mail ships with their mail-bags on board, coming from or going to neutral or Allied countries, without any more concern about the inviolability of the dispatches and correspondence they carried than about the lives of the inoffensive persons aboard the ships.

It has not come to the knowledge of the allied governments that any protest touching postal correspondence was ever addressed to the Imperial Governments.

Is not our Government in this matter straining at a gnat and swallowing a camel?

AMOS S. HERSHEY.

THE CASE OF VIRGINIA *v.* WEST VIRGINIA

On June 14, 1915, in the case of Virginia *v.* West Virginia (238 U. S. 202), the Supreme Court of the United States awarded Virginia the sum of $12,393,929.50, to be paid by West Virginia with interest thereon at the rate of five per centum from July 1, 1915, until paid. In this most recent decision of the Supreme Court in this long drawn-out and carefully argued case, decided on June 12, 1916, Virginia petitioned a writ of execution against West Virginia "on the ground that such relief is necessary as the latter has taken no steps whatever to provide for the payment of the decree." West Virginia resisted the petition for three reasons, which are thus stated by Chief Justice White, delivering the opinion of the Supreme Court:

(1) Because the State of West Virginia, within herself, has no power to pay the judgment in question, except through the legislative department of her government, and she should be given an opportunity to accept and abide by the decision of this court, and, in the due and ordinary course, to make provision for its satisfaction, before any steps looking to her compulsion be taken; and to issue an execution at this time would deprive her of such opportunity, because her legislature has not met since the rendition of said judgment, and will not again meet in regular session until the second Wednesday in January, 1917, and the members of that body have not yet been chosen; (2) because presumptively the State of West Virginia has no property subject to execution; and (3) because although the Constitution imposes upon this court the duty, and grants it full power, to consider controversies between States and therefore authority to render the decree in question, yet with the grant of jurisdiction there was conferred no authority whatever to enforce a money judgment against a State if in the exercise of jurisdiction such a judgment was entered.

These objections on the part of West Virginia are of a kind to give the jurist pause, although they do not seem to impress the layman, who believes that a court cannot be a court unless it has power to com-

pel the appearance of a State before its bar, and unless it has power to execute its judgments against a State by force. The Supreme Court, however, is not composed of laymen, as its carefully considered and wonderfully brief judgment in this case shows:

> Without going further [Chief Justice White says, speaking for the court, after stating the three objections of West Virginia], we are of the opinion that the first ground furnishes adequate reason for not granting the motion at this time.
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> The prayer for the issue of a writ of execution is therefore denied without prejudice to the renewal of the same after the next session of the legislature of the State of West Virginia has met and had a reasonable opportunity to provide for the payment of the judgment.

The procedure of the Supreme Court in the matter of suits between states is as important as it is interesting, and it is believed that it might be of more than passing interest to note some of the cases of suits between states and the practice and procedure of the Supreme Court in such matters.

Article III, Section 2, of the Constitution extends the judicial power of the United States "to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; * * * to controversies between two or more States," and the Supreme Court is vested with original jurisdiction in cases "in which a State shall be a party." The Supreme Court has, therefore, jurisdiction of a case by a State against another State of the American Union, but as a court it can merely take jurisdiction of a case involving law or equity. It naturally and necessarily follows that the court must determine whether the case presented to it is one involving law or equity; that is to say, the Supreme Court is obliged to determine upon the threshhold whether or not the case is justiciable.

The right of a court so to do seems to be inherent and to be equally well settled in international as in national law. Thus, Lord Loughborough held that the Mixed Commission, organized under Article 7 of the Jay Treaty, must determine its jurisdiction, stating "that the doubt respecting the authority of the commissioners to settle their own jurisdiction was absurd; and that they must necessarily decide upon cases being within, or without, their competency." (Moore's International Abitrations, Vol. I, p. 327.) The question arose and was elaborately considered in the case of Rhode Island *v.* Massachusetts (12 Peters 657), decided in 1838, in which Massachusetts objected to the

jurisdiction of the court on the ground that the question (one of boundary) involved sovereignty, which was a political, not a judicial, question. In delivering the judgment of the court, Mr. Justice Baldwin said:

> Before we can proceed in this cause, we must, therefore, inquire whether we can hear and determine the matters in controversy between the parties, who are two States of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes.
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> * * * Those States * * * adopted the constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more States. By the Constitution, it was ordained, that this judicial power, in cases where a State was a party, should be exercised by this court as one of original jurisdiction. The States waived their exemption from judicial power (6 Wheat. 378, 380), as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified.

As to the distinction between a political and a judicial question, Mr. Justice Baldwin, speaking for the court, said:

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

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

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

It thus appears from this that the Supreme Court of the United States, invested by the Constitution with original jurisdiction in suits between States of the Union, passes upon and determines its competency, and in so doing necessarily decides whether the particular question submitted to it is properly within its jurisdiction; that is to say, whether it is justiciable, in the sense that it involves law or equity.

If the States in controversy accept the jurisdiction of the court and appear by counsel, the case takes the usual course, resulting in a judgment for plaintiff or defendant. The question, however, early arose, how the defendant State should be summoned before the court, whether its presence could be compelled or whether, in its absence, the plaintiff could present his case *ex parte* and judgment be rendered by default.

In the case of New Jersey *v.* New York (3 Peters 461), decided by the Supreme Court in 1830, the State of New York did not appear and the State of New Jersey asked for a *subpœna* to be issued against New York to appear by counsel and argue the question. Chief Justice Marshall, delivering the opinion of the court, said:

As no one appears to argue the motion on the part of the State of New York, and the precedent for granting the process has been established upon very grave and solemn argument, in the case of Chisholm *v.* State of Georgia, 2 Dall. 419, and Grayson *v.* State of Virginia, 3 *Ibid.*, 320, the court do not think it proper to require an *ex parte* argument in favor of their authority to grant the *subpœna*, but will follow the precedent heretofore established. The court are the more disposed to adopt this

course, as the State of New York will still be at liberty to contest the proceeding, at a future time, in the course of the cause, if it shall choose to insist upon the objection.

This case decided that the plaintiff was entitled to a *subpœna* against the defendant State. Should the defendant State, however, refuse to appear, does the court compel the appearance of the defendant or does the court allow the plaintiff to proceed *ex parte* in the absence of the defendant?

This situation arose in a later stage of the case of New Jersey *v.* New York (5 Peters 284), decided by the Supreme Court in 1831. In this very important case Chief Justice Marshall considered the suits which had already been entertained between State and State and summarized the procedure, stating that service of process of the court upon governor and Attorney General of the State sixty days before the return day of the process is sufficient service, and that upon failure of the defendant State to appear and to litigate the case after proof of such service, the court would allow the plaintiff to proceed *ex parte* in the absence of the defendant. Thus, Chief Justice Marshall said, speaking for the court:

> It has, then, been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing acts of Congress. The rule respecting the process, the persons on whom it is to be served, and the time of service, are fixed. The course of the court on the failure of the State to appear, after the due service of process, has been also prescribed.
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> In this case, the *subpœna* has been served, as is required by the rule. The complainant, according to the practice of the court, and according to the general order made in the case of Grayson *v.* Commonwealth of Virginia has a right to proceed *ex parte;* and the court will make an order to that effect, that the cause may be prepared for a final hearing. If, upon being served with a copy of such order, the defendant shall still fail to appear, or to show cause to the contrary, this court will, as soon thereafter as the cause shall be prepared by the complainant, proceed to a final hearing and decision thereof. But inasmuch as no final decree has been pronounced or judgment rendered in any suit heretofore instituted in this court against a State, the question of proceeding to a final decree will be considered as not conclusively settled, until the cause shall come on to be heard in chief.

The plaintiff may, however, prefer to have the defendant State appear by appropriate counsel and to have the case litigated in its presence. The question arises whether coercive measures will be used against the defendant State in order to compel its appearance. This situation arose in the case of Massachusetts *v.* Rhode Island (12 Peters 755), decided in 1838. In the case of Rhode Island *v.* Massachusetts (12 Peters 655),

already referred to, Massachusetts appeared by counsel to deny the jurisdiction of the court. After the decision in favor of accepting jurisdiction, Daniel Webster, who had argued the case for Massachusetts, moved the court "for leave to withdraw the plea filed on the part of that State; and also to withdraw the appearance heretofore entered for the State." In delivering the opinion of the court, Mr. Justice Thompson considered the procedure in cases of this kind, and showed the successive steps by which that procedure had been moulded by the court, after which he thus proceeded:

> By such proceedings, therefore, showing progressive stages in cases towards a final hearing, and in accordance with this course of practice; the court, in the case of New Jersey *v.* New York [5 Pet. 287], adopted the course prescribed by the general order made in the case of Grayson *v.* Commonwealth of Virginia [3 Dall. 320]; and entered a rule, that the *subpœna* having been returned, executed sixty days before the return-day thereof, and the defendant having failed to appear, it is decreed and ordered, that the complainant be at liberty to proceed *ex parte;* and that unless the defendant, on being served with a copy of this decree, shall appear and answer the bill of the complainant, the court will proceed to hear the cause on the part of the complainant, and decree on the matter of the said bill. *So that the practice seems to be well settled, that in suits against a State, if the State shall refuse or neglect to appear, upon due service of process, no coercive measure will be taken to compel appearance; but the complainant, or plaintiff, will be allowed to proceed ex parte.*
>
> If, upon this view of the case, the counsel for the State of Massachusetts shall elect to withdraw the appearance heretofore entered, leave will accordingly be given; and the State of Rhode Island may proceed *ex parte.* And if the appearance is not withdrawn, as no testimony has been taken, we shall allow the parties to withdraw or amend the pleadings; under such order as the court shall hereafter make.

It thus appears that the defendant State is summoned in order that it may know the case in which it is expected to appear and to contest, but that if it fails to appear, or if it appears and asks that its appearance be withdrawn, the case will proceed against it in its absence; and its appearance may even be withdrawn, because appearance seems to be voluntary. The question next arises as to the procedure to be followed in the trial and disposition of the case.

In a later stage of the case of Rhode Island *v.* Massachusetts (14 Peters 210), decided by the Supreme Court in 1840, Chief Justice Taney, speaking for the court, discussed the question of procedure and stated it to be as follows:

> The case to be determined is one of peculiar character, and altogether unknown in the ordinary course of judicial proceedings. It is a question of boundary between two sovereign states, litigated in a court of justice; and we have no precedents to

guide us in the forms and modes of proceedings, by which a controversy of this description can, most conveniently, and with justice to the parties, be brought to a final hearing. The subject was, however, fully considered at January term 1838, when a motion was made by the defendant to dismiss this bill. Upon that occasion, the court determined to frame their proceedings according to those which had been adopted in the English courts, in cases most analogous to this, when the boundaries of great political bodies had been brought into question. And acting upon this principle, it was then decided, that the rules and practice of the court of chancery should govern in conducting this suit to a final issue. The reasoning upon which that decision was founded, is fully stated in the opinion then delivered; and upon reëxamining the subject, we are quite satisfied as to the correctness of this decision (12 Peters 735, 739).

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

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

Finally, the question arises, whether a decision of the Supreme Court in the case of a suit between States will be executed by force? This question arose and was elaborately considered by the Supreme Court in a case involving interstate rendition under the Constitution and Act

of Congress of 1793 prescribing procedure. Chief Justice Taney, speaking for a unanimous court, said:

> It [the Act of 1793] does not purport to give authority to the State Executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which the State authority is bound to perform. And when it speaks of the duty of the Governor, it evidently points to the duty imposed by the Constitution in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the Act of 1793.
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> And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well-being in their internal concerns, as well as members of the Union. Hence the use of the words ordinarily employed when an undoubted obligation is required to be performed, "it shall be his duty."
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> But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him. (Kentucky *v.* Dennison, 24 Howard 66.)

It thus appears that the Supreme Court of the United States has original jurisdiction in suits between States of the American Union; that the causes in dispute shall involve law or equity; that the court necessarily passes upon its competence and decides whether or not the particular case be within its jurisdiction, that is to say, that it involves law or equity; that upon assuming jurisdiction a *subpœna* will be issued in behalf of the complaining State against the defendant State; that upon failure of the defendant to appear the court will retain jurisdiction of the case and allow the plaintiff to continue the case *ex parte;* that the defendant, having appeared, may withdraw its appearance; that the presence of the defendant State will not be compelled; that the procedure appropriate between individuals will be modified by the court in such a way as to afford the States in litigation full opportunity to have the case decided on its merits; that in the absence of the defendant judgment will be rendered by default; and finally, that the judgment against the State is not subject to execution by force, as is the case in disputes between individuals.

The decision of the Supreme Court in the long drawn-out controversy between Virginia and West Virginia will be awaited with no ordinary

interest, as it involves a question of very great importance in that due process of law which does and must exist between the States, if justice is to be administered through courts of justice.

JAMES BROWN SCOTT.

THE VON IGEL CASE

The von Igel case raises certain interesting questions of diplomatic privilege, the facts publicly reported being as follows:

In April last Herr Wolf von Igel, former secretary of Captain von Papen, was arrested in his New York office and his papers seized. These were said to contain evidence of their owners' complicity in conspiracies against the neutrality of the United States, along with the revelation of others implicated with him. Copies were made of some or all of these. Against this action Count Bernstorff protested, claiming von Igel to be an attaché of the German Embassy and the papers therefore Embassy documents privileged from seizure.

The Department of State replied that the actions complained of were committed before von Igel became connected with the German Embassy. As to the papers, von Bernstorff was asked to identify what belonged to the Embassy. This request was thought to be an embarrassing one, since copies were kept and responsibility for unfriendly acts might thus be held to be confessed. The request was refused.

Assuming that the facts are correctly stated, the questions at issue appear to be:

1. Does subsequent connection with a foreign embassy or legation wipe out the liability for acts previously committed?

2. May a foreign diplomatic agent claim at will any papers as belonging to his Government without identification and proof?

3. In the case cited above, if the papers were surrendered, could copies be properly kept?

4. Is there any law paramount to the right of diplomatic immunity?

Taking up these questions *seriatim*, we remark that from the moment that von Igel was certified to as a member of the German Embassy staff, his immunities became operative and his papers became inviolable. All this is a question of record. The object of this immunity is to add to his serviceability, not to screen him from the consequences of illegal acts. It is inconceiveable that a man should be taken into the service