strife," and that "the enlightened opinion of the world has long realized that this is a field in which international action is necessary."[11] On May 29, 1934, Mr. Norman Davis stated to the General Committee of the Disarmament Conference that the United States was willing to "work out, by international agreement, an effective system for the regulation of the manufacture of and traffic in arms and munitions of war."[12] This was followed on June 15, 1934, by the submission by the American Delegation of a memorandum containing suggestions for the assertion of "national responsibility for the manufacture of and traffic in arms," and for the establishment of a system of "general licenses for manufacture."[13] This memorandum has led to substantial progress in the effort to deal with the problems of manufacture by international action.

Here, then, is a situation where an erroneous view of the constitutional powers of the Government of the United States with respect to the making of treaties has been clearly and unmistakably abandoned and corrected. It is unfortunate that for a period of five years the assertion of that view obstructed American participation in international coöperation. It is fortunate, however, especially when the United States has accepted an invitation to become a member of the International Labor Organization, that our position has been set right on this problem. The whole history suggests that there is but one course for the Department of State to pursue: it should proceed to make the treaties which the United States desires and needs, leaving to other agencies the assertion of the constitutional limitations, if any, which may be found to exist.

MANLEY O. HUDSON

THE PRINCIPALITY OF MONACO *v.* THE STATE OF MISSISSIPPI

By its decision in the case of the Principality of Monaco *v.* The State of Mississippi, rendered May 21, 1934,[1] the Supreme Court has clearly and unmistakably denied its jurisdiction to a foreign State to sue a State of the Union under Section II of Article 3 of the Constitution. The Principality of Monaco sought to recover upon repudiated bonds of Mississippi, relying upon a set of facts not unlike those in South Dakota *v.* North Carolina (192 U. S. 286), in which the court rendered a judgment against North Carolina. This exercise of the original jurisdiction of the Supreme Court by which one of the States of the Union may sue another involves "a distinct and essential principle of the constitutional plan which provided means for the judicial settlement of controversies between States of the Union, a principle which necessarily operates regardless of the consent of the defendant State."

[11] Department of State Press Releases, No. 242, p. 293.

[12] League of Nations Document, Conf. D./C.G./P.V. 82.

[13] *Id.*, Conf. D./C.G. 171.

[1] Printed in the last number of this JOURNAL, p. 576. See editorial comment in that number, p. 527.

A suit brought by a foreign State, however, says Mr. Chief Justice Hughes in his opinion (to which, be it noted, there was no dissent), against a State of the Union without the consent of the latter was no part of the "constitutional plan." It follows, therefore, (a) that such a suit cannot be instituted without the consent of the State involved and (b) that, as such consent would amount to "an agreement or compact" with a foreign Power, the consent of Congress would be necessary under Article I, Section 10, of the Constitution. As such consent would be of the utmost improbability, the right of a foreign State to sue a State of the Union in the Supreme Court of the United States is now fully and effectually denied.

It seems strange that so long a time should have elapsed before the exact question was presented for determination by the Supreme Court. Ever since Cherokee Nation *v.* Georgia [2], it has been assumed by most commentators that the jurisdiction was exercisable. Willoughby [3] stands almost alone in doubt. The major premise in Cherokee Nation *v.* Georgia was that the Constitution provided for such jurisdiction. It was upon this theory that the bill of Cherokee Nation was drawn. Marshall addressed himself squarely to the question as to whether Cherokee Nation was a foreign and independent State and found it to be "a domestic, dependent nation," and, being such, it could not maintain an action against the State of Georgia. The dissenting opinion of Thompson, in which Story concurred, found the Cherokee Nation to be a foreign State within the sense and meaning of the Constitution, and constituting "a competent party to maintain a suit against the State of Georgia." In other words, the Supreme Court decided as a judicial question that the Cherokee Nation was not a foreign State, but the justices were in agreement upon the major premise, to wit, that the Supreme Court had original jurisdiction over controversies between a State and foreign States. The question of jurisdiction is, of course, wholly judicial, and in Cherokee Nation *v.* Georgia was admitted. The elements underlying the decision of the court and the dissenting opinion were essentially political. Much of the muddy thinking which has resulted proceeds from the dubious start of the court in that famous case.

The clear and cogent exposition of the Chief Justice in the present case comes in as a draught of fresh pure air. Deciding squarely upon the question of jurisdiction, the confusion of judicial and political questions is eliminated. No doubt lurks in the mind of the court, and the decision is complete notice to the world upon a hitherto vexing question.

It is significant that the opinion turns back to determine the nature of the "constitutional plan" as regards the right of a foreign State to sue a State of the Union. Hamilton in *The Federalist* had declared that the States under the Constitution would not "be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." Madison and even Marshall took the same

[2] 1831, 5 Peters, 1.

[3] Constitutional Law, 2 ed., p. 1379.

position in the Virginia Convention. The court in Chisholm *v.* Georgia [4] denied these earlier expressions, and the phraseology of Amendment XI seemed to clinch the matter, for while by that amendment the judicial power of the United States was not to be construed "to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State," the amendment was significantly silent as to suits by a foreign State. The result was the unchallenged assumption in Cherokee Nation *v.* Georgia. Story, in the first edition of his *Commentaries on the Constitution,* which appeared in 1833, immediately accepted the attitude of the Supreme Court in the then recent decision of Cherokee Nation *v.* Georgia, a statement which was unchanged in later editions and accepted by Cooley. Kent, in the first edition of his *Commentaries,* the first volume of which was published in 1826, does not discuss the matter, but merely rehearses the provisions as to the original jurisdiction of the Supreme Court. Editions subsequent to the date of Cherokee Nation *v.* Georgia fully affirm the jurisdiction under the authority of that case, which is cited: "The Supreme Court has original jurisdiction in the case of suits of a foreign State against members of the Union" (I, 297).

The decision in the Monaco case has important bearings upon questions of international law. The Draft Convention on the Competence of Courts in Regard to Foreign States, prepared by the Research in International Law, does not consider the question of the right of a State to sue a subdivision of another State in the courts of the latter. It is believed, however, that it is correct to say that a State is under no duty to another State to open its courts to suits against its political subdivisions. In other words, international law does not appear to confer a right upon a State to sue a political subdivision of another State in the courts of the latter. Whether or not such a right exists is purely a matter of the constitutional law of the State and is, therefore, wholly permissive. The fact that the State's organization is federal would seem to make no modification as to its duties in international law. The question is one primarily affecting only States federal in form. To extend the right of a foreign State to sue a State of the Union in the courts of the United States is wholly lacking in reciprocity. It could not be applied to a unitary State because of the nature of its organization. There would seem to be in that complicated quasi-federal State, commonly called the British Commonwealth of Nations, no Imperial court in which a foreign State could sue one of the British Dominions. It is true that by the Constitution of Brazil of 1891, Section III, Article 59, it is provided that the "Federal Supreme Court shall have power: (1) to hear and to determine originally and exclusively . . . (d) suits and claims between foreign countries and the Union or the States." It does not appear, however, that any foreign country has ever sought to take advantage of this provision and sue one of the States of the United States of Brazil.

[4] 1793, 2 Dallas, 419.

The immediate result of the decision in Monaco *v.* Mississippi would seem to be that, if a foreign State should have a claim against a State of the Union, which would amount to a controversy justiciable by the Supreme Court of the United States if the claim ran in favor of one of the States of the Union, it must proceed by way of diplomatic reclamation. But here an important question arises as to the liability in international law of a federal state for the acts or failures to act of one of its constituent parts. By closing the door to the determination of this matter by the Supreme Court of the United States, another door is opened, namely, the question of the international responsibility of a federal State for the acts or failures to act of the various States of the Union. The route of diplomatic reclamation has its terminus in an international court. That the United States would consent to have an international court pass upon the delinquencies of States of the Union, for which the United States might be responsible, is hardly likely.

J. S. REEVES

THE FACTOR EXTRADITION CASE

In the recent case of Factor *v.* Laubenheimer, United States Marshall,[1] Factor was held in Chicago, Illinois, on complaint of the British Consul for extradition to England on the charge of having received in London large sums of money in pursuance of a fraudulent scheme[2] "knowing the same to have been fraudulently obtained," under Article I of the British-American Extradition Treaty of 1889, requiring the surrender of fugitives for ". . . receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained." The United States District Court on *habeas corpus* had ordered Factor released on the ground that the act charged was not a crime under the laws of Illinois, and hence there was no treaty obligation to surrender; the Circuit Court of Appeals reversed[3] on the ground that the offense charged *was* a crime in Illinois as declared in Kelly *v.* Griffin.[4]

The Supreme Court of the United States, on *certiorari*, by a vote of six to three, affirmed the decision of the Circuit Court of Appeals on what might be considered several alternative grounds, either (a) that it is not necessary that a crime charged coming within the terms of the treaty, be also an offense against the laws of Illinois; (b) that as the offense was recognized as criminal

[1] 290 U. S. 276, 54 Sup. Ct. 191 (1933); this JOURNAL, Vol. 28 (1934), p. 149.

[2] The scheme, to sell worthless stock through a tipster sheet, is set out in U. S. *ex rel.* Klein *v.* Mulligan, 1 Fed. Supp. 635 (1931), Knox, D. J., and U. S. *ex rel.* Geen *v.* Fetters, *ibid.*, 637 (1931), Dickinson, D. J., in which other members of the group to which Factor belonged were held for extradition.

[3] 61 F. (2) 626 (7th Circuit).

[4] 241 U. S. 6, 36 Sup. Ct. 487 (1915). Two of the three judges of the Circuit Court thought that there were statutes in Illinois, independently of Kelly *v.* Griffin, sufficient to convict Factor. Judge Dickinson came to the same conclusion in the Federal Court in Pennsylvania, *supra*, note 2.