IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA
)
VS.) IN EQUITY.
)
STATE OF WEST VIRGINIA.

REPLY OF WEST VIRGINIA TO SUPPLEMENTAL NOTE OF VIRGINIA AND TO EXTRACTS FROM OFFICIAL RECORDS OF THE REBELLION IN REFERENCE TO CONDITION OF RAILWAYS IN VIRGINIA AND IN THE CONFEDERATE STATES, FILED BY COUNSEL FOR VIRGINIA WITH SAID SUPPLEMENTAL NOTE.

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January 11, 1915.

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After the first and second arguments before the Master upon the evidence taken in this cause, it was supposed that the same had been finally submitted

for his consideration, with the exception that each party might thereafter, in accordance with the request of the Master, file with him a statement giving definitely and in detail the particular portions and pages of the record relied upon. This analysis on the part of West Virginia was prepared and printed upon the twenty-fourth day of December, 1914, and copies thereof mailed to the Master upon the twenty-sixth day of that month. A few days later, copies thereof were likewise sent to counsel for Virginia, and the cause was supposed to have been finally submitted, it being inferred that Virginia had either theretofore filed a corresponding analysis, or had relinquished the idea of so doing; but she has now filed a supplemental brief or note, accompanied by a manuscript document, consisting of extracts from the official records of the Rebellion with reference to the condition of railways in Virginia and in the Confederate States, and other letters and resolutions in relation thereto.

We are not complaining; neither do we presume to criticize; but, as West Virginia has the burden, and the opening and conclusion, in consequence, of the discussion, we feel at liberty to reply to this supplemental brief, and to make a few comments upon its accompanying document.

SUPPLEMENTAL BRIEF OF VIRGINIA.

This supplemental note deals, although not in the following order, with the following questions:

1. The time as of which West Virginia should

take her credits, or the time as of which the securities set up by her as credits should be valued;

II. The evidentiary value of the alleged market quotations on the securities here involved presented by Virginia in this cause;

III. The absence of any presumption of actual value based upon the face or par value of a bond or certificate of stock;

IV. The subject of interest, and,

V. The pecuniary interest of Virginia in the result of this controversy.

But, before discussing the foregoing propositions, it will conduce to clearness to make the following introductory.

INTRODUCTORY.

If the division of the old Commonwealth of Virginia into two States had taken place without any agreement upon the part of the State of West Virginia to assume an equitable proportion of the pre-existing debt, out of analogy to the rule that obtains in the division of municipalities, Virginia would have taken all the property originally owned by the old Commonwealth, excepting the physical property actually situated within the new State, and would have become responsible for the entire debt.

Dillon Mun. Corp., Vol. 1, Sec. 188, page 216 (3 ed.).
Mt. Pleasant v. Beckwith, 100 U. S., 514; 25 L. Ed., 699.
Comrs. of Larimie County v. Comrs. of Albany County, 92 U. S., 307; 23 L. Ed., 552.

The text of Dillon above cited is as follows:

> "So it has been frequently held that, if a new corporation is created out of the territory of an old corporation, or if part of its territory or inhabitants is annexed to another corporation, unless some provision is made in the Act respecting the property and existing liabilities of the old corporation, the latter will be entitled to all the property and be solely answerable for all the liabilities."

Likewise, the first point of the syllabus in the case of Mt. Pleasant v. Beckwith, *supra,* reads as follows:

> "Where a new town is formed from portions of an old one, the old corporation owns all the public property within its new limits, and is responsible for all the debts of the corporation contracted before the Act of separation was passed, unless the legislature otherwise provide."
> (Syl. L. Ed.)

And the second point of the syllabus in the case of Laramie County v. Albany County, *supra,* reads:

> "Where the legislature does not prescribe any different regulations, the rule is

that the old corporation owns all the public property within its new limits, and is responsible for all debts contracted by it before the Act of separation was passed, which debts it must pay without any claim for contribution from the new sub-division."

(Syl. L. Ed.)

But, as further said by Dillon,

"Upon the division of the old corporation and the creation of a new corporation out of part of its inhabitants and territory, or upon the annexation of part to another corporation, *the legislature may provide* for an *equitable appropriation or division* of the property, and impose upon the new corporation, or upon the people and territory thus disannexed the obligation to pay an equitable proportion of the corporate debts."

(Dillon Mun. Cor. Sec. 189, Vol. 1, page 216; 3 ed.)

It will be seen, therefore, that, under such circumstances, an *equitable division* of the property and the *payment of an equitable proportion of the debts* go hand in hand, and it becomes quite evident that, when West Virginia promised to assume "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, in the year one thousand, eight hundred and sixty-one", she meant that she should receive a like equitable proportion of the property owned by the old Commonwealth. In other words, and under the rule, if she paid no part of the debt, she should receive no part of the property; but, if, upon the other

hand, she should pay an equitable proportion of the debt, she should receive an equitable proportion of the property.

In the next place, it is stipulated in this case, and is a fact, that the stocks, securities and other properties presented in this case by West Virginia for valuation, to the end that the same proportion of such valuation may be applied as a credit upon her part of the debt as her part of the debt bears to the whole debt, were actually purchased out of the proceeds of the very bonds that evidence the debt to the payment of which she is compelled to contribute (New Record, Vol. 1, page 711); and it follows as a corollary that, if she is compelled to pay any part of a debt representing purchase money, she is entitled to receive a corresponding part of the value of the thing purchased.

Again, as we have shown in former briefs, the assets in question here were devoted by the Legislature of Virginia to the payment of her public debt.

Act of Gen. Assembly of Va. of 1838, New Rec., Vol. 1, p. 661-4.

Sections 28, 29 & 30, Art. 4, Constitution of Va. 1851, New Rec., Vol. 1, p. 651.

Act of Va. passed March 26, 1853, New Rec. Vol. 1, p. 652-6.

Act of Gen. Assembly of Va., approved March 31, 1875, New Rec., Vol. 1, p. 656-8.

Joint Resolution of Gen. Assembly of Va. of 1866, New Rec., Vol. 1, p. 705-6.

Resolution concerning Canal Co., New Rec., Vol. 2, p. 198-9.

Sec. 1 of an Act of Gen. Assembly of Va., approved Feb. 18, 1870, New Rec., Vol. 1, p. 706.
Message of Gov. Letcher of Va., New Rec., Vol. 1, p. 665-6.
Message of Gov. Walker of Va., New Rec., Vol. 1, p. 667-73.

And, in the last place, the Supreme Court has held that West Virginia is compelled to pay 23½% of the debt, and West Virginia's contention is that she should receive 23½% of the value of the assets.

Virginia v. West Virginia, 220 U. S., p. 1; 55 L. Ed., 358.

We come now to reply to the propositions discussed in Virginia's supplemental brief.

I.

DATE OF VALUATION OF STOCKS CLAIMED AS CREDITS.

Virginia, on January 1, 1861, owned a great many railroad, bank and navigation company stocks and other securities purchased with the proceeds of the bonds that evidenced her debt as of that date, and amounting at par to many millions of dollars. West Virginia claims, as we have seen, 23½% of the actual value thereof as a credit upon her part of the debt, because she is charged with 23½% of that debt; and the question is, what is the proper date as of which they should be valued. Virginia claims that they should be valued as of the 20th day

of June, 1863, the date upon which West Virginia was admitted into the Union and became a State; and West Virginia insists that they should be valued as of the first day of January, 1861, that being the date as of which her equitable proportion of the debt has been ascertained.

The contention of Virginia at the time the testimony in this cause was taken, as well as upon the oral argument before the Master, was, and now through the medium of her supplemental brief is, that West Virginia could not take a credit as of January 1, 1861, because she had not become a State at that time; that she had not then been born, and that in this, the year of our Lord 1915, she could not get the benefit as credits of the *pre-natal* values of 1861; but, in the very next breath, Virginia complacently announces that West Virginia may be saddled with the *pre-natal* debts of 1861.

West Virginia, in reply, now insists, as heretofore,—

1. That, if she were enough of an entity to be charged with a debt created prior to her admission into the Union, she was likewise enough of an entity to receive a credit thereon existing at the date of the creation of the debt, although that may have been prior to her admission as a State. Whoever has the capacity to be charged has a like capacity to be credited;

2. That the date of the admission of West Virginia into the Union (just so she was finally admitted) has nothing in the world to do with the question; for, after she has become a State, she may

be charged with any obligation imposed as a condition to her admission into the Union, and may be credited with any amount necessary to make that obligation *equitable* in accordance with the terms of the condition. In other words, the obligation in the one case and the credit in the other spring out of circumstances existing prior to the creation of West Virginia, but the judgment charging her with the one and crediting her with the other is not entered until after she has become a State;

3. That West Virginia's promise was to pay an *equitable* proportion of the Virginia debt existing prior to January 1, 1861, and that that proportion could not be ascertained without allowing her the credits as of that date, and striking the balance as of that time. It would not be equitable to add up the debtor side of the column on the 31st day of December, 1860, or the first day of January, 1861, and then postpone the addition of the credit column until the twentieth day of June, 1863, when the ravages of war had impaired the value of the assets represented by that column;

4. That the Supreme Court measured the indebtedness as of January 1, 1861, and the credits must be measured as of the same date, and,

5. That the State of Virginia was herself responsible for the impairment in value of these securities.

She went into rebellion against the Government of the United States, and for four long and bloody years waged war against Federal power; caused, in part at least, her own territory to become the arena of contending armies, resulting in a necessary blockade of her ports by the Federal Government,

so that the railway companies issuing many of the stocks in question here were unable to procure rails and rolling stock necessary to the proper up-keep of their roads, with the consequent impairment, more or less, of their securities.

She undertook by this war to overturn the current money of the United States, in which these investments had been made, and substitute in lieu thereof a worthless confederate currency, however much of which the railways might earn during the war, they did not dare to put to surplus or keep, for the reason that it diminished in purchasing power too rapidly to hold.

Suppose Virginia had not embarked in this war —the battle arena had been beyond her borders to the south, and her railways and her canals would have fattened through the transportation of Federal troops and stores.

Suppose she had not seceded from the Union— Confederate currency would never have fallen upon her or upon her people and property as a blight, and the war, we suspect, would not have lasted one-fourth so long; for its length and severity were due in large part to the almost boundless genius of Virginia commanders and the unmeasured zeal and gallantry of Virginia troops.

But it is said in Virginia's supplemental brief that who was responsible for the war is not a question for decision in this case. Very true, but Virginia is responsible for her participation in it.

And it is further said that to hold Virginia responsible for the depreciation of assets in consequence of her secession from the Union would operate "the repudiation of the essential postulates upon

which the political existence of West Virginia depends. It was the government of Virginia having its seat at Richmond which went into the war, and not the restored government of Virginia. West Virginia's existence as a State depends upon the validity of the restored government of Virginia—the only government of Virginia which had any transaction with the new State with reference to the debt, and the government with which West Virginia entered into the compact which the Court made the basis for determining her share of that indebtedness". (Virginia's supplemental brief, page 31.)

Technically this may all be true, but equitably it is not. West Virginia was brought into existence through the "restored government" of Virginia, but the State of Virginia, through her people, had theretofore acted upon the question of secession, and had, before the "restored government" was ever thought or dreamed of, set on foot all of the destructive agencies of war. Indeed, the "restored government" was an effort to remedy the disaster in so far as it could be that had been theretofore provoked by the only Virginia that was in existence at the time of the ordinance of secession. Virginia may never have gone out of the "indestructible Union of indestructible States"; but, be that as it may, she fought it then from within with such might of genius that it was shaken from foundation to turret stone. Neither must this be taken as a criticism of her course, because our individual judgment and feeling is that she was then settling an unsettled question, and approached it with unfaltering courage. The die was cast against her, and we are now speaking only of consequences.

II.

THE EVIDENTIARY VALUE OF THE ALLEGED MARKET QUOTATIONS ON THE SECURITIES HERE INVOLVED.

Counsel for Virginia insist that, by the taking of the supplemental testimony upon this subject (taken at Richmond in the month of November, 1914), they have met all the requirements of the cases upon the subject of market quotations, and that their revised exhibit No. 2 (New Record, Vol. 2, pages 322-58), as well as the sales by Davenport & Co. (New Record, Vol. 3, pages 199a to 199h, inclusive), had been brought within the requirements of the law, and should be taken as evidence of the values of these stocks, both as of January 1, 1861, and June 20, 1863.

They feel that they have brought themselves within the rule of Wheelan v. Lynch, 60 N. Y., 474, and N. & W. Ry. Co. v. Reeves, 97 Fed., 284, but say that, even if they have not done so, they have brought themselves within the principles of the case of Cliquot's Champagne, 3 Wallace, 114-45, and that the latter case must rule in this controversy, regardless of what the Courts of last resort of the States may have held.

The Cliquot Champagne case arose under the Act of Congress of 1863, which provided that goods imported into this country which had been obtained in any other way than by purchase must be invoiced according to "the actual market value thereof at the time and place when and where the same were procured or manufactured", and the duty would be

charged accordingly. Under this Act, two lots of champagne, one containing one hundred and twenty-five baskets and the other six hundred baskets, were shipped at the port of Bordeaux, in France, consigned to one Alfred Borel, at San Francisco, in the United States, and they were seized at the latter port by the Federal authorities, upon the charge that they had been falsely and fraudulently invoiced for the purpose of defrauding the government of revenue. They should have been invoiced under the Act according to their actual market value at the time and place when and where they were procured or manufactured. They had been manufactured at Rheims, in France, and were owned by Eugene Cliquot, who, when they were libeled in the District Court for forfeiture, appeared as the claimant thereof, and pleaded the general issue, the pleading amounting in fact to a denial of the charge of false invoice.

It became important at once to ascertain the actual market value of these goods at the place of their procurement or manufacture, and a naval officer was sent by the government to France to make inquiry upon this subject. In Paris, he went to the place of business of Jean Petit & Fils, who were the agents of Eugene Cliquot, the claimant, and inquired the prices per bottle of wines, and also the wholesale prices for shipment to England and elsewhere. The agent stated to him the different prices, and, at the same time, furnished him with a list of wines and prices, or a "Price-Current".

Subsequently, upon the trial of the case, the testimony of the naval officer as to what the agent of Cliquot had told him, as well as the admissibility of

the Price-Current, was objected to, upon the ground that the one was hearsay, and the other too remote; but these objections were overruled, and judgment was entered for the government by the District Court, which was subsequently affirmed by the Circuit Court, and finally by the Supreme Court of the United States.

This testimony was received as proof of the actual market value of the goods at the time and place in question, because it was the admission of the accredited agent of Eugene Cliquot, the owner, and would, of necessity, bind Cliquot in a proceeding either civil or criminal where he alone was interested, but is not authority for the proposition that such admissions would bind any one else who was not a party thereto.

The syllabus of the case upon this point reads as follows:

> "Whatever is done by an agent in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal and may be proved as well in a criminal as in a civil case, in all respects as if the principal were the actor or the speaker."
>
> (1st paragraph syl. 18 L. ed., 116.)

To the same effect is Henkle v. Smith, 21 Ill., 238.

By an examination of the plaintiff's revised Exhibit No. 2 (New Record, Vol. 2, pages 334-44), it will be seen that the alleged market quotation therein set down as taken from the Richmond Dispatch

is in each case based upon the last sale, and nowhere does the date of the last sale appear. It may have been months before the date in question, and could not furnish a proper quotation for the specific date.

It also appears therefrom that the quantity or amount of stock or number of shares sold is never given; so the sale may have been of one share or of two. In other words, there may have been no market for the stocks at all.

It likewise appears from this exhibit that the source of information for many of these alleged quotations is not given and is unknown. Who the people were furnishing them to the paper, and what their responsibility and character does not appear (New Record, Vol. 2, pages 336, 337, 338, 339, 340, 341, 343 and 344).

This exhibit likewise shows that Davenport & Co. nowhere appear until the year 1863 (New Record, Vol. 2, pages 335, 337, 339 and 341).

And, when we turn to the supplemental testimony taken upon this subject at Richmond in the month of November, we find that Lancaster & Son, according to the testimony of Mr. Williams, based the quotations furnished by them to the Richmond Dispatch solely upon their own transactions, although there were other brokers at the same time engaged in the City of Richmond in the same business. In other words, if they were to sell today a share of stock in the Richmond & Danville Railroad at seventy-five cents, their next market quotation would be made at that price, regardless of sales made by other brokers upon the same day of the same issue of stock. It appears that they neither knew nor cared in publishing these reports whether other

brokers were selling the same stocks at a less or at a greater price; and how it would be possible to make up market quotations in such a way it is difficult to see. One broker might sell at ninety cents, another upon the same day might sell the same stock at ninety-five, and a third at one dollar. How either price could be arbitrarily taken as representing the market price it is difficult to see.

That such was the practice of Lancaster & Son appears from the testimony of Mr. John L. Williams at pages 127-8 of Vol. 3 of the New Record, which reads as follows:

> "68. XQ. That may be. Then I will ask you this question: Did you keep up with the sales of stocks made by Maury & Co?
>
> A. No, we didn't make any inquiry, or know anything about them.
>
> 69. XQ. You didn't know what prices they got?
>
> A. No, sir.
>
> 70. XQ. You didn't know whether their prices were greater or less than what you got?
>
> A. We had nothing to do with their business.
>
> 71. XQ. Answer my question: Do you know whether their prices were greater or less than what you got for the same stocks?
>
> A. I would like to know how I was going to know.
>
> 72. XQ. You can say whether you did know?
>
> A. I did not know.
>
> 73. XQ. That is all we are trying to get at. Now, then, there was more than one

> firm engaged in the sale of stocks in Richmond in the years 1860, '61, '62 and '63, and any market quotations that were published in the Richmond papers at the time by John A. Lancaster & Son were based upon their own experience, regardless of what the other brokerage firms were doing?
>
> A. Yes, sir."

And also, at the top of page 123, he was asked the following question, and made the following answer:

> "35. XQ. Would you go and inquire of the other brokerage firms what they had been selling before making your market quotations?
>
> A. No, indeed; I do not recollect any other brokers, except the Maurys, at that time."

Again, that portion of the supplemental testimony taken in November that consists of sales taken from the records of Davenport & Co., styled "Exhibit R. B. Washington No. 4", and found in Vol. 3 of the New Record, pages 199a to 199h, inclusive, as we understand it, relates exclusively to bonds, and embraces none of the stocks here in question, and is confined to the years 1863 and 1864. Nothing appears as of January 1, 1861.

In this connection, it may be well enough to call attention to two paragraphs found in the supplemental brief of counsel at page 24. These paragraphs read as follows:

> "It is a strange thing that the firm of Davenport & Co., which existed before and

through the Civil War, should still survive, though, of course, with an entirely changed personnel. All those who were connected with it in the sixties have (doubtless) long since passed away.

But it is far more marvelous that the books of account of the predecessor firm of 1860 to 1865, surviving the mutations of half a century of change, including war and revolution, 'destruction and reconstruction', should be now discovered in time to bring their irrefutable evidence into this cause."

By what warrant counsel assert in the first paragraph that the firm of Davenport & Co. existed before and through the Civil War, or in the second paragraph that the books of account of the predecessor firm of 1860 to 1865 had been discovered, we are at a loss to know. Certain it is that no quotation was furnished by that firm and embodied in the plaintiff's revised exhibit No. 2 prior to the year 1863. Neither has any extract been taken from their books and embodied in the supplemental testimony that ante-dates that year. Besides, Mr. John L. Williams was of the opinion and belief that they did not exist prior to the war (New Rec., Vol. 3, p. 124, cross questions 46 and 47 and answers). William H. Palmer did not recall when Davenport & Co. commenced business (New Rec., Vol. 3, page 151). Coleman Wortham, one of the successors, did not know when the firm of Davenport & Co. began business, and the books discovered at Richmond deal only with the year 1863 and subsequent to that date (New Rec., Vol. 3, pages 160-2).

The stipulation covering the testimony of Richard W. Maury does make him state that Davenport

& Co. was a firm in the City of Richmond during the Civil War, from 1861 to 1865, inclusive, but the stipulation concerning Mr. Purcell confines the period to the Civil War, without stating when they first began. It is pretty clear, however, that Davenport & Co. did not ante-date 1863; but, however this may be, none of their books, at least, were exhibited covering any period prior to that year.

III.

IS THE VALUE OF STOCK PRESUMPTIVELY ITS PAR?

Counsel for Virginia, in their supplemental note, state that "counsel for West Virginia in their briefs and oral argument before the Master rested their case largely upon the proposition that the par value of the shares of stock and bonds of a corporation are presumed to be their true value, in the absence of evidence to the contrary".

They further say:

> "This presumption not only runs counter to human experience, but in no case cited by counsel for West Virginia, or which we have examined, has the par value of stock been taken as *fixing* its actual value, though in some cases it may have been accepted as evidence of its value under circumstances very different from those presented in this case."

In response to the first statement, we say that counsel are in error when they allege that we *largely* rested our case upon this proposition. On the con-

trary, it has no bearing upon any of the credits embraced either in Class A, Class B, Class D, Class E or Class F, and was invoked only with respect to some of the credits in Class C, and the James River & Kanawha and the Manassas Gap Railroad in Class G.

The proposition could certainly have nothing to do with Class A, which consists of cash, nor with Class B (the Richmond, Fredericksburg & Potomac R. R. Co.), with respect to which we proved the book value, and showed the dividend declarations, and claimed much more than the par of the stock. Likewise with Class D, consisting of dividends and interest, into which par value could not enter; and also with respect to Class E, covering all bank stocks, the book value of which we showed to be greater than the par of the stock, and made and make our claim accordingly. The same is true of Class F; and, when we turn to Class G (James River & Kanawha Canal Co. and Manassas Gap R. R. Co.), we treat the James River & Kanawha Canal Company in the alternative, first taking the par of that stock, and next taking a capitalization of its earnings for the year ending September 30, 1860, which latter makes its stock worth less than par; and, with respect to the Manassas Gap R. R. Co., we do take it at par, first, because Virginia paid for it at par, secondly, because the Company seems to have had no bonded debt, and, third, because it seems just prior to 1861 to have completed and put into operation 86.73 miles of main line and branches, exclusive of second tracks and sidings, at a cost of $3,322,164.67, and with a paid up stock of $3,188,312.97.

Defendant's Exhibit 7a, New Rec., Vol. 2, p. 61.

Testimony of J. K. Anderson, New Rec., Vol. 1, p. 724-6.

The few and unimportant companies in Class C, to which the presumption of par was asked to be applied, were the Roanoke Navigation Company, the Alexandria Canal Co., the Upper Appomattox Company and the Dismal Swamp Canal Company.

With respect to the rule of law involved, the weight of authority we believe is that the par of stock makes a *prima facie* case, but may be rebutted by evidence either showing the stock to be actually worth more or less than its par.

Appeal of Harris, 12 Atl., 743.
Henry v. North Am. Ry. Construction Co., 158 Fed., 79.
Brinkerhoff-Farris Co. v. Lmbr. Co., 118 Mo., 447.
Tevis v. Ryan (Ariz.), 108 Pac., 465.

It is said by counsel, however, that "there is direct authority to the contrary in the case of Bull v. Douglas, 4 Munf. (Va.), 303". In this case a bill was filed to foreclose a mortgage to secure the delivery of $6,000 of U. S. 8% stock. The defendant filed an answer that was not responsive to the bill, and the cause was heard upon bill and answer in the absence of testimony. The Court below decreed the face value of the stock, instead of hearing testimony, and was reversed. The action of the Court below amounted practically to treating the par value of the stock as raising a conclusive presumption of actual value, instead of a presumption rebuttable by evidence.

In addition to this, the Court of Appeals based

its opinion upon the case of Groves v. Graves, 1 Washington, page 1, wherein an examination of the case shows that the only point pertinent to this discussion decided was that "the rule for estimating the damages in this case is the value of the certificates at the time when they ought to have been delivered, and not that when the cause was tried".

But, treating Bull v. Douglas as a decision in accordance with the contention of counsel for Virginia, it would seem to stand alone, with the single exception of the case of Beaty v. Johnson, 66 Ark., 529, which is a useful case in this controversy for the ascertainment of actual values by a comparison of the assets and liabilities of the companies involved.

The weight of authority is not only against the 4 Munford case, but against the Federal authorities upon this subject, which must obtain in this cause. The principle here contended for was announced by the Circuit Court of Appeals for the Eighth Circuit in the case of Henry v. North Am. Ry. Construction Co., 158 Fed., 79; and these Courts, composed as they are, and of which the Chief Justice and the Associate Justices of the Supreme Court are members, must, in a controversy in the latter Court, take precedence over the State Courts.

IV.

INTEREST.

Upon this subject counsel for Virginia say that counsel for West Virginia, in closing the last oral argument before the Master, injected a new contention into the discussion, to which they had no oppor-

tunity to reply, and, in consequence, have resorted to the supplemental brief.

The new position so taken by West Virginia, and as described by counsel for Virginia, is that it is the first part of Sec. 8 of Article 8 of West Virginia's Constitution of 1861 that constitutes the whole of the contract between the two States, and "that all of the residue of that section is merely a mandate from the people of West Virginia to their own legislature, which this Court decided, as West Virginia's counsel mistakenly claim, was no part of the compact, and had to so decide or destroy its own jurisdiction" (bottom of page 44 and top of page 45, supplemental note of Virginia).

The position is not a new one, but a new reason was simply given therefor at the time and upon the occasion to which attention has been called by counsel for Virginia. In concluding the first oral argument before the Master, the same counsel for West Virginia took the position that the concluding part of Sec. 8 of Art. 8 of the Constitution was necessarily no part of the contract as interpreted by the Supreme Court, but did not until the later date give the jurisdictional reason for so contending. However this may be, counsel for Virginia now assert that we are mistaken, both in our construction of the contract and in our interpretation of the Supreme Court's decision, and assert that not only the whole of Sec. 8 of Art. 8, but that "every other provision of that Constitution constituted a part of the compact between the two States".

Let us examine the whole of Sec. 8 once again, and in the light of the opinions of the Supreme Court

in this cause, both upon the demurrer and upon the merits. The section reads as follows:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, in the year one thousand, eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

It will be seen at a glance that the contract between the two States (if the whole of Sec. 8 is to be taken as evidencing the same) promised two distinct things:

First, that West Virginia should assume an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, and,

Second, that "the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years".

And, upon the demurrer, it was contended by West Virginia that, in consequence of the second promise in the contract, the Supreme Court had no jurisdiction over the controversy, because by the contract "the question of the liability of West Virginia to Virginia was submitted to the arbitrament and award of the Legislature of West Virginia as the sole tribunal which could pass upon it"; but the Court

repudiated this contention, which, in effect, was to strike the second promise from the section, leaving the first as the sole effective and enforceable promise in the contract.

> Commonwealth of Virginia v. State of West Virginia, 206 U. S., 290-322; 51 L. Ed., 1068-81; see pages of the opinion 319-21.

The same question was discussed upon the decision of the merits, when Mr. Justice Holmes, in delivering the opinion of the Court, made use of the following language:

> "But again it was argued that if this contract should be found to be what we have said, then the determination of a just proportion was left by the Constitution to the Legislature of West Virginia, and that, irrespectively of the words of the instrument, it was only by legislation that a just proportion could be fixed. These arguments do not impress us. The provision in the Constitution of the State of West Virginia that the Legislature shall ascertain the proportion as soon as may be practicable was not intended to undo the contract in the preceding words by making the representative and mouthpiece of one of the parties the sole tribunal for its enforcement. It was simply an exhortation and command from supreme to subordinate authority to perform the promise as soon as might be, and an indication of the way."

Virginia v. W. Va., 220 U. S., 1; 55 L. ed., 353.

Here, the language of the Court is in exact accord with our contention; for it is said that "the

provision in the Constitution * * * that the Legislature shall ascertain the proportion as soon as may be practicable was not intended to undo *the contract in the preceding words* by making the representative and mouthpiece of one of the parties the sole tribunal for its enforcement". And it is further said that "it was simply an exhortation and command from supreme to subordinate authority to perform the promise as soon as might be, and an indication of the way". In other words, this was simply an exhortation and a command from the people of West Virginia, acting in convention assembled, made to one of its own departments of government, and not a promise by the State of West Virginia to the State of Virginia, nor embodied in and as an integral part of the enforceable compact between them.

If this be true, then the language of the real contract nowhere contains the word "interest", and, in the absence of an express promise to pay the same, made either by its Legislature or by its officials thereunto lawfully authorized, a State is not chargeable with interest.

U. S. v. State of N. C., 136 U. S., 211; 34 L. ed., 336.
South Dakota v. North Carolina, 192 U. S., 321; 48 L. ed., 462.

If, however, the Master should be of the opinion that the whole of Sec. 8 of Art. 8 is embraced in the contract, instead of the first part thereof, still the result would necessarily be, not that West Virginia would pay interest upon a proportion of the Virginia bonds, but would (if she did not pay in cash her proportion of the debt when ascertained) simply pay

interest upon her ascertained proportion of the debt as upon a new principal after its ascertainment. The language of the Constitution is "and the Legislature shall ascertain the same as soon as may be practicable" (West Virginia's equitable proportion of the debt), " and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years". Evidently, the word "principal" relates to West Virginia's ascertained equitable proportion of the debt, and the words "accruing interest" must be construed as the interest accruing upon such principal.

The method of "liquidation" prescribed was by the establishment of a sinking fund "sufficient to pay the accruing interest, and redeem the principal within thirty-four years", and it is clear that this could be done only by the laying of levies, the amount of which could not be determined until after the equitable proportion had been ascertained and the accruing interest thereon calculated; otherwise, it would not be known what amount of levies to lay. The sinking fund could not be established in any other way, and, after it had been established, the interest would not run upon a portion of the old Virginia bonds, but upon the "principal" required to be redeemed "within thirty-four years".

In other words, even were we to treat the whole of Sec. 8 of Article 8 of the Constitution as constituting the contract, still interest could not be paid through the medium of a sinking fund (in consequence of the inability to lay levies because of the lack of necessary information to that end) until West Virginia's equitable proportion had been established, and the interest would necessarily run

thereon as upon a new principal. That new principal has never been ascertained, but the claim remains unliquidated to this hour.

See authorities cited below under sub-division A.

Also brief on subject of interest, filed before the Supreme Court by A. A. Lilly, Atty. Gen., Charles E. Hogg and John H. Holt.

It is suggested, however, that West Virginia's promise was to assume an equitable proportion of the debt, and that, as the debt referred to was an interest-bearing one, the contract would necessarily cover a just proportion of both principal and interest. Indeed it has likewise been suggested (see the question of Mr. Justice Lurton upon the oral argument for leave to file the supplemental answer of West Virginia) that the bonds evidencing the debt in question were interest-bearing, and had been scattered broadcast throughout the world among purchasers, and that it might not be equitable to such purchasers to have recourse against West Virginia for her proportion of the principal thereof alone. It should be borne in mind, however, that the contract was not between West Virginia and the bondholders, but between the two States. West Virginia's promise to Virginia cannot be measured by Virginia's promise to the bondholders. There are many equities between the two States that have no place between Virginia and the bondholders. An example of this is to be found in the many public buildings that went to Virginia upon the separation, in addition to the assets set up as credits in the de-

fendant's supplemental answer, whereas West Virginia received practically nothing of this character. And again, Virginia received upon the assets that have been set up as credits millions of interest and dividends, in which West Virginia has not participated.

Defendant's exhibits 12 and 13, New Rec., Vol. 2, pages 227-40.

These are equities that affect West Virginia's promise to Virginia, but have no place in Virginia's promise to the bondholders.

For fear the alleged new position upon interest may be treated as our sole dependence, and as a waiver of former contentions against such payment, we will again insist, as heretofore, upon the following additional points:

A.

INTEREST IS NOT CHARGEABLE UPON AN UNLIQUIDATED AMOUNT, AND THE CLAIM AGAINST WEST VIRGINIA WAS NOT IN THE BEGINNING, AND NEVER HAS BEEN, LIQUIDATED.

Redfield v. Iron Co., 110 U. S., 174; 28 L. Ed., 109.

Barrow v. Reab, 9 How. (U. S.), opinion, page 371.

Stevens v. Bridge Co., 139 Fed., 248.

Lynchburg v. Amherst County, 115 Va., 600-8.

Also authorities cited in former briefs.

B.

WEST VIRGINIA'S PROMISE WAS TO PAY "AN EQUITABLE PROPORTION OF THE PUBLIC DEBT OF THE COMMONWEALTH OF VIRGINIA", AND THE VERY USE OF THE WORD "EQUITABLE" STAMPS THE PRESENT CLAIM AS UNLIQUIDATED. IT IS NOT CAPABLE OF ASCERTAINMENT BY MERE COMPUTATION, BUT, BEING INDEFINITE AND UNCERTAIN, AND DEPENDENT UPON THE SURROUNDING EQUITIES, COULD BE RENDERED FIXED AND CERTAIN ONLY THROUGH THE NEGOTIATION OF THE PARTIES OR THE DECREE OF A CHANCELLOR, BASED UPON EVIDENCE TAKEN.

C.

WEST VIRGINIA HAS NOT DELAYED SETTLEMENT.

From January 1, 1861, to June 20, 1863, she certainly did not delay, because she could take no action in consequence of the fact that she was not as yet a State.

From June 20, 1863, until the early part of 1866, the two States were at war, and could not negotiate.

On December 1, 1866, Virginia instituted a suit in the Supreme Court, attacking the integrity of West Virginia's boundaries, and, until that was settled, West Virginia could not negotiate, because she did not know her own boundaries; and this suit continued to pend until the year 1871.

Virginia v. West Virginia, 11 Wallace, 39.

Within nine days after the decision of this case, West Virginia sent a commission to Virginia to negotiate a settlement of this debt, called the Bennett Commission, and Virginia refused to negotiate with it. She had theretofore suggested a commission, but, when the West Virginia commission arrived at Richmond, Virginia had repealed her Commission Act, and had no one with whom to negotiate.

Matters remained in this shape until the Funding Acts of Virginia began on March 30, 1871, by which she arbitrarily announced that she only owed two-thirds of the debt, and that West Virginia owed the remaining one-third; and from that time on her commissions subsequently appointed could negotiate only upon that basis. In other words, they settled the subject-matter of the negotiation before the negotiation began, and, of course, any effort upon the part of West Virginia to meet Virginia in conference under such circumstances, would have been worse than idle.

The controversy remained practically in this shape until the institution of the present suit, a step at last taken by Virginia after the lapse of many years, and a step which she could and should have taken many years before.

D.

VIRGINIA HAS BEEN GUILTY OF *LACHES;* AND, WHILE THE GENERAL RULE MAY BE THAT *LACHES* MAY NOT BE ATTRIBUTED TO THE CROWN OR A STATE, SUCH WE TAKE IT IS NOT THE RULE WHERE THE CROWN OR STATE ACTS IN A FIDUCIARY CAPACITY,

AS DOES VIRGINIA IN THIS CASE. IN OTHER WORDS, IT WOULD APPEAR THAT SHE HAS NO FINANCIAL INTEREST, BUT IS LENDING HER NAME IN THE SUIT TO THE BONDHOLDERS, WHO ARE THE SOLE BENEFICIARIES.

V.

THE PECUNIARY INTEREST OF VIRGINIA IN THE RESULT OF THE CONTROVERSY.

It is insisted in the supplemental brief that Virginia still has a substantial interest in any recovery that may result from this controversy, and that we are laboring under a misapprehension when we say that the bondholders are exclusively interested in any such recovery, and that Virginia is a mere trustee in this suit for their benefit.

The reason given for her interest is expressed by her counsel in the following language:

> "Virginia, as shown by the record, has paid off in full, and taken up a considerable amount of the obligations which constitute an integral part of the debt already definitely fixed by the Court. She has not only paid her own part, but also West Virginia's part of those obligations, and now holds them in her own right, and will be entitled to participate in any recovery to the extent to which they constitute part of the debt, for a share of which West Virginia is held liable."
>
> (Page 50 Virginia's supplemental note.)

We may be laboring under a misapprehension, but we are impressed with the idea that the foregoing position is in conflict with the arrangement between Virginia and the bondholders.

Acts Gen. Assembly of Virginia, 1893 and 1894, old record, Vol. 1, page 40.
Acts Gen. Assembly of Virginia, 1899 and 1900, old rec., Vol. 1, pages 42-4.
Report of Va. Commission Jan. 9, 1906, old rec., Vol. 1, p. 44-51 (May).

The first section of the last Act above cited (record, page 43) provides that the certificate holders of the certificates deposited under its terms should "accept the amount realized on such settlement from West Virginia on said certificate as a full settlement of all their claims thereunder". In other words, the certificate holders are to receive the whole recovery, whatever it may be, and Virginia is to take nothing.

Section 2 thereof (pages 43-4) provides for the institution of suit, and that "all the expenses involved in connection with any of the matters aforesaid shall be borne by the certificate holders as provided in the joint resolution aforesaid, and the State shall not be subject to any expense on that account."

The report of the Commission above cited shows that a great majority of the certificate holders at least accepted the foregoing terms.

The various Acts of Virginia, contracts of Brown Bros. & Co., reports of the Virginia Commission, etc., are all set forth in the record in this cause, Vol. 1, beginning at page 40, and extending to page 93, inclusive, and give a complete history of the ar-

rangement between Virginia and the certificate holders (May).

If Virginia is going to claim a portion of any recovery that may be had in this case, it would appear to be in violation of the arrangement between her and the bondholders, and it is not difficult to foresee an ugly controversy when this battle shall have ended between her and her present allies, the bondholders.

REBELLION RECORDS AND HISTORICAL REFERENCES.

According to our view (believing that the credits in this cause should be valued as of the first day of January, 1861, and not as of the 20th day of June, 1863, which first date was before the war), the extracts presented by counsel for Virginia from the official records of the Rebellion, embracing correspondence between Mr. Daniel, President of the Richmond, Fredericksburg & Potomac R. R. Co., and the Hon. James A. Seddon, Secretary of War of the Confederate States, and including resolutions of conventions of railway officials passed from time to time, and showing the condition of railways in Virginia and in the Confederate States during the war, are immaterial.

The first letter from Mr. Daniel to Mr. Seddon is dated April 22, 1863, practically two years and four months after the first day of January, 1861, and his first enclosure referred to a paper read at a railroad conference just then adjourned; while his sec-

ond enclosure consisted of resolutions passed by railway conventions at Richmond, the one December, 1861, and the other February, 1862, the one a little less and the other a little more than a year after January 1, 1861, and both during the war. Then comes a letter from R. R. Cuyler to Mr. Seddon upon the same subject, dated April 22, 1863, enclosing a report adopted and resolutions passed by a railroad convention on the day before, and relating to the same subject, which is followed by a final letter from Mr. Daniel to Mr. Seddon, dated April 23, 1863.

These all relate to the period of the war, and are intended to show upon the 20th day of June, 1863, the period of valuation contended for by the plaintiff, such a dilapidated condition of the railroads in Virginia that the stocks owned therein by that State had become worthless, and could, if valued as of that date, furnish but a very small equity indeed in favor of the State of West Virginia. They fall short, however, even of the purpose for which they are offered, and disclose such an unprecedented volume of business passing over the railways at the place and during the period named as that the railways were crying out for relief against the glut of goods and men that they were expected to transport. We take the following extract from one of the resolutions presented, found upon page 18:

> "RESOLVED: That, in order to increase the present efficiency and capacity of the railroads in their existing condition for the military transportation of the Confederate States, the following measures are re-

spectfully recommended to the War Department:

First: That on all canals, rivers and other lines of water transportation as large a number as practicable of boats and vessels of any kind be speedily constructed and used for transporting military supplies, so as to relieve the railroads of the overwhelming amount of freights now thrown upon them, and leave them available for transportation of what cannot be carried by water because of its locality or the urgency with which it is needed."

This is taken from the second enclosure with Mr. Cuyler's letter to the Secretary of War of April 22, 1863, and shows such a volume of business that one might expect the capital invested in railroads to enjoy some little return at least, and be of no little value even in the year 1863.

Attention has likewise been called to the history of the times for the purpose of depreciating the value of railway properties and of railway stocks in Virginia and the South generally during the period of the war; and some of these treat us to a very Illiad of railroad woes. They have embankments gone, cuts filled, and now and then even rails removed and wrapped around trees; but it must be borne in mind that historians have a disposition to become rhetorical, and frequently color the truth, or discolor it, rather, with alliterative adjectives and high-sounding periods. Some of Macaulay's most splendid sentences serve but to cover the falsity of his propositions; and Richard the Lion-hearted, in the hands of the historians, becomes so heroic that a lover of

truth is apt to turn from him in disgust, and pick up the story of Don Quixote with its wind mills.

However, if values are to be inferred from history rather than from the concrete evidence in the cause, let us briefly see from the historical standpoint what the railways of the South really were even during the war.

We have the following statement from a respectable authority:

> "On the whole, the cost of construction upon southern railroads to 1850 averaged probably about $17,000 per mile, and to 1860 about $25,000 per mile. This was little more than half the average cost of northern roads in the periods. The capitalization of most of the southern companies approximated rather closely the cost of their roads and equipment. In the case of a few powerful companies only had the corporations begun to increase their stocks or bonds for the purpose of acquiring the securities of connecting roads; and practically none had resorted to stock manipulation nor in any considerable degree to stock watering. These practices were more common in the north, but none of the important southern roads had fallen under Wall Street control in the ante-bellum period."

The South in the Building of the Nation, Vol. 5, page 365.

And again:

> "On many roads freight traffic in the first year of the war fell to a tithe of its former volume. Beginning in 1862, how-

ever, the movement and counter-movement of troops to and from the threatened points on all the frontiers of the South, and the movement of non-combatant refugees from the danger zones to the interior began to tax the passenger carrying capacity of the roads. By 1863 the depletion of supplies in the battle zones caused the roads leading from the centre to the periphery of the South to become more busy in handling corn than they had formerly been in handling cotton."

Ibid, page 366.

The article from which the foregoing extracts have been taken was contributed to the book above cited by Ulrich B. Phillips, Professor of History in the Tulane University; and our recollection is that one of our distinguished adversaries in this cause, Major Anderson, likewise contributed to this series, and can possibly vouch for its accuracy.

The foregoing facts alone are sufficient to explain why, as the record in this cause shows, some of the Virginia railways passed so easily out of the Confederate into the renewed Federal regime (New Rec., Vol. 1, pages 1066-1070; Vol. 2, pp. 270-80, and pp. 256-269).... They had a small capital and a large business. Some of them had no bonded indebtedness; none of them appear to have had watered stock, and they were able, in consequence of these facts, to emerge even from the war and rehabilitate themselves by an increase of securities that would practically put them on a par, so far as securities were concerned, with the railways as they existed in the north before the war.

However all these things may be, we have undertaken by our schedules introduced on behalf of West Virginia, both for the year 1861 and the year 1863, to show the actual condition and earning power of the railway companies here involved. This we have done, in some instances by the production of their balance sheets and the dividends paid by them. In the case of others, we have relied upon the reports made by their officials to the State of Virginia, which reports were not criticized, but adopted and published by her as reliable and authoritative, thereby announcing to stockholders, actual and prospective, as well as to the public at large, that they were dependable. This we insist we have done, even in the case of the year 1863; and, if perchance we should be driven to that date as the time for the valuation of these securities, we would still be full-handed with evidence; but have not contemplated that conclusion, for the reason that it would be violative of West Virginia's contract and of her equities in the cause. She could scarcely be charged with the value of a bond ascertained as of January 1, 1861, and have her then existing credits postponed in their valuation until 1863. An equitable proportion of the debt could not be so ascertained.

Hoping that we have said the last word upon this case, we respectfully submit the same.

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January 11, 1915.

STANDARD PTG. & PUB. CO., HUNTINGTON, W. VA.