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REPORT

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To the Members of the Senate and the House of Delegates:

Your Commission respectfully reports that a few days after the end of the legislative session of 1917 the civil suit of the Commonwealth of *Virginia* v. *The State of West Virginia* (commonly known as the Virginia Debt suit) came again before the Supreme Court of the United States upon the petition "of the Commonwealth of Virginia for a writ of mandamus against the State of West Virginia and the individual members of her Legislature to command the Legislature of said State to provide for the payment of said judgment by a levy of taxes or through the medium of a bond issue," the Court having, on the 5th day of February, 1917, issued its rule against the presiding officers and members of the two Houses to appear before the Court on March 6th, 1917, and show cause "why a writ of mandamus should not issue against them as prayed for in said petition."

On the 6th day of March, 1917, the members of the two Houses of the Legislature appeared by counsel.

Counsel for West Virginia moved to discharge the rule. The question, after argument, was taken under consideration by the Court, which at a later date, made the following order:

LIST OF CIVIL SUITS.
No. 1.

COMMONWEALTH OF VIRGINIA,

v.

STATE OF WEST VIRGINIA.

On the 14th day of June, 1915, the Supreme Court of the United States, in the exercise of its original jurisdiction under Section 2 of Art. 3 of the Constitution, entered a judgment in favor of the Commonwealth of Virginia against the State of West Virginia for the sum of $12,393,929.50, with interest thereon from July 1, 1915, until paid at the rate of 5 percent per annum.

On June 5, 1916, the Commonwealth of Virginia, after notice given, moved for a writ of execution upon said judgment; but the writ was denied, upon the ground that the application therefor was premature, for the reason that the Legislature of the State of West Virginia had not met since the rendition of the judgment, and it had had no opportunity to provide for the payment of the debt.

Commonwealth of Virginia v. *State of West Virginia,* 241 U. S., 531.

On the 10th day of January, 1917, the Legislature of West Virginia convened in regular biennial session, being the first session of the Legislature since theredition of said judgment, and while said Legislature was still in session, and before the adjournment thereof, the Commonwealth of Virginia applied for and obtained leave to file a petition for a writ of mandamus against the State of West Virginia and the individual members of both branches of her Legislature, commanding the Legislature of said State to provide for the payment of said judgment by a levy of taxes or through the medium of a bond issue.

The petition was received, and, on the 5th day of February, 1917, a rule in mandamus was issued, commanding the Honorable Wells Goodykoontz, President of the West Virginia Senate, and the other members of that body, as well as the Honorable Joseph S. Thurmond, Speaker of the House of Delegates of the State of West Virginia, and the other members of that House, to show cause before this Court on the 6th day of March, 1917, "why a writ of mandamus should not issue against them as prayed for in said petition." Said rule was served upon the individual members of the Legislature on the 23rd day of February, 1917, and, by a joint resolution on that day passed, the Attorney General and special counsel were authorized and directed to appear and make appropriate defense against said rule for and on behalf of the State of West Virginia, the Legislature thereof and the several Senators and Delegates constituting the membership of said Legislature.

Upon the return day of the rule, and pursuant to the resolution aforesaid, the Attorney General of this State and special counsel retained for the purpose appeared on behalf of the respondents, and filed a motion to discharge the rule. This cause then was continued for final submission until the 23rd day of March following, on which day the cause was submitted.

Grounds of the Motion.

The grounds of the motion to discharge are assigned as follows:

1. A writ of mandamus from the Supreme Court of the Nation coercing the legislative department of a state, and compelling it to enact a revenue law, or to lay a tax for state purposes, would infringe upon the constitutional rights of the states expressly reserved unto them by the Tenth Amendment to the Federal Constitution.

2. The constitutional grant of jurisdiction to hear and determine controversies between states does not include, as an incident to such jurisdiction, the power to enforce a judgment, rendered in the exercise thereof, by a writ of mandamus addressed to a state legislature, coercing and controlling it in the exercise of its legislative functions.

3. Such a writ for such a purpose would be contrary to the principles and usages of law, and does not fall within the category of final writs against a state.

4. It is not the office of a writ of execution, nor can it be of any writ used as a substitute therefor, to create property, by legislation or otherwise, for the satisfaction of a debt, but only to seize and subject property already in existence for that purpose.

5. Sec. 8 of Art. 8 of the West Virginia Constitution of 1863 imposed no ministerial duties upon the Legislature of the State, but only judicial and legislative duties.

6. Mandamus is a discretionary writ, and to issue it in this case would give an undue advantage to the relator, and operate unjustly against the respondents.

On the 22nd day of April, 1918, said Court, by order, set aside the re-submission of said cause and directed a re-argument.

In setting aside said submission and opening said cause for re-argument the Court prepared a syllabi, together with opinion written by Mr. Chief Justice White, which syllabi and opinion are as follows:

Supreme Court of the United States — Jurisdiction — Enforcing judgment against state.

1. The Federal Supreme Court has the right to enforce the result of its exertion of its judicial power under the Federal Constitution over controversies between states. (For other cases, see Supreme Court of the United States, I. c; Courts, I. c, in Digest Sup. Ct. 1908.)

Supreme Court of the United States — Jurisdiction — Enforcing money judgment against state.

2. the judicial power of the Federal Supreme Court under the Constitution over a suit between the Commonwealth of Virginia and the State of West Virginia to determine the amount due the former state by the latter as the proportion of the public debt of the original State of Virginia which was assumed by the State of West Virginia at the time of its creation as a state by a contract between the two states, assented to by Congress, and expressed in substance as a condition in the Constitution under which West Virginia was admitted

into the Union, essentially involves the right to enforce the money judgment which was the result of the exercise of such power. (For other cases, see Supreme Court of the United States, I. c; Courts, I. c, in Digest Sup. Ct. 1908.)

States—Admission on footing of equality—Jurisdiction of Federal Supreme Court—Enforcing compact.

3. The principle that a new state, upon its admission to the Union, stands upon an equal footing with the other states has no application to the question of the judicial power of the Federal Supreme Court to enforce against such state, when admitted into the Union, a contract entered into by it with another state, with the consent of Congress.

(For other cases, see States, XI; VII. b; Supreme Court of the United States, I. c, in Digest Sup. Ct. 1908.)

Supreme Court of the United States — Jurisdiction — Enforcing judgment against state—Reserved powers of state.

4. The right of the Federal Supreme Court to enforce by appropriate proceedings a judgment rendered against a state by that court in the exercise of its original jurisdiction of controversies between states extends, notwithstanding the rights reserved to the states by the Federal Constitution, to the exertion of authority over the governmental powers and agencies possessed by the state to the extent necessary to discharge the state's obligation.

(For other cases, see Supreme Court of the United States, I. c; States, IV. b, in Digest Sup. Ct. 1908.)

States—Compacts between—Enforcement by Congress—Reserved powers of states.

5. The power of Congress to refuse to assent to a contract between states carried with it the right, if the contract was assented to and hence became operative by the will of Congress, to see to its enforcement, and, such authority being plenary and complete, its exertion is not circumscribed by the powers reserved by the Federal Constitution to the states.

(For other cases, see States, IV. b; VII. b, in Digest Sup. Ct. 1908.)

Supreme Court of the United States—Congressional interference with jurisdiction—Enforcing compact between states.

6. The existence of power in Congress to legislate for the enforcement of a compact between states which has received congressional approval is not incompatible with the constitutional grant of original jurisdiction to the Federal Supreme Court to entertain a suit between the states on the same subject.

(For other cases, see Supreme Court of the United States, I. a; States, IV. b; VII. b, in Digest Sup. Ct. 1908.)

Constitutional law—Congressional encroachment on judicial powers—Remedies for enforcing judgment against state.

7. The exigency occasioned by the judicial duty to enforce a judgment of the Federal Supreme Court in a suit between states, founded upon a compact between those states, assented to by Congress, could be met by the creation by Congress of new remedies, in addition to those provided for by the Judicial Code, sec. 262, without violating the rule against legislative exertion of judicial power.

(For other cases, see Constitutional Law, III. a, 2; Supreme Court of the United States, I. a, in Digest Sup. Ct. 1908.)

No. 2, Original.

Submitted March 6, 1917. Decided April 22, 1918.

On petition for a writ of mandamus to compel the levy of a tax by the legislature of West Virginia to pay the amount adjudicated as due from that state to the Commonwealth of Virginia as the equitable proportion of the public debt of the original State of Virginia which was assumed by the State of West Virginia at the time of its creation as a state. Restored to docket for further argument as to the appropriate remedies under existing legislation.

The facts are stated in the opinion.

Mr. John Garland Pollard, former attorney general of Virginia, and Messrs. William A. Anderson, Randolph Harrison, John G. Johnson, and Sanford Robinson, for Virginia.

Mr. E. T. England, attorney general of West Virginia, and Mr. John H. Holt, special counsel, for West Virginia.

Mr. Chief Justice White delivered the opinion of the court:

A rule allowed at the instance of Virginia against West Virginia to show cause why, in default of payment of the judgment of this court in favor of the former state against the latter, an order should not be entered directing the levy of a tax by the legislature of West Virginia to pay such judgment, and a motion by West Virginia to dismiss the rule, is the matter before us.

In the suit in which the judgment was rendered, Virginia, invoking the original jurisdiction of this court, sought the enforcement of a contract by which it was averred West Virginia was bound. The judgment which resulted was for $12,393,929.50, with interest, and it was based upon three propositions specifically found to be established; first, that when territory was carved out of the dominion of the State of Virginia for the purpose of constituting the area of the State of West Virginia, the new state, coincident with its existence, became bound for and assumed to pay its just proportion of the previous public debt of Virginia. Second, that this obligation of West Virginia was the subject of a contract between the two states, made with the consent of Congress, and was incorporated into the Constitution by which West Virginia was admitted by Congress into the Union, and therefore became a condition of such admission and a part of the very governmental fiber of that state. Third, that the sum of the judgment rendered constituted the equitable proportion of this debt due by West Virginia in accordance with the obligations of the contract.

The suit was commenced in 1906 and the judgment rendered in 1915. The various opinions expressed during the progress of the cause will be found in the reported cases cited in the margin, in the opinion in one of which (234 U. S. 117, 58 L. ed. 1243, 34 Sup. Ct. Rep. 889) a chronological statement of the incidents of the controversy was made.

The opinions referred to will make it clear that both states were afforded the amplest opportunity to be heard, and that all the propositions of law and fact urged were given the most solicitous consideration. Indeed, it is also true that, in the course of the controversy, as demonstrated by the opinions cited, controlled by great consideration for the character of the parties, no technical rules were permitted to frustrate the right of both of the states to urge the very merits of every subject deemed by them to be material.

And controlled by a like purpose, before coming to discharge our duty in the matter now before us we have searched the record in vain for any indication that the assumed existence of any error committed has operated to prevent the discharge by West Virginia of the obligations resulting from the judgment, and hence has led to the proceeding to enforce the judgment which is now before us. In saying this, however, we are not unmindful that the record contains a suggestion of an alleged claim of West Virginia against the United States, which was not remotely referred to while the suit between the two states

was undetermined, the claim referred to being based on an assumed violation of trust by the United States in the administration of what was left of the great domain of the Northwest Territory—a domain as to which, before the adoption of the Constitution of the United States, Virginia, at the request of Congress, transferred to the government of the Confederation all her right, title, and interest in order to allay discord between the states, as New York had previously done, and as Massachusetts, Connecticut, South Carolina, North Carolina and Georgia subsequently did. It is obvious that the subject was referred to in connection with the duty of West Virginia to comply with the requirements of the judgment, upon the hypothesis that if the United States owed the claim, and if, in a suit against the United States, recovery could be had, and if West Virginia received its share, it might be used, if sufficient, for discharging the judgment, and thus save West Virginia from resorting to other means for so doing.

That judicial power, essentially involves the right to enforce the results of its exertion is elementary. *Wayman* v. *Southard,* 10 Wheat. 1, 23, 6 L. ed. 253, 258; *Bank of the United States* v. *Halstead,* 10 Wheat. 57, 6 L. ed, 266; *Gordon* v. *United States,* 117 E. S. 697, 702. And that this applies to the exertion of such power in controversies between states as the result of the exercise of original jurisdiction conferred upon this court by the Constitution is therefore certain. The many cases in which such controversies between states have been decided in the exercise of original jurisdiction make this truth manifest. Nor is there room for contending to the contrary because in all the cases cited the states against which judgments were rendered conformably to their duty under the Constitution voluntarily respected and gave effect to the same. This must be unless it can be said that because a doctrine has been universally recognized as being beyond dispute and has hence hitherto in every way, from the foundation of the government, been accepted and applied, it has by that fact alone now become a fit subject for dispute.

It is true that in one of the cited cases (*South Dakota* v. *North Carolina,* 192 U. S. 286, 48 L. Ed. 448, 24 Sup. Ct. Rep. 269) it was remarked that doubt had been expressed in some instances by individual judges as to whether the original jurisdiction conferred on the court by the Constitution embraced the right of one state to recover a judgment in a mere action for debt against another. In that case, however, it is apparent that the court did not solve such suggested doubt, as that question was not involved in the case then before it, and that subject was hence left open to be passed on in the future

when the occasion required. But the question thus left open has no bearing upon and does not require to be considered in the case before us, first, because the power to render the judgment as between the two states whose enforcement is now under consideration is, as to them, foreclosed by the fact of its rendition. And second, because, while the controversy between the states culminated in a decree for money, and that subject was within the issues, nevertheless the generating cause of the controversy was the carving out of the dominion of one of the states the area composing the other, and the resulting and expressly assumed obligation of the newly created state to pay the just proportion of the pre-existing debt,—an obligation which, as we have seen, rested in contract between the two states, consented to by Congress and expressed in substance as a condition in the Constitution by which the new state was admitted into the Union. In making this latter statement we do not overlook the truism that the Union under the Constitution is essentially one of states equal in local governmental power, which therefore excludes the conception of an inequality of such power resulting from a condition of admission into the Union. *Ward* v. *Race Horse,* 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076. But this principle has no application to the question of power to enforce upon a state, when admitted into the Union, a contract entered into by it with another state with the consent of Congress, since such question but concerns the equal operation upon all the states of a limitation upon them all, imposed by the Constitution, and the equal application of the authority conferred upon Congress to vivify and give effect by its consent to contracts entered into between states.

Both parties admit that West Virginia is the owner of no property not used for governmental purposes, and that therefore from the mere issue of an execution the judgment is not susceptible of being enforced, if, under such execution, property actually devoted to immediate government uses of the state may not be taken. Passing a decision as to the latter question, all the contentions on either side will be disposed of by considering two subjects: First, the limitations on the right to enforce inhering in the fact that the judgment is against a state and its enforcement against such governmental being; and second, the appropriateness of the form of procedure applicable for such enforcement. The solution of these subjects may be disposed of by answering two questions which we propose to separately state and consider.

1. May a judgment rendered against a state as a state be enforced

against it as such, including the right, to the extent necessary for so doing, of exerting authority over the governmental powers and agencies possessed by the state?

On this subject Virginia contends that as the Constitution subjected the State of West Virginia to judicial authority at the suit of the State of Virginia, the judgment which was rendered in such a suit binds and operates upon the State of West Virginia; that is, upon that state in a governmental capacity, including all instrumentalities and agencies of state power, and indirectly binding the whole body of the citizenship of that state and the property which, by the exertion of powers possessed by the state, is subject to be reached for the purpose of meeting and discharging the state obligation. As, then, the contention proceeds, the legislature of West Virginia possesses the power to tax, and that body and its powers are all operated upon by the judgment, the inability to enforce by means of ordinary process of execution gives the right and sanctions the exertion of the authority to enforce the judgment by compelling the legislature to exercise its power of taxation. The significance of the contention and its scope are aptly illustrated by the reference in argument to the many decided cases holding that where a municipality is empowered to levy specified taxation to pay a particular debt, the judicial power may enforce the levy of the tax to meet a judgment rendered in consequence of a default in paying the indebtedness.

On the other hand, West Virginia insists that the defendant as a state may not, as to its powers of government reserved to it by the Constitution, be controlled or limited by process for the purpose of enforcing the payment of the judgment. Because the right for that end is recognized to obtain an execution against a state and levy it upon its property, if any, not used for governmental purposes, it is argued, affords no ground for upholding the power by compelled exercise of the taxing authority of the state to create a fund which may be used when collected for paying the judgment. The rights reserved to the states by the Constitution, it is further insisted, may not be interfered with by the judicial power merely because that power has been given authority to adjudicate at the instance of one state a right asserted against another, since, although the authority to enforce the adjudication may not be denied, execution to give effect to that authority is restrained by the provisions of the Constitution which recognize state governmental power.

Mark, in words a common premise—a judgment against a state and the authority to enforce it—is the predicate upon which is rested, on

the one hand, the contention as to the existence of complete and effective, and the assertion, on the other, of limited and inefficacious power. But it is obvious that the latter can only rest upon either treating the word "state" as used in the premises as embracing only a misshapen or dead entity, that is, a state stripped for the purpose of judicial power of all its governmental authority, or, if not, by destroying or dwarfing the signifiance of the word "state" as describing the entity subject to enforcement, or both. It needs no argument to demonstrate that both of these theories are incompatible with and destructive of the very numerous cases decided by this court to which we have referred. As it is certain governmental powers reserved to the states by the Constitution—their sovereignty—were the efficient cause of the general rule by which they were not subject to judicial power, that is, to be impleaded, it must follow that when the Constitution gave original jurisdiction to this court to entertain at the instance of one state a suit against another, it must have been intended to modify the general rule; that is, to bring the states and their governmental authority within the exceptional judicial power which was created. No other rational explanation can be given for the provision. And the context of the Constitution, that is, the express prohibition which it contains as to the power of the states to contract with each other except with the consent of Congress, the limitations as to war and armies, obviously intended to prevent any of the states from resorting to force for the redress of any grievance, real or imaginary, all harmonize with and give force to this conception of the operation and effect of the right to exert, at the prayer of one state, judicial authority over another.

But is in substance said this view must be wrong for two reasons: (a) because it virtually overrides the provision of the Constitution reserving to the states the power not delegated, by the provisions making a grant of judicial power for the purpose of disposing of controversies between states; and (b) because it gives to the Constitution a construction incompatible with its plain purpoes, which was, while creating the nation, yet at the same time to preserve the states with their governmental authority in order that state and nation might endure. Ultimately the argument at its best but urges that the text of the Constitution be disregarded for fear of supposed consequences to arise from enforcing it. And it is difficult to understand upon what ground of reason the preservation of the rights of all the states can be predicated upon the assumption that any one state may destroy the rights of any other without any power to redress or cure

the resulting grievance. Nor, further, can it be readily understood why it is assumed that the preservation and perpetuation of the Constitution depend upon the absence of all power to preserve and give effect to the great guaranties which safeguard the authority and preserve the rights of all the states.

Besides, however, the manifest error of the propositions which these considerations expose, their want of merit will be additionally demonstrated by the history of the institutions from which the provisions of the Constitution under review were derived, and by bringing into view the evils which they were intended to remedy and the rights which it was contemplated their adoption would secure.

Bound by a common allegiance, and absolutely controlled in their exterior relations by the mother country, the colonies before the Revolution were yet, as regards each other, practically independent; that is, distinct one from the other. Their common intercourse more or less frequent, the contiguity of their boundaries, their conflicting claims in many instances of authority over undefined and outlying territory, of necessity brought about conflicting contentions between them. As these contentions became more and more irritating, if not seriously acute, the necessity for the creation of some means of settling them became more and more urgent if physical conflict was to be avoided. And for this reason, it is to be assumed, it early came to pass that differences between the colonies were taken to the Privy Council for settlement and were there considered and passed upon during a long period of years, the sanction afforded to the conclusions of that body being the entire power of the realm, whether exerted through the medium of a royal decree or legislation by parliament. This power, it is undoubtedly true, was principally called into play in cases of disputed boundary, but that it was applied also to the complaint of an individual against a colony concerning the wrongful possession of property by the colony alleged to belong to him is not disputed. This general situation as to the disputes between the colonies and the power to dispose of them by the Privy Council was stated in *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 739, et seq., 9 L. ed. 1233, 1266, and will be found reviewed in the authorities referred to in the margin.

When the Revolution came and the relations with the mother country were severed, indisputably, controversies between some of the colonies of the greatest moment to them had been submitted to the Privy Council and were undetermined. The necessity for their consideration and solution was obviously not obscured by the struggle

for independence which ensued, for by the ninth of the Articles of Confederation, an attempt to provide for them as well as for future controversies was made. Without going into detail it suffices to say that that article in express terms declared the Congress to be the final arbiter of controversies between the state, and provided machinery for bringing into play a tribunal which had power to decide the same. That these powers were exerted concerning controversies between the states of the most serious character cannot be disputed. But the mechanism devised for their solution proved unavailing because of a want of power in Congress to enforce the findings of the body charged with their solution—a deficiency of power which was generic because resulting from the limited authority over the states conferred by the Articles of Confederation on Congress as to every subject. That this absence of power to control the governmental attributes of the states for the purpose of enforcing findings concerning disputes between them gave rise to the most serious consequences and brought the states to the very verge of physical struggle and resulted in the shedding of blood, and would, if it had not been for the adoption of the Constitution of the United States, it may be reasonably assumed, have rendered nugatory the great results of the Revolution, is known of all and will be found stated in the authoritative works on the history of the time.

Throwing this light upon the constitutional provisions, the conferring on this court of original jurisdiction over controversies between states, the taking away of all authority as to war and armies from the states and granting it to Congress, the prohibiting the states also from making agreements or compacts with each other without the consent of Congress at once makes clear how completely the past infirmities of power were in mind and were provided against. This result stands out in the boldest possible relief when it is borne in mind that not a want of authority in Congress to decide controversies between states, but the absence of power in Congress to enforce, as against the governments of the states, its decisions on such subjects, was the evil that cried aloud for cure, since it must be patent that the provisions written into the Constitution, the power which was conferred upon Congress, and the judicial power as to states created, joined with the prohibitions placed upon the states, all combined to unite the authority to decide with the power to enforce—a unison which could only have arisen from contemplating the dangers of the past and the unalterable purpose to prevent their recurrence in the future. And while it may not materially add to

the demonstration of the result stated, it may serve a useful purpose to direct attention to the probable operation of tradition upon the mind of the framers, shown by the fact that, harmonizing with the practice which prevailed during the colonial period in the Privy Council, the original jurisdiction as conferred by the Constitution on this court embraced not only controversies between states, but between private individuals and a state—a power which, following its recognition in *Chisholm* v. *Georgia,* 2 Dall. 419, 1 L. ed. 440, was withdrawn by the adoption of the eleventh amendment. The fact that in the convention, so far as the published debates disclose, the provisions which we are considering were adopted without debate, it may be inferred, resulted from the necessity of their enactment as shown by the experience of the colonies and by the specter of turmoil, if not war, which, as we have seen, had so recently arisen from the disputes between the states—a danger against the recurrence of which there was a common purpose efficiently to provide. And it may well be that a like mental condition accounts for the limited expressions concerning the provisions in question in the proceedings for the ratification of the Constitution which followed, although there are not wanting one or two instances where they were referred to which, when rightly interpreted, make manifest the purposes which we have stated.

The state, then, as a governmental entity, having been subjected by the Constitution to the judicial power under the conditions stated, and the duty to enforce the judgment by resort to appropriate remedies being certain, even although their exertion may operate upon the governmental powers of the state, we are brought to consider the second question, which is:

2. What are the appropriate remedies for such enforcement?

Back of the consideration of what remedies are appropriate, whether looked at from the point of view of the exertion of equitable power or the application of legal remedies extraordinary in character (mandamus, etc.), lies the question what ordinary remedies are available, and that subject must necessarily be disposed of. As the powers to render the judgment and to enforce it arise from the grant in the Constitution on that subject, looked at from a generic point of view, both are Federal powers, and, comprehensively considered, are sustained by every authority of the Federal government—judicial, legislative or executive—which may be appropriately exercised. And confining ourselves to a determination of what is appropriate in view

of the particular judgment in this cause, two questions naturally present themselves: (*a*) The power of Congress to legislate to secure the enforcement of the contract between the states; and (*b*) the appropriate remedies which may by the judicial power be exercised to enforce the judgment. We again consider them separately.

(*a*) The power of Congress to legislate for the enforcement of the obligation of West Virginia.

The vesting in Congress of complete power to control agreements between states; that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the states and for their protection, was concerned with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the Federal power. It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between states carried with it the right, if the contract was assented to and hence became operative by the will of Congress, to see to its enforcement. This must be the case unless it can be said that the duty of exacting the carrying out of a contract is not, within the principle of *McCulloch* v. *Maryland,* 4 Wheat. 316, 4 L. ed. 579, relevant to the power to determine whether the contract should be made. But the one is so relevant to the other as to leave no room for dispute to the contrary.

Having thus the power to provide for the execution of the contract, it must follow that the power is plenary and complete; limited, of course, as we have just said, by the general rule that the acts done for its exertion must be relevant and appropriate to the power. This being true it further follows, as we have already seen, that by the very fact that the national power is paramount in the area over which it extends, the lawful exertion of its authority by Congress compel compliance with the obligation resulting from the contract between the two states which it approved is not circumscribed by the powers reserved in the states. Indeed, the argument that the recognition of such a power in Congress is subversive of our constitutional institutions from its mere statement proves to the contrary, since at last it comes to insisting that any one state may, by violating its obligations under the Constitution, take away the rights of another, and thus destroy constitutional government. Obviously if it be con-

ceded that no power obtains to enforce as against a state its duty under the Constitution in one respect, and to prevent it from doing wrong to another state, it would follow that the same principle would have to be applied to wrongs done by other states, and thus the government under the Constitution would be not an indissoluble union of indestructible states, but a government composed of states each having the potency with impunity to wrong or degrade another—a result which would inevitably lead to a destruction of the union between them. Besides, it must be apparent that to treat the power of Congress to legislate to secure the performance by a state of its duty under the Constitution; that is, its continued respect for and obedience to that instrument, as coercion, comes back at last to the theory that any one state may throw off and disregard without sanction its obligation and subjection to the Constitution—a conclusion which brings at once to the mind the thought that to maintain the proposition now urged by West Virginia would compel a disregard of the very principles which led to the carving out of that state from the territory of Virginia; in other words, to disregard and overthrow the doctrines irrevocably settled by the great controversy of the Civil War, which, in their ultimate aspect, find their consecration in the amendments to the Constitution which followed.

Nor is there any force in the suggestion that the existence of the power in Congress to legislate for the enforcement of a contract made by a state under the circumstances here under consideration is incompatible with the grant of original jurisdiction to this court to entertain a suit between the states on the same subject. The two grants in no way conflict, but co-operate and co-ordinate to a common end; that is, the obedience of a state to the Constitution by performing the duty which that instrument exacts. And this is unaffected by the fact that the power of Congress to exert its legislative authority, as we have just stated it, also extends to the creation of new remedies in addition to those provided for by section 14 of the Judiciary Act of 1789 (1 Stat. at L. 81, chap. 20, now sec. 262, Judicial Code; 36 Stat. at L. 1162, chap. 231, Comp. Stat. 1916, sec. 1239) to meet the exigency occasioned by the judicial duty of enforcing a judgment against a state under the circumstances as here disclosed. We say this because we think it is apparent that to provide by legislative action additional process relevant to the enforcement of judicial authority is the exertion of a legislative, and not the exercise of a judicial, power.

This leaves only the second aspect of the question now under consideration.

(*b*) The appropriate remedies under existing legislation.

The remedy sought, as we have at the outset seen, is an order in the nature of mandamus commanding the levy by the Legislature of West Virginia of a tax to pay the judgment. In so far as the duty to award that remedy is disputed merely because authority to enforce a judgment against a state may not affect state power, the contention is adversely disposed of by what we have said. But this does not dispose of all the contentions between the parties on the subject, since, on the one hand, it is insisted that the existence of a discretion in the Legislature of West Virginia as to taxation precludes the possibility of issuing the order, and, on the other hand, it is contended that the duty to give effect to the judgment against the state, operating upon all state powers, excludes the legislative discretion asserted and gives the resulting right to compel. But we are of opinion that we should not now dispose of such question, and should also now leave undetermined the further question, which, as the result of the inherent duty resting on us to give effect to the judicial power exercised, we have been led to consider on our own motion—that is, whether there is power to direct the levy of a tax adequate to pay the judgment and provide for its enforcement irrespective of state agencies. We say this because, impelled now by the consideration of the character of the parties which has controlled us during the whole course of the litigation, the right judicially to enforce by appropriate proceedings as against a state and its governmental agencies having been determined, and the constitutional power of Congress to legislate in a twofold way having been also pointed out, we are fain to believe that if we refrain now from passing upon the question stated, we may be spared in the future the necessity of exerting compulsory power against one of the states of the Union to compel it to discharge a plain duty, resting upon it under the Constitution. Indeed, irrespective of these considerations, upon the assumption that both the requirements of duty, and the suggestions of self-interest may fail to bring about the result stated, we are nevertheless of the opinion that we should not now finally dispose of the case, but, because of the character of the parties and the nature of the controversy—a contract approved by Congress and subject to be by it enforced—we should reserve further action in order that full oppor-

tunity may be afforded to Congress to exercise the power which it undoubtedly possesses.

Giving effect to this view, accepting the things which are irrevocably foreclosed—briefly stated, the judgment against the state, operating upon it in all its governmental powers, and the duty to enforce it, viewed in that aspect—our conclusion is that the case should be restored to the docket for further argument at the next term after the February recess. Such argument will embrace the three questions left open: First, the right, under the conditions previously stated, to award the mandamus prayed for; second, if not, the power and duty to direct the levy of a tax, as stated, and third, if means for doing so be found to exist, the right, if necessary, to apply such other and appropriate equitable remedy by dealing with the funds or taxable property of West Virginia, or the rights of that state, as may secure an execution of the judgment. In saying this, however, to the end that if, on such future hearing provided for, the conclusion should be that any of the processes stated are susceptible of being lawfully applied (repeating that we do not now decide such questions), occasion for a further delay may not exist, we reserve the right, if deemed advisable, at a day hereafter, before the end of the term or at the next term before the period fixed for the hearing, to appoint a master for the purpose of examining and reporting concerning the amount and method of taxation essential to be put into effect, whether by way of order to the State Legislature or direct action, to secure the full execution of the judgment, as well as concerning the means otherwise existing in the State of West Virginia, if any which, by the exercise of the equitable powers in the discharge of the duty to enforce payment, may be available for that purpose.

And so it is ordered.

On May 6th, 1918, special counsel for the State wrote your commission the following letter:

"Commonwealth of Virginia v. State of West Virginia et al. —No. 2 Origital.

"Hon. JOHN J. CORNWELL,
Governor of West Virginia, and ex-officio
Chairman of New Virginia Debt Commission,

Hon. W. E. Wells,
Hon. William T. Ice, Jr.,
Hon. Joseph S. Miller,
Members of said Commission, and
Hon. E. T. England,
Attorney General of West Virginia.

"Gentlemen: On the twenty-second of April, the Supreme Court of the United States delivered an opinion in the mandamus proceeding springing out of the above-entitled cause.

"You will recall that, after judgment had been rendered by the Supreme Court in favor of Virginia and against the State of West Virginia (reported in 238 U. S., 202), an application was made by the former State against the latter for a writ of execution in satisfaction of such judgment; but that this application was denied (case reported in 241 U. S., 531).

"Subsequently, Virginia applied for a writ of mandamus against West Virginia, and the two Houses of her Legislature, requiring the levy of a tax with which to satisfy the judgment, and the Supreme Court issued a rule directing the two Houses and the individual members thereof to appear and show cause why such order should not be issued. In response to this rule, the State appeared and filed its answer, supported by a printed brief in resistance of the writ. It was in this last proceeding that the recent opinion of the Court has been announced.

"I have but one copy of the opinion which was delivered by the Chief Justice, otherwise I would send one to each of you; but, in lieu thereof, I shall now undertake to give a brief statement of the Court's conclusions and of its order, as I understand them: In the first place, West Virginia's indebtedness to Virginia and the amount thereof is treated as irrevocably foreclosed, in consequence of the judgment rendered against her on the 14th day of June, 1915. In the second place, it is held that a judgment rendered against a State may be enforced against it as such, under the Constitution, even if it be necessary in so doing to exert authority over the governmental powers and agencies possessed by the State. And, in the third place, it is said that Congress may provide necessary machinery to that end, or the Court may enforce such judgment by appropriate existing remedies.

"The Court, however, in consequence of the character of the parties and the nature of the controversy, is averse to now finally

disposing of the case, and feels that it 'should reserve further action in order that full opportunity may be afforded to Congress to exercise the power which it undoubtedly possesses,' and that, in the meantime, 'the case should be restored to the docket for further argument at the next term after the February recess.' This argument will be addressed to judicial means of enforcement, and, to use the language of the Court, 'will embrace the three questions left open: 1. The right under the conditions previously stated to award the mandamus prayed for. 2. If not, the power and duty to direct the levy of a tax as stated. 3. If means for doing so be found to exist, the right, if necessary, to apply such other and appropriate equitable remedy by dealing with the funds or taxable property of West Virginia or the rights of that State as may secure an execution of the judgment.'

"The Court further reserves the right, notwithstanding the reargument, to appoint a Master in the interim, 'for the purpose of examining and reporting concerning the amount and method of taxation essential to be put into effect, whether by way of order to the State Legislature, or direct action, to secure the full execution of the judgment, as well as concerning the means otherwise existing in the State of West Virginia, if any, which, by the exercise of the equitable powers in the discharge of the duty to enforce payment, may be available for that purpose. This is done in order to save time and avoid further delay, in the event, on the 'future hearing provided for, the conclusion should be that any of the processes stated are susceptible of being lawfully applied.'

"In consequence of this situation, I would suggest that the Commission be convened, and one more effort made to adjust this matter. I assume it has power under section 2 of chapter 46 of the Acts of 1915, page 326, 'to negotiate a settlement of said controversy, subject, however, to the ratification of the Legislature of the State of West Virginia'; and, in the event of its success, the result could be submitted by the Governor either to a special or a regular session of the Legislature, as his Excellency might deem expedient or best.

"Very respectfully yours,
(Signed) "John H. Holt."

In accordance with the suggestion embodied in the foregoing letter the chairman called a meeting of this Commission on the 12th day of June, 1918. As a result of the meeting the following letter was written to the chairman of the Virginia Debt Commission:

"JUNE 12th, 1918.

"Hon. H. H. DOWNING,
Chairman, Virginia Debt Commission,
Front Royal, Virginia.

"DEAR SIR: At my call the West Virginia Debt Commission today met and passed the following resolution:

> "*Resolved,* That the Governor of our State, and the ex-officio Chairman of this Commission, at once invite the Virginia Commission to meet this Commission for the purpose of discussing the Virginia debt controversy and ascertaining whether a settlement of it can be arranged out of court.

"I would be glad, indeed, if you would invite your Commission to meet ours at an early date, at the White Sulphur Springs or such other convenient point as may suggest itself to you.

"Very respectfully,
(Signed) JNO. J. CORNWELL, *Governor.*

To which the following answer was received.

"Hon. JOHN J. CORNWELL,
Governor of West Virginia,
Charleston, West Virginia.

"MY DEAR GOVERNOR: Your favor of June 12th has been received. I will at once communicate your invitation to the several members of the Virginia Debt Commission and as soon as I hear from them I will advise you so that we can agree upon a date for the meeting of the West Virginia and Virginia Debt Commissions.

"Yours very respectfully,
(Signed) "H. H. DOWNING,
"Chairman of the Virginia Debt Commission."

A little later the following letter was also received from the Chairman of the Virginia Debt Commission:

"JUNE 26, 1918.

"Hon. JOHN J. CORNWELL,
Governor of West Virginia,
Charleston, West Virginia.

"MY DEAR GOVERNOR: Referring to our recent correspondence relative to a meeting of the Virginia and West Virginia Debt Commissions, I beg to say the Virginia Commission wishes to express to you its appreciation of your courteous invitation for a meeting of the two commissions and also its earnest desire to end any further

litigation concerning the Virginia and West Virginia debt controversy.

"I know you are familiar with the course of this litigation in all of its various stages extending through a period of twelve years and I feel sure when you reflect upon this, that you will agree that the Virginia Commission and all other parties to the suit are conclusively bound by the Court's decree.

"My Commission is convinced that it has no right within the limits of its duties and its powers, to make or agree to any modification whatever of the terms of that decree, or to release or surrender, any of the rights determined by the same.

"However, the Virginia Commission is unanimous in its desire to enable West Virginia to meet the demands of the decree of the Supreme Court of the United States in such manner and by such method, as will be most convenient to the State of West Virginia.

"I hope it is for this latter purpose that you have requested the meeting.

"With reference to the time and place of the meeting, I learn from the members of my commission, that it would suit the majority thereof, to have the meeting on Thursday, the 15th day of August, 1918, at the New Willard Hotel, Washington, D. C.

"After a conference with the members of your commission, I will be glad to have you advise me if this time and place will be agreeable to them.

"Yours very truly,
(Signed) "H. H. DOWNING,
"Chairman of the Virginia Debt Commission."

On July 22, 1918, this Commission met at Charleston, pursuant to the call of the Chairman and directed its Chairman to write the following letter:

"CHARLESTON, W. Va., July 22, 1918.

"Hon. H. H. DOWNING,
Chairman, Virginia Debt Commission,
Front Royal, Virginia.

"DEAR SIR: Since the receipt of your letter of June 26th, I have conferred with the West Virginia Commission and its counsel, and your Commission being of the opinion that it has no authority to agree to any modification of the decree in favor of the State of Virginia against West Virginia, I am directed to say that there appears to us to be really nothing for discussion between the two Com-

missions of advantage to this State and that a meeting with your Commission would therefore be futile.

"However, the West Virginia Commission is of the opinion that the Virginia Commission, in conjunction with the representatives of the certificate holders, has the power, if they desire to exercise it, to modify the terms of such decree, and in consequence of this fact I am further directed to request to know whether or not your Commission, in conjunction with the representatives of the certificate holders, would be willing to meet the West Virginia Commission at some convenient time and place, with a view to discussing a modification of this decree.

"An early reply will be appreciated.

"Very respectfully,

(Signed) "JNO. J. CORNWELL, *Chairman.*"

To which, on August 11th, the following reply was received:

"AUGUST 9th, 1918.

"HON. JNO. J. CORNWELL,

Chairman, West Virginia Debt Commission,

Charleston, W. Va.

"DEAR SIR: Pardon me for not sooner acknowledging your letter of July 23rd, 1918. A copy of your letter was forwarded to the Depositing Committee in New York and some delay has been occasioned by the fact that it was difficult to get that Committee together at this season of the year. However, on August 6th, I received a communication from Mr. Eugene Delano, Chairman, in which he inclosed me a resolution recently passed by his Committee. I inclose you a copy of this resolution.

"Again regretting the delay, I am

"Yours very truly,

(Signed) "H. H. DOWNING,

"Chairman, Virginia Debt Commission."

"Resolution.

"The Chairman laid before the Committee a communication from the Debt Commission of the Commonwealth of Virginia embodied in extracts from the minutes of a meeting of the Commission held on July 26, 1918, in which the Virginia Commission invited this Committee to communicate to the Commission the views of this Committee in full on the suggestions contained in two letters from the

Governor of West Virginia to Hon. H. H. Downing, Chairman of the Virginia Debt Commission, dated June 12th and July 23d, and after full consideration it was

"*Resolved,* That it is the firm opinion of this Committee that the interests of the certificate holders require that the State of West Virginia should comply with the judgment of the Supreme Court of the United States in the suit of *Virginia* v. *West Virginia;* that any compromise of the amount adjudged to be due by West Virginia or any modification of the terms of the judgment would be against the interests of the certificate holders; that any meeting of the Commissions of the two states in conjunction with this Committee as the representatives of the certificate holders with a view to discussing a modification of the decree as suggested by the Governor of West Virginia could not serve any useful purpose;

"*Further Resolved,* That while this Committee desires to assist West Virginia to meet the demands of the judgment of the Supreme Court of the United States in a manner and by a method which will be convenient to her, still this Committee in response to your invitation for a full expression of its views must say that it is firmly of the opinion that no meeting to discuss means and methods of payment should occur until the State of West Virginia shall have officially declared its readiness to pay the debt without unnecessary delay.

"A True Copy:

"ROBERT L. HARRISON,
"*Secretary to the Committee.*"

On September 6th this Commission again assembled and upon consideration directed the writing of the following letter:

SEPTEMBER 6, 1918.

"Mr. H. H. DOWNING,
Front Royal, Va.

"DEAR SIR: Replying to your letter of August 9th, the West Virginia Commission directs me to say that notwithstanding the fact that the Depositing Committee of the bondholders has explicitly stated in the resolution—a copy of which you inclose—that 'it is firmly of the opinion that no meeting to discuss means and methods of payment should occur until the State of West Virginia shall have officially declared its readiness to pay the debt without unnecessary delay'; in view of the fact that this Commission has no power or authority under the act creating it to officially declare the readiness of the State to pay the debt, or judgment, and as the Legislature of

the State of West Virginia is the only body in existence which has the power to make such declaration, or to made any provision for the payment of said judgment; and in view of the further fact that the Legislature of this State will not assemble until the second Wednesday in January, 1919, the West Virginia Commission has directed me to inquire of your commission and through it of the Depositing Committee of the bondholders, whether it will reconsider the decision embodied in the resolution hereinbefore quoted, to the extent and to the end of submitting to this commission a suggestion or proposition looking to the acceptance of bonds of the State of West Virginia, carrying a favorable rate of interest, provided the Legislature in its wisdom should decide to issue such bonds in payment of the judgment without further litigation. And if your Commission and said Committee should be willing to submit a proposition for the acceptance of bonds in satisfaction of said judgment, what rate of interest said bonds should carry and the length of the term of said bonds.

"The West Virginia Commission is prompted to make this inquiry by reason of the fact that it desires to submit a report to the Legislature, when it convenes, of the proceedings of this Commission, as well as any information which might properly guide the Legislature in its action.

"Yours very truly,

(Signed) "JNO. J. CORNWELL, *Governor.*"

Without replying directly to the foregoing letter the Chairman of the Virginia Commission fixed October 18th as a date for a meeting between the two Commissions in Washington, D. C. This suggested meeting was postponed until November 14th, when the two Commissions met in said city. The meeting was informal and the discussion of the whole subject, which followed, was of the same character, the Virginia Commission not taking a position or doing anything that might possibly waive or prejudice any of the plaintiff's rights.

However, the discussion and subsequent negotiations reached such a stage your Commission believed it would be able to report a plan and make a recommendation to the Legislature for an adjustment of the judgment, but subsequently, upon consideration of details, one obstacle was encountered which, to us, appeared insurmountable.

This Commission, therefore, regrets it has not been able to reach a point of final agreement with the Virginia Commission upon which

we could base a recommendation for settlement to the Legislature notwithstanding an earnest effort in that direction.

Respectfully submitted,

THE NEW VIRGINIA DEBT COMMISSION,
JNO. J. CORNWELL, *Chairman.*
JOS S. MILLER.
W. E. WELLS.
W. T. ICE, JR.
WILLIAM MCKELL.