SPECIAL MESSAGE OF GOVERNOR HATFIELD TO LEGISLATURE OF 1917 ON SUBJECT OF THE VIRGINIA DEBT

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THE VIRGINIA DEBT

TRIBUNE PTG. CO., CHARLESTON, W. VA

To the Members of the Senate and House of Delegates:

In my biennial message I promised to send to your honorable bodies a special message dealing with the subject of the Virginia Debt. In a special message to the Legislature of 1915, I submitted the findings of Master Littlefield, which were the result of the re-opening of the case, as prayed for by the representatives of West Virginia, in March, 1914, for the purpose of having considered certain credits which had not been presented or considered in the litigation of this important subject. At this time I am in position to give to you the final word of the Supreme Court, sustaining in part the contentions that were made in West Virginia's supplemental answer, which credits awarded by the Court went to the reduction of the principal and interest of the original decree entered against West Virginia in March, 1911.

It is my purpose to give to you briefly such facts in relation to this ante-bellum controversy as will give you the origin, history and present status of the litigation between the two states growing out of the borrowing of certain amounts of money for internal improvements in the name of the state before its division.

As early as the year 1822 the old Commonwealth of Virginia (that is, the Virginia before West Virginia was established as a separate state), engaged in a system of internal improvements, consisting of railroads, canals, turnpikes, bridge companies and banking institutions, and she kept up her subscription thereto and construction thereof until the year 1861. In some instances she subscribed two-fifths, until the year 1858, of the capital stock of these improvements, and from 1858 to 1861 three-fifths of a contemplated railway or canal or other improvements, and issued and sold her interest-bearing bonds, and paid such subscriptions out of the proceeds of these sales. In this way she incurred a heavy bonded indebtedness and acquired many large and valuable holdings. Her declared policy was to devote the securities thus acquired to the payment of the debt thus incurred, but this policy was later disregarded.

In this manner most of the railroads that now traverse the present Commonwealth of Virginia, such as the Virginia Central Railroad, running from Richmond to Covington, Virginia, (now constituting a part of the Chesapeake & Ohio); the Virginia and Tennessee Railroad, extending from Lynchburg, Virginia, to Bristol, in that state;

the Southside Railroad, running from Lynchburg to Petersburg and the Norfolk and Petersburg Railroad from the latter point to Norfolk, (being a part of the Norfolk & Western Railway system); the Orange & Alexandria; the Richmond, Fredericksburg & Potomac; the Manassas Gap; the Richmond & Danville Railroad; as well as the James River and Kanawha Canal, running from the mountains to the sea, and numerous other shorter and less important canals, such as the Dismal Swamp Canal, etc., were built, and in addition the establishment of five banking institutions was carried out.

In 1861, she owned in part and controlled the whole of these public improvements, and her bonded debt incurred in their construction had reached, for the purpose of the debt hereinafter discussed and the litigation that subsequently took place between the two states, the enormous sum of $33,879,073.82, which was later reduced by the Supreme Court to $30,563,861.56. The Civil War was on, and on the 17th day of April, 1861, the State of Virginia seceded from the Union. A great majority of her citizens, however, living west of the Alleghenies, did not believe in secession, and immediately took steps to support the cause of the Union, and to carve a new state out of the old commonwealth that would adhere to the union and support its cause, and for the further purpose of developing the vast natural resources hidden in the wilderness of the territory of the commonwealth of Virginia which had been so long neglected by those who controlled the affairs of the mother state. They met in convention and adopted the constitution of 1862, and in consequence of the Enabling Act of Congress, passed on the 31st day of December, 1862, were admitted into the Union, and on the 20th day of June, 1863, as a new state bearing the name of "the State of West Virginia."

The Commonwealth of Virginia, by an ordinance adopted by her state constitutional convention, August 20, 1861, providing for the formation of the state of West Virginia, and looking to the payment of the debt of the Commonwealth of Virginia, adopted among other things this ordinance prescribing specifically the manner of settling the debt, to-wit:

> "The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any

> part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new state during the same period. * * * * * *"

The constitution of West Virginia was prepared and proposed by a convention which met at Wheeling on the 26th day of November, 1861, and, with a view of declaring West Virginia's willingness to assume an equitable proportion of the debt, contained as section eight of article eight the following:

> "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, shall be assumed by this state; and the legislature shall ascertain the same as soon as practical and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal thereof within thirty-four years."

It will be observed that this section of the constitution of West Virginia provides for the assumption by this state of an equitable proportion of the public debt of Virginia, existing prior to the first of January, 1861, and the ordinance above referred to, commonly known as the "Wheeling Ordinance" does the same thing and in addition thereto prescribes the manner of settlement. There is no difference in substance between the obligation imposed by this ordinance and the promise made by the constitution. The ordinance expressed the will of the people of Virginia speaking through their convention. The people of the proposed new state afterwards adopted this constitution and agreed to pay an equitable proportion of the debt. Taking the ordinance adopted by the convention and the section of the constitution of West Virginia together, there is no conflict nor room for misunderstanding.

Prior to the decision of the Supreme Court of the United States the contention of West Virginia had always been that the just and equitable proportion of the debt should be ascertained in the manner provided by the "Wheeling Ordinance," but Virginia afterward sought to depart from this method and assumed that West Virginia should pay one-third of the debt. The Supreme Court took a different view and decided that the equitable proportion of the debt assumed by West Virginia should be ascertained by the relative valuation of the real and personal property of the two states at the time of the creation of the State of West Virginia.

During the war West Virginia could not have negotiated with Virginia for the settlement of this debt because they were armed against each other, one in support of the union, and the other in opposition, and for West Virginia to have negotiations with Virginia under such circumstances, and especially to have paid her any money with which to carry on the war against the national government, would have been considered in the light of treason. So that, during this period, no settlement could or did take place in keeping with the constitutional promise as made and hereinbefore referred to.

At the close of the war Virginia instituted a suit against West Virginia in the Supreme Court of the United States, claiming that the counties of Jefferson and Berkeley in the eastern panhandle belonged to her instead of the new State, and during this legal controversy no settlement could be reached because the integrity of West Virginia was attacked, and until the conclusion of the suit she could not tell of what counties she was composed or what proportion of the debt would, under the circumstances, equitably be hers. This suit pended until sometime in 1871.

In 1871 Governor Jacobs, of West Virginia, pursuant to an act of the Legislature, appointed what is known as the Bennett Commission, to negotiate with Virginia concerning the debt, with the purpose of ascertaining from Virginia a true and actual statement of the joint obligation and assets, so that West Virginia might know her status in the way of obligation, if any, after the proper credits had been applied which she was entitled to receive upon such obligation that might be justly hers by reason of the promise made in the Constitution of 1862, but Virginia declined to receive this commission or furnish a statement of the account between the two states, and the matter remained without adjustment. It should be noted that the decree dismissing Virginia's suit against West Virginia relating to the counties of Berkeley and Jefferson was entered March 6, 1871. On the 24th day of February, prior to this and in contemplation of the termination of this suit, West Virginia, desiring to have a settlement with Virginia, passed an act authorizing the appointment of commissioners to treat with Virginia on the subject. The state of Virginia, by a resolution passed on the 30th of March, 1871, instead of appointing a commission to meet the one authorized by the State of West Virginia, not only ignored the resolution adopted by the State of West Virginia, but proceeded to negotiate with her creditors and make a settlement with them, assigning

one-third of the debt to West Virginia, thus arbitrarily attempting to settle the whole question without regard to West Virginia.

This would seem to have been an opportune time to have settled this much controverted case. The suit between Virginia and West Virginia was just ended, leaving the parties free to make settlement; but instead of settling with West Virginia, Virginia assumed to make a settlement without consulting the State of West Virginia, and, this being done, was content to permit the matter to rest for many years.

Later on, Virginia appointed a commission, with power and directions to arrange terms with West Virginia, but made it a condition precedent in all negotiations that West Virginia should recognize that Virginia only owed two-thirds of the debt, and that West Virginia owed the remaining one-third, together with the interest charged from January 1, 1861, and this in turn prevented a settlement for the reason that West Virginia felt that Virginia's representatives were attempting to find the award against West Virginia before the arbitrators had any opportunity to discuss any phase entering into an equitable adjustment of the public debt of Virginia.

In the meantime Virginia appointed another commission and approached West Virginia for a settlement, but the latter firmly refused to recognize any liability upon her part. During what was known as the funding period, when she arbitrarily reduced her diet, both as to principal and interest, Virginia arbitrarily set aside one-third of the public debt and charged it to West Virginia, and issued what are known as "West Virginia Certificates" therefor, and certain holders of her bonds surrendered the same to be held by Virginia, and took in lieu thereof the West Virginia certificates, which were accepted by Virginia's creditors and relieved them of a like burden. Certain agrements were made and entered into by Virginia and her creditors as to the protection the mother state would give these creditors for certain privileges and favors bestowed upon her. In the year of 1894 a joint resolution was passed by the general assembly of Virginia providing for the settlement of the controversy between Virginia and West Virginia, and the bond holders agreed at that time to save Virginia harmless from expenses of all litigation between the two states and Virginia gave her consent and name in the institution of the suit against West Virginia in favor of her bondholders, and finally Virginia, on the 26th day of February, 1906, instituted suit against West Virginia in the Supreme Court of the United States, for the

recovery from West Virginia of one-third of the debt, in keeping with her obligation and pre-arrangement with her creditors who held these certificates.

The suit was based upon the constitutional promise of West Virginia made when she was admitted into the union, under Section 8 of Article 8 of the Constitution of 1862. The arrangement previously made between the state of Virginia and the West Virginia certificate holders, who accepted these certificates in lieu of certain obligations these certificate holders held against Virginia, was that these certificate holders should receive from Virginia in full settlement thereof whatever amount she might recover from the state of West Virginia.

The litigation began during the administration of Governor William M. O. Dawson, and while the Honorable Clark W. May, now deceased, was Attorney General. Able counsel, both within and without the State, were employed to assist Attorney General May, and the battle waged during the residue of Governor Dawson's term, and was still pending when Honorable William E. Glasscock became Governor of West Virginia, the Honorable W. G. Conley having succeeded Mr. May as attorney general; and the battle went on until the 6th day of March, 1911, when the supreme court announced that West Virginia's equitable proportion of the principal of the Virginia debt amounted to $7,182,507.46, but left the question of interest open and suggested that the two states confer through representatives properly raised to represent them, and in response to this suggestion the legislature of West Virginia established a commission with directions and authority to the governor to appoint its members.

Va. v. W. Va. 220 U. S. 1 (55 L. Ed. 353).

Such is a brief history, and was the status of this now famous case when I, on the 4th day of March, 1913, became governor of the State of West Virginia and the present administration began. I at once appointed a debt commission, pursuant to the joint resolution of the two houses of the Legislature, and through this commission negotiations were at once begun with the Virginia commission looking to a settlement of the controversy. But the Virginia commission, at the conference held between the two, positively declined to discuss or consider any question other than that of interest upon the principal as ascertained by the court, and an adjournment of the joint conference necessarily followed.

West Virginia originally defended the suit brought against her by the State of Virginia in the Supreme Court of the United States on the theory that the settlement between the two states would be made upon the basis of the Wheeling ordinance and, that it was not necessary in such proceeding to consider any equities that the state of West Virginia might have in the stocks and bonds bought by the commonwealth of Virginia and loans made by her out of the proceeds of these bonds; but when the supreme court decided that the settlement should be made upon a different basis, then it became necessary for West Virginia to take credit for whatever the commonwealth of Virginia had received arising from the proceeds of the sale of these bonds; that is to say, West Virginia, being liable for 23½ per cent of the bonds, as found by the supreme court, would also be entitled to 22 1-2 per cent of the proceeds arising from the sale of these bonds. It therefore became necessary for West Virginia to file a supplemental answer asking that her equities in these stocks and these lands be ascertained and credit given her therefor.

It was our contention that West Virginia was entitled to certain credits upon her part of the principal of the debt as ascertained by the supreme court, by reason of the fact that the state of Virginia had received the benefits of certain bonds, stocks and other securities purchased by her out of the proceeds of the bonds that were issued to raise the money to cary on the internal improvements from which resulted the public debt, in which benefits the state of West Virginia had not participated. Chief Accountant of the State, Mr. E. A. Dover, and his assistants, were put to work at the city of Richmond to collect as much evidence as possible in the time allowed, relating to the character, number and value of these securities. Mr. R. L. Gregory, an attorney, was also employed for the purpose of abstracting all acts and resolutions passed by the legislature of Virginia authorizing the representatives of the state of Virginia to invest in these stocks, and finally authorizing the sale of the same in part, making complete the chain of facts of undisputable equities in the way of credits to which West Virginia was entitled. Mr. Dover reported in February, 1914, and after the West Virginia commission had examined and analyzed this report, it asked for another joint conference with the Virginia commission, to be held at Washington. At this conference the West Virginia commission represented to the Virginia commission that as the state of West Virginia had been charged with 23½ per cent of the debt, as decided by the Supreme

Court of the United States, March 6, 1911, they insisted that she should be credited with the same per cent of the value of the assets that had been discoverd, and this would reduce, according to their contentions, the $7,182,507.46 of principal charged by the court in decree to West Virginia, to an amount approximating $2,327,195.28. They offered to the Virginia commission to recommend to the legislature of the state of West Virginia the payment of the latter amount in full settlement of West Virginia's proportion of the debt, provided the state of Virginia would accept the same. This offer, however, was declined positively and emphatically. Indeed the Virginia commission refused to discuss it, but forthwith moved the Supreme Court of the United States to proceed with and speed the cause.

In the meantime additional counsel had been employed in the case in connection with the legal department of the state to represent West Virginia in the further defense. The counsel were John H. Holt, of Huntington, Charles E. Hogg, of Point Pleasant, and V. B. Archer, of Parkersburg, and on the 23rd day of March, 1914, the state of West Virginia, after notice to the state of Virginia, filed before the Supreme Court of the United States a motion for leave to file an amended and supplemental answer. West Virginia's answer was prepared and presented at the same time as the motion of Virginia to speed the cause, in order that the court might learn in advance the character of the answer it proposed to file. This motion and the motion made by Virginia for final decree came on to be heard together upon the 13th day of April, 1914, and both motions were elaborately argued, both orally and upon printed briefs. On the 8th day of June, 1914, the supreme court re-opened the case and granted leave to the state of West Virginia to file its amended and supplemental answer and the case was re-referred to Honorable Charles E. Littlefield, of New York, former master in the case, with power and direction to hear any and all evidence that either of the states might offer before him relative to matters embraced in said answer.

Va. *vs.* W. Va. 324 U. S. 117 (58 L. Ed. 1243.)

The master began his sittings in the city of Richmond and many weeks were spent before him in the introduction of evidence relative to the existence, ownership and value of various stocks, bonds and other securities that had been purchased by the state of Virginia prior to the first day of January, 1861, out of the proceeds of the sale of

the bonds that evidenced the Virginia debt referred to in the West Virginia constitution, and after the evidence had been completed the case was argued before the Master in the city of New York, by counsel for Virginia, the bondholders, and for the State of West Virginia. Printed briefs were likewise submitted upon both sides.

The Master made up a report and printed the same and filed it on the 22nd day of January, 1915. In this report the Master found that West Virginia was entitled to credit upon her part of the principal of the debt amounting to $2,868,839.49, and that the original findings of the Supreme Court in consequence thereof be reduced from $7,-182,507.46 to $4,313,667.97. He further found that this sum should bear interest, and gave as his reason that West Virginia had promised in her first constitution to pay an equitable proportion of an interest-bearing debt; but he did not fix any rate of interest or name any time during which it should run, because there was no fixed amount upon which interest could be computed.

Both West Virginia and Virginia filed exceptions to this report, West Virginia based her exception on two grounds; First, that the Master had reduced the value of the securities proved to be in the possession of Virginia on January 1, 1861, amounting to $20,810,357.-98, to $14,511,945.74, without substantial legal proof upon the part of Virginia. Second, that it was improper and unjust that West Virginia should be held liable for interest upon a debt of which the proportionate part of the State of West Virginia had not been determined. Virginia based her exception upon the ground that the assets from which the allowed credit had been derived should be valued as of June 20, 1863, instead of January 1, 1861. Both exceptions were of the highest importance, for if West Virginia should be charged upon the one hand with interest her indebtedness would be greatly increased, and upon the other hand, if Virginia should succeed in valuing the assets as of June 20, 1863, instead of January, 1861, the assets would be practically worthless because the war at the former date was raging in full force and proportionate interest in the securities was reduced in value.

The Supreme Court fixed the 19th day of April, 1915, as the date upon which the exceptions would be heard, and at that time they were argued both orally and upon printed briefs by counsel for both states and by attorneys representing the bondholders, with the result that on the 14th day of June, 1915, the Court rendered its opinion through Mr. Justice Hughes, practically confirming the report of the Master. This report was sent to the Legislature in its regular session of 1915,

and is a part of the legislative record of that session. So that the result was that West Virginia succeeded in maintaining her credits as reported by the Master, and Virginia succeeded in sustaining the charges of interest. In other words, West Virginia reduced her part of the principal from $7,182,507.46 to $4,215,622.26, and Virginia succeeded in establishing the contentions that the principal remaining should bear interest as of January 1, 1861.

Va. *vs.* W. Va. 238 U. S. 202 (59 L. Ed. 1272.)

In this connection it may be added that there are two matters involved in this history of the case that have not always been discussed in certain quarters with entire frankness. The first relates to the efforts to compromise the case, and the second to the result of the efforts of the present administration to secure credits which West Virginia was justly entitled to receive. It should be borne in mind that the commission appointed by me to negotiate with Virginia was authorized by the legislature only after the supreme court had practically decided the case by settling the principle upon which it should be determined; and it should be further borne in mind that the commission was composed of business and professional men of both parties who brought to the discharge of their duties ripe experience and persistent industry to investigate the available sources of information and fortify themselves with every obtainable fact and make definite proposition of compromise based thereon. This the Virginia commission refused to discuss, and there was nothing left but to fight within the narrow limits that had been imposed. The Virginia representatives were relentless in their position that West Virginia was entitled to no credit or consideration in the investments that had been made by the state. They were unwilling to discuss anything that would lead up to the principal of the debt, leaving nothing but the question of interest to be discussed, notwithstanding the supreme court, by its decision in re-opening the case on West Virginia's contention that physical assets did exist, pointed out the arbitrary and unfair position that had been taken by the Virginia commission and the bondholders with respect to West Virginia, through its commission, when it asked that the entire subject be thrown open for discussion between the parties interested and that West Virginia be given the equities to which she was entitled if she be required to pay her proportionate part of the principal. The Virginia commission, as well as the bondholders, must have known of the existence of these

equities, yet neither of these representatives, the bondholders in the one instance and the representatives of the state of Virginia upon the part of the other, were willing to concede to West Virginia that which she was justly entitled to receive, so that West Virginia had no other course than to appeal to the supreme court to be given equity, and the brief period of five months was allotted to review a record of ninety-three years.

This commission was composed of John W. Mason, (its chairman), a distinguished jurist, of Fairmont; William D. Ord, a coal operator of the Pocahontas field and a man of wide business experience; J. A. Lenhart, a merchant and man of affairs, of Kingwood; R. J. A. Boreman, a business man of experience and character, of Parkersburg; Henry Zilliken, a former state senator, from the county of Brooke; Joseph S. Miller, a former auditor of the state and commissioner of internal revenue under President Cleveland; U. G. Young, a clear-headed lawyer of Buckhannon; W. T. Ice, Jr., a well known member of the legal profession; W. E. Wells, a prominent business man of the Upper Panhandle, well known for his private enterprise and public spirit; John M. Hamilton, a former congressman, and Major Joseph Chilton, of Charleston, a man well versed in the history and affairs of our state.

A detailed account of the negotiations of the commission will be found in its published report thereof, and any one desiring to familiarize himself with the entire history of the controversy will find an accurate and clear statement of the same therein. It was made a part of the record of the legislture of 1915. The present paper is but a brief outline of what occurred.

With respect to the success of the efforts made by the present administration to reduce the amount of this debt, it should likewise be borne in mind that had the case been left where it was found when I came into office the result would have been far more onerous to West Virginia than it now is. The supreme court had already decreed by its opinion of March, 1911, that West Virginia's share of the principal of the debt was $7,182,507.46. Applying the method that was used by the court in its decision of June 14, 1915, in charging interest on the original principal of the debt that was found on March 6, 1911, then the interest on the original principal, computed by the court at 4 per cent, from January 1, 1861, to July 1, 1891, would have been $8,762,659.10 instead of $5,143,069.18; on the reduced principal of $4,215,622.28, and the interest from July 1, 1891, to July 1, 1915, at 3 per cent would have been $5,171,405.38

instead of $3,305,248.04, making an aggregate principal and interest on the original amount as found by the court in October, 1911, of $21,116,571.84, instead of $12,393,929.50. In other words, the state has been saved in principal and interest, $8,722,642.34. This resulted from the re-opening of the case and by the application of credits which reduced West Virginia's part of the principal from $7,182,507.46 to $4,215,622.28.

Neither should any attempt at even an outlined history of this controversy be made without mentioning the labors of the supreme court itself. The record was voluminous; much evidence had been lost by the lapse of time and the questions involved were difficult and delicate; but notwithstanding all these things the court has conducted the proceedings with uniform patience and fair consideration to both sides, with the exception of the short period of time that was given our state to present in the proper way substantial but accurate data of the credits to which West Virginia was entitled but which was indeed hard to support on account, as previously stated, of the long lapse of time that had intervened. With the short period at hand it was almost impossible to verify the absolute authenticity and justification of the credits that were asked for, and had more time been given, in all probability greater results would have been achieved. The court has been considerate. Even after once making its findings, it re-opened the case and heard additional testimony to the end that no equitable claim might be overlooked. There are other equities in such condition that West Virginia, on account of her embarrassing position, has been unable to present. These other equities, which it is my purpose to discuss, West Virginia has been unable to present because of her restricted position. Virginia found in the days when she was staggering under a financial obligation that it was necessary for her to refund her public debt in part, which was done to the end that she might be able to liquidate her obligation; yet with all of these burdens, which came about largely from the result of the Civil war, she did not take upon herself the burden of assuming an interest-bearing obligation at a rate of 5 per cent, and, if we are to interpret from her previous attitude, if she had been confronted with this appalling interest charge which the supreme court has suggested for West Virginia, by Virginia's expressed act of 1871 to 1892, she would refund and reduce it to an amount which she would consider just and equitable. It is true West Virginia does not enjoy the same free and unrestricted position as did the mother state when she refunded her pub-

lic debt. Virginia has conspired with her creditors, which resulted in a reduction of her debt and the charging of one-third of her obligations to West Virginia, which the supreme court found was inequitable and placed it at 23 1-2 per cent instead of 33 1-3 per cent.

Virginia issued bonds to her creditors against West Virginia upon the basis of charging West Virginia with one-third of her public debt, which were accepted by the bondholders, and then obligated herself to permit her name to be used, if need be, to carry on whatever litigation was necessary to compel West Virginia to pay this amount at the expense of the bondholders, including the interest upon these bonds. This was done, notwithstanding Virginia had always had control, possession and use of these assets which she developed out of the money that was borrowed and which she is asking West Virginia to help pay, and that she in some instances sold these properties, from which was realized millions of dollars, as well as dividends and interest.

Some of these assets which were developed and for which West Virginia is asked to help pay, are still retained by the state of Virginia. Some of them are quoted in the market as being worth many times their original cost. Virginia has had the continuous benefit of the money derived out of their sales and out of the dividends and interest that has been paid by the property that she still holds, and the use of other properties that she still reains and from which she is drawing substantial returns. None of these properties has ever benefitted West Virginia whatever, yet she must pay at a rate of three per cent upon the principal part of the obligation, which these properties represent, as decreed by the supreme court; at a rate of four per cent for another period, and with the high water mark fixed at five per cent, in the way of interest upon the decreed principal to West Virginia, until the entire amount is liquidated, notwithstanding that these certificates representing West Virginia's share of the Virginia debt were bartered and traded in by speculators at five and ten cents on the dollar.

Taking into consideration all these historical facts representing the stages through which the debt matter has passed, as a layman, I indeed can see no equity or right in the saddling of this great burden of interest, approximating a total double the amount of the decreed principal that has been asked of West Virginia to assume, upon the taxpayers of West Virginia.

After many of the matters and things heretofore appearing had been reported by the debt commission to the Legislature, but before the supreme court had rendered the judgment of June 20, 1915, the Legislature by an act passed February 20, 1915, and effective from passage, abolished the debt commission hereinbefore referred to and created another, known as the new Virginia debt commission, with less members and increased power. By this act the governor was made ex-officio a member, and the chairman of the commission and the remaining four commissioners to be appointed by him and confirmed by the senate, and this was at once done and the present or new Virginia debt commission as now constituted is composed of the governor as ex-officio chairman, Honorable W. E. Wells, of Newell; Honorable William T. Ice, Jr., of Philippi; Honorable Joseph S. Miller, of Kenova and Honorable J. W. Dawson, of Charleston, the latter having succeeded the Honorable John W. Mason, who resigned to accept an appointment upon the supreme court of the state of West Virginia.

After the creation and appointment of the new commission and after the rendition by the supreme court of the United States of the final judgment of June 20, 1915, the state of Virginia gave notice to the state of West Virginia that it would, on the fifth day of June, 1916, move the supreme court for a writ of execution upon the judgment aforesaid, directing the marshal of said court to levy upon the property of the state of West Virginia subject to levy, in satisfaction of said judgment, and upon the day named said state presented its petition to the supreme court for and moved the issuance of such execution. The state of West Virginia, by counsel, likewise appeared upon said date and filed her answer to said petition, through the Honorable John H. Holt, and in resistance to said motion presented a brief in support of the answer so filed. The ground set up in the answer by way of resistance to the motion was as follows:

"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 Wednes-

day in January, 1917, and the members of that body have not yet been chosen.

"2. Because not only presumptively, but in fact, the state of West Virginia did not, before or at the time of the rendition of the judgment herein, own, and has not since owned, and does not now own, any property, real or personal, except such property as was and is devoted exclusively to public use, and none of the property so devoted may be levied upon or sold under execution.

"3. Because section 2 of article III of the Federal Constitution, conferring jurisdiction upon this court to determine 'controversies between two or more states,' simply referred to the judiciary the settlement of the questions of law and fact involved in such controversies, and the determination, in the form of a judgment, of the rights of the sovereign parties, with the implication that the defeated commonwealth would, in good faith, accept and abide by the judgment so rendered, and voluntarily provide for its satisfaction, and does not make such judgments compulsory, but only persuasive, where they are for money without collateral security, because not enforceable by execution against public property, or by mandamus infringing the taxing power of the states reserved by the Constitution."

On the twelfth day of June, 1916, the supreme court denied the motion of Virginia, and refused to issue the writ, upon the ground that the application therefor was premature. Mr. Chief Justice White delivered the opinion of the court, and, after stating the grounds of the motion, as well as the defenses set forth in the answer, stated the conclusion of the court in the following language:

> "Without going further, we are of the opinion that the first ground furnishes adequate reason for not granting the motion at this time.
>
> 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."

Commonwealth of Virginia v. state of West Va., 241 U. S., 531. (60 L.ed., 1147).

The next step, therefore, in the Debt controversy must be taken by the Legislature of the State of West Virginia, and such step should be taken at its present session. Fortunately, two members of the present

Legislature are familiar with all of the details of this controversy; one, the Hon. Septimius Hall, of Wetzel county, having served in the Constitutional Convention of 1872, and who remembers well the discussion that took place relative to the provisions of section 8 of Article 8 of the Constitution of 1862, and also section 4 of Article 10 of the Constitution of 1872, and who has served almost continuously—either in the Senate or the House—in the West Virginia Legislature since that time. He is quite familiar with the progress in the way of law-making and state development since the foundation of West Virginia, and has rendered valuable service to me as Governor on account of the great amount of knowledge possessed by him as to this controversy. I would indeed be recreant to my duty if I did not express my sincere appreciation of the great service he performed in assisting in the efforts to secure substantial equities to which West Virginia was justly entitled, but on account of the great lapse of time proved to be indeed a most arduous task. The other member of the present Legislature is the Honorable Robert L. Gregory, who abstracted all the Acts and Resolutions passed by the General Assembly of Virginia bearing upon the Virginia Debt subject, from 1822 to the present, and he now has in his possession a copy of his work which no doubt will be of great service in giving information to those who have not an intimate knowledge of this controversy. I, therefore, am deeply indebted to Senator Gregory for his valuable service in this controversy during my term as Governor, and no doubt he will be of great service to the upper branch of the Legislature on account of his knowledge of the litigation of this case during the last four years.

The narrow limits that have been imposed leave but few alternatives. To decline to pay the debt means repudiation—and this course I do not believe West Virginians are willing to adopt: I feel justified in saying that our citizenry will be willing to assume any equitable or reasonable amount that their ability to pay will permit for the sake of the Constitution under which we live, for the sake of the Union of which we are a part, and for the high regard in which they hold the highest tribunal of the land, regardless of the unfairness of the embarrassing position which it has always been our State's misfortune to occupy in the public debt controversy. The mere suggestion that West Virginia would eventually be forced to adopt some extreme measure to protect herself against injustice is a reflection on Virginia. We must conclude that in the end the amount West Virginia should pay will be correctly ascertained, and when so ascertained we can only declare our oft repeated willingness to pay. What West

Virginians protest against is paying what we do not owe. Virginia has unliquidated assets in which West Virginia has an equitable part; but again on account of West Virginia's position she has been unable to prosecute these claims and have them considered in the adjustment of the financial differences that now exist between West Virginia and Virginia. Notwithstanding Virginia's former governors have discussed in their messages to the legislature these assets, up to the present time Virginia authorities have failed to act.

I am confident West Virginians are willing to pay when Virginia and her bondholders concede to West Virginia the proper credits to which she is entitled, which include the liquidation of all the joint assets and their proper apportionment in the way of credits. Any residue or balance that West Virginia owes thereafter she is willing to assume.

Had we received a statement of the account as requested and asked for by the commission raised by West Virginia, known as the Bennett Commission of 1871, there is no question but what this long drawn out litigation that has cost the State enormous sums of money would have been at an end many years ago. The long period of time that has elapsed has made it almost impossible to have an accurate statement of the account rendered showing the small liability that West Virginia would be required to assume, if complete information had been obtainable relating to the interest to which we were entitled in the assets.

Making immediate provision for the payment of this debt as indicated by the Court's last opinion without discount or further controversy by West Virginia involves a serious question of ways and means.

It is well known that there are no present funds out of which such a payment could be made, and a direct levy for that purpose would be onerous, if permissible, which is not the case. Therefore, we turn at once to a bond issue, the only method left, and the question has been raised as to whether such bonds could be issued under our Constitution, and whether or not the present Legislature would have the right and power to act under the authority of the old Constitution, or whether any acts upon its part regarding the issuing of bonds would be permissible under the Constitution of 1872, and, if so, whether that clause of section 4 of Article 10 of the Constitution gives the Legislature the power to authorize the issuance of such bonds in the absence of a vote of the people. This, I believe, is not a question for me to decide, but for the Legis-

lature itself. But it is unnecessary to discuss ways and means until we know how much we are to pay.

This Legislature will have all the information that is available upon the subject of the Virginia Debt, and it must meet the responsibility of determining what the future course of the State should be in this important matter. The members of the Legislature come fresh from the people and know the sentiment of the people upon this question. It is their duty to leave with the Virginia Debt Commission and the Legal Department of the State specific instructions as to the steps they desire to have taken to protect the interest of West Virginia.

There are substantial equities in favor of West Virginia which have not been heretofore presented to the Supreme Court, and could not have been reasonably presented any sooner under the circumstances with which West Virginia has, from a legal standpoint, been confronted. This situation has been given consideration by Senator William E. Chilton. (The correspondence between the Senator and myself, in part, I submit, together with the reports of the Judiciary Committee of the United States Senate and the discussions of the bill which Senator Chilton has presented before the Senate of the United States.) While this course would necessarily, for the time being, postpone the consideration of payment of any part of the judgment, or the arrangement for the same in whole or in part, yet, if taken in good faith (and no equity should be presented of such a character as would not carry the stamp of good faith upon its face) it would involve neither repudiation nor any threat thereof, but would simply be an effort to reduce a burden which negotiations so far have been unable to touch, and courtesy and consideration in the way of information at the hands of representatives of the mother state have been closed to West Virginia, leaving its representatives to their own ingenuity and energies to work out and present the best effort that they could with the small light they have had to guide them in search for equities in settling up the joint obligations of the two states. This assertion is substantiated by the forceful resistance and denial of any equities to which West Virginia was entitled when she asked the Virginia Commission to grant her share in such equities and that the representatives of West Virgina would recommend to the Legislature of West Virginia the assumption of the residue after these equities had been applied. Not only did the Virginia Commission refuse to discuss these equities, but resisted and denied their exist-

ence before the Supreme Court of the United States; and upon an investigation, hurried though it was, during a short period of five months, West Virginia was able to prove to the satisfaction of the Supreme Court of the United States that such equities did exist in the amount of $14,511,945.74.

I feel that West Virginia's record is such that after the proper preparation had been made and presented to the Supreme Court, it would have respectful consideration, notwithstanding the Court's last decision. In the consideration of such an equity, my attention has been called to the claim of Virginia against the Government of the United States growing out of the cession of the Northwest Territory, and in the fruits of which, if Virginia should realize anything therefrom, West Virginia should be permitted to participate, either by way of liquidating or reducing the claim of Virginia against her, which equity Virginia unquestionably has and which is doubted by no one who fully knows of this historical proceeding, in which Virginia has a seventh part in a claim against the Government of the United States amounting to many millions of dollars. A brief history, I herewith recite:

Prior to the adoption of the articles of confederation entered into by the thirteen original states, Maryland refused to sign the same, unless and until those states holding western territory should surrender the same to the United States. The State of Virginia at the time laid claim to all that territory lying northwest of the Ohio River out of which the States of Ohio, Indiana, Illinois, Michigan, Wisconsin and a portion of Minnesota have since been formed; and, by an act of her General Assembly passed at a session commencing on the 20th day of October, 1783, and for the purpose of expediting the establishment of the proposed confederation, authorized her delegates in Congress to convey to the United States in Congress assembled all her territory northwestward of the Ohio River, and, on the 1st day of March, 1784, her delegates in Congress, consisting of Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, and pursuant to the Act of October 20, 1783, presented a deed to Congress ceding all the territory of Virginia northwestward of the Ohio River to the United States, upon certain terms, conditions and trusts therein set forth, which deed of cession was accepted according to its terms, and directed to be recorded and enrolled among the acts of the United States in Congress assembled. Among the conditions set out in the deed and accepted by Congress was the following.

"(F) That all the lands within the territory so ceded to the United States, and not reserved for, or appropriated to, any of the before-mentioned purposes, or disposed of in bounties to the officers and soldiers of the American army, shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confereration or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditures, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."

It further appears from the requisition made by Congress upon the thirteen States at the time of this cession that Virginia's "usual respective proportion in the general charge and expenditures" was about one-seventh of the whole; and it seems to be also conceded that the moneys derived from a sale of the lands embraced in this cession were to be applied to the extinguishment of the public debt incurred in the war of the Revolution, which debt was finally paid; so that, after this part of the trust had been met, and certain other conditions of the deed not necessary to mention had been performed, the residue of the trust fund should have been applied to the reserved interests of the States set forth in Article (F) of the deed, Virginia included, and to "No other use or purpose whatsoever". Instead of doing this, however, Congress seems to have donated many of these lands and much of the proceeds thereof to purely local purposes not contemplated by the deed of cession, but actually contrary to its terms.

Since 1912, Senator Chilton, of this State, has been pressing upon the attention of the Congress of the United States a bill to authorize West Virginia to sue in the Supreme Court of the United States for West Virginia's part of the Northwest Territory trust. He has kept me informed from time to time of his progress, and, as I understand it, a bill has finally been reported from the Committee on the Judiciary of the United States Senate allowing any state to sue the United States upon any claim which, as between individuals, would be cognizable in a court of justice. If this bill should pass, West Virginia would have the right to bring a suit against the Federal Government and present this claim and secure a decision one way or the other. I deem this subject of sufficient importance to present to the Legislature a brief history of this claim. The matter can be best understood by a report made by a sub-committee of the United States Senate, consisting of Senators Walsh, Nelson and Chilton, which I hereby make part of this message.

"(COMMITTEE PRINT)

REPORT OF SUB-COMMITTEE TO COMMITTEE ON THE JUDICIARY ON SENATE BILL 4054.

This bill was referred to a sub-committee composed of Senators Bacon, Nelson and Chilton. Senator Bacon having died, Senator Walsh was substituted in his place.

The subject matter of this report arises out of Senate bill 578 introduced in the Senate on April 9, 1913, and Senate Bill 5054, introduced on January 17, 1914. (The data upon which this report is made is found in an address delivered by Senator Chilton in the Senate of the United States on April 10, 1912).

On the 21st of May, 1779, the Delegates from Maryland laid before Congress the following instructions received by them: Instructions of the General Assembly of Maryland to George Plater, William Paca, William Carmichael, John Henry, James Forbes, and Daniel of St. Thomas Jenifer, Esqs.

GENTLEMAN: Having conferred upon your a trust of the highest nature, it is evident we place great confidence in your integrity, abilities, and zeal to promote the general welfare of the United States, and the particular interest of this State where the latter is not incompatible with the former; but to add greater weight to your proceedings in Congress and take away all suspicion that the opinions you there deliver, and the votes you give, may be the mere opinions of individuals and not resulting from your knowledge of the sense and deliberate judgment of the State you represent, we think it our duty to instruct as followeth on the subject of the Confederation—a subject in which, unfortunately, a supposed difference of interest has produced an almost equal division of sentiments among the several States composing the Union. We say a supposed difference of interest; for if local attachments and prejudices and the avarice and ambition of individuals would give way to the dictates of a sound policy, founded on the principles of justice—and no other policy but what is founded on those immutable principles deserves to be called sound—we flatter ourselves this apparent diversity of interests will soon vanish, and all the States would confederate on terms mutually advantageous to all, for they would then perceive that no other confederation than one so formed can be lasting. Although the pressure of immediate calamities, the dread of their continuance from the appearance of disunion, and some other peculiar circumstances may have induced some States to accede to the present Confederation, contrary to their own interests and judg-

ments, it requires no great share of foresight to predict that when those causes cease to operate the States which have thus acceded to the Confederation will consider it as no longer binding and will eagerly embrace the first occasion of asserting their just rights and securing their independence. Is it possible that those States who are ambitiously grasping at territories to which, in our judgment they have not the least shadow of exclusive right, will use with greater moderation the increase of wealth and power derived from those territories, when acquired, than what they have displayed in their endeavors to acquire them? We think not. We are convinced the same spirit which hath prompted them to insist on a claim so extravagent, so repugnant to every principle of justice, so incompatible with the general welfare of all the States, will urge them on to add oppression to injustice. If they should not be incited by a superiority of wealth and strength to oppress by open force their less wealthy and less powerful neighbors, yet depopulation, and consequently the impoverishment of those States, will necessarily follow, which, by an unfair construction of the Confederation, may be stripped of a common interest and the common benefit derivable from the western countries. Suppose, for instance, Virginia indisputably possessed of the extensive and fertile country to which she has set up claim. What would be the probable consequences to Maryland of such an undistrubed and undisputed possession? They can not escape the least discerning.

Virginia, by selling on the most moderate terms a small proportion of the lands in question, would draw into her treasury vast sums of money, and, in proportion to the same arising from such sales, would be enabled to lessen her taxes. Lands comparatively cheap and taxes comparatively low with the lands and taxes of an adjacent State would quickly drain the State thus disadvantageously circumstanced of its most useful inhabitants. Its wealth and its consequence in the scale of the confederated States would sink, of course. A claim so injurious to more than one-half if not the whole of the United States ought to be supported by the clearest evidence of the right. Yet what evidences of that right have been produced? What arguments alleged in support either of the evidence or the right? None that we have heard of deserving a serious refutation.

It has been said that some of the delegates of a neighboring State have declared their opinions of the impracticability of governing the extensive domain claimed by that State. Hence also the necessity was admitted of dividing its territory and erecting a new State under the auspices and direction of the elder, from whom, no doubt, it would re-

ceive its form of government, to whom it would be bound by some alliance or confederacy, and by whose councils it would be influenced. Such a measure, if ever attempted, would certainly be opposed by the other States as inconsistent with the letter and spirit of the proposed Confederation. Should it take place by establishing a subconfederacy, *imperium in imperio,* the State possessed of this extensive dominion must then either submit to all the inconveniences of an overgrown and unwieldy government or suffer the authority of Congress to interpose at a future time and to lop off a part of its territory, to be erected into a new and free State and admitted into a confederation on such conditions as shall be settled by nine States. If it is necessary for the happiness and tranquility of a State thus overgrown that Congress should hereafter interfere and divide its territory, why is the claim to that territory now made and so pertinaciously insisted on? We can suggest to ourselves but two motives—either the declaration of relinquishing at some future period a proportion of the country now contended for was made to lull suspicion asleep and to cover the designs of a secret ambition, or, if the thought was seriously entertained, the lands are now claimed to reap an immediate profit from the sale. We are convinced policy and justice require that a country unsettled at the commencement of this war, claimed by the British Crown, and ceded to it by the treaty of Paris, if wrested from the common enemy by the blood and the treasure of the 13 States, should be considered as a common property, subject to be parceled out by Congress into free, convenient, and independent governments in such manner and at such times as the wisdom of that assembly shall hereafter direct.

Thus convinced we should betray the trust reposed in us by our constituents were we to authorize you to ratify on their behalf the confederation, unless it be further explained. We have coolly and dispassionately considered the subject; we have weighed probable inconveniences and hardships against the sacrifice of just and essential rights; and do instruct you not to agree to the confederation unless an article or articles be added thereto in conformity with our declaration. Should we succeed in obtaining such article or articles, then you are hereby fully empowered to accede to the confederation.

That these, our sentiments respecting our confederation, may be more publicly known and more explicitly and concisely declared, we have drawn up the annexed declaration, which we instruct you to lay before congress, to have printed, and to deliver to each of the delegates of the other states in congress assembled copies thereof

signed by yourselves or by such of you as may be present at the time of delivery, to the intent and purpose that the copies aforesaid may be communicated to our brethern of the United States and the contents of said declaration taken into their serious and candid consideration.

Also we desire and instruct you to move at the proper time that these instructions be read to congress by their secretary and entered on the journals of congress.

We have spoken with freedom as becomes free men, and we sincerely wish that these, our representations, may make such an impression on that assembly as to induce them to make such additions to the articles of confederation as may bring about a permanent union.

A true copy from the proceedings of December 15, 1778.

Test: T. DUCKETT,
Clerk of the House of Delegates.

These instructions were referred to a committee. Later, on September 6, 1780, the congress took into consideration the report of this committee, when the following proceedings took place:

IN CONGRESS OF THE CONFEDERATION,
Wednesday, September 6, 1780.

Congress took into consideration the report of the committee to whom were referred the instructions of the general assembly of Maryland to their delegates in congress respecting the articles of confederation and the declaration therein referred to, the act of the legislature of New York on the same subject, and the remonstrance of the general assembly of Virginia, which report was agreed to and is in the words following:

"That, having duly considered the several matters to them submitted, they consider it unnecessary to examine into the merits or policy of the instructions or declarations of the general assembly of Maryland or of the remonstrance of the general assembly of Virginia, as they involve questions, a discussion of which was declined on mature consideration, when the articles of confederation were debated; nor, in the opinion of the committee, can such questions be now revived with any prospect of conciliation; that it appears more advisable to press upon those states which can remove the embarrassment respecting the western country a liberal surrender of a portion of their territorial claims, since they can not be pre-

served entire without endangering the stability of the general confederacy; to remind them how indispensably necessary it is to establish the federal union on a fixed and permanent basis and on principles acceptable to all its members; how essential to public credit and confidence, to the support of our army, to the vigor of our councils and success of our measures, to our tranquility at home, our reputation abroad, to our very existence as a free, sovereign, and independent people; that they are fully persuaded the wisdom of the respective legislatures will lead them to a full and impartial consideration of a subject so interesting to the United States and so necessary to the happy establishment of the federal union; that they are confirmed in these expectations by a review of the beforementioned act of the legislature of New York, submitted to their consideration; that this act is expressly calculated to accelerate the federal alliance, by removing as far as depends on that state, the impediment arising from the western country, and for that purpose to yield up a portion of territorial claim for the general benefit: Whereupon

Resolved, That copies of the several papers referred to the committee be transmitted, with a copy of the report, to the legislatures of the several states, and that it be earnesly recommended to those states who have claims to the western country to pass such laws and give their delegates in congress such powers as may effectually remove the only obstacle to a final ratification of the articles of confederation; and that the legislature of Maryland be earnestly requested to authorize the delegates in congress to subscribe the said article.

Later, on October 10, 1780, the congress passed the following resolution:

Tuesday, October 10, 1780.

Resolved, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular state pursuant to the recommendation of congress of the sixth day of September last, shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states, which shall become members of the union and have the same rights of sovereignty, freedom and independence as the other states; that each state which shall be so formed shall contain a suitable extent of territory, not less than 100 nor more than 150 miles square, or as near thereto as circumstances will admit; that the necessity and reasonable expenses which any particular state shall have incurred

since the commencement of the present war in subduing any British posts, or in maintaining forts or garrisons within and for the defense, or in acquiring any part of the territory that may be ceded or relinquished to the United States shall be reimbursed.

That the said lands shall be granted or settled as such times and under such regulations as shall hereafter be agreed on by the United States in congress assembled, or any nine or more of them.

At this point it is well to consider the articles of confederation, the powers of the continental congress, and the relations of each one of the states thereto. The articles of confederation left to the states complete control of the western lands belonging to each state. The congress did have the power given it in article IX for the settlement of boundaries in dispute between the states, but beyond that there was no power in the congress concerning the states or their land holdings.

In January, 1781, the legislature of Virginia passed a resolution which suggested a plan under which that state could convey to the then federal alliance the northwest domain then held by the state of Virginia. Let it be borne in mind that this northwest territory was held by the state of Virginia in fact under its original grant from King James, and that the state of Virginia claimed that its boundaries went to the lakes and to the Mississippi river, and before the time of which we are about to speak that state had at its own expense fought the battle of Point Pleasant at the mouth of the Kanawha river, and had sent George Rogers Clark on his famous expedition to Vincennes and had conquered the territory in question. In other words, it had located on the ground the boundary claims and had seized it as a sovereign and had taken pedis possessionis of the territory claimed, so that when the resolutions of 1781 were passed the state of Virginia was dealing with a territory which is not only claimed under a grant but its title and possession had been sealed by its own treasure and its own sacrifice of blood.

At the time in question, to-wit, when the state of Virginia made this proposition to the federal alliance, the state of Maryland had not entered into the federal alliance. The other twelve of the thirteen original states had done so, but for the reasons set forth in the instructions to its delegates to the continental congress Maryland had declined to become a party to the alliance by formal action. True, it had sent delegates to the continental congress and had paid its proportion of the public expenditures, but it had de-

clined to enter formally into the alliance; and the action of the continental congress, its representations made to the state of Virginia and the action of the state of Virginia were all part of a plan to induce the state of Maryland to enter into the federal alliance. To show that this is true, it is only necessary to read the proceedings, hereinbefore referred to, of September 6, 1780, and October 10, 1780, and then to note the fact that in about two months after Virginia had passed the resolution of January, 1781, setting forth the terms upon which she would make the grant to the federal alliance, to-wit, in March, 1781, Maryland ratified the federal compact and became a part of the federal alliance, and thus completed the first organized government of the original thirteen states.

On the twentieth of October, 1783 (there was no need to hurry in those days), Virginia, through her legislature, authorized the continental congress to make the conveyance.

On March 1, 1784, Virginia, through her delegates to the continental congress, to-wit; Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, tendered the deed of cession to the continental congress. The deed contained the same clauses, reservations and trusts that were mentioned in the act of January, 1781, of the legislature of Virginia.

On March 1, 1784, the matter came before the continental congress upon the presentation of the deed of cession aforesaid, and thereupon the following proceedings took place:

March 1, 1784, Virginia, through her delegates in the continental congress, Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, completed the act of cession, the following proceedings being had in congress:

On motion of Mr. Howell of Rhode Island, the following resolution was adopted:

Whereas the general assembly of Virginia, at their session commencing on the 20th day of October, 1783, passed an act to authorize their delegates in congress to convey to the United States in congress assembled, all the right of that commonwealth to the territory northwest of the River Ohio; and

Whereas the delegates of the said commonwealth have presented to congress the form of a deed proposed to be executed pursuant to the said act, in the words following:

"To all who shall see these presents, we, Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, the underwritten dele-

gates for the commonwealth of Virginia, in the congress of the United States, send greetings:

"Whereas the general assembly of the commonwealth of Virginia, at their sessions begun on the 20th day of October, 1783, passed an act entitled 'An act to authorize the delegates of this state in congress to convey to the United States, in congress assembled, all the right of this commonwealth to the territory northwestward of the River Ohio, in these words following, to-wit:

" 'Whereas the congress of the United States did, by their act of the 6th day of September, in the year 1780, recommend to the several states in the union having claims to waste and unappropriated lands in the western country a liberal cession to the United States of a portion of their respective claims for the common benefit of the union; and

" 'Whereas this commonwealth did, on the 2nd day of January, in the year 1781, yield to the congress of the United States for the benefit of said states, all right, title, and claim which the said commonwealth had to the territory northwest of the River Ohio, subject to the conditions annexed to the said act of cession.

" 'And Whereas the United States in congress assembled have, by their act of the 13th of September last, stipulated the terms on which they agree to accept the cession of this state, should the legislature approve thereof, which terms, although they do not come fully up to the propositions of this commonwealth, are conceived, on the whole, to approach so nearly to them as to induce this state to accept thereof, in full confidence, that congress will, in justice to this state for the liberal cession she has made, earnestly press upon the other states claiming large tracts of waste and uncultivated territory the propriety of making cessions equally liberal for the common benefit and support of the union:

" '*Be it enacted by the General Assembly,* That it shall and may be lawful for the delegates of this State to the Congress of the United States or such of them as shall be assembled in Congress, and the said delegates or each of them so assembled are hereby fully authorized and empowered, for and on behalf of this State, by proper deeds or instruments in writing, under their hands and seals, to convey, transfer, assign, and make over unto the United States in Congress Assembled, for the benefit of said States, all right, title, and claim, as well of soil as jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying and being to the

northwest of the River Ohio, subject to the terms and conditions contained in the before-recited act of Congress of the 13th day of of September last; that is to say, upon condition that the territory so ceded shall be laid out and formed into States, containing a suitable extent of territory, not less than 100 nor more than 150 miles square, or as near thereto as circumstances will admit; and that the States so formed shall be distinct republican States and admitted members of the Federal Union, having the same right of sovereignty, freedom, and independence as the other States.

"That the necessary and reasonable expenses incurred by this State in subduing any British posts or in maintaining forts and garrisons within and for the defense, or in acquiring any part of, the territory so ceded or relinquished shall be fully reimbursed; and that one commissioner shall be appointed by Congress, one by this Commonwealth, and another by those two commissioners, who, or a majority of them, shall be authorized and empowered to adjust and liquidate the account of the necessary and reasonable expenses incurred by this State which they shall judge to be comprised within the intent and meaning of the act of Congress of the 10th of October, 1780, respecting such expenses. That the French and Canadian inhabitants and other settlers of the Kaskaskies, St. Vincents, and the neighboring villages who have professed themselves citizens of Virginia shall have their possessions and titles confirmed to them and be protected in the enjoyment of their rights and liberties. That a quantity not exceeding 150,000 acres of land promised by this State, shall be allowed and granted to the then Colonel, now Gen. George Rogers Clark, and to the officers and soldiers of his regiment who marched with him when the posts of Kaskaskies and St. Vincent were reduced, and to the officers and soldiers that have been since incorporated into the said regiment, to be laid off in one tract, the length of which not to exceed double the breadth, in such place on the northwest side of the Ohio, as a majority of the officers shall choose, and to be afterwards divided among the said officers and soldiers in due proportion according to the laws of Virginia. That in case the quantity of good land on the southeast side of the Ohio, upon the waters of Cumberland River and between the Green River and Tennessee River, which have been reserved by law for the Virginia troops, upon continental establishment, should, from the North Carolina line bearing in farther upon the Cumberland land than was expected, prove insufficient for their legal bounties, the deficiencies should be made up to the said troops in good lands, to be laid off between the rivers Scioto and Little Miami, on the Northwest

side of the river Ohio, in such proportion as have been engaged to them by the laws of Virginia. That all the lands within the territory so ceded to the United States and not reserved for or appropriated to any of the before-mentioned purposes or disposed of in bounties to the officers and soldiers of the American Army shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confederation or federal alliance of the said States, Virginia, inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose and for no other use or purpose whatsoever: *Provided,* That the trust hereby reposed in the delegates of this State shall not be executed unless three of them, at least, are present in Congress.

" 'And Whereas the said general assembly, by the resolution of June 6, 1783, had constituted and appointed us, the said Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, delegates to represent the said Commonwealth in Congress for one year, from the first Monday in November then next following, which resolution remains in full force:

" 'Now, therefore, know ye that we, the said Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, by virtue of the power and authority committed to us by the Act of the said General Assembly of Virginia before recited, and in the name and for and on behalf of the said Commonwealth, do by these presents convey, transfer, assign, and make over unto the United States, in Congress assembled, for the benefit of the said States, Virginia inclusive, all right, title, and claim, as well of soil as jurisdiction, which the said Commonwealth hath to the territory or tract of country within the limits of the Virginia charter situate, lying, and being to the northwest of the River Ohio, to and for the uses and purposes and on the conditions of the said recited act. In testimony thereof we have hereunto subscribed our names and affixed our seals in Congress the 1st day of March, in the year of our Lord, 1784, and of the independence of the United States the eighth.' "

Resolved, That the United States in Congress assembled are ready to receive this deed whenever the delegates of the State of Virginia are ready to execute the same.

The delegates of Virginia then proceeded and signed, sealed, and delivered the said deed, whereupon Congress came to the following resolution:

Resolved, That the same be recorded and enrolled among the acts of the United States in Congress assembled.

The claim of the thirteen original States, including the States of Virginia and West Virginia (which were, prior to June 1863, the State of Virginia), arises out of the following clause in the deed of cession and in the act of January 1781:

That all land within the territory so ceded to the United States and not reserved or appropriated to any of the before-mentioned purposes, or disposed of in bounties to the officers and soldiers of the American Army, shall be considered as a common fund for the use and benefit of such of the United States as have become or shall become members of the Confederation, or Federal Alliance, of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose and for no other use or purpose whatsoever.

In the case of the State of Virginia *vs.* the State of West Virginia, recently decided by the Supreme Court of the United States (220 U. S. 1), it was held that the obligations of the State of Virginia prior to the separation must be in part assumed by the State of West Virginia, and it necessarily follows that the assets and property which originally belonged to the State of Virginia must be divided or proportioned among the two States upon the same basis that the obligations are to be paid. The contention is, therefore, that if Virginia had a claim against the Government of the United States arising out of the deed of cession hereinbefore referred to, a proportionate part of the said claim would, since the separation in 1863, belong to the State of West Virginia, and that the trust subject reserved in the deed of cession of 1784 now belongs to fourteen States.

The trust created by the deed of cession of 1784 is specific in every particular. It, in effect, made the original Federal Government a trustee to whom was conveyed the legal title to the Northwest Territory, and the same should be held for the use and benefit of the thirteen original States, "Virginia inclusive". By inserting the words "Virginia inclusive" there is shown an intention on the part of Virginia to avoid any possible construction that she being the grantor should not participate with her twelve sister States in the proceeds of the land which her foresight had acquired and her valor had conquered. She left no room to construe the grant more strongly against the grantor and expressed in precise language a purpose and intention to keep this territory as a trust for the benefit of the original thirteen States. She fixed by the act of her Legislative Assembly, and followed it in the conveyance, a rule by which the interest of each State

should be determined, to-wit, "according to their usual respective proportions in the general charge and expenditure".

It is a well known rule of equity that "that is certain which can be made certain".

To determine what this language means we must go back to the original Articles of Confederation and put ourselves in the position now, in which the original thirteen States were, at the time this deed of cession was made, and in the position in which the members of the Continental Congress were when it was accepted.

By turning to Article VIII of the Articles of Confederation we find that the expenses of the Federal Alliance were to be paid out of a common fund to be contributed by each State, or, in the language of the Articles of Confederation, "Supplied in proportion to the value of the land in each State".

It is a matter of history and of record that the land in each State was valued and that this valuation in each State was added together and made the common denominator by which the whole cost was divided. Then this result was multiplied by the value of the land in each State to ascertain the amount which each State was expected to pay into the common fund for the common defense. To illustrate: If Virginia paid 4000, Delaware 1000, Pennsylvania 4000, New Jersey 2000, Georgia 2000, Connecticut 1000, Massachusetts 4000, Maryland 2000, South Carolina 1000, New Hampshire 1000, New York 4000, North Carolina 3000, Rhode Island 1000, all of them would have paid 30,000; then the proportions would be for Virginia 4/30, Delaware 1/30, Pennsylvania 4/30, New Jersey 2/30, Georgia 2/30, etc. There would be no trouble for any jury, master, commissioner, or court to determine the rights of any party in the trust thus created.

The clause in question refers to the practice under Article VIII of the Articles of Confederation. It refers to the practice of the Continental Congress and of each State in construing and executing that article of their fundamental law. What was paid in by each State is a matter of record. The value of the lands in each State is a matter of record. Neither the States nor the Continental Congress had any trouble in fixing the proportionate part of the general expenses which each State should bear. There should be no trouble now in ascertaining in the same way the part of the trust subject to which each State would be entitled.

The States of Virginia and West Virginia now claim that the present National Government when it was formed in 1789 took possession of this Northwest Territory and has ever since treated it as the prop-

erty of the United States, and has dealt with it as if the conveyance had been without condition or reservation.

These States claim that the present Federal Government has sold the land and has used the proceeds for the general expenses of the Government; that it has given away the land to States and to colleges, and has not kept the trust subject for the use and benefit of the thirteen original States as was provided in the original deed of cession.

It is claimed in defense of this course that the Federal Government which was in existence in 1784 was merged into the present United States under the present Constitution and that the purpose of the original grant was to admit other States into the Union and that each State which should be so admitted would be entitled to participate under the clause "or shall become members of the Confederation, or Federal Alliance", etc.

The thirteen original States, or at least the State of Virginia and West Virginia claim that this is not possible for the following reasons:

That it could not have been in contemplation of the Continental Congress that the present Constitution would be adopted by all of the thirteen original States. In fact, there is nothing to show that the present Constitution was in contemplation as early as 1784. It may be conceded that some constitution and some more permanent government than the original Federal Alliance was then in contemplation, but that the present Constitution would be ratified by all of the thirteen original States could not have been in contemplation of the State of Virginia or of the Continental Congress as early as 1784. This position is urged upon the following grounds:

The present Constitution provides that it shall be operative when nine States shall have ratified it. The States of West Virginia and Virginia contend that it was probably within contemplation certainly a possibility that only nine States would ratify the present Constitution, and they assert that in the event that all of the original thirteen States, except four, Virginia being one of the four, had ratified the Constitution, then it could not possibly have been in contemplation of the parties that the nine who ratified the Constitution could take the Northwest Territory and leave out Virginia and her three sister States which failed to ratify. The use of the words in the grant "Virginia inclusive" would seem to add great force to this argument. In other words, suppose that Pennsylvania, New York, Massachusetts, and Virginia had failed to ratify the present Constitution; then Virginia

and West Virgina assert that it would have been contrary to every principle of justice and to the clear intention of the deed of cession of 1784 for the nine States which ratified the Constitution to appropriate the trust subject and hold it as against the four States which had contributed so much to the revolutionary struggle, and especially would it have seemed contrary to every principle of justice to have disposed thus of the trust subject leaving out of consideration the original benefactor, the State of Virginia.

These are questions which your committee did not feel called upon to settle. The construction of the grant of 1784, and especially the rights of the thirteen original States under that grant, your committee does not feel called upon to settle. It is sufficient to state that there is a controversy, and that the States of Virginia and West Virginia claim with great earnestness that there should be some tribunal which should settle the matter, or else it should be taken up by Congress and dealt with in a manner that will preserve the dignity and honor of the United States and do complete justice to the complaining States.

Under article VI of the constitution, "all debts contracted and engagements entered into, before the adoption of this constitution" were assumed by the United States. If, therefore, the contention of Virginia and West Virginia be tenable, and the first federal alliance was a trustee for the benefit of the thirteen original states, then by the adoption of the constitution of the United States government became the trustee and bound itself to deal with the trust subject to the same as the old confederation was bound to do at the time the grant was made.

Indeed, it is urged that by using the word "engagements" it was intended to preserve this particular trusteeship. And section 3 of article IV of the constitution in relation to the "territory" of the United States is also cited as showing an intention on the part of the framers of the constitution to protect each of the thirteen original states in the trust. That section is as follows:

"The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state."

It is contended that it is most significant that in the clause which empowers congress to dispose of the public domain the framers of

the constitution took pains to see that such a grant of power should not be construed so as to "prejudice" any claims of any state.

It is strongly urged that the use of this language in dealing with the public domain evinced a purpose to preserve the trust created by the deed of cession because nothing else could have been in mind.

The territory in question embraces the states of Ohio, Indiana, Illinois, Wisconsin, and a large part of Michigan. The state of Virginia in 1910 by a resolution called upon her representatives in congress to take steps to protect the rights of Virginia in the premises; and the state of West Virginia in 1913 through her legislature memorialized congress to protect the rights of that state in the trust subject. A bill giving the consent of the United States to be sued was introduced by Senator Chilton in 1912, which was referred to the committee but was never acted upon.

The real object of the present bill S. 4054 is to permit a suit to be brought by any of the thirteen original states in the supreme court of the United States to test the contention of Virginia and West Virginia that only the thirteen original states have the right to participate in the proceeds of this northwest territory.

Of course, it is well settled that the national government can only to be sued by its consent and it can attach such conditions to that consent as it may deem proper. It has already established a court of claims in which can be brought, first, those claims which are founded on the constitution of the United States or any law of congress; second, those cases founded upon a regulation of an executive department; third, cases of contract, express or implied, of the government; fourth, actions for damages, liquidated or unliquidated, in cases not sounding in tort.

The supreme court has held that a state may sue in the court of claims notwithstanding the provision of the constitution that gives to the supreme court original jurisdiction in those cases in which a state shall be a party.

United States vs. Louisiana, 123 U. S. 32.

It is very doubtful whether a claim of this kind could be brought in the court of claims for the reason that it is probably not that kind of a contract which is contemplated by the act. *See*

Russell vs. United States, 182 U. S. 530;
Hartley vs. United States, 198 U. S. 229-234;
vs. United States, 46 Ct. Claims 601.

But there is a statute of limitations for the court of claims of six years, and inasmuch as the states cannot bring themselves within

any of the excepted classes it is believed that it would be useless for the state to attempt to sue on this claim in that court. (*See* Judicial Code, Sec. 156.)

It is further urged that the states should have the right to sue the United States in the supreme court, independent of any of the matters presented above. It is pointed out that now any citizen, alien, corporation, or Indian can sue in the court of claims and that it would be conducive to good feeling to extend this privilege to the states.

In the case of Virginia vs. West Virginia, 220 U. S., at page 27, the court defines the broad powers of the supreme court in cases between states. Justice Holmes there uses this language:

The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by congress or disposed of by the legislature of either state alone.

In Kansas v. Colorado, 206 U. S., 46, the court says:

In a qualified sense and to a limited extent the separate states are sovereign and independent, and the relations between them partake something of the nature of international law.

It is contended that the same principle should obtain in controversies between any state or states upon the one side and the United States upon the other; and, independent of the merits of this claim made on behalf of the original thirteen states, this highest tribunal in the land ought to be entrusted with all controversies between the states and the government. It is urged by the proponents of the bill that, if the contention of the thirteen original states be correct, the United States is in the position of a defaulting trustee, and has declined to permit its own courts to decide upon the facts and the law on which this claim is based. The matter is of such great importance that a majority of your sub-committee has felt constrained to report the facts and leave the final disposition of the subject to the full committee.

It is noted that in this report it is suggested that on account of the statute of limitation contained in the court of claims act the state could not sue on this claim in that court. However, since that report has been made it has been ascertained that the United States has in its hands about 67,000 acres of this land undisposed of, and therefore there could not be any question of the statute of limita-

tions which could be successfully urged. It will be also noted that there are two reasons why West Virginia, so it is claimed, cannot sue. One reason, because no state can sue the United States government except by its consent. This question and the reasons why authority should be given a state to sue are fully discussed in another report made to the United States senate from the committee on judiciary of the United States which is of such importance that I make it a part hereof.

COMMITTEE PRINT.

64th Congress) SENATE (Report
1st Session) (No....

STATE SUITS AGAINST FEDERAL GOVERNMENT.

———Ordered to be printed.

Mr. Chilton, from the Committee on the Judiciary, submitted the following:

REPORT.

(To accompany S. 5126.)

The Committee on the Judiciary, to whom were referred S. 902, S. 4059 and S. J. Res. 68, all of which sought to give the consent of the United States that suits may be brought against it by the States, beg leave to report as follows:

In addition to the above, bill S. 3346, giving to the court of claims jurisdiction to adjudicate certain claims of the state of Massachusetts against the Federal Government, was also referred to the Committee on the Judiciary, but that bill was reported back to the senate and the Committee on the Judiciary was discharged from further consideration thereof and the same was referred to the Committee on Claims. However, if the solution of the subject made by the Committee on the Judiciary shall be approved by the senate, it is submitted that there may be no need of any further consideration by the senate of that bill.

The committee recommend as a substitute for all the bills above mentioned and pending before it, the following:

Be it enacted by the Senate and House of Representatives of the United States of America in congress assembled, That any state which now has or hereafter shall have a cause of action against the United States, which, as between individuals, would be cognizable

in a court of justice, is hereby authorized to sue the United States thereon in the Supreme Court of the United States. The United States shall have the right in any such suit to interpose any counterclaim, set-off, equitable or other defense which could be made by the defendant were such suit between individuals.

Sec. 2. Process against, and notices to, the United States in any such suit may be served upon the attorney general.

And the same is now reported to the senate with the recommendation that the same do pass as S. 5126, and that the said S. 902, S. 4059, and S. J. Res. 68 be indefinitely postponed.

The judicial power of the United States, as fixed by the constitution, extends—

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 all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

The constitution further provides that—

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make. (Art. 3, Sec. 2).

By the eleventh amendment these powers were restricted as follows:

The judicial power of the United States shall not 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.

It has been held that the United States can sue a state in an original suit brought in the Supreme Court of the United States. (136 U. S., 211; 143 U. S., 621).

In the latter case, on page 643, the court says:

The words, in the constitution, "in all cases * * * in which a state shall be party, the Supreme Court shall have original juris-

diction," necessarily refer to all cases mentioned in the preceding clause in which a state may be made, of right, a party defendant, or in which a state may, of right, be a party plaintiff.

These cases settle beyond all question the constitutional power of the Supreme Court of the United States to determine any suit in which a state may be a plaintiff or defendant, as well as the proposition that the United States can sue a state in the Supreme Court of the United States. The anomalous rule of allowing the United States to sue a state without the reciprocal right of a state to sue the United States rests upon the doctrine that a sovereign can not be sued without its consent and that the states gave their consent to have suits brought against them by a sister state, or by the United States, when they came into the Union and ratified the constitution. (143 U. S., 646). But the United States has not given its consent to be made a defendant, and the purpose of the bills before us and of this substitute bill is to grant that consent.

The question presented is whether or not it is right, just, and expedient to grant that consent. In the above cited case of the United States v. Texas the question at issue was the boundary line between Texas and the territory of Oklahoma. It seems that the whole of Greer county governed by Texas was involved, Texas claiming that the county was within the boundary of that state and the United States claiming that it was within the territory of Oklahoma. The Supreme Court decided that a proper running of the boundary line put Greer county within the territory of Oklahoma, and, thereupon, the claim of Texas was held to be erroneous and she was deprived of the jurisdiction which she had theretofore exercised over the county. The effect of the judgment was to transfer the land and people of the whole county from the jurisdiction of the state of Texas to the jurisdiction of the territory of Oklahoma. If it had happened, by a similar mistake of running the boundary line, that Greer county had been erroneously placed under the jurisdiction of the territory of Oklahoma, the state of Texas would have been helpless, except by an appeal to congress, to correct the mistake. No reason has been assigned, and, as we think, no reason can be assigned, why, in this kind of a controversy, the state should not have the same right to appeal to the judicial power of the United States and to the jurisdiction of the Supreme Court for relief. If the sovereign state of Texas could be compelled to release its jurisdiction of a whole county by virtue of a judgment and decree of the Supreme Court, then it would seem only fair, if the position of the parties

were reversed, that the Federal Government should be compelled, by the exercise of the same judicial power, to submit to a full legal investigation and to the decree and judgment which would follow the ascertainment of the facts.

The Senate has very recently passed an act granting to the State of Nevada a large tract of land for the benefit of its school fund. The same kind of grant has been made to other States. Under the terms of the grant to Nevada the State makes certain selections and locations under a plan set forth in the act. After the State shall make the selection and location it is entirely possible that there may arise a conflict due to one construction by an engineer or other subordinate officer of the Interior Department on the one side and a claim of the State on the other. If the State shall get upon the wrong side of any such controversy the United States can fix the boundary and recover her rights by a suit in the Supreme Court of the United States against the State of Nevada. But if it should so happen that the United States through its officer should claim and occupy any part of the land granted to the State, the latter is left to the arbitrary judgment of the Department of the Interior, right or wrong, and has no recourse to any court.

A bill is pending in the Senate to provide for the development of water power and the use of public lands in relation thereto (H. O. 408). Section 13 of that bill provides:

That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state relating to the control, appropriation, use, or distribution of water.

But, suppose rights are claimed by the State, which rights are, in fact, invaded by the execution of the law of Congress, this might make a controversy between the State and the United States. There would be no trouble for the United States to get relief by a suit in the Supreme Court; but the State, however much its rights might be trampled upon by an executive officer, will be relegated to the tedious processes of Congress for relief.

Instances could be multiplied of the need of this reciprocal right of the State to sue the Federal Government. When we recall that the United States has had dealings with States and that contractual relations exist by virtue of acts of Congress and grants of lands, and that controversies have arisen over boundaries, trust fund, and mutual obligations arising out of these acts and out of actual contracts, it seems that the question whether or not the Federal Government should

be compelled to give the States the right to bring suit against it on the ground of fairness and justice must be answered in the affirmative.

The Federal Government is a sovereign, but so is each of the States. Except so far as they have, by Constitution, granted powers to the Federal Government, these States are supreme. Therefore, the same reasons which can be urged against compelling the United States to submit to being made a defendant in the Supreme Court could be urged on behalf of each one of these States.

In the case of the United States *v.* Texas (143 U. S., 648), in a dissenting opinion by Chief Justice Fuller and Mr. Justice Lamar, the position is taken that the United States can not sue a State in an original suit in the Supreme Court. This dissenting opinion makes no reference to the case of The United States *v.* North Carolina (136 U. S., 211), wherein the original jurisdiction of the Supreme Court was exercised without question; and the only significance to this dissenting opinion is that, as late as 1891, it was seriously denied that the United States could sue a State without the latter's consent.

But for the eleventh amendment, the States would have been compelled to submit to suits brought by individuals, because the original grant of judicial power was broad enough to embrace such controversies. (Chisholm *v.* Georgia, 2 Dallas, 419.) This latter decision, holding that a State may be sued in the Supreme Court by a citizen of another state and that judgment may be rendered in default of an appearance, was made in February, 1793. As a direct result of this decision, on the fifth day of March, 1794, a resolution of Congress was passed submitting the eleventh amendment to the States for ratification. It is hardly worth while to consider to what extent the States then recognized the right of the Federal Government to sue them in an original suit in the Supreme Court of the United States; but it is altogether probable that had the right been then asserted the eleventh amendment would have contained a provision to compel the United States to submit to a suit by a State to the same extent that the State could be sued by the Federal Government. It must be borne in mind that nowhere in the Constitution is there an express consent given by the State to a suit brought by the United States. That consent is inferred from section 3, article 2. (143 U. S., 646.)

In the last case cited the Supreme Court held that the States having adopted the Constitution "agreed" to the grant of judicial power and original jurisdiction in the Supreme Court in all cases "in which a State shall be a party", without excluding those in which the United States may be the opposite party, and therefore the exercise of original

jurisdiction in a suit brought by the United States against a State was not infringing upon the sovereignty of the States, but was "with the consent of the State sued".

It is too late to argue that by the grant of judicial power the States did not mean to create the anomalous condition that if there were mutual accounts between them and the United States, which could not be adjusted out of Court, the State must wait for the Federal Government to bring suit before it could file its sets-off. The thought constantly recurs, however, that the decision leaves the relations between the Federal Government and the States in the position that if the United States should sue a State upon an account, the State might file a set-off which would more than avail to defeat the claim of the United States, and yet might not have a judgment over for the difference between the claim of the plaintiff and that of the defendant. The above considerations make it clear that there are no Constitutional reasons why this bill should not pass. The grant of judicial power extends to "controversies to which the United States shall be a party". The Supreme Court has held that because original jurisdiction is given in those suits "to which a State shall be a party," the United States may sue a State in the Supreme Court.

It is the opinion of this committee that justice is denied when one party can sue and the other cannot. It cannot long obtain that the United States can sue a State, denying the reciprocal right to the State, without engendering a feeling of distrust, suspicion, and envy which is not conducive to patriotism and cordiality. The sovereign dignity of the states is as much their pride as is the sovereign dignity of the United States. The judicial construction which has envolved an actual consent of sovereign States to be sued by the Federal Government by an interpretation of article 3, section 2, of the Constitution, has clearly created a nanomalous and unfair, if not a dangerous, situation. We hear much these days of the rights of States. All admit that insofar as power has not been granted by the Constitution the States are supreme, but the fear is often expressed that gradually the Federal Government is encroaching upon the rights of the States. Is not this one-sided right to invoke the judicial power, in controversies between the Nation and the States, an instance of such an encroachment, as well as a needless denial of justice?

The suggestion is made that this Republic, composed of 48 sovereign States, each with equal dignity and rights, and all, outside of the granted powers in the Constitution, real sovereigns has so construed the grant of judicial powers and of jurisdiction to the Su-

preme Court as to leave the States, in their contracual relations with the Federal Government, but half sovereigns. A national tribunal has been created which has jurisdiction over all suits to which a State may be a party, and yet the States are in the humiliating position of being compelled to submit to a suit brought by the Federal Government without the reciprocal right of compelling the Government to submit to a suit brought by a State in the same kind of a controversy. In other words, the Federal Government, one sovereign, can compel the State, another sovereign, to keep the latter's obligations; but, no matter how solemn may be the duty and the obligation of the Federal Government, the State is powerless to enforce it. Does not such a condition imply a misconception of the purposes and objects to be attained in giving original jurisdiction to the Supreme Court? How can we expect the States to be satisfied, to feel that security which comes only with the consciousness of justice, when the enforcement of justice is one-sided and arbitrary?

The general grant of judicial powers in suits in which the United States may be a party and the grant of original jurisdiction in the Supreme Court in a suit in which a State shall be a party have been so construed as to read that "the judicial power shall extend to suits to which the United States shall be a party plaintiff", whereas the Constitution meant to create a tribunal to try cases in which the United States is a "party".

The substitute bill put into operation the full judicial power granted by the Constitution.

Upon the grounds of expediency, nothing can be urged against this bill, except the possibility of the United States having to defend many suits. Such a claim is an indictment of each one of the 48 States of the Union. It is unfair to the States and entirely inconsistent with their sovereign dignity to presuppose that any of them will attempt to implead the United States except in a controversy which has received careful consideration and which cannot be adjusted except by an appeal to the highest court in the land and is of such importance as to demand that judgment.

It might as well be argued that the United States would, upon slight cause, harass the States as it is to contend that the States would, except in the utmost good faith, sue the United States. The States act by the authority of their legislative bodies and through their executive departments. There is nothing in the past history of the Government of the States to justify the belief that the Legislature of a State would authorize a suit to be brought against the Federal Government unless

it was concerning a matter of great importance which could be settled in no other way. If the Federal Government has not abused its right of suit against the States, so we may well conclude the States will not abuse the proposed legislation. The 48 sovereigns of the United States may well be trusted to confine their suits brought under the proposed legislation to matters which comport with the dignity of the Supreme Court and the high regard which the people of the country have for that tribunal.

In the opinion of this Committee, the proposed legislation will make for peace, contentment and good feeling. The Supreme Court of the United States is the National tribunal. It now tries controversies between States involving all sorts of questions of boundaries and mutual obligations. (N. J. *v.* N. Y., 5 Peters 284; R. I. *v.* Mass. 12 Peters, 657; Mo. *v.* Iowa, 7 Howell, 660; Fla. *v.* Ga., 17 How., 478; Ala. *v.* Ga., 23 How., 505; Mo. *v.* Ky., 11 Wall., 395; Va. *v* W. Va., 11 Wall., 39; Nebr. *v.* Iowa, 143 U. S., 359.)

An investigation of the records in those suits will show that they were not instituted for slight cause, but that the controversies embrace matters which were in good faith in dispute between the parties and were of such dignity and importance as to demand decision by the Supreme Court of the United States. There is nothing in any of these cases to warrant the suggestion that the States acted hastily in bringing the suits. It is submitted that to legislate upon the assumption that one sovereign State of this Union would abuse the jurisdiction of the United States Court is entirely out of harmony with the history of this country, the conduct of the States in the past, and is almost insulting to the sovereign dignity of the States.

The proposed legislation limits the suits which can be brought under its provisions to those which would be cognizable in a court of justice "between individuals". That clause was intended to exclude any chance of involving a political right or claim as the subject matter of a suit. There was inserted in the bill the right of the United States in any such suit to interpose any counter-claim, set-off, equitable, or other defense, which would be made by the defendants, were such suit between individuals. One of the purposes of that clause was to make it perfectly clear that where the questions involved would be the settling of accounts there could be no doubt of the right of the United States to interpose any matter which might make the settlement complete.

In the case of Virginia *v.* West Virginia (220 U. S. 27), the Supreme Court held that in suits between two States—

The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone.

And in Kansas *v.* Colorado (206 U. S., 46), the court said:

In a qualified sense and to a limited extent the separate States are sovereign and independent, and the relations between them partake something of the nature of international law.

Inasmuch as the Court announced this principle upon the ground that the parties to the suit were sovereigns, the same rule would apply in controversies between the United States and a State.

In the case of Virginia *v.* West Virginia (220 U. S.) it was held that in the exercise of its original jurisdiction, the Supreme Court is not bound by any special rule or by any particular form of pleading, but that it could exercise its original jurisdiction in its own way. Suits brought under the proposed act would, of course, be governed by this rule.

It seems from this report that we are in the strange position which enables the United States Government to sue any state in the Supreme Court and does not allow any state to sue the Government except with the consent of the latter. Another reason urged why West Virginia cannot sue is that she was not a party to the original contract or deed of cession. It is believed that, in a suit in equity brought in a court of general jurisdiction, the equities of West Virginia arising out of the fact that the territory of West Virginia was a part of Virginia at the time the latter made the deed of cession would be ample to give such a court the right to adjust the claim of West Virginia. But in a statutory court like the Court of Claims this jurisdiction is limited to matters arising out of contract, and it is seriously doubted that West Virginia could by any possibility maintain a suit in that court. But since the matters arose out of contract and since the State of Virginia was a party to the contract, and since the trust is not settled so that there would not be any ground for pleading the statute of limitations, and since the Supreme Court of the United States in the case of the United States against Louisiana, 123 U. S. 32, decided that a state may sue the United States in the Court of Claims, I desire to call the attention of the Legislature to the duty which this state owes to its people and its taxpayers to take advanage of what I believe is now the obligation of Virginia to press this claim.

If I am right, there is a large sum of money amounting to many millions of dollars which is due to the State of Virginia and West Virgina from the Federal Government arising out of this conveyance out of this conveyance of the Northwest Territory. As between each other, they stand in the position of partners, and, according to the ratio of ownership in the joint assets, West Virginia would own 23-½% and Virginia 76-½% of these joint assets.

The total acreage embraced, according to government surveys, in the cession, amounted to 170,208,613 acres, and out of this Congress seems to have donated to local uses, contrary to the deed, 38,864,189 acres, which, valued at $2 per acre, the price fixed by Congress when these lands were offered for sale by the Act of May 18, 1796, would amount to $77,728,378. In addition to this, proceeds of the sales of lands amounting to $2,953,654.70 were likewise donated to local uses, making an aggregate of donations contrary to the deed of $80,682,032.70.

In addition to this, my information is that the trust has not even yet been entirely administered, but that there remains on hand undisposed of several thousand acres of these lands; and, not adding the value of these to the value of the local donations above ascertained, and allowing unto Virginia one-seventh thereof as her residuary interest in the trust, there would be due and payable from the Government of the United States to the State of Virginia $11,526,004.67 in principal, in which West Virginia would share in the same ratio that she is compelled to contribute to the liquidation of the public debt.

However, if Virginia can sue in the Court of Claims and West Virginia cannot it is clearly the duty of Virginia to bring this suit and reduce to possession this joint asset, and credit upon the claim which she is now asserting in the Supreme Court of the United States, West Virginia's part of it, which Senator Chilton believes will be enough to pay even the judgment rendered by the Supreme Court and probably leave a balance.

This matter was presented to me by Senator Chilton in a letter dated September 9, 1916, as follows:

"W. E. CHILTON, W. VA., Chairman,
Henry Fry, Clerk.
John E. Scaggs, Assistant.

UNITED STATES SENATE,
COMMITTEE ON THE CENSUS,
WASHINGTON, Sept. 9. 1916.

My Dear Governor:—

I consider it my duty to write to you concerning the status of West Virginia's claim against the United States and its relations to the debt suit. In a matter where the best interests of our state is concerned I have no politics. As you remember I was earnest in helping you find claims which could be properly introduced before the Court to cut down the claim of Virginia and congratulate myself that the data which I sent you was ample to show at least one credit of a large amount which was allowed. But I need not dwell on this at the present time. We are now confronted with the fact that West Virginia has a judgment against her which now amounts to approximately thirteen millions of dollars. A motion is pending, which the court said would be decided in a reasonable time after the next meeting of the Legislature, to compel West Virginia to pay this judgment.

It will do no good to discuss now the right or power of the Court to compel the state to pay this judgment. While the lawyers are arguing this question it seems to me that the friends of the state who are charged with the responsibility in the premises should be working upon the practical way to do what statesmanship would seem to dictate. As you know, I have been for the last four years working upon the claim of West Virginia arising out of the conveyance of the Northwest Territory. My bill seeks to give authority to West Virginia to bring a suit in the Supreme Court of the United States against the government, and if this authority shall ever be given there can be little doubt of the right of the state to recover. The language of the original trust agreement is too plain to admit of any doubt of the correctness of the claim of Virginia and West Virginia in this trust.

When I introduced the bill and made my first speech in the Senate on the question I was joked for my supposed impudence, but I kept on from one session to another gaining supporters one at a time until finally I passed the bill through the Judiciary Committee at the present session and got the bill upon the calendar with a favorable report from that committee. But there never has been a minute of time when I could get the bill up without unanimous consent. All the time we have had unfinished business and this unfinished business has been a part of the program of the President or democratic party, and while many of them might favor my bill as a single proposition, many of them would not vote to displace the President's program to

take up a bill of a private nature. Whenever the calendar would be called and this bill would be reached an objection was always raised and under the rule this put the bill over unless I could get the Senate to vote otherwise, and inasmuch as every one else would have bills upon the calendar and with hopes of reaching those bills, I could not get a majority vote to delay the calendar long enough to vote to consider this bill. Yesterday before the Senate adjourned I went to Senator Smoot and asked him frankly to tell me whether or not he was watching that bill and had been instructed to see that objection was made to it and he told me that such was the case and he could not let me bring it up at this session.

At one time Senator Sutherland objected; at another Senator Nelson; at another Senator Townsend; at another Senator Brandegee, and so on. Finally I moved to take the matter up out of order, but owing to the peculiar situation of the calendar and of the unfinished business, even the friends of the bill could not give me support. I know from personal interviews with Senators that I have a large majority of the Senate for it. Every democratic Senator will vote for it except possibly Senator Culberson, and Senators Lodge, Gallinger, Sterling and others have told me that they favored the bill.

Its failure to pass at the present session does not cause it to fail, because when Congress meets in December it will still have its place on the calendar with a favorable report, and such will be the status until the expiration of this Congress on the 4th of March next, and I have little doubt that the bill can be passed in the Senate because in December we will not be working under high pressure as we have been at this session. I have talked about this matter to members of the Judiciary Committee of the House, notably Chairman Webb and Congressman Neely, and it is so clearly a state's rights bill and a matter of simple justice to all of the states that these two members feel some confidence in their ability to pass it in the House. My reason for wanting jurisdiction in the Supreme Court is to conserve time and to get the advantage of having the suit thrashed out in a Court of full powers. But the delay in the passage of my bill should not delay the State of West Virginia in getting relief to which she is entitled by virtue of the claim and its assertion.

In the case of the United States against Louisiana, 123 U. S., 32, it is held that a state may sue in the Court of Claims. When I introduced my bill in 1912 I thought there was some doubt whether or not a state could sue in the Court of Claims on this particular claim. My doubts arose out of the question whether or not the sale of the northwest territory contract was such a contract as gave jurisdiction to the Court of Claims, and, second, whether or not the statute of limitations of six years fixed in the Court of Claims would bar us. There was, of course, the third reason that West Virginia was not a party to the grant of the northwest territory and we would have the additional trouble of bringing West Virginia into a contractual relation with the Federal Government. Since that time I have discovered that the trust is not yet settled and that the

government of the United States has in its hands 67,000 acres of that land unsold. These lands lie in the states of Wisconsin, Michigan and Minnesota, and it would seem to me quite clear that if the northwest territory grant did make a trust in the Federal Government and a part of the trust subject is still in the hands of the Federal Government the latter could not plead the statute of limitations on any matter arising out of the settlement of that trust.

Whether West Virginia can sue or not at the present time may be doubtful, but I know of no reason why the state of West Virginia may not sue in the Court of Claims for a settlement of that trust and the recovery of what may be due her thereunder, and, of course, whatever would be recovered would belong to the two states, Virginia and West Virginia in the proportion figured by the Court of Appeals in the debt suit, to-wit, 23 per cent to West Virginia and 77 per cent to Virginia. I am satisfied that with a correct figuring of the amount of this land which has been sold and disposed of by the government and the prices received by the government at the time it was disposed of, the part which would come to West Virginia would be probably twelve or fifteen millions of dollars.

Might you not well take into consideration at once the course of filing a bill in equity against Virginia in the Supreme Court of the United States alleging this northwest territory trust, the fact that large amounts of this land had been sold and the money paid into the treasury, large quantities of the land conveyed to colleges and to others in violation of the trust, and other facts, showing approximately the amount which in justice would be coming to the two states, Virginia and West Virginia? Then take the position that Virginia can sue in the Court of Claims and West Virginia's right to do so is at the best doubtful, and now since Virginia has brought a suit to ascertain the amount which West Virginia owes Virginia, before the latter can compel West Virginia to pay this claim Virginia should reduce to possession the joint assets, which, after reduced to possession would wipe out the original joint debt and leave nothing for West Virginia to pay. Let me illustrate. If A and B were in partnership and a part of the partnership business was a contract in A's name to build a lock and dam for the government. A makes the contract with the government, gives the bond and the government looks to A for it and will not allow him to assign it to the partnership, and yet as between A and B all of the profits arising from the contract belongs to the partnership. Afterwards A settles up the business and finds that the partnership is indebted $40,000, which he pays and then brings a suit in equity to settle up the partnership, alleging that B owes A $20,000, or one-half of the amount paid by A. B answers that the bill is true but that the contract which A had with the government was in equity a firm contract and that the government really owes A $40,000 for which A can sue in the Court of Claims and B cannot, and B asks the court to restrain the hands of A from enforcing the claim against B until A sues the government and recovers the amount due under the con-

tract. Certainly a Court of Equity would look with favor upon such a cross bill and would be justified in compelling A to bring the suit.

There is a greater reason for applying this principle in the controversy between Virginia and West Virginia than in a suit between private individuals. The court has more than once said in the pending case that it will not deal with a sovereign state in the same technical way that it deals with an individual. Now inasmuch as the Court of Claims is a stautory court created for the adjudication of claims against the government and the exact status of West Virginia to Virginia is not exactly contractual in the narrow sense, but was one of those conditions created by political changes and must be worked out upon lines which take into consideration not only equitable principle but political history and the idea that a sovereign state can act only through its officers who are restricted by constitutional provisions and legislative enactments, the reason for applying the principle which I would invoke becomes stronger than in the case between A and B which I have stated. Of course the court may decide that the bill comes too late and there are many other answers which could be given to my proposition, but I consider it my duty to present this idea to you who now represent the state of West Virginia in this most important matter.

In discussing my bill in the campaign which is about to open all of these matters will naturally come to my mind and will be presented to the people. I cannot deal with the people of West Virginia except in the utmost frankness. I have no doubt that in the end my bill will be passed by congress. I have the votes to pass it when that is the sole question for consideration. I am speaking now of the senate. I fell sure that the same consideration which have induced the senate to consider it favorably will induce the house to act favorably. It would be a short case if the Supreme Court had jurisdiction. But my interest in the subject and my sincere desire to avoid the calamity of West Virginia having this burden to bear induces me to make the above suggestion to you for whatever you think it worth. I could not have any personal interest in this because my position as United States senator would make it improper for me to represent the state in the suit. Indeed, if I did not have this notion of propriety I would take that position because if I in any sense were employed or retained it might detract from my influence in pushing the bill in which I am so deeply interested.

The great trouble about our claim is that a very few of our people have studied it sufficiently to become acquainted with its merits. A great many of our people have the general idea that it is an old claim and has been buried under the dust so long that it could not have much merit in it. A great many others dismiss it with the idea that I have simply been playing politics. But it does seem to me that when a body of lawyers like the Judiciary Committee of the United States senate has dignified my position with a favorable report it is time for West Virginia to wake up to the fact that she

has some rights which it is her duty to take care of. I have been trying to get the people all the information which I had upon the subject. I have tried to keep you and Attorney General Lilly posted upon every move here. I am indeed sorry that I could not get this bill through before adjournment, and in the utmost good faith I give you the benefit of my judgment.

Very truly yours,

(Signed) W. E. CHILTON.

Hon. H. D. Hatfield,
Governor of West Virginia."

To which I made the following reply:

12" September, 1916.

My dear Senator Chilton:—

Your communication of September 9th has been read with a great deal of interest and has impressed me very much indeed.

The motion you speak of that is pending in the Supreme Court of the United States was disposed of by that court upon one point made by Judge Holt, who represented the state, in resisting the motion of the Virginia representatives in asking that the Supreme Court of the United States proceed to collect the judgment it had rendered against West Virginia; but no doubt the same motion or one similar in substance will be submitted to the court after our session of legislature in 1917 in case the actions of that body do not meet with the approval of the Virginia authorities. But whatever may be the future action of the Virginia attorneys, I thoroughly agree with you that the officials of West Virginia who are responsible for the welfare of the state should be working co-operatively and in a statesmanlike way to do whatever they can that will bring relief to the state and its citizens.

I have watched your work relative to the northwest territory with a great deal of concern and I truly hope that your efforts will not be in vain, nor do I feel that they will be, because the position you take is equitable and just; and I am glad to have you say that there is little doubt but what, if the bill becomes a law, there is indeed small chance for the State to lose in recovering its equitable part out of the trust fund that grows out of the Northwest Teritory on account of West Virginia being a part of the territory of one of the original thirteen States from which this valuable property comes and for which the Federal Government has not settled the claim that is held against the Government for any part of this territory of land.

I remember quite well when you introduced your bill and the adverse criticism that was made to some as to the fallacy of your idea. You had talked with me about this matter and I was impressed with the soundness of your position. Of course, not being a lawyer I could not appreciate it as those who were lawyers might have, but who did not seem to be interested or enthusiastic at least about the proposition.

I note with regret your inability at the last session of the Senate to get this bill passed, notwithstanding it had been recommended favorably by the Judiciary Committee, and that you feel when it comes to a vote there is little question of a majority of the Senate assenting to its passage. I feel that I can appreciate your experience along this line in a slight way on account of the small amount of training I received while a member of the State Senate of West Virginia, and I can understand how embarrassing and exasperating it is to have a measure so meritorious hanging in this way on account of the fact that someone else has something that they feel is more important than a matter which is so vital to West Virginia, affecting the citizenry and our State's future as this principle does. I am glad to know that its failure of passage at this session of Congress does not mean a reconsideration of the whole matter at the coming session, which begins in December, and I truly hope it will become a law at the coming session; and I want to assure you that if there is anything I can do as Governor of West Virginia to expedite the passage of this bill it will afford me much pleasure to join you in your efforts in this regard.

I also note with much interest that your failure to get this bill passed which would permit West Virginia to litigate her claim on the Northwest Territory before the Supreme Court should not delay the State in getting the relief by filing a bill in equity against Virginia in the Supreme Court of the United States, requiring her to reduce to possession the joint assets of the two States in their claim on the Northwest Territory. I thoroughly understand your idea. It seems to me rational and I am quite willing to join with you at any time either in Washington or elsewhere in a conference preparatory to instigating the litigation in the Supreme Court of the United States as outlined by you.

I can understand your great effort and the seeming lack of interest taken by the citizenry, and I might even go farther and say, by those whose duty it is to safeguard and protect the interest of the State in this respect. I have had my experience along this line and I feel that I am in position to appreciate your position. It was indeed hard for me to impress upon some the idea of equities in the way of credits that were legitimately due West Virginia on account of the sales of certain properties that were developed by the State of West Virginia out of the money that was originally borrowed by that State for internal improvements and later sold by her and from which she enjoyed all the increment. The mother State did not account to West Virginia for any proportional part of what she realized out of the sales of these properties, but in her declaration and in the argument presented by her attorneys she insisted upon West Virginia assuming 33-1/3 per cent originally of the debt, but she did not say one time through her counsel that West Virginia was entitled to any proportional part of the money that the mother State had realized out of the sales of these properties which she had sold, which had been bought with the money she had borrowed originally for the

purpose of internal improvements, and which she was asking the Supreme Court gave us the short period of five months to pay 33-1/3 per cent of the original. After we were successful in this respect in convincing some that we were entitled to credits, the Supreme Court gave us the short period of five months to investigate a record which covered a period of ninety years and to present our claims to the Master, who in turn was to make a report in that period of time to the Supreme Court of the United States. The Court awarded us a credit amount to something over three millions of dollars, which reduced the original judgment of seven million two hundred and fifty thousand dollars to a little in excess of four millions of dollars.

* * * * * * * * I certainly feel there is merit in your position and that you are entitled to support, and I stand ready and willing to give to you every ounce of energy and influence I possess that will be helpful in protecting West Virginia in this long drawn out litigation, which should have been adjudicated fifty years ago.

I shall be very glad to have a conference with you as soon as you can arrange it, and to go into this matter in all seriousness.

I want to thank you for the great interest you have taken, and to ask you to write me and make any suggestions at any time that you feel inclined to make.

Believe me

Faithfully,
(Signed) H. D. HATFIELD.

Honorable William E. Chilton,
Washington, D. C.
HDH:MP

This correspondence sets forth what I have in mind now.

West Virginia is one of the states of this Union. She was admitted into the Union during the Civil War; she was recognized as a child of the war whose admission was much desired by the United States because of her geographical position, and every move connected with her admission was inspired by a desire to carry out the celebrated toast of Andrew Jackson, "Our Federal Union; it must be preserved." There is no use to warn the people of West Virginia against any spirit of opposition or rebellion to constituted authority. This State is in the Union to stay and we will patriotically live up to every obligation demanded by the Constitution.

The Supreme Court has decided that we owe an immense sum of money for interest. This looks to us like a most burdensome charge, and we feel sure that great Court will listen to any reasonable plea which the State may make looking to a review of that question, and I would, therefore, recommend to the Legislature that

we respectfully but earnestly present to the Court a petition for a rehearing of the matter of the interest upon the debt.

This controversy has indeed sorely tried the patience of West Virginians for many years, and on numerous occasions this State, through its representatives, has tried sincerely to adjust the difference with the mother State, but up to the present these efforts have proved in vain. It was attempted through the Bennett Commission in 1871, as I have heretofore indicated, and again—but the arbitrary action of the Commission in insisting that West Virginia's representatives agree to a stipulation fixing the proportional part of West Virginia's obligation at one-third of the total before any negotiations took place, made it an impossible proposition for West Virginia to accept. In March, 1914, West Virginia's representatives again offered a basis of settlement, after deducting from the principal fixed by the Supreme Court certain credits which had been procured from the records of the mother State. But again Virginia's representatives refused a respectful consideration of West Virginia's contentions. These were later proven to be right in principle and in equity. West Virginians are willing to assume any obligation that presents itself after a just and equitable basis of settlement of this controversy has been accepted, but the State is handicapped seriously in its efforts by the lack of co-operation in bringing out the facts which are material in the consideration of the equities. We have asked for no special consideration or advantage. It is to the interest of West Virginia to see a speedy end to this controversy. The passing of years has worked only to our disadvantage, rendering obsolete the many avenues of proof that were once available in the sustaining of West Virginia's contentions as to assets jointly owned by the two commonwealths. In the recent litigation it has been necessary to delve into the rubbish in the archives from many departments of government, both state and national, as well as from private corporations, which has cost much in time, patience and money, and with all of these efforts upon the part of West Virginia the mother State, through her representatives, has stood aloof upon technical legal rights, and with no seeming inclination to settle the controversy upon a broad ground devoid of untechnicalities, as was pointed out as the ground upon which it should be settled when the Supreme Court passed upon the disposition of the case. The Court took the ground that the matter should be considered upon broad untechnical lines as a controversy between two sovereign states. The question naturally comes to us, how long do the representatives of Virginia and the bond holders

expect to continue this arbitrary attitude? I am of the opinion that so long as this position is maintained by them the longer it will take the representatives of West Virginia, on account of the embarrassing position they occupy with respect to the availibility of the records in this controversy heretofore discussed in their efforts at adjudication of all equities that must be considered and passed upon before justice is done and the litigation ended.

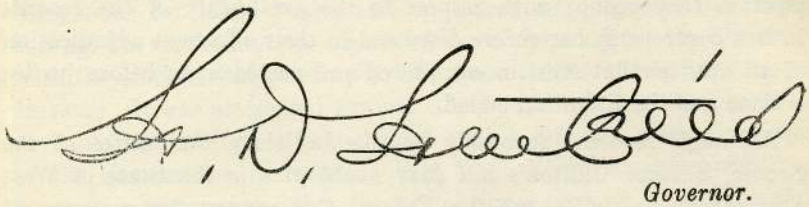
Although reported favorably by the Judiciary Committee of the Senate, Senator Chilton's bill that would give to the State of West Virginia the right to sue the Federal Government for recovery of its proportionate part of this claim has not yet been enacted into law, and it would seem to me appropriate that a memorial should be adopted at this session of your honorable bodies asking the representatives in Congress from West Virginia to assist in expediting the passage of this bill. Provision should also be made by the Legislature for having presented to the Supreme Court of the United States the contentions of West Virginia as to why Virginia should be restrained from pressing her claim against West Virginia further, until the state of Virginia sues in the Court of Claims, as I am informed she can, for the purpose of recovering her claim growing out of the cession of the Northwest Territory, and thereby reducing the joint assets of the two states to a common fund which will place the states in a position to receive their proportionate credits and to end further litigation.

I am indebted to Senator Chilton, who has made a persistent study of this subject in the patriotic hope to be able to render to his State a distinct service; and to Honorable John H. Holt, who has been untiring in his efforts to assist me in any and all phases of the situation growing out of this litigation. I am also thankful to the Honorable John W. Mason and feel deeply grateful for the efforts he has made to bring success to the common effort made by those whose duty it is to serve the State in this matter.

I therefore respectfully submit these matters to you for your careful consideration, and with the sincere hope that with the facts that have been developed during my administration, as well as facts developed with previous administrations, that some suggestion will be forthcoming that will result in the protection of the interests of our State in this litigation and bringing about the consideration of further equities which West Virginia is entitled to receive, and

after the proper equities have been conceded to the State, the prompt liquidation of the residue, if any there be.

Respectfully submitted,



Governor.

January 17, 1917.