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WITH AN INTRODUCTION

BY

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INTRODUCTION.

I. THE SUPREME COURT OF THE UNITED STATES.

I have chosen as the subject of these lectures a comparison between the Supreme Court of the United States and the Permanent Court of International Justice. I have made this choice because such a comparison appears to me to afford an object-lesson of supreme value at the present moment.

Owing to our insularity, which is both a virtue and a vice, we are, perhaps, the most prone of all nations to ignore or reject the experience of other communities, even if they happen to be of our own race.

Now the origin and history of the Supreme Court present us with a study in international organisation which has proved most fruitful in the various attempts which have been made to establish International Arbitral Tribunals and International Courts of Justice. It is a study from which one rises with a confident belief in the future success of the Permanent Court of International Justice.

To appreciate the real significance of the Supreme Court you must examine the Constitution of the United States, and to understand that Constitution you must bear in mind the Constitutions of the New England States prior to the Declaration of Independence; the various schemes for union, such as "the New England Confederation" of 1643, William Penn's "Plan for a Union," 1754, and his "Sketch of Articles of Confederation" read

before the Congress of July 21, 1775; the causes which led up to the War of Independence; the Declaration itself; the Articles of Confederation of November 17, 1777, whereby the United States became for the first time a Confederation in law as well as in fact; and the Debates of the Philadelphia Convention of 1787, which framed the present Federal Constitution.

The Confederation of 1777 was a true confederation of sovereign independent States, united for certain specific purposes, and for such purposes only. It was a Union of States. It was not intended to be a super-State. There was apparently no intention to create a nation.

Its defects soon became apparent. The principal defect was the lack of any permanent judicial tribunal with jurisdiction to settle disputes between the States themselves, or between the central Government and any one State. The machinery by which, under Art. IX., Commissions *ad hoc* might be appointed by Congress, proved quite inadequate. Only one such Commission was appointed, and only one case decided. In the boundary dispute between Pennsylvania and Connecticut blood had flowed in 1781.

A dispute between the States of Virginia and Maryland relating to inland navigation produced a conference at Annapolis in 1786. Hamilton, one of the first to recognise the real difficulty, seized the occasion to convert the assembly into a constitutional conference, the Philadelphia Conference, which in May, 1787, adopted the new Constitution, whereby the old Confederation became a Federal Union with divided sovereignty.

This sovereignty was defined by Chief Justice Marshall in *McCullock* v. *Maryland* (4 Wheaton, 316), decided in 1819, when he said: "The powers of sovereignty are divided between the Government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

This principle of divided sovereignty has been clearly recognised in our own Imperial Constitution, and has received judicial interpretation. It has been held, for instance, by the Judicial Committee of the Privy Council that the powers possessed by the Legislatures of the Canadian Provinces under sect. 92 of the British North America Act were not in any sense to be

exercised by delegation, but that the Provincial Legislatures had authority as plenary and as ample within the limits prescribed as the Imperial Parliament in the plenitude of its powers possessed and could bestow (see *Hodge* v. *The Queen*, 9 App. Cas. 117).

Whether the State delegates had any intention of creating a nation may be doubted. As Lord Bryce has observed, there were elements of unity; there were elements of diversity. James Wilson said in the Philadelphia Convention: "By adopting this Constitution we shall become a nation: we are not one now"; and the prediction has been amply fulfilled.

You will observe that the Constitution commences with the words: "We, the People of the United States, do ordain and establish this Constitution." The original words as approved by Congress were: "We, the People of the United States of New Hampshire, Massachusetts, Rhode Island, etc."; and these words were only changed by the committee on style. Moreover, the Constitution was not submitted to the American people. It was submitted to the States, and was ratified by the peoples of the States.

This is clearly expressed by James Monroe soon after the event, when he said that, in wresting the power, or what is called the sovereignty, from the Crown, it passed directly to the people, not to the people of all the colonies in the aggregate, but to the people of each colony—to thirteen distinct communities, and not to one.

This distinction was recognised by Hamilton, Madison, and others at the time. In *McCullock* v. *Maryland* (4 Wheaton, 316) Chief Justice Marshall said: "No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass."

But from the very birth of the Constitution a ceaseless conflict has existed between the Federal Government and the States Governments.

We see two schools of thought struggling for the mastery. The one, believing in a strong national authority, welcomed centralisation as a symptom of strength in the national life. The other, believing in local self-government and State autonomy, regarded with apprehension the attempted supersession of State autonomy by the Federal Government, with its resulting over-concentration

of political action. Both schools were, and still are, strongly represented. Nevertheless, the growth of national sentiment is undoubtedly tending to substitute unity for union. The American people have begun to regard themselves as "one common mass," and it remains to be seen whether the preservation of local autonomy will be found in the awakened conscience, broader views, and higher sense of responsibility to the general public of the States in their effective legislation, conforming more closely to the general moral sense of the nation and in the more vigorous exercise of their authority for the general public good. I am inclined to think that *pari passu* with the growth of centralisation an enlightened provincialism will be substituted for a narrow parochialism.

Our immediate concern, however, is with the position of the Supreme Court in the Constitution. Familiar as you doubtless are with the structure of the Constitution, it is nevertheless desirable to refer briefly to its constituent parts.

By the Constitution all the legislative powers are vested in Congress, consisting of a House of Representatives, representing the people of the States according to population; and of a Senate, representing the States, or the people within the States, and in which each State is represented by two Senators, acting as independent members, and not as delegates upon instructions.

The powers granted to Congress are in general terms. Congress is free to exercise its discretion in the choice of means to carry out its powers so as "to provide for the common defence and general welfare of the United States," and within the express or implied grant of powers for this primary object "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this Constitution in the Government of the United States or in any Department or Offices thereof."

The chief executive power is vested in the President, who is elected by the people for a term of four years. Before taking office the President takes an oath to "faithfully execute the office of President," and "to the best of his judgment and power, preserve, protect and defend the Constitution of the United States." His powers are very great, and are said to be greater than those of any constitutional monarch.