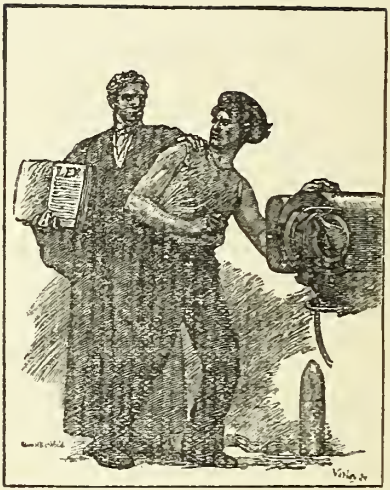
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The Development of the American Doctrine of Jurisdiction of Courts Over States

Alpheus Henry Snow

By the Articles of Confederation, the American States made the United States, in Congress assembled, "the last resort on appeal" in all disputes between them, and authorized the Congress, upon the complaint of any State against another, to institute a special tribunal, according to a method prescribed by the Articles, for the final decision of the dispute. By the Constitution, the people of the United States and the States of the Union established a Supreme Court of the United States and made it a tribunal for the judicial settlement of all interstate and international disputes in which the United States or the States of the Union might be involved with each other or with foreign states, and which were capable of being settled by the exercise of "the judicial power" of the United States. By these two documents, therefore, it was recognized as an American doctrine that disputes between

states may, under some circumstances, properly be settled according to the decision of courts—or, to put it inversely, that courts may, under some circumstances, properly have jurisdiction over states.

Now that the states of the society of nations are on the point of establishing a Court of Arbitral Justice for the settlement of such international disputes as are capable of judicial determination, it becomes interesting to discover the process by which the Supreme Court of the United States has been evolved. It may be that by tracing this line of development, some light may be thrown upon the questions which are now presenting themselves in regard to the proposed international court.

The institutions of a people are in part the expressions of their political, social and economic beliefs, and in part the result of experiments made by them and of improvements upon institutions which have stood the test of experiment. It is necessary, therefore, in this inquiry, to examine first the nature of the political, social and economic beliefs of the founders of the American commonwealth; then, to investigate their experience in the working of those institutions set over them by

England as their mother country, or established by themselves, which bore an analogy to the Supreme Court of modern times, and to ascertain the process by which these early institutions were improved and adapted to the changing environment.

In our search for the political doctrine held by the American colonists which may reasonably be thought to have manifested itself in our Supreme Court, we perhaps may find a clue in a remark made by Grotius in his *Three Books of Peace and War*. Describing the power which a State ought to exercise over its colonies (lib. i, cap. iii, sec. 21), he says that while the Latins described the power of the mother city or state by the word *imperare*, to command, and regarded it as having the *imperium*, or empire, over the colonies, the Greeks "more modestly" described the power of the mother city by the word τάσσειν, to dispose or set in order, and regarded the mother city as having the ἡγεμονία that is, the hegemony, leadership in judgment or supreme jurisdiction. The American colonists regarded England, their mother country, as the Greek colonists regarded their mother city. They recognized that England had a leadership in judgment and hence a supreme jurisdiction

over the Colonies for the purpose of disposing and setting in order their affairs to the extent that might be necessary for the common defence and for the general welfare, but they denied its power to command. They insisted that the execution of the judgments of the mother country was of right in the Colonies and that, in extreme cases, where its decisions were palpably unjust, the Colonies might refuse to adopt or execute them.

The American colonists went farther, and denied to their own governments and to all governments the power of absolute command, holding that government in every form is essentially leadership in judgment. To place it beyond doubt that their governments did not have the *imperium* of the Latins, but only the hegemony of the Greeks, they adopted the custom of binding their governments by written constitutions regarded as emanating from the people, limiting the powers which the government was authorized to exercise and placing it in the position of an authorized agent of the people. Their representative assemblies they called, in some cases, general courts; and they held the members of such assemblies responsible as members of a supreme tribunal. Every act of government

they regarded as an act of judgment, and they considered that the persons appointed to govern were but the leaders in the judgment. They held that the final judgment rested in the whole people, who confirmed by their acquiescence and conformity those acts of government which by common consent were regarded as necessary and just, and who ultimately nullified such acts of government as by common consent were regarded as unnecessary and unjust. With regard to every governmental act, the question in their minds was, whether the act in question appealed to their reasons and consciences as necessary and just under the circumstances. If the general consensus was that the act of government was necessary and just, the people executed it as a matter of choice and free will. Governmental commands and prohibitions, in their view, thus derived their force from the judgments on which they were based and on the general acquiescence in the judgment as necessary and just.

The social ideas of the American colonists were based upon Christianity. The people were thus at the same time individualists and humanitarians and sought to find the middle ground between selfishness and altruism. They believed in the equality of all men before

God by reason of the common and equal creation of all men by God, and held to the conception of a law of nature imposed by God, which is supreme over all human action and relationship and to which all men, states and peoples are equally subject. This law of nature was to their mind composed of those principles of natural justice, based primarily on the equal right and duty of self-protection and self-preservation, which are implanted in man by God, and which are in part revealed and in part discoverable by the enlightened reason and conscience. All governmental acts they believed were to be judged by the people according to this supreme law.

The economic ideas of the American colonists were similar to their social ideas. As individualists they opposed monopoly and caste and believed in the fundamental rights of self-protection and self-preservation, called the rights of life, liberty and property. As humanitarians they believed that trade, commerce and intercourse ought to be free and universal, limited only by the necessities of self-protection and self-preservation.

Holding these views, the American colonists regarded the colonies as commonwealths and free states, and at the same time thought it

not inconsistent that these free states and commonwealths should be parts of the English empire and the English commonwealth. They willingly assented to those provisions of the colonial charters which required that the governmental acts of the colonies should be consistent and harmonious with the governmental acts of England. The effect of this was, to make the law of England a supreme law of the colonies, governing not only the people of the colonies, but the colonies themselves. But to this law they could not yield absolute supremacy consistently with their conception of a supreme and universal law of nature emanating from God. They therefore regarded the English empire and commonwealth, and each of the constituent states, as subject in the first instance to the law of England as a supreme law, but as also subject in the last resort to the law of nature. The English and colonial courts and governments also recognized the law of nations, composed of the principles of international conduct and relationship agreed upon by independent states and manifested in treaties or in their political action, though even this law the American colonists regarded as subordinate to the law of nature. Disputes between the states forming the

English empire and commonwealth, involving questions capable of judicial determination, were thus to be decided by courts. The local law of the colony was applied in cases where it was solely applicable, and the law of England or the law of nations were also applied where applicable, the one or the other being supreme according to the nature of the case; the law of nature governing all cases not covered by the other laws and being supreme over all.

Realizing, however, that there were disputes between states, as between individuals, involving dignity or vital interests, which were not susceptible of decision by the cold and dispassionate methods of investigation and adjudication, and which could only be settled by methods taking into account passions, sentiments and prejudices, they believed that the settlement of disputes between the states composing the English empire and commonwealth ought to be in the charge of a specially constituted tribunal fitted by training to act judicially where the judicial method was applicable and to act diplomatically where the judicial method was inapplicable. Yielding reasonable deference to England as the mother country, they were willing to entrust her with the duty of establishing and maintaining such

a tribunal. During the Colonial period, the people of the Colonies consented that the arbitration or adjudication of disputes between the Colonies or between one or more of the Colonies and England should be conducted before tribunals in England established by the English government for that purpose. When by the Revolution there ceased to be a mother country to act as arbitrator and judge between the American States, it was inevitable that their political, social and economic beliefs should find expression in a system of their own for carrying on such arbitrations and adjudications.

Having thus attempted to form some conclusion concerning the development of the doctrine of jurisdiction of courts over states as a matter of political, social and economic belief, it becomes necessary to examine the experience of the Americans in the working of institutions which culminated in the establishment by them of the Supreme Court of the United States.

It may be objected that such an investigation is without practical value as bearing upon the institution of the proposed Court of Arbitral Justice, because the institutions of which the Americans had experience were those which

existed under a political union formed by England and the Colonies and held together by the power of England. Such institutions, it may be urged, have no resemblance to or bearing upon the institutions which a body of independent states would find it for their interests to form.

It must indeed be admitted that the tribunals in England which settled the disputes of the American Colonies were the product of English statesmanship supported by English force, and that these institutions were accepted by the Colonies and in no sense created by them. At the same time, it is to be remembered that all unions or combinations of individuals or states arise out of the same circumstances and have the same objects—they are for the common defence and for the general welfare. It matters little from what standpoint each of the parties enters upon the negotiations. Whether they start from a position of assumed equality or from a position of assumed inequality, the union or combination will tend to perfect itself by conforming to the facts as they exist, and the institutions of the union or combination will tend to take the form which best suits the needs of all the parties. In spite, therefore, of the fact that the Supreme Court of the United

States had its origin in the institutions of the English empire and commonwealth and the British empire, and exists today as an institution of the American Union, it by no means follows that American experience of these institutions may not be of value at this time to the states of the society of nations.

In the English realm and empire, from the earliest times until the Revolution of 1641, the tribunal known as "the King (or the Queen) in Council" played the most important part. From 1660 until about 1770, it had a settled and peculiar jurisdiction, as opposed both to the jurisdiction of the body known as the Parliament, established in 1295, composed of King, Lords and Commons, and to that of the ordinary courts of justice of the realm. The King in Council was legally the King advised by his Privy Council. This council was composed of men selected by the King for their social influence and their expertness in statesmanship, law and economics. By their advice the King made treaties with independent states, exercised jurisdiction over annexed countries, and carried on the government of the realm according to customary principles and according to Parliamentary acts.

During the reign of Elizabeth, the government of England was carried on almost entirely by the Queen in Council. Few Parliaments were held, and the action of those which were held was largely devoted to registering the decrees of the Queen in Council and levying taxes to be expended as the Queen in Council might direct.

An examination of the charters of discovery granted by Queen Elizabeth to Sir Humphry Gilbert and Sir Walter Raleigh shows that it was her purpose, had colonies been established under these charters, to govern them by herself, advised by her Privy Council. Judging from the system pursued by Elizabeth and her predecessors in the case of Ireland and Jersey, there would have been a Governor and Privy Council in each of the American Colonies, subordinate to and in correspondence with the Queen in Council. The bond of union between England and the Colonies would have been considered to arise from the common allegiance of all English-born people, and their descendants, to the person of the reigning monarch. Under this system the Colonies and their citizens would have been subject to the Queen in Council as a supreme tribunal.

The system of government by councils which prevailed in England during Elizabeth's time was a favorite system at that time throughout Europe. The feudal system was on the point of giving place to the representative system, but during the last half of the sixteenth century there was a reaction towards the feudal system. Spain, the most successful colonizing power of that day, was governed by councils. Its relations with its colonies were in charge of a specially selected and distinguished body of men who formed the Council of the Indies, which was assisted by a subordinate Council of Trade. A similar system prevailed in Portugal. In the Empires of Venice and Genoa, then passing into decay, the relations with the oversea colonies and trading-posts had been in charge of a central tribunal.

When James VI of Scotland came to the throne of England as James I in 1603, after the death of Elizabeth, a new situation was beginning to be formed on the Continent of Europe. Spain and Portugal, claiming the whole world outside of Europe under Papal bull, were declining, and the northern powers of the Continent under the lead of Henry IV, King of France, were trying to arrange a European

Concert to regulate Europe and all the rest of the world. The movement was ostensibly aimed against Spain and Austria, but it was evident that any Concert of the Continental powers must inevitably in the long run be turned against England. It became necessary for England, whose trade was already almost strangled by hostile regulations of Continental powers, to gain colonies for itself in America and to hold them against any possible Continental coalition. A systematic plan of colonization was therefore entered upon in which the great lawyers of England, among them Coke, Bacon and Popham, participated.

Just as these plans were being prepared, an event occurred in England which, as the Colonial documents and literature show, had a profound influence on the people of the American Colonies. This was the settlement of a dispute between England and Scotland according to a decision made by the Judges of England. When King James became King of both countries, the question arose, what rights the citizens of the two states should have against each other while their peoples were thus united through the person of the King. Commissioners were appointed by the legislatures of the two states, and an agreement was

reached except upon the question of what rights the citizens of Scotland should have in England, and vice versa. In 1604, the English House of Commons brought the negotiations to a temporary close by insisting that the rights of the Scots in England should be such only as they were entitled to according to the principles of law and established precedents. The House of Lords insisted upon an arrangement for naturalizing in England by statute all persons born in Scotland after the Union; it being agreed that all persons born before the Union were aliens, who could be naturalized only by the methods applicable to aliens. A great hearing of the question was had, which was given the form of a Conference between the Lords and Commons of England, to which all the judges of England were summoned as advisers of the Conference. The effect of the whole arrangement was to constitute the judges of England an Extraordinary Tribunal to determine judicially the dispute between England and Scotland. At the hearing Sir Francis Bacon acted as leading counsel, and prominent lawyers of the House of Commons argued the case from the standpoint of the civil law, "the law of nations and of reason," the history of nations, and the common law.

All the cases in the English year books and reports arising out of England's connection with the principalities and duchies in France and the Low Countries, with Ireland, and with Jersey and Guernsey, were examined. The case is reported in the State Trials under the title of the Case of the Postnati. In an opinion in which the principles of law and the precedents were fully discussed, the judges arrived at the unanimous conclusion that Scots born after the accession of James to the throne of England were entitled in England to full civil rights of person and property, but had no political rights; and that Scots born before the Union were aliens in England. Though the judges in their opinions necessarily based themselves on English law and precedents, the investigation of counsel and the reasoning of the judges took so wide a range that the principles laid down were really those of universal law, and the effect of the decision was to recognize a supreme common law governing the relations between England and all the countries politically connected with her. The decision of the judges was accepted by the people of England and Scotland, and the dispute was thus judicially settled. A test case called Calvin's Case, involving the same ques-

tions as the Case of the Postnati, was brought two years later to the Court of King's Bench, and was heard before all the judges, the decision being the same. By reason of the nature of the points decided in the Case of the Postnati, and the manner of the decision, and by reason of the fact that this decision did in fact settle the difficulty between England and Scotland, the Case of the Postnati had the dignity of an international adjudication and illustrated the possibility of Courts having jurisdiction over States.

Incidentally, the judges in their opinions in these cases, stated the principles which in the past had governed the relationship between England and the countries subordinately connected with her; thereby in fact establishing the principles upon which the relationship between England and the American Colonies was to rest. The King in Council was recognized as having a superintending legislative power and jurisdiction over all countries subordinately connected with England, to be exercised by orders in council or by writs. The Parliament was recognized as having a superintending legislative power over such countries above that exercised by the King in Council, this power being exercised by means of Acts of

Parliament in which the Colonies were specially named. A special Act relating to a country outside the realm of England—which was necessarily not represented in the Parliament—could be intelligently framed only after investigation of the facts and hearing of the parties concerned. In passing such special Acts, therefore, the Parliament, if it acted reasonably and conscientiously, necessarily acted both as a tribunal having jurisdiction over such countries and as a legislature.

When, therefore, the English colonization of America began, in 1606, not only were the minds of the people of England habituated to the idea of government through councils of experts sitting as tribunals as well as legislatures, but they had just had an object lesson in international adjudication. The English colonists of America had moreover special cause to be familiar with the Case of the Postnati and Calvin's Case, for the principles laid down in them in fact formed the unwritten constitution governing the relations between England and the American Colonies. A permanent tribunal in England exercising jurisdiction in disputes between England and the Colonies, or between one Colony and another, determining their rights against each

other according to sound political, legal, social and economic principles, was probably regarded by all as an appropriate means for maintaining proper relations between them. It was of course impossible at that time for the Colonies to be united with England by representation in Parliament, and such a tribunal was the only practicable bond of union between them. Such a tribunal was not inconsistent with a system of local self-government in the Colonies; indeed it depended for its success upon a recognition of their self-governing statehood, and of their power and duty to execute the judgments of the tribunal in so far as they appealed to the reason and conscience of the people of the Colonies as reasonably necessary and just.

By the Charter of 1606, James I claimed all North America between 34° and 45°,—that is, all the region between what is now South Carolina and what is now Canada,—calling it "Virginia"; and divided it into two districts overlapping between 38° and 41°, one of which was probably intended to be a northern and the other a southern viceroyalty,—the middle line falling very close to what was later on "Mason and Dixon's Line" between the Northern and Southern States. In each of

the grand divisions provision was made for an English Colony with specified boundaries. The local government of each Colony was placed in charge of a local Council, called the "Council of the First (or Second) Colony," to be appointed by, and to act under the instructions of the King in Council. The Charter also provided for a Council in England, to be "Council of Virginia." The ultimate and supreme power over the Colonies was recognized as vested in the whole State and Government of England, and this power was to be executed, so far as the Charter shows, by the King in Council. The "Council of Virginia" was given jurisdiction, subject to final decision of the King in Council, to determine disputes between the Colonies, and advise the King concerning the general social and economic situation; the Charter providing that this Council was to have the "superior managing and direction only of and for all matters that may concern the government, as well of the several Colonies, as of and for any other part or place within the aforesaid precincts of four and thirty and five and forty degrees."

The likeness between the system of government established by this Charter, and the Spanish system, is apparent. The Council of

Virginia corresponded to the Council of the Indies and the Council of each Colony to the local *Audiencia* in each of the Spanish colonies which conducted the local government. The Charter made no provision for representative Assemblies in the Colonies—in this respect also conforming to the Spanish system. Some basis is to be found for a belief that this Charter shows Spanish influence in the fact that England and Spain were then in close relationship under the Treaty of 1604, and that Spanish ideas were prevalent at the English Court. As, however, the Charter was drawn by the most eminent English lawyers, and as the English scheme of colonization of America was strongly opposed by Spain, it seems more reasonable to believe that the Council of Virginia was a development of the ideas underlying the English Privy Council than that it was based on any foreign model.

The Charter of 1606 proved ineffective, because it did not induce sufficient emigration. There was no precious metal to produce quick returns to the colonists. They could only hope for the slow return from agriculture and trade; and this necessitated the use of large amounts of capital and systematic operations for colonizing the country and protecting and

supplying the colonists until they could become self-supporting. In 1609, the "First Colony" referred to in the Charter of 1606 was organized as a colonizing and trading joint-stock corporation called the Virginia Company, which was authorized to colonize and govern the region at present included within Virginia and the country to the westward. The Company was given the privilege of the general and local government of the country granted, and the monopoly of its trade. The governing board of the Company in England was constituted by the Charter the "Council for Virginia" and was subordinate to the King in Council. By an amendment in 1611, the adventurers were allowed to sit with the Councillors, and the meetings were called "Courts" of the Company. Four "Great and General Courts" in each year were required to be held "for the handling, ordering and disposing of matters and affairs of greater weight and importance, and such as shall or may in any sort, concern the weal public and general good of the said Company and Plantation."

This Charter was unsatisfactory. By the people of England it was objected to as giving to the Company a monopoly; the King regarded it as too democratic and republican,

and as likely to lead to too radical ideas in the Colonies; the nobility found fault with it because it allowed merchants to sit in one of the King's councils.

The admission of merchants to membership in this council was, it would seem, due to the economic necessities of the situation. The opening of the sea-route to India and America, the closing of the Mediterranean to the Oriental trade by the Mohammedan invasion of what is now Turkey, the consequent ruin of Venice, and the decline of Spain and Portugal through extravagance and bad government, had made the English Channel the Mediterranean of the world, and London, as the most secure port on the Channel, was becoming the metropolis. England required a permanent economic connection with America, in order that raw material might be secured and an increased market for English manufacturers might be provided. The tribunal in England having jurisdiction over the relations of the American Colonies, in order to be efficient, had to be so organized as to be able to cope with economic as well as with social and political questions. The system was perfected half a century later, by the institution of a Council

of Trade, subordinate to the King in Council, having charge of these economic relations.

Under the Charter of 1609, the local government of Virginia took on a democratic and republican aspect. To the Governor and Council appointed by the King in Council was added in 1621, by consent of the King in Council, a representative "House of Burgesses," all together constituting the General Assembly of Virginia. In the Ordinance of the Company establishing this system occurred the remarkable provision that no orders of the General Courts of the Company should bind the Colony unless ratified by the General Assembly of Virginia,—a provision which left to the General Courts of the Company what was essentially a power of adjudication, and gave Virginia the power of executing the judgments of the Courts of the Company according as these judgments were approved by the public sentiment of the people of Virginia. This ordinance, representing as it did the maximum of self-government which was ever granted by England to any of the Colonies, was regarded by all the Colonies as a fundamental constitution determining the relationship not only between England and Virginia, but between England and all the Colonies.

In 1620, an experiment was made of another system, resembling somewhat that of the Virginia Company. A colonizing and trading corporation of forty members with power of self-perpetuation by the name of "Council for New England," was chartered by James I, with power of government and trade monopoly throughout North America from 40° to 48°,— that is, approximately from what was afterwards "Mason and Dixon's Line" to the mouth of the St. Lawrence. The meetings of the council was described in the Charter as "Courts." The Company, which was at the same time "Council" and a "Court," thus constituted a tribunal in England having jurisdiction, subject to the King in Council, of the colonies to be formed in this great region. As a corporation it was subject to have its charter forfeited for cause by *quo warranto* proceedings; and its monopoly made it vulnerable. The opposition of Parliament to monopolies was so great that the corporation did little more than make grants of land.

Charles I, upon coming to the throne in 1625, abolished the Virginia Company, and took Virginia under the direct government of himself advised by his Privy Council, without any subordinate council. In 1628 he granted

a Charter to the Company of Massachusetts Bay, empowering it to colonize the region surrounding what is now the city of Boston, with full powers of government and without express reservation of control by the King in Council or by Parliament. The meetings of the Company were described in the Charter as "Courts," and four "Great and General Courts" of the Company were to be held in each year. It was not specified whether the Company should be located in England or in Massachusetts Bay.

This Charter was based upon principles of government inconsistent with the Latin theory of government held by Charles I, and his Privy Council, according to which the binding force of governmental acts was derived from the King's command, and so evidently made the public judgment supreme within the Colony, that when the Company removed to Massachusetts Bay, it became specially obnoxious to the King in Council, and the charge was made that the Charter was obtained "surreptitiously."

In 1635, the Council for New England surrendered its Charter and the King created a special commission to regulate all the English Colonies in America and elsewhere, composed

of the highest clerical and lay officials of the realm—William Laud, Archbishop of Canterbury, being the President. This commission was invested with full powers, and it seems to have been responsible only to the King in person. It was expressly given power to determine all disputes between the Colonies. The Letters Patent read, in this respect:

"Farther, be it known that we constitute you, or any five or more of you, our commissioners, to hear and determine, according to your sound discretions, all complaints whatsoever, whether against the Colonies themselves, or their Presidents or Governors, either at the instance of the party aggrieved, or upon information concerning injuries done, * * * and to summon the parties before you, and they having been heard, * * * by themselves or by their attorneys, to extend to them full and complete justice."

This tribunal was also authorized to hear and determine controversies between the Colonies and England, their powers extending to the revocation of "charters surreptitiously or unduly obtained or prerogatives granted on terms prejudicial to the rights of the Crown or of foreign princes;" the commission being required to proceed in such cases "according

to the law and custom of our realm of England." It was this tribunal which directed that a *quo warranto* suit be brought against the Massachusetts Bay Colony to forfeit its Charter, on the ground that the Charter was obtained surreptitiously and unduly and that it was not intended to authorize the whole government of the Colony to be removed to America.

The arbitrary methods of Archbishop Laud led the Colonies to distrust the commission as formed, but they recognized the necessity of a reasonable judicial control by the King in Council. In 1638, the General Court of Massachusetts Bay, in its answer to the demand of the commission to surrender up the Charter for cancellation, declared that Massachusetts Bay was "ready to yield all due obedience to our Sovereign Lord the King's Majesty, and to your Lordships under him." The expression "due obedience" or "due subjection" was often used in the Colonial documents as describing the relation of the Colonies to England, to signify that they regarded themselves as subject only to the power of England duly exercised,—that is, exercised to the extent needful for the common good. They regarded themselves as free states or commonwealths,

and based their subjection to the reasonable jurisdiction of England partly on their consent, partly on the economic necessities of the case, and partly on the moral compulsion growing out of their special relationship to England and their general relationship with the rest of the world.

The position taken by the General Court of the Massachusetts Bay Colony was in harmony with the prevailing sentiment in England. In 1640, the Parliament by an act declared and "regulated" the powers of the King in Council and defined its jurisdiction as a tribunal. This act provided:

"That neither his Majesty, nor his Privy Council, have or ought to have any jurisdiction, power or authority, by English bill, petition, articles, libel, or other arbitrary way, to examine or draw into question, determine or dispose of the lands, tenements, hereditaments, goods or chattels of any of the subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice and by the ordinary course of law."

The effect of this statute was to differentiate the King in Council from the ordinary courts of justice of the realm of England and to make the King in Council an Extraordinary Court

for the judicial settlement of disputes arising outside of the realm of England but within the English empire. In the exercise of this extraordinary jurisdiction it acted according to the equity of the laws of England, inasmuch as all the Colonial charters provided that the Colonial law should be not inconsistent with the law of England.

In 1638, the people of the town of Windsor, Hartford and Wethersfield, in what is now Connecticut, without any charter from England, "associated and conjoined" themselves "as one public state or commonwealth." In their articles of "combination and confederation," they provided for two "General Assemblies or Courts" to be held annually and to be composed of deputies of the towns. The whole State was spoken of in the articles as a "Jurisdiction." A Governor and six Assistants were to be elected and were to have power "to administer justice according to the laws here established, and for want thereof according to the rule of the word of God." It was provided that the General Court should be "for the making of laws and any other public occasion which concerns the good of the Commonwealth,"—a power sufficiently broad to enable the General Court to adjust disputes

between the constituent towns and to make treaties with their neighbor "Commonwealths" or "Jurisdictions."

In the Massachusetts Bay "Body of Statutes" of 1641, the "Commonwealth" of Massachusetts Bay was spoken of as a "Jurisdiction."

In 1643, when England was distracted by the civil war, the Colonies of Massachusetts Bay, New Plymouth, Connecticut and New Haven found themselves in a position where they were obliged to defend themselves from external attack and where they were at the same time in danger of war among themselves unless they could find a peaceful way of settling their disputes. They accordingly entered into a Confederation, by the name of "The United Colonies of New England." One of the Articles of Confederation provided:

"If any of the Confederates shall hereafter break any of these present articles, or be any other way injurious to any of the other Jurisdictions, such breach of agreement, or injury, shall be duly considered and ordered by the Commissioners for the other Jurisdictions, that both peace and this present Confederation may be entirely preserved without violation."

Before tribunals organized according to this provision, several disputes between the Col-

onies regarding boundaries were heard and determined. The case of the greatest consequence which came before these tribunals, however, was that between Massachusetts and Connecticut involving the right of Connecticut to impose duties on the navigation of the Connecticut River, in consideration of the maintenance by Connecticut of a fort at the mouth of the river. The case was decided in favor of Connecticut and was twice afterwards argued on rehearings asked by Massachusetts. Retaliation by Massachusetts finally resulted in a free trade system among the Confederates.

On November 3rd, 1643, three months after the New England Confederation was formed, the Lords and Commons, who then constituted the legislature of England under a provisional government practically republican in form, passed an ordinance establishing a new commission with full jurisdiction over all the English colonies. The Earl of Warwick was named as president of the commission, and Sir Henry Vane, John Pym, and Oliver Cromwell were among the members. One of its first acts was to grant a charter to Providence Plantations, which had been excluded from the Confederation on account of the strong individualistic doctrine of the settlers there. In

this charter the commission asserted its jurisdiction to determine disputes between the Colonies by a clause which read:

"Always reserving to the said Earl and Commissioners, and their successors, power and authority to dispose the general government of that, as it stands in relation to the rest of the Plantations in America, as they shall conceive, from time to time, most conducive to the general good of the Plantations, the honor of his Majesty, and the service of the State."

This commission, and its successor, the Committee of the Council of State for the Plantations, established when the English Commonwealth was instituted in 1649, permitted the United Colonies of New England to operate under their Articles of Confederation in subordination to the supreme power of the Commonwealth; and the Confederation continued in full vigor until the restoration of Charles II in 1660.

Under Cromwell, provision was made for determining the economic as well as the political relations of the Colonies by the institution of a Council of Trade, which was subordinate to the Committee of the Council of State for the Plantations. The Council of Trade acted

as a tribunal of first instance or a master in chancery, deciding routine matters and reserving the more important questions for the decision of the Committee of the Council of State for the Plantations and later of the Lord Protector in Council. From the beginning the Colonies had had the practice of sending commissioners to England or employing agents there to represent their interests in special emergencies before the King in Council. Massachusetts Bay, in 1637, had sent agents to represent it before the Laud Commission. This now began to become a settled custom, but it was fifty years after this time before the system came into full operation.

The passage of the Navigation Act in 1651, by the Parliament of the Commonwealth, brought up in acute form the question how the relations between England and the Colonies, and between the Colonies individually, ought to be determined. The object of this Act was to restrict the trade of the Colonies to the English market, and to place the whole carrying trade in the hands of English shipowners, thus giving England the monopoly of the trade of the Colonies. This action was acquiesced in by some of the Colonies, as a reasonable regulation of their foreign and

intercolonial trade necessitated by the circumstances. Others regarded it as evidencing the adoption by England of a theory of absolute power over the Colonies. It appeared to them to show that England had accepted the "Colonial Pact" theory invented by Richelieu a few years before, by which the claim of France to absolute power over her Colonies had been concealed under the pretext that there existed a Fundamental Compact between France and her Colonies by the terms of which the Colonies were assumed to have granted to France a monopoly of their trade in consideration of her assumed promise to protect them. On this theory, there was no occasion for a tribunal in England having jurisdiction over the Colonies. They had no rights against England, and were bound implicitly to obey the edicts of England. All the Colonies moreover objected to Acts of Parliament which purported to affect them, because it was evident that Parliament was not organized as a tribunal but as a representative of territorial districts in England. Upon the passage of the Navigation Act in 1651, Virginia revolted from the Commonwealth, claiming that the Act was a violation of the principle that the subjection of the American Colonies was to a proper tri-

bunal in England, and that the Colonies were subject to no legislatures except their own. Commissioners were sent by the Commonwealth Parliament to Virginia, who, under instructions, succeeded in settling the controversy by agreeing to Articles of Capitulation in which it was declared that Virginia (and, by necessary implication, all the other Colonies) owed only "due obedience and subjection to the Commonwealth of England," and that the "submission and subscription" of Virginia was a "voluntary act" on her part.

This great constitutional settlement between the Commonwealth of England and the American Colonies made the validity of the Navigation Act and of all other governmental acts of England relating to the Colonies depend upon whether or not they were reasonable and just under the circumstances, the Colonies having the right, at least in extreme cases, to determine the question of reasonableness and justness as well as England. In case of deadlock, there was no solution except through agreement in conference, or through arbitration, or through judicial decision by the King in Council, or through war. The relations between England and the Colonies and between the Colonies individually, under this settlement,

bore a close resemblance to those of states which are subject to the principles of international law.

With the restoration of Charles II in 1660 and the cessation of the domestic troubles of England, a systematic reorganization of the American Colonies was begun. As the system was developed during the century succeeding his accession, three general objects were pursued—the establishing of direct and close communication between each Colony and England; the directing of the trade of each towards England as the common market; and the maintaining of a permanent political connection between all parts of the empire. In pursuance of the first object the Dutch and Swedes were dislodged from the regions about the Hudson and Delaware Rivers, and the whole sea coast from what is now the southern boundary of Georgia to what is now the northeastern boundary of Maine was divided so that ultimately there were formed twelve Colonies, each having a good harbor from which ships could sail direct to England. In pursuance of the second object, the Navigation Act was continued and more stringent provisions were made for carrying it into effect, it being the general understanding, at least in the Colonies,

that this Act was an exceptional measure necessitated by the circumstances and dependent for its validity upon its reasonableness and necessity and upon their consent or acquiescence. In pursuance of the third object, the general jurisdiction of the relations of the Colonies was placed in charge of the King advised by a standing committee of the Privy Council known as the Committee of the Privy Council for Plantation Affairs, which was itself assisted by a subordinate judicial and administrative body of experts known as the Board of Commissioners for Trade and Plantations. This subordinate tribunal was appointed by the King in Council, and was specially concerned with economic questions, though it appears to have had a general jurisdiction. Important matters, particularly those involving diplomatic and political action with reference to the Colonies, were referred by this subordinate council to the Committee of the Privy Council for Plantation Affairs.

During the last years of the reign of Charles II and during the reign of James II this system of managing the relations with the Colonies was rendered unpopular in America by the arbitrary methods pursued, and particularly by the attempts of these monarchs to

centralize the system by the abolition of the corporate and proprietary charters of the Colonies and by the substitution for them of charters converting each Colony into a royal province, ruled by a Governor and Council appointed by the King. It seems probable that it was intended by them to form the Colonies into two viceroyalties—a northern and a southern—composed of provinces; the dividing line being that of 40°. When this plan was abandoned, various schemes for uniting the Colonies under a Governor General and a General Council appointed by the King in Council were agitated. William Penn, who in 1693 had published a plan for uniting Europe under a general government, proposed in 1697 to the English Government a plan for uniting the American Continental Colonies under a general government, subject to the supremacy of England. All plans for a union, however, failed, and until shortly before the American Revolution, the King in Council was the bond of union between England and the Colonies and between each Colony and all the others.

In 1700, the Commissioners for Trade and Plantations recommended that the practice of having agents in London be adopted by all the Colonies, and most of them thereafter adopted

the practice. The Colony agents occupied a relationship to Parliament somewhat similar to that of a delegate without power to speak or vote, or even to sit in the body, yet recognized by committees and in some cases called to the bar of the House of Commons to present the views of the Colonies. As respects the King in Council, their relationship was semi-diplomatic. As respects the Commissioners for Trade and Plantations, their position was essentially that of attorneys in England for the Colonies. Thus the whole governmental establishment of Great Britain stood in the relation of a supreme tribunal for the Colonies rather than a supreme legislature. Even Acts of Parliament were regarded as deriving their binding force from the acquiescence of the Colonies in them as necessary and just regulations for the common defence and general welfare.

The merger of England and Scotland in 1707, by which was formed the United Kingdom of Great Britain, brought various new ideas and influences to bear upon the relations between the Colonies and the mother country; but under the British empire the system whereby the King in Council acted as the bond of union was not essentially changed.

During the decade between 1730 and 1740, the system probably obtained its highest degree of perfection and its greatest success.

From about the year 1700 until shortly before the Revolution, the King in Council was both the supreme political tribunal of the empire and the supreme court of appeals of the empire. Besides the political committee already mentioned—the Committee of the Privy Council for Plantation Affairs,—there existed a judicial committee known as the Committee for Appeals. This latter committee had jurisdiction of appeals from the supreme courts of the Colonies. As appears from the statement of Lord Mansfield in the great case of Campbell v. Hall, decided in the King's Bench in 1774, it was the law that the King in Council could do nothing as respects the Colonies which was "contrary to fundamental principles"; from which it appears that it was the duty of the King in Council, in exercising jurisdiction over the Colonies, to recognize and regard, both in its political and its judicial action, the fundamental rights of the individual to life, liberty and property. Disputes between the Colonies, or in which a Colony or Great Britain was involved, were within the jurisdiction of the King advised by the Committee of

the Privy Council for Plantation Affairs, who arranged the method of trial in each case.

Several cases involving the boundaries between Colonies were settled between 1700 and 1770 by the political committee of the King in Council. One of these was that which arose in 1736 between Maryland and Pennsylvania in regard to a part of the region which is now Delaware. After much trouble between the border populations and many ineffectual attempts of the local governments to adjust the matter, the dispute came to the King in Council in 1750. As it appeared that the controversy arose out of an agreement between the Lords Proprietors, who were within the jurisdiction of the English courts by reason of their residence in England, the King in Council acquiesced in a plan whereby a suit in chancery for specific performance of the agreement and for the settlement of boundaries and the quieting of title was to be brought by the Proprietor of Pennsylvania against the Proprietor of Maryland in the English court of chancery, the right to jurisdiction over the region in question to be settled by order in council according to the decision. The suit, by the title of Penn v. Lord Baltimore, was accordingly brought, and was heard and adjudicated by Lord Chancellor

Hardwicke. Upon report of the decision of the court of chancery to the King in Council, an order in council was made in conformity with the decision, establishing the right of Pennsylvania to jurisdiction over the region in dispute.

In granting a motion of the defendant to make the Attorney General a party, Lord Hardwicke said (Ridgeway, 332):

"This is a question between feudatory Lords, Proprietors of Provinces, and concerning not only their private interest, but the rights of government and the rights of private persons. . . . The disputes of private persons in the Provinces are determined in the courts of the Province, on which a writ of error by way of appeal lies before the King in Council. Therefore questions between Proprietary Lords, in analogy to the ancient law of the Marches, must be determined before the King in Council. . . .

"If . . . Proprietary Lords are to alter the bounds of their Provinces without the privity and consent of the Crown, by whom alone such powers are vested, directed and disposed, consider the inconveniences that must follow; this is no less than transferring lands into different jurisdictions, legislations, etc.,

you subject the people to different government, different assemblies, laws, courts, taxes, etc., to which they never assented by their delegates."

Delivering the opinion on final hearing (1 Vesey Sr., 444), Lord Hardwicke said:

"This cause [is] for the determination of the right and boundaries of two great Provincial Governments and three Counties; of a nature worthy the judicature of a Roman Senate rather than of a single Judge; and my consolation is, that if I should err in my judgment, there is a judicature equal in dignity to a Roman Senate that will correct it. . .

"It is certain that the original jurisdiction in cases of this kind relating to boundaries between provinces, the dominion and proprietary government, is in the King and Council; and it is rightly compared to the cases of the ancient Commotes and Lordships Marches in Wales; in which if a dispute is between private parties it must be tried in the Commotes or Lordships, but in those disputes where neither had jurisdiction over the other, it must be tried by the King and Council; and the King is to judge, though he might be a party; this question often arising between the Crown and one Lord Proprietor of a Province in America;

so in the case of the Marches it must be determined in the King's court, who is never considered as partial in these cases; it being the judgment of his judges in [the King's Bench] and chancery. So where before the King in Council the King is to judge, and is no more to be presumed partial in one case than in another."

Another case of disputed boundaries which came before the King in Council for settlement was that of New Hampshire against Massachusetts. There being in this case no Lords Proprietors, of whose persons the English courts might have jurisdiction, and no agreement,—the case arising under the Charters of the Colonies,—the King in Council ordered a reference of the case to a commission in America composed of twenty persons, who were to be the five eldest councillors of the Colonies of New York, New Jersey, Nova Scotia, and Rhode Island, any five being a quorum, and their decision being reviewable by the King in Council. The Massachusetts Assembly wished the reference to be to "wise disinterested persons" to be chosen equally by or in behalf of the parties, those in behalf of Massachusetts "to be chosen by the Assembly of that Province out of the neighboring gov-

ernments;" but this request was denied and the commissioners were named by order in council.

About the year 1755, the system began to break down. In part this was no doubt due to the recrudescence of autocratic and absolutist ideas throughout the European world. In part it was probably also due to the necessities of international trade. The close and continuous contact of British traders and government officials with the peoples of the Orient and the tropics who understood no governmental power which was not absolute, had led the British government to claim and assert absolute power over these peoples, and it doubtless appeared to British statesmen that to recognize the American Colonies as subject only to a jurisdiction on the part of Great Britain was inconsistent with the exercise of the absolute power which it seemed necessary to assert in dealing with Oriental and tropical peoples. However this may be, Great Britain about the year 1755 began to advance the claim that it had absolute power throughout the empire, with the right to monopolize the trade of all the subordinate parts and to tax them for the general defence and welfare; the excuse for the claim of absolute power being the assumed duty of Great Britain to protect

all parts of the empire. This system, called in France, as has been said, the system of *le Pacte Colonial,* was in England called "the Mercantile System."

The war between Great Britain and France for the ten years from 1753 to 1763, which was largely fought on American soil and in which British and American soldiers served side by side, delayed and concealed the carrying out of the new policy. The British and Americans fraternized and good feeling reigned. The acquisition of Canada by Great Britain as the result of the war, however, brought matters to a head. British America, instead of consisting of a row of seaboard colonies inhabited by British settlers, with direct communication from each by sea to Great Britain, became a great region into which, through the St. Lawrence and the Mississippi, French and Spanish influences had penetrated, and containing a great body of uncivilized aboriginal inhabitants. At one stroke, the old system of government was made impossible, and a new situation created which, as it seemed to British statesmen at least, could be met only by the exercise of absolute power.

Immediately a system of absolutism was put in force. By edict of the King in Council in

1763, the western bounds of the old Colonies were limited to the Allegheny Mountains, and the whole of Canada (which included the Northwest Territory) placed under the government of the Crown. In 1764, the Colonies were taxed by Act of Parliament for the general purposes of the empire, both internally by a Stamp Act and externally by tariff duties on goods imported into the Colonies. When the Stamp Act was repealed, Great Britain by a Declaratory Act of Parliament asserted its absolute power in the empire. By this Act, it was declared that the Parliament of Great Britain "had, hath and of right ought to have full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the Crown of Great Britain, in all cases whatsoever."

The Americans stood for the old system. They were willing to recognize Great Britain as having jurisdiction over the Colonies as free states, reserving their right of judgment, at least in extreme cases, for the protection of their honor and dignity and for their self-preservation. They acknowledged the supremacy of Great Britain in reasonably and justly regulating the common affairs of the states

of the empire, particularly in regulating the intercolonial commerce and the foreign commerce of the empire and of all its constituent states. They considered that this jurisdiction ought to be exercised by a properly constituted tribunal in Great Britain of which the King should be the head, and they were even willing to conform to acts of Parliament passed in the reasonable exercise of this jurisdiction; but they would not accept even a theoretical claim of absolute power over them, however benevolent might be the despotism.

The issue raised by the Stamp Act, the Declaratory Act, and the Tea Act, was whether Great Britain had legally unlimited power over the colonies as their supreme absolute legislature or whether it had a legally limited power—that is, a jurisdiction over them—as their supreme tribunal and supreme executive legislature. The Americans at first tried to find a legal limitation of the powers of Great Britain in the Colonial Charters and in the British Constitution, but failed to make out a complete case. The charters were acts of the British Crown and recognized the power of Parliament without mentioning conditions or limitations, and the only doctrine of the British Constitution which could be

applied was that which asserted the injustice of taxation without representation—a doctrine which had in fact no application, because the Americans refused to be represented in a Parliament three thousand miles away and the British refused to allow such a representation.

Burke declared that the British empire of that day could not be constituted on the basis that Great Britain was essentially the supreme tribunal of the empire. No peace in the British empire was possible, he asserted, in his Speech on Conciliation, which was to "depend upon the juridical determination of perplexing questions, or the precise marking of the shadowy boundaries of a complex government." Great Britain, or Great Britain and the American Colonies integrated in a common representative Parliament, he asserted in his Speech on American Taxation, must of necessity exercise absolute power in the empire.

"The Parliament of Great Britain," he said, "sits at the head of her extensive empire in two capacities: One as the local legislature of this island, providing for all things at home immediately and by no other instrument than the executive power. The other, and I think her nobler capacity, is what I call her imperial character, in which, as from the throne of

Heaven, she superintends all the several inferior legislatures, and guides and controls them all without annihilating any. . . . . It is necessary to coerce the negligent, to restrain the violent, and to aid the weak and deficient, by the overruling plenitude of her power. She is never to intrude into the place of others, whilst they are equal to the common duties of their institution. But in order to enable Parliament to answer all these duties of provident and beneficent superintendence, her powers must be boundless. Such, sir, is my idea of the Constitution of the British empire as distinguished from the Constitution of Britain."

Burke's Speech on American Taxation closed the issue between Great Britain and America. From that moment the Continental Congress realized that they were called upon to decide a single momentous question—for Burke's plan of integrating Great Britain and the Colonies in a common representative Parliament was recognized as wholly impracticable—which was, whether the American Colonies should remain a part of the British empire on the understanding that Great Britain's power in the empire should thereafter be a power to command instead of a power to lead the Col-

onies in judgment, or whether they should declare themselves independent states and organize a political union independent of Great Britain and the British empire, in which their political ideas should be applied. If they took the latter course, it was necessary to state reasons which would appeal to the civilized world why Great Britain should not exercise absolute power in the empire, for the doctrine of Great Britain was the accepted doctrine of Europe. It was useless for such a purpose to talk of rights under the Colonial charters or under the British Constitution. It was necessary for them to base themselves on universal and fundamental principles and to commit the American States forever to the principles announced.

The Continental Congress was equal to the emergency. By the Declaration of Independence the American Colonies, as free, independent and united states, denied the claim of Great Britain to exercise absolute power in the British empire by asserting as a universal doctrine that supreme power in civilized society is limited by "the laws of nature and of nature's God," and that the function of all governments is to exercise jurisdiction under this law for the purpose of "securing" to each

individual those "unalienable rights" with which all men are endowed by their Creator for their self-protection and self-preservation—called in the Declaration the rights of "life, liberty and the pursuit of happiness"—and to which all are equally entitled by reason of the creation of all men by the common Creator. The binding force of all acts of government was held to arise from the exercise of this jurisdiction by the government and from the acquiescence of the governed, as beings endowed with reason and conscience, in the necessary and just judgments of the government, made for the purpose of securing the fundamental rights of the individual.

The Declaration of Independence was also a Declaration of Union. By laying down these principles of government, it had the negative effect of eliminating Great Britain as the supreme government of the colonies; by asserting the union of the American States to support these principles, it had the affirmative effect to commit the individual States and the United States to the principles of government which it declared.

Accepting the principle that the supreme power of government is the power to judge, it follows from the fact that each state must

necessarily have relations with its own citizens and with persons and states external to itself, that if a State assumes to finally determine these relations, it acts as a judge in its own cause. By the Declaration of Independence, the American Union acted as a judge in its own cause in declaring the political connection between Great Britain and the Colonies to have been dissolved by the acts of Great Britain. The Americans based their judgment on the ground that the action of Great Britain was in violation of the fundamental rights of the individual. Recognizing, however, the danger to the peace of the world from states acting as judges in their own causes, they declared, in the Declaration, that whenever states so act, "a decent respect to the opinions of mankind requires that they should declare the causes which impel them."

Before the Revolution, the American Colonies, though they regarded themselves as free states or commonwealths, were willing to have the disputes between themselves and with the mother country settled by the King in Council, though that was a tribunal of the mother country and was open to the objection that it was a judge in its own case. Because that tribunal that was composed of men trained in

political, social and economic judgment and was headed by the King, who was by his office bound to be impartial, they accepted and executed its adjudications.

Burke, in his Speech on Conciliation, said: "We are, indeed, in all disputes with the Colonies, by the necessity of things, the judge. But I confess that the character of judge in my own cause is a thing that frightens me. Instead of filling me with pride, I am exceedingly humbled by it. I cannot proceed with a stern, assured, judicial confidence, until I find myself in something more like a judicial character. I must have these hesitations as long as I am compelled to recollect that, in my little reading upon such contests as these, the sense of mankind has at least as often decided against the superior as the subordinate power."

The humility which Burke regarded as necessary in one who is called upon to be a judge in his own cause would seem to be as likely to create a bias in him favorable to his adversary as pride would create in favor of himself. The only reasonable means by which bias can be avoided by individuals, peoples or states, whether the judgment be required to be given in one's own cause or in the cause of others, would seem to be training

and education in judgment, and an appreciation of the truth which Burke stated, that every judgment will ultimately be reviewed by "the sense of mankind," which will "as often decide against the superior as the subordinate power."

Upon the promulgation of the Declaration of Independence the Congress regarded itself as the successor of the King in Council. Until the Articles of Confederation were adopted, it exercised the powers which had been exercised by the King in Council over the Colonies previous to the Declaration. By the Articles of Confederation, these powers were reduced to writing and given the sanction of a mutual agreement of the States. As the King in Council had been recognized as "the last resort, on appeal," in disputes between the Colonies, the Articles of Confederation made the Congress a tribunal of the same kind, for the same purpose, and authorized it to act, as the King in Council had done, by means of a tribunal instituted in each case under its auspices.

In the Constitution, the people of the United States and the States of the Union divided between the Congress, the President, and the Supreme Court the powers granted by the Articles of Confederation to the Congress of

the Confederation, and, in addition, granted to the Congress the power to legislate in execution of the powers granted to it. They also granted to Congress the power to regulate by legislation the interstate and foreign commerce of the United States. To the Supreme Court naturally fell the function of determining disputes between the States of the Union, and the remarkable provision was added that foreign States might avail themselves of the jurisdiction of the Supreme Court if they had disputes with States of the Union. This provision was perhaps suggested by the fact that the American Colonies, though holding themselves to be free states in some respects foreign to Great Britain, had appeared before the King in Council as plaintiffs and defendants and had found it an impartial tribunal, though it was a national tribunal of Great Britain. The Constitution preserved the dignity of the United States and of the States by recognizing their rights to act as judges in their own causes, if they saw proper, as respects claims of individuals against them. Inasmuch as the Supreme Court was granted only the "judicial power" of the United States, its jurisdiction was, it would seem, limited to the decision of cases which are of such a nature as to be

capable of judicial settlement. Opportunity was provided for settling disputes between States by conference or arbitration by the provision of the Constitution which recognized the right of the States to enter into treaties or contracts with each other by consent of the Congress; and if there be disputes between States of the Union which are not capable of judicial settlement, the States involved may, it would seem, establish in each case of dispute, by consent of Congress, a political tribunal for the settlement of the dispute.

It will have been noticed, in the course of this investigation of the process of the development of the American doctrine of jurisdiction of courts over States that the fundamental political belief of the people of the American colonies and of the United States has always been that there exists a supreme universal law governing the actions of States, which secures to each individual his right of self-protection and self-preservation, and that the actions of states, nations and empires, are void so far as they are inconsistent with the "securing" of these "unalienable rights." It may well be questioned whether it is not through this conception of a universal supreme law that there exists among the American people the concep-

tion of a constitutional law which is supreme over States, and which is formed by agreement of the people and States concerned to live in indissoluble union. If this constitutional law has its sole basis in agreement, there may be a question as to its supremacy and as to the indissolubility of the Union. An agreement which is supreme over those who agree to it, and which is indissoluble, is a self-contradiction. Indissolubility of an agreement, and its supremacy over those who agree to it, must depend upon some other fact than the agreement of the parties.

The theory that the supremacy of the Constitution of the United States arises from the agreement of the people and States of the United States was invoked in the Civil War as a reason for dividing the Union into two unions when the people of the two sections differed in their opinions concerning the nature of the Constitution which they desired. The Union was upheld by those who believed in the existence of this supreme universal law referred to in the Declaration of Independence which secures "the unalienable rights" of all men to "life, liberty and the pursuit of happiness." After the war, the Union was by the fourteenth amendment again expressly committed to the

maintenance of this law; which thus became the real bond of union between the people and States of the Union. By that amendment and the fifth amendment, the Supreme Court, in all cases brought before it, whether by or against States or persons, was authorized to hold invalid any act of any legislative body, of any executive or administrative official, or of any court,—whether of a State or of the United States,—which deprives any person of his life, liberty or property without due process of law. Under this authority the Supreme Court exercises a jurisdiction over States and over the United States similar to that which the ordinary courts of justice exercise over private individuals. It is a logical and reasonable ground for maintaining and preserving the Union that the Union is the ultimate protector and preserver of this law, and that in order to perform this function it must have a supremacy over the actions of constituent States to the extent necessary to enable it to perform the function.

The question therefore arises, whether a true international court can ever exist until the nations of the world recognize this supreme universal law. Until such recognition is made, the powers of any body of men

called an international court can, it would seem, never rise higher than a mere interpretation of treaties; for conventions are but joint treaties and supremacy of treaties or conventions over national law by agreement can of necessity exist only so long as the agreement exists, unless the agreement is itself the recognition of a supreme universal law. A court to interpret treaties would be useful, but it would be an instrumentality and adjunct of the states creating it, and would be bound by their agreements, even though such agreements might palpably deprive individuals of life, liberty or property without due process of law.

If it be the fact, as American beliefs and experience would seem to indicate, that the test of the international character of a court is not whether it is established by the nations, but whether it administers a law which is supreme over the nations, there is, it would seem, no objection to national courts having jurisdiction to settle disputes in which foreign states or semi-foreign states (now called colonies or dependencies) are involved with citizens or states of the nation. Once it is recognized that a national court may administer a law which is supreme over

states, there is no reason why, if the court is learned and impartial, it should not be resorted to by foreign states for the judicial settlement of their disputes. So also federal states or empires may form their own courts for the administration of this supreme law as between their own constituent states, and may provide for the resort of foreign states to these tribunals.

By the establishment of such national, federal or imperial courts having jurisdiction over states by administering this supreme universal law, the supreme international court —when one shall be established by agreement of the nations—will be safeguarded, as the Supreme Court of the United States is safeguarded by the fact that every court in the United States administers this universal supreme law. Under such an arrangement the Supreme Court becomes "the last resort, on appeal," in disputes between states, and has the benefit of the consideration and action of other courts.

Such an international supreme court would of course need to be safeguarded in every possible way, so that its attention might be invoked only when the sifting process has been carried to the last extremity and when

the final issues have been determined and the material facts on both sides have been stated in the most succinct form. During the colonial period, England and Great Britain found it necessary to have the King in Council assisted by a subordinate council to act as master in chancery or referee, and to investigate social and economic questions. It was also found necessary that the King in Council should have power to appoint commissioners for investigating facts at a distance from Great Britain and should have, indeed, all the powers necessary to make its jurisdiction effective. Such powers, it would seem, an international supreme court ought to have.

In view of the fact that states may represent the claims of their citizens against foreign states, the volume of business of a supreme international court will tend to be increasingly large, and it will become increasingly necessary as it has in the case of the Supreme Court of the United States, that the jurisdiction of such a court should, so far as possible, be limited to deciding questions which it has been impossible to decide by agreement or by resort to any other tribunal.

If it be the case, as it appears to be, that one of the functions of such an international

supreme court would be to administer this supreme universal law, it would follow that it ought to have jurisdiction, similar to that which the Supreme Court of the United States has under the Fourteenth Amendment, in cases where a citizen of the state complains against his own state for its violation of his fundamental rights as an individual. Jurisdiction of such cases, would, it would seem, be as useful for doing away with the necessity of civil war as would the jurisdiction of cases between states for doing away with the necessity of foreign war.

This examination of the development of the American doctrine of jurisdiction of courts over states will, it is hoped, have served to show that the Supreme Court of the United States exists not merely as a part of the Federal Union for the interpretation of the Constitution, but that it has a reason for its existence which appeals equally to all the nations of the world, in that it expounds and applies the supreme universal law securing the fundamental rights of the individual, which the Constitution recognizes and which binds all nations and peoples; and in that it upholds the fundamental rights of the states is the best means of upholding this law.

It would seem, therefore, that it is immaterial whether the nations of the world shall federate in the same way that the United States have federated or in any other way; or whether they shall remain substantially as they are at present. The close relationship of federal union under a general government may be too intimate for the separated and diverse nations of the world, and the most efficient bond of union may be this supreme universal law securing the fundamental rights of the individual against all governmental action, administered by the courts of all the nations, federal states and empires of the world, and in the last resort on appeal by an international supreme court established by the nations.

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George B. Cutten, Wolfville, N. S.
William R. Day, Ohio.
Jacob M. Dickinson, Washington, D. C.
Andrew S. Draper, New York.
Charles W. Eliot, Massachusetts.
Charles E. Fenner, Louisiana.
William Dudley Foulke, Indiana.
James Cardinal Gibbons, Maryland.
George Gray, Delaware.
Charles Noble Gregory, Iowa.
Peter S. Grosscup, Illinois.
Joseph F. Johnston, Alabama.
David Starr Jordan, California.
Harry Pratt Judson, Illinois.
William H. King, Utah.
George W. Kirchwey, New York.
Philander C. Knox, Washington, D. C.
Charles F. Libby, Maine.
Francis B. Loomis, Washington, D. C.
Horace H. Lurton, Tennessee.
R. McBride, Victoria, B. C.
Pablo Macedo, Mexico City, Mexico.
Charles Marcil, Ottawa, Ont.
Sidney E. Mezes, Texas.
S. C. Mitchell, South Carolina.
Francis G. Newlands, Nevada.
L. Oppenheim, Cambridge, England.
Thomas Nelson Page, Washington, D. C.
Walter H. Page, New York.
W. Peterson, Montreal.
Sir Thomas Raleigh, London, England.
Whitelaw Reid, London, England.
William Renwick Riddell, Toronto, Ont.
Uriah M. Rose, Arkansas.
A. C. Rutherford, Edmonton, Alberta.
Walter Scott, Regina, Saskatchewan.
Albert Shaw, New York.
Hoke Smith, Georgia.
Bishop Robert Strange, North Carolina.
Sir Charles Hibbert Tupper, Vancouver, B. C.
George Turner, Washington.
Charles R. Van Hise, Wisconsin.
Benjamin Ide Wheeler, California.
William Allen White, Kansas.
George G. Wilson, Rhode Island.
Prince de Cassano, Italy.

Publications of the American Society for Judicial Settlement of International Disputes—

1. The New Era of International Courts, by Simeon E. Baldwin. August, 1910.

2. The Necessity of a Permanent Tribunal, by Ernest Nys. November, 1910.

Supplement—The American Society for Judicial Settlement of International Disputes, by James Brown Scott. November, 1910.

3. The Importance of Judicial Settlement, by Elihu Root. February, 1911.

4. The Development of the American Doctrine of Jurisdiction of Courts Over States, by Alpheus H. Snow. May, 1911.

The Third National Peace Congress will be held in Baltimore, McCoy Hall, Johns Hopkins University, May 3-5, 1911, *under the joint auspices of all the leading societies in America devoted to the cause of the settlement of international disputes by means other than war. Noted men from all parts of the country will take part in the congress.*