Supreme Court of the United States

OCTOBER TERM, 1913

No. 2 Original

COMMONWEALTH OF VIRGINIA

Vs. { In Equity

STATE OF WEST VIRGINIA

SUPPLEMENTAL ANSWER OF WEST VIRGINIA; Oral Argument of John H. Holt, Esq., Associate Counsel for West Virginia, in Support Thereof and in Opposition to Interest; Closing Argument on Behalf of West Virginia Made Upon These Subjects by A. A. Lilly, Esq., Attorney General for West Virginia, and Opinions of the United States Supreme Court so far Rendered in Cause.

TRIBUNE PRINTING CO., CHARLESTON, W. VA.

NOTICE.

Charleston, W. Va., March 10, 1914.

To the Honorable Jno. Garland Pollard,
Attorney General of Virginia,
Richmond, Virginia:

Please take notice that, in the suit of the Commonwealth of Virginia against the State of West Virginia, No. 2 Original, pending in the Supreme Court of the United States at Washington, D. C., the State of West Virginia will, on Monday, the 23rd day of March, 1914, move the said Court for leave to file, on or before the thirteenth day of April, 1914, a supplemental answer to the original bill of complaint filed in said Court by the Commonwealth of Virginia against said State.

A copy of said motion, as well as of the grounds therefor, and of the proposed supplemental answer, are hereto appended for your information.

Respectfully,

STATE OF WEST VIRGINIA,
By A. A. Lilly,
Attorney General for West Virginia.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

In Equity.

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL ANSWER.

TO THE HONORABLE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now, comes the defendant, the State of West Virginia, by A. A. Lilly, her Attorney General, and moves the Court for leave to file, on or before the thirteenth day of April, 1914, a supplemental answer to the bill of complaint of the Commonwealth of Virginia filed herein against her.

The notice of this motion, together with the service thereof and the grounds of said motion, as well as a copy of the proposed supplemental answer, are presented herewith.

STATEMENT OF FACTS.

By its opinion of March 6, 1911, in this cause, this Court held that the State of West Virginia, in consequence of Section 8 of her Constitution of 1861, the Act of the Legislature of the restored State of Virginia passed May 13, 1862, consenting to the erection of the new State under the provisions of said Constitution, and the Act of Congress of December 31, 1862, giving sanction to its creation, became obligated to pay an equitable proportion of the public debt of Virginia existing prior to the first day of January, 1861, and by said opinion ascertained the total indebtedness as of that date to be apportioned between the two State to be $30,563,861.56.

Virginia v. West Virginia, 220 U. S., 1.

It was also there held that, in consequence of the relative resources of the two debtor populations, exclusive of slaves, 76½% of said debt should be apportioned to Virginia, and 23½% thereof to West Virginia, and, upon this basis, West Virginia's proportion of the principal of the debt was fixed at $7,182,507.46. No decree, however, was entered against her for that amount, but a conference was suggested between the two States looking to an amicable settlement of the matters in difference.

In the same opinion, and while discussing a division of the assets of the old Commonwealth in the purchase of which her debt had been incurred, it was stated that "*it does not appear that there are any stocks of value on hand,*" and, as a necessary consequence, as the record then stood, there were no credits applicable to the reduction of West Virginia's ascertained proportion of the principal of the debt, and it remained as fixed.

Subsequently, however, and in willing obedience to the suggestion of this Honorable Court, the Governor of West Virginia, after the passage of a joint resolution by the Legislature of the State authorizing him so to do,

appointed a Commission to treat with the State of Virginia, and this Commission, during the course of its labors, after the filing of the original answer herein, and after the delivery of the opinion aforesaid of March 6, 1911, discovered the live assets set forth in the accompanying proposed supplemental answer, which had been purchased with the common funds of the two States prior to the first day of January, 1861, and retained, sold or given away by the Commonwealth of Virginia after the twentieth day of June, 1863, without accounting to West Virginia for any part thereof, and amounting, in the aggregate, as it is alleged, to $20,810,357.98.

West Virginia, feeling that she was entitled to a just proportion of these assets, and believing that, if they had been presented by the record at the time of the opinion of March 6, 1911, this Court would have given her credit for 23½% thereof, proposed to the State of Virginia at a joint conference held at Washington on the fourth day of March, 1914, that she allow 23½% of the value of said assets as of the first day of January, 1861, as a credit upon West Virginia's portion of the principal of said debt as fixed by this Court, and that she would cause to be paid unto Virginia the balance, after making said deduction, or the sum of $2,327,195.27, in full settlement of principal and interest of West Virginia's equitable proportion of said debt.

Interest was to be omitted for the reasons given and the facts enumerated in the proposition, and now more in detail alleged in the proposed supplemental answer.

Virginia declined the proposition, expressing an unwillingness even to discuss the question of principal, because the same, according to her view, had been irrevocably fixed by this Court, and, upon the question of interest, although she considered that still open, contented herself with ignoring the reason given by West Virginia why no interest should be charged.

Here the negotiations ended, and the present motion follows.

OBJECTS OF THE MOTION.

One of the objects of the motion is to obtain leave to file a supplemental answer, presenting assets purchased with the common funds prior to January 1, 1861, and appropriated thereafter by the State of Virginia to her exclusive use, and to 23½% of which West Virginia, according to the basis of liability fixed by this Court, is entitled as a credit upon her equitable proportion of the principal of the Virginia debt; and the other is by said supplemental answer to present certain facts why West Virginia should not be charged with interest upon whatever proportion of the principal of said debt may be decreed against her.

GROUNDS OF MOTION.

It is respectfully submitted that said supplemental answer should be permitted to be filed for the following reasons and upon the following grounds:

I. Because the value and disposition of the assets set up in the supplemental answer, purchased with common funds prior to January 1, 1861, disposed of after June 20, 1863, and appropriated by Virginia to her exclusive use, were discovered mostly by the defendant, if not wholly, since the last continuance;

II. Because the evidence of the existence, value and disposition of said assets was in the possession of the State of Virginia, and she did not volunteer the disclosure thereof, although the object of this suit, instituted by her, was the ascertainment of West Virginia's *equitable* proportion of the Virginia debt;

III. Because, while greater diligence might be required of individuals to ascertain the evidence gov-

erning their rights, when in controversy, yet, in the case of a State, no such requirement can obtain, for the reason that it is represented by officials whose tenures of office are frequently of short duration, and whose chief executive may not, under its Constitution, as in the case of the defendant, succeed himself, thereby breaking the chain of knowledge of public affairs, especially when it relates to the records of other States, and destroying the continuity of information that must be passed from one administration to another;

IV. Because the decree of reference executed in this case did not specifically, if at all, call for the discovery of the assets now disclosed and presented for the first time (see decree, Virginia v. West Virginia, 209 U. S., 514);

V. Because the right of West Virginia to be credited with 23½% of the value of the assets by the purchase of which the debt was created constitutes an equity just as "*deep seated*" as the obligation to pay 23½% of the debt so created. The one is the exact measure of the other;

VI. Because an examination of the said supplemental answer discloses a large amount of bonds, stocks and other securities applicable to the discharge of the entire debt created by the Commonwealth of Virginia prior to January 1, 1861, and were designed to be so applied by the Constitution of Virginia, adopted in 1851, and which Constitution was the organic law of Virginia at the time West Virginia adopted her first Constitution in 1861, and when the Commonwealth of Virginia passed the Act of legislation in May, 1862, giving her consent to the formation of West Virginia as one of the States of the Union, and the law of Virginia became the law of West Virginia, and so remained the law of said last named

State, not altered or repealed by West Virginia after her admission into the Union; and the provisions of the Constitution of Virginia making the said stocks, bonds and other securities available for the payment of the said debt governed and controlled their application to the payment of this debt before and at the time of the admission of West Virginia into the Union as one of the States thereof, and,

VII. Because, in addition to the grounds already stated, the proposed supplemental answer alleges new facts and presents new reasons why interest should not be charged against West Virginia. These are money received by Virginia derived from the common investment and common assets appropriated by her, which are not embraced in those assets out of which credits are claimed upon the principal of the debt. They are set off against interest alone, and amount to many millions of dollars. Such is the item of $5,782,240.09, representing dividends upon stocks not otherwise accounted for, and such are the public buildings constructed and equipped out of the common funds, and retained by Virginia, as well as much personal property, consisting of libraries, arms and munitions of war.

A. A. LILLY,
Attorney General for West Virginia.

V. B. ARCHER,
CHAS. E. HOGG,
JOHN H. HOLT,
Associate Counsel for West Virginia.

Supplemental Answer

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA

vs. } In Equity.

STATE OF WEST VIRGINIA.

THE SUPPLEMENTAL ANSWER OF THE STATE OF WEST VIRGINIA TO THE BILL OF COMPLAINT EXHIBITED AGAINST HER HEREIN BY THE COMMONWEALTH OF VIRGINIA:

Now comes the defendant, the State of West Virginia, by A. A. Lilly, her Attorney General, and, by leave of Court first had and obtained, files this her supplemental answer to the bill of complaint of the plaintiff filed herein against her, and alleges:

FIRST: That, prior to the establishment of the State of West Virginia out of the territory of the Commonwealth of Virginia on the twentieth day of June, 1863, and prior to the first day of January, 1861 (West Virginia, by her Constitution, having assumed an equitable proportion of the public debt of the Commonwealth of

Virginia existing prior to the latter date), the Commonwealth of Virginia purchased with the bonds that evidenced her public debt existing prior to the first day of January, 1861, or out of the proceeds of the sale thereof, certain stocks, bonds, securities and other properties, and made loans to various persons and companies, and was the owner and holder of said stocks, bonds, securities and other properties on the first day of January, 1861, as well as upon the twentieth day of June, 1863, and, after said last named date, has continued until the present time to hold, own and enjoy the fruits of a portion of said securities and properties; has sold certain other portions thereof for many millions of dollars; collected said loans, and given away the residue of said securities, without the knowledge or consent of this defendant, except as hereinafter stated;

That that portion of said securities so retained by the Commonwealth of Virginia consisted of stock in the Richmond, Fredericksburg & Potomac Railroad Company, amounting to $275,200.00, and certain bank stocks owned by the State of Virginia, amounting to $3,710,020.00, and had, as this defendant is now informed, an actual commercial and market value, both on the first day of January, 1861, and the twentieth day of June, 1863, of at least $3,985,220.00;

That the securities aforesaid sold by her after the twentieth day of June, 1863, except as hereinafter set out, consisted of stock owned in various railroad companies, which was subsequently sold by her to the Atlantic, Mississippi & Ohio Railroad Company at the price of $4,000,000.00, and stocks in and loans to various other railroad and canal companies, including a loan to the Government of the United States and a claim against Selden-Withers Company, which stock she sold and loans collected, and received therefor the sum of $6,313,532.47, which securities and loans had, as this defendant is now

informed, an actual value, both upon the first day of January, 1861, and the twentieth day of June, 1863, of $10,313,532.47;

That the residue of the securities so sold by her consisted of stock in the Manassas Gap Railroad Company, Roanoke Valley Railroad Company, and certain other railroad companies hereinafter described, and stock in certain navigation and canal companies, likewise hereinafter described, with an aggregate par value of $3,885,076.68, which said stocks, as this defendant is now informed and believes, had an actual value, both on the first day of January, 1861, and the twentieth day of June, 1863, of twenty-five per cent. of their par, or $971,269.17;

That the securities and property so given away by her subsequent to the twentieth day of June, 1863, consisted of 104,000 shares of stock in the James River and Kanawha Company, with a par value of $10,400,000.00, which stock, as this defendant is now informed and believes, had an actual value, both on the first day of January, 1861, and the twentieth day of June, 1863, of twenty-five per cent. of its par, or $2,600,000.00;

That, after the foregoing securities had been purchased and loans made, there accrued dividends upon the one and interest upon the other prior to January 1, 1861, which were collected by the Commonwealth of Virginia after that date, and mostly after the twentieth day of June, 1863, amounting in the aggregate to $1,835,409.28;

That, as this defendant is now informed, the State of Virginia, after the division of the old Commonwealth into two States (June 20, 1863), collected large amounts of money from several Counties then and now located in the State of West Virginia, aggregating the sum of $225,078.06;

That, in addition to the foregoing securities and properties so retained or disposed of as aforesaid, and the

collections made as aforesaid, by the Commonwealth of Virginia, she had in her treasury on the first day of January, 1861, cash amounting to $1,104,927.06;

That the total of said assets on the first day of January, 1861, and the twentieth day of June, 1863, excluding the sum of $225,078.06, collected from West Virginia Counties as aforesaid, had a reasonable value of $20,810,357.98;

That these assets were available for the discharge of the debt of the Commonwealth of Virginia existing prior to the first day of January, 1861, and, if they had been so applied, would have greatly diminished the same; but that, instead of so applying them, the plaintiff, the Commonwealth of Virginia, has, as aforesaid, retained a portion thereof, and devoted the same to her own exclusive use, without the knowledge or consent of this defendant; sold other portions thereof without the knowledge or consent of this defendant, and appropriated the proceeds thereof to her individual use, and, without such knowledge or consent, has made certain collections as aforesaid, and given away the residue of said assets, except as hereinafter stated, and has neither reported to this defendant any of said transactions nor has accounted unto her, either in whole or in part, for the value of the assets so retained or given away, or for the proceeds of such as were sold or collected by her;

That this defendant was interested in said assets to the extent of her just proportion of the value thereof as of the first day of January, 1861, and was the equitable owner of, and entitled to receive out of the proceeds thereof, according to the basis of liability fixed by this Honorable Court, 23½% of the sum of $20,810,357.98, and the whole of $225,078.06, collected by Virginia from West Virginia Counties, as aforesaid, making an aggregate of $5,115,512.19;

That out of the assets neither sold nor given away,

but retained by the Commonwealth of Virginia, as aforesaid, she did turn over to the State of West Virginia a part of her stock in the Northwestern Bank, amounting to $210,200.00, and the whole of her stock in the Fairmont Bank, amounting to $50,000.00, making an aggregate of $260,200.00, which, when deducted from the aforesaid sum of $5,115,512.19, would leave a balance of $4,855,312.19, representing West Virginia's equitable proportion of said assets so retained, sold, collected or given away by the Commonwealth of Virginia, which said sum should be applied as a credit upon and deducted from the sum of $7,182,507.46, allotted by this Honorable Court as West Virginia's equitable proportion of the principal of the Virginia debt, which would reduce said principal to the sum of $2,327,195.27.

The names and descriptions of said stocks, bonds, securities and other properties, as well as the time and manner of their acquisition by the Commonwealth of Virginia, the time and manner of their disposition by said State, and the amounts of money received therefor and appropriated by the Commonwealth of Virginia are hereinafter set out in detail in paragraph six of this supplemental answer.

SECOND: That this defendant, both at the time of the filing of its original answer herein and at the date of the fixing by this Honorable Court of the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed, was ignorant of the value of the stocks, bonds, securities and property aforesaid, and did not then know that the same had been sold by the Commonwealth of Virginia, and large, or any, sums of money derived therefrom; that the knowledge of these facts was peculiarly within the possession of the plaintiff, the State of Virginia, and that said State never at any time informed this defendant of the value of said properties, or any of them, or reported to her that

moneys had been derived therefrom and appropriated, either wholly or in part, to the exclusive use of the State of Virginia.

She further says that she did not discover the value and disposition of these securities until after the appointment of a Commission by her Governor on the 19th day of April, 1913, pursuant to a joint resolution passed by the two Houses of her Legislature on the 21st day of February, 1913, for the purpose of attempting, in accordance with the suggestion of this Honorable Court, an amicable adjustment of the matters here in controversy with a like Commission from the State of Virginia, and that her said Commission has, since the filing of the original answer herein and the opinion of the Court hereinbefore referred to of March 6, 1911, discovered the matters hereinbefore and hereinafter set out in this her supplemental answer;

THIRD: That, after the Commissions of the two States had met in joint conference in the City of Washington on the 25th day of July, 1913, and had adjourned to meet at a later day, the West Virginia Commission met at Charleston on the 12th day of August, 1913, and appointed a sub-committee out of its own membership, for the purpose of making a complete examination into all the matters involved in this controversy, with the view of submitting a proposition to the Virginia Commission, which said sub-committee entered promptly upon its work, and diligently pursued its investigations until on or about the 27th day of February, 1914, at which time it completed its labors and reported the result thereof to the full West Virginia Commission;

That, during the investigations made by the sub-committee aforesaid, it discovered the matters and things hereinbefore and hereinafter alleged with respect to the value and disposition of the stocks, bonds and other securities and property owned by the Commonwealth of

Virginia on the first day of January, 1861, and retained or disposed of by her after the twentieth day of June, 1863, and embodied the same in its report on the 27th day of February, 1914, to the West Virginia Commission, and, at the same time, formulated and reported a proposition of settlement based thereon, with the recommendation that the same be made by the West Virginia to the Virginia Commission.

The substance of the proposition so formulated was that, if the Virginia Commission would allow to the State of West Virginia 23½% of the value as of the first day of January, 1861, of the stocks, bonds, securities and other properties owned by her on that day, and subsequently disposed of by her, hereinbefore referred to and hereinafter described in detail, as well as the whole amount of moneys ($225,078.06) collected by Virginia from West Virginia Counties after the separation of the two States, after deducting the amount of bank stocks ($260,200.00) theretofore turned over by Virginia to West Virginia; that is to say, the sum of $4,855,312.19, as a credit upon the sum of $7,182,507.46, ascertained, as aforesaid, by this Honorable Court to be the part of the principal of the Virginia debt assumed by the State of West Virginia, and accept the balance so ascertained in full settlement, both principal and interest, of West Virginia's equitable proportion of the Virginia debt, then, and in that event, the West Virginia Commission would at once report that fact to the Governor of the State of West Virginia, with the request and recommendation that he immediately convene in extraordinary session the Legislature of that State, for the purpose of adopting or rejecting the recommendation of the West Virginia Commission, and for the further purpose, in the event of its adoption, of providing the means, without further delay, of paying unto the State of Virginia, as Trustee for her bondholders, the sum of $2,327,195.27,

in full settlement of that portion of the Virginia debt assumed by the State of West Virginia.

The West Virginia Commission, upon receiving the report of said sub-committee, and after an examination and discussion thereof, approved and adopted the same; and, thereupon, a joint conference of the Virginia and West Virginia Debt Commissions was called to meet at the City of Washington on the fourth day of March, 1914. The two Commissions convened at the time and place designated, and the West Virginia Commission made, in writing, to the Virginia Commission its proposition of settlement aforesaid, and accompanied the same, as a part thereof, with a tabulated statement of the stocks, bonds securities and other properties 23½% of the value of which she claimed as a credit upon her ascertained proportion of the principal of the Virginia debt assumed by her. This proposition, however, was rejected by the Virginia Commission, and, thereupon, the conference ended, as well as the negotiations between the two Commissions. A true copy of said proposition, together with a true copy of the tabulated statement of the stocks, bonds, securities and other property therein referred to and thereto appended, as well as a copy of the letter of the Chairman of the West Virginia Commission transmitting the same to the Virginia Commission, are herewith filed as a part of this supplemental answer, and marked "Exhibit A". A true copy of the reply of the Virginia Commission thereto, as well as a copy of the letter of the Chairman of said Commission transmitting the same, are likewise exhibited herewith as a part hereof, and marked "Exhibit B". A true copy of the rejoinder of the West Virginia Commission to the reply of the Virginia Commission is also exhibited herewith as a part hereof, and marked "Exhibit C".

FOURTH: This defendant further alleges that, under the provisions of Sections 28, 29 and 30 of the

Constitution of Virginia of 1851, in force January 1, 1861 (Code of Virginia, 1860, page 47), she became, and was, entitled, under her Constitution adopted and in force on June 20, 1863, to an equitable proportion of and interest in the stocks, bonds and other securities, credit and settlement for which she now seeks to obtain by her supplemental answer;

That, under the provisions of Section 29 of said Constitution, a sinking fund was created; that, under the provisions of Section 30 of said Constitution, it was provided that the General Assembly may, at any time, direct a sale of the stocks held by the Commonwealth in internal improvement and other companies, but the proceeds of such sale, if made before the payment of the public debt, should constitute a part of the sinking fund, and be applied in like manner.

This defendant claims that, under these provisions of the Constitution, the Commonwealth of Virginia held, owned and was entitled to possess and sell the securities which she had acquired by the issue and sale of the bonds constituting the common debt, and that West Virginia, by her contract (Sec. 8, Art. VIII. of her Constitution), while assuming an equitable proportion of the Virginia debt, nevertheless acquired a proportional interest in these securities belonging to the sinking fund, measured by her equitable proportion of the debt, and that she had a vested interest in these securities which could not be divested by any subsequent constitutional provision adopted by the Commonwealth of Virginia, or by any legislative enactment other than authorized by the said sections of the Constitution of 1851.

FIFTH: This defendant, further answering, says that, as will appear from the Acts of the Legislature of the two States, both States contemplated a fair division of the property belonging to Virginia upon the settlement of the controversy between the two States with

reference to the said debt and the proportion thereof assumed by West Virginia in which West Virginia was interested before she became an independent State, and that both States declared for a fair division of the property, always, however, in connection with the ascertainment and adjustment of the equitable proportion of the debt assumed by West Virginia under her Constitution. And this defendant avers that she is advised and believes, and, upon such advice and belief, avers, that the property referred to evidently meant the stocks, bonds and other securities in the possession of Virginia possessing a commercial value, and available as assets for the discharge of the said debt, and that too without any impediment to or interference with the ordinary operations of the State government; and the defendant avers that it has always been the policy of Virginia to apply these assets to the payment of the said debt, and, in support thereof, this defendant avers that, in the Constitution of Virginia adopted in 1864, as shown by the "Acts of the General Assembly of Virginia, 1861-1865", on pages 15 and 16 thereof, the following provision with reference to the public debt appears:

> "The General Assembly may at any time direct the sale of the stocks held by the Commonwealth in internal improvement and other companies located within the limits of this Commonwealth, but the proceeds of such sale, if made before the payment of the public debt, shall be appropriated to the payment thereof."

On the twenty-eighth day of February, 1866, a joint resolution bearing upon the adjustment of the debt between the two States, appearing in the Acts of Assembly of Virginia of 1865-6, at page 453, was adopted, the third paragraph of which reads as follows:

> "The commissioners appointed under the foregoing resolution are also empowered and directed to treat with the authorities of West Virginia upon the subject of the proper adjustment of the public debt of Virginia due or incurred previous to the dismemberment of the State, and of a fair division of the public property; subject, however, to the approval or disapproval of this General Assembly."

This resolution was adopted within less than three years after the State of West Virginia was admitted to the Union, and is expressive of the attitude of Virginia relating to the equities of West Virginia in the assets of the former State applicable to the discharge of the public debt.

On February 18, 1870, an Act of the General Assembly of Virginia was passed, appearing on page 8 of the Acts of the General Assembly of Virginia for 1869-1870, with reference to the adjustment of the public debt, the first section of which is as follows:

> "Be it enacted by the General Assembly that three commissioners, resident citizens of this State, be appointed by the Governor to treat with the authorities of West Virginia upon the subject of a proper adjustment of the public debt of the State of Virginia due or incurred previous to the dismemberment of the State, and a fair division of the public property; provided, however, that the action of the said commissioners shall be subject to the approval or disapproval of this General Assembly."

SIXTH: This defendant, further answering, says that the history of the purchase, ownership, value and final disposition by the State of Virginia of the stocks, bonds and other securities and properties hereinbefore

referred to in the first paragraph of this supplemental answer is as follows:

SECURITIES RETAINED BY VIRGINIA.

1. Under and by virtue of two Acts of the General Assembly of Virginia, the one passed on January 23, 1835, and the other on March 23, 1836, the Commonwealth of Virginia purchased 2,752 shares of stock, of the par value of $100 each, in the Richmond, Fredericksburg & Potomac Railroad Company, and paid therefor the sum of $275,200.00, which purchase money was derived either from taxation or from the proceeds of the sales of a portion of the bonds that evidenced the debt in controversy here, and constituted a common fund, 23½% of which was owned by this defendant, and 76½% thereof by the State of Virginia. The stock so purchased was never disposed of by the Commonwealth of Virginia, and was owned by her on the first day of January, 1861, and is still so owned and held. Said stock, this defendant is now informed, and, upon such information, alleges, was dividend paying on the first day of January, 1861, and on that date, as well as on the twentieth day of June, 1863, was worth in the market, at the very least, the sum of $275,200.00.

This defendant is further informed, and, upon such information, alleges, that said stock has continued to pay dividends from January 1, 1861, to the present time, and that, during that period, has not only paid to the State of Virginia in cash dividends the sum of $1,282,198.74, but that she has received, in addition thereto, on account of said stock, and in the form of stock dividends, the sum of $319,615, which dividend stock bears the same rate of dividend as the original stock.

2. Prior to the first day of January, 1861, the Commonwealth of Virginia purchased, and paid for out of

the common funds of the plaintiff, and the defendant, stock in the following banks, of the par value as herein set out; that is to say:

Farmer's Bank of Virginia	$962,600.00
Bank of Virginia	963,620.00
Bank of the Valley	483,900.00
Exchange Bank	875,500.00
Northwestern Bank	374,400.00
Fairmont Bank	50,000.00
Total	$3,710,020.00

This defendant is informed, and upon such information alleges, that the foregoing bank stocks were, at the least, worth par on the first day of January, 1861, and continued to be worth par, or more, from that date until long after this defendant was separated from the Commonwealth of Virginia on June 20, 1863. It further says, upon information and belief, that said bank stocks, both upon the first day of January, 1861, and upon the twentieth day of June, 1863, and for sometime thereafter, were regularly paying dividends of from seven to eight per cent. per annum.

This defendant further says that the Commonwealth of Virginia appropriated the whole of said stock unto her own exclusive use, except $210,200 of the stock held and owned by her in the Northwestern Bank, and her stock in the Fairmont Bank, amounting to $50,000.00, which stocks were turned over by her to this defendant.

SECURITIES PURCHASED BY VIRGINIA PRIOR TO JANUARY 1, 1861, AND SOLD AFTER JUNE 20, 1863.

1. Prior to January 1, 1861, the State of Virginia, with the common funds of the two States, bought stocks

of and made loans to each of the following railroad companies:

Virginia and Tennessee Railroad Company,
Southside Railroad Company,
Virginia & Kentucky Railroad Company,
Norfolk & Petersburg Railroad Company,

and from time to time sold portions of said stock, until she had left on hand a residue of stocks therein and loans thereto that cost her:

Virginia & Tennessee Railroad Company, Stock	$2,300,000.00
Southside Railroad Company, Stock	803,500.00
Loans	708,102.34
Virginia and Kentucky Railroad Company, Stock	82,000.61
Norfolk & Petersburg Railroad Company, Stock	1,139,970.00
Loans	134,975.51
Total	$5,168,548.46,

which residuary stocks and loans she subsequently, that is to say, on the twentieth day of December, 1870, sold to the Atlantic, Mississippi & Ohio Railroad Company for the sum of $4,000,000.00. The purchase price was to be paid in instalments, and a second mortgage was taken upon the property of the Atlantic, Mississippi & Ohio Railroad Company to secure the payment of the same. This sale was made and this security taken without the knowledge or consent of this defendant; and finally, after the lapse of many years, first mortgage on the property of the Railroad Company was foreclosed, and the property embraced therein sold, but did not bring enough to satisfy the second mortgage and pay the $4,000,000.00 debt to the State of Virginia. Notwithstanding that fact, the Atlantic, Mississippi & Ohio Railroad

Company was subsequently reorganized, and, on the first day of March, 1882, paid into the treasury of the State of Virginia the sum of $500,000.00 for her interest in said second mortgage.

This defendant further says that she is informed, and upon such information charges, that the stocks so purchased in said railroads, as aforesaid, and the loans so made to them, were of the market value of $4,000,000.00, or more, not only as of the first day of January, 1861, but as of the twentieth day of June, 1863.

2. Virginia also, prior to the first day of January, 1861, purchased with the common funds of the two States shares of stock in the following railroad companies, and out of said funds made loans to said railroads, and subsequently collected the principal of said loans and sold said stocks, and likewise collected a claim against the Government of the United States, and another against Selden-Withers Company, and realized therefrom the amounts hereinafter next set out, and has never accounted unto this defendant for its proportionate part thereof; that is to say:

Orange & Alexandria Railroad Company, Stock and loan	$1,156,210.98
Richmond & Danville Railroad Company, Stock and loan	1,653,423.04
Richmond & Petersburg Railroad Company, Stock	578,404.13
Virginia Central Railroad Company, Stock and loan	321,458.17
Blue Ridge Railroad Company, (Built by State of Virginia)	705,280.82
Alexandria, Loudoun & Hampshire R. R. Co., Stock	68,044.51
Winchester & Potomac Railroad Company, Loan reduced by annuity	83,333.33

Virginia & Tennessee Railroad Company, Loan	992,030.32
Southside Railroad Company, Loan	91,897.66
Norfolk & Petersburg Railroad Company, Loan	165,024.49
Roanoke Navigation Company, Stock	3,832.00
Alexandria Canal Company, Stock	816.00
Upper Appomattox Company, Stock	16,144.26
Dismal Swamp Canal Company, Stock	24,839.98
Loan to Washington College	2,000.00
Richmond Academy, Bonds	400.00
Claim against United States Government	298,369.74
Claim against Selden-Withers Company	152,023.04
Total	$6,313,532.47

RESIDUE OF SECURITIES PURCHASED BY VIRGINIA PRIOR TO JANUARY 1, 1861, AND SOLD AFTER JUNE 20, 1863.

The residue of the securities purchased by the State of Virginia with common funds prior to January 1, 1861, and disposed of by her subsequent to that time in one way and another, and not hereinbefore recapitulated, consisted of stocks in the following railroad, navigation and canal companies, the actual value of which, as of the first day of January, 1861, and of the 20th day of June, 1863, in consequence of the lapse of time and the consequent obscurity of the evidence relating to such value, is unknown to this defendant, but the par value of which is set opposite the name of each company as follows, to-wit:

Manassas Gap Railroad	$2,105,000.00
Roanoke Valley Railroad	307,402.00
Fredericksburg & Gordonsville R.R.	132,399.00
Richmond & York River R.R.	490,999.52

Rappahannock Company	179,500.00
Rivanna River Navigation Co.....	227,133.00
Smith's River Navigation Co.....	4,083.12
Slate River Co.....	21,000.00
Kempsville Canal Company.....	13,650.00
Hazel River Navigation Co.....	63,079.58
Goose Creek & Little River Co.....	58,255.35
Dragon Swamp Navigation Co.....	1,464.00
Chesapeake & Ohio Canal Co.....	281,111.11
Total	$3,885,076.68

And this defendant says that she believes, and charges upon such belief, that these securities last above enumerated had an actual value, both on the 1st day of January, 1861, and the 20th day of June, 1863, of 25% of their par, or $971,269.17.

INTEREST ON LOANS AND DIVIDENDS ON STOCK.

This defendant is also informed, and upon such information alleges, that, after the Commonwealth of Virginia had, as hereinbefore set out, purchased with the common funds of this defendant and of the plaintiff the bank and railroad stocks hereinbefore described, and had made unto the various railroad companies and persons hereinbefore set out the various loans herein set forth, she, prior to the first day of January, 1861, became entitled to dividends upon said stocks and to interest upon said loans in the aggregate sum of $1,835,409.28, and, after the first day of January, 1861, collected the same, but did not apply the same to the discharge of her indebtedness existing prior to the first day of January, 1861, and has never paid or accounted unto this defendant for any part thereof.

The names of the various Companies and the amounts received from each, as aforesaid, whether as dividends upon stock or as interest upon loans, are as follows:

Orange & Alexandria Railroad Company....	$18,144.29
Richmond & Danville Railroad Company	8,516.80
Richmond & Petersburg Railroad Co.	43,048.00
Virginia Central Railroad Company.....	182,436.36
Winchester & Potomac Railroad Company ..	833.33
Richmond, Fredericksburg & Potomac R.R. Company	157,662.07
Virginia & Tennessee Railroad Company...	211,891.82
Southside Railroad Company.....	204,602.34
Norfolk & Petersburg Railroad Company..	45,900.00
James River & Kanawha Company.....	250.00
Loan to Washington College.....	60.00
Richmond Academy Bond.....	12.00
Claim against United States Government..	832,451.57
The Farmers' Bank of Virginia.....	33,691.00
Bank of Virginia.....	33,726.70
Bank of the Valley.....	16,936.50
Exchange Bank	30,642.50
Northwestern Bank	13,104.00
Fairmont Bank	1,500.00
Total	$1,835,409.28

SECURITIES AND PROPERTY GIVEN AWAY BY VIRGINIA.

This defendant, further answering by way of supplement to her original answer, says that the Commonwealth of Virginia, pursuant to the terms and provisions of certain Acts of her General Assembly, the first passed upon the 16th day of March, 1832, the second upon the 14th day of February, 1834, the third upon the 24th day of January, 1835, and the fourth upon the 23rd day of

March, 1860, purchased, and from time to time became the owner of, certain shares of stock in the James River & Kanawha Company, until the aggregate number of shares owned by her in said Company prior to the first day of January, 1861, amounted to 104,000 shares, with an aggregate par value of $10,400,000.00;

That, prior to the 23rd day of March, 1860, she had purchased and owned shares of this stock amounting in the aggregate, at par, to $3,000,000.00, and, under the provisions of an Act of her General Assembly passed on March 23, 1860, she purchased, prior to the first day of January, 1861, $7,400,000.00 more of this stock, paying therefor par, partly in cash, partly by the assumption of certain debts due from the Company to others, and the residue by the exchange of a debt owed by the Company to the Commonwealth of Virginia for an equal amount of the Company's stock at par;

That the State of Virginia, by her said Act of March 23, 1860; that is to say, only a period of about nine months prior to the first day of January, 1861, valued said stock at par, and between said date and the first day of January, 1861, purchased a large amount thereof for cash at that valuation; and this defendant is informed that nothing happened to depreciate the value of the same between the time of the valuation so placed thereon and the purchases thereof made by the State of Virginia at par and the first day of January, 1861; but that, making every allowance for mistakes in the valuation so made by the State of Virginia, and every allowance for depreciation in the value of said stock, this defendant believes that said stock and the property represented by it was reasonably worth on the first day of January, 1861, as well as upon the 20th day of June, 1863, twenty-five per cent. of its par, or the sum of $2,600,000.00;

That the State of Virginia, notwithstanding the fact that the stock in this Company had been purchased with

the common funds of the two States, and notwithstanding its value as aforesaid, pursuant to and by virtue of two Acts of its General Assembly, the one passed on February 27, 1879, and the other upon March 4, 1880, donated, without consideration so far as the State of West Virginia was concerned, all of the property of said Company, and authorized and caused said Company to convey the same to the Richmond & Alleghany Railroad Company, upon consideration that the latter would pay certain named debts of the James River & Kanawha Company, and agree to construct and operate a railroad along the tow-path of the canal of the James River & Kanawha Company from Clifton Forge, in the State of Virginia, to the City of Richmond, in said State, within a given time, and would guarantee the performance of its said contract by the deposit of $500,000.00 in United States Government bonds.

The road was built by the Richmond & Alleghany Company along the old tow-path of the James River & Kanawha Company, the bonds deposited by the Richmond & Alleghany Company as a guarantee for the performance of its contract withdrawn, and a deed executed by the James River & Kanawha Company to the Richmond & Alleghany Railroad Company on March 4, 1880, conveying the whole of the property of the James River & Kanawha Company described in the Act of February 27, 1879.

This defendant was entitled to 23½% of the value of said property so given away as of the first day of January, 1861; but the State of Virginia has never paid the same, or any part thereof, unto her, nor accounted to her therefor, in whole or in part.

MONEYS COLLECTED BY VIRGINIA FROM WEST VIRGINIA COUNTIES AFTER THE SEPARATION OF THE TWO STATES.

This defendant is further informed and believes, and upon such information and belief charges, that the State of Virginia, after the division of the old Commonwealth into two States (June 20, 1863), collected large sums of money from several Counties then and now located within the State of West Virginia, aggregating the sum of $225,078.06, the whole of which she avers should be allowed her as a credit upon her just proportion of the Virginia debt.

CASH ON HAND JANUARY 1, 1861.

In addition to the foregoing assets, the Commonwealth of Virginia, on the first day of January, 1861, had cash on hand in her treasury in the sum of $1,104,927.06, which sum of money was derived from assessments and levies upon the subjects of taxation situate both in that portion of the old Commonwealth of Virginia which is now the State of West Virginia and that portion of said Commonwealth that constitutes the State of Virginia.

The amount aforesaid was standing in the treasury of Virginia to the credit of the following funds:

Commonwealth fund	$252,842.67
Literary fund	26,876.08
Board of Public Works fund	5,958.28
Sinking fund	819,250.03
Total	$1,104,927.06

These moneys (or, at least, the portion thereof that was in the sinking fund) this defendant says were applicable by the Commonwealth of Virginia to the discharge of her bonded indebtedness existing prior to the 1st day

of January, 1861, or to the accrued interest thereon, and, as this defendant is informed, were in part so applied; that is to say, the Commonwealth of Virginia discharged out of these moneys during the month of January, 1861, or shortly thereafter, the sum of $977,-209.88 of unpaid interest that had accrued on her public debt from the first day of July, 1860, to the 31st day of December, 1860, but that, notwithstanding this fact, the interest so accrued and paid has been added to and embraced in the public debt of Virginia existing prior to the 1st day of January, 1861, and this defendant charged with her equitable proportion thereof, although the same had been paid, as aforesaid.

The foregoing assets set forth in detail in this paragraph, excluding the moneys collected from West Virginia Counties by Virginia ($225,078.06), aggregate, as alleged in the first paragraph of this supplemental answer, the sum of $20,810,357.98, twenty-three and one-half per cent. of which is $4,890,434.13, from which that portion of the bank stocks turned over by Virginia to West Virginia, and amounting to $260,200.00, should be deducted, leaving a balance of $4,630,234.13, to which should be added the whole of the moneys collected by Virginia from West Virginia Counties after the separation of the two States, amounting to the sum of $225,-078.06, making a total of $4,855,312.19, to be credited to West Virginia on account of said assets; and this last named sum, when deducted from the sum of $7,182-507.46, ascertained, as aforesaid, to be this defendant's equitable proportion of the Virginia debt, leaves a balance of $2,327,195.27, or the amount offered in compromise by the West Virginia Commission to the Virginia Commission, as hereinbefore set out.

SEVENTH: As another evidence of the value on or about the first day of January, 1861, of the stocks, bonds

and other securities and property hereinbefore described, and as a part of the information upon which this defendant has based her allegations hereinbefore made with respect to the value thereof, the defendant respectfully calls the attention of the Court to a statement contained in the message of John Letcher, Esquire, Governor of the Commonwealth of Virginia, submitted to the Legislature of Virginia on September 7, 1863, relating to the debt of Virginia, which had been prepared with great care, as stated by the Governor in said message, and after consultation with the State Auditors of Virginia, and was believed by the then executive of said State to be accurate and reliable. In this message, the Governor says:

> "We have available stocks belonging to the literary fund, railroad and other stocks belonging to the internal improvement fund, worth in the market, and from which may be realized at any time the State may direct, the sum of ..... $16,543,055.35."

In this message, the Governor adds:

> "In addition, the Commonwealth owns $2,340,600.00 worth of bank stock, which will readily command in the market the sum of $3,019,125.00."

The part of Governor Letcher's message dealing with the public debt of Virginia will be filed herewith, marked "Exhibit D", and made a part of this supplemental answer.

EIGHTH: This defendant, further answering, says that she ought not to pay any interest upon any part of the said debt assumed by her until the amount thereof has been definitely ascertained, upon the following grounds:

By Section 8 of Article 8 of her Constitution adopted in 1861, it is provided that—

> "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 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 this respondent avers that, under this provision of the Constitution, to which the plaintiff assented as the condition of the defendant's admission into the union, there is no promise or obligation upon the part of this defendant to pay any interest already accrued upon the said debt. The obligation is simply to ascertain the equitable proportion thereof, and provide for its payment, and the accruing interest, which means the interest accruing upon that proportion of the debt which West Virginia assumes; nor has there been any contract or agreement upon the part of this defendant, by any of her officers, agents or representatives, obligating her to pay interest upon the said debt.

This defendant further says that, after her formation as a State, she had no opportunity for ascertaining the amount for which she was liable, because of the existence of war between the States, in which the State of Virginia was an active participant; and, shortly after its close, and before the rehabilitation of the State of Virginia as one of the United States, she instituted suit in the Supreme Court of the United States, claiming a part of the territory of West Virginia, to-wit, the Counties of Jefferson and Berkeley, to which suit this defendant was a party, and no decision was rendered therein until the sixth day of March, 1871;

That, in the same month, to-wit, on the thirtieth day thereof, the State of Virginia undertook, without the consent and advice of the State of West Virginia, to ascertain the per cent. and proportion of said debt herself which West Virginia assumed, and fixed it at one-third of the whole debt, the said State of Virginia declaring that she was only liable for two-thirds;

That thereafter the State of Virginia would not negotiate a settlement so as to determine the amount which West Virginia assumed of the said debt, except upon the sole condition that Virginia was only liable for two-thirds thereof, thus necessarily leaving to this defendant the payment of the other one-third thereof to the State of Virginia.

This defendant further says that she had no power or authority to settle with the creditors of Virginia, because Virginia had full control of the debt, and, had West Virginia attempted a settlement with the creditors of Virginia, whatever she might have done in the premises would not have been binding upon the State of Virginia; and all that was done by Virginia in fixing the one-third of the said debt as the part assumed by West Virginia was with the consent and co-operation of her creditors.

This defendant also says that whatever sum is obtained in this suit is not payable to Virginia for her use and benefit, but is to be turned over to the holders of the unfunded portion of the said debt, and that these holders are private persons; and for this defendant to assume the payment of any interest which has heretofore accrued upon the said debt would be to impose upon her the burden of paying interest to private persons without any act of her own imposing such liability, either by legislation or by contract entered into by any of her officers or representatives.

In addition to the foregoing matters and things, this defendant further says that no interest should be charg-

ed upon West Virginia's portion of the Virginia debt in consequence of the following matters and things, which she now alleges upon information and belief to be true:

I. She is advised, and upon such advice avers, that a large amount of the bonds evidencing the debt of Virginia created prior to the first day of January, 1861, has been lost or destroyed, so that they will never be presented for liquidation, and, to that extent, there is a further reduction of the debt appearing to have been in existence on the first day of January, 1861. This defendant is not advised as to the exact amount of the bonds so lost or destroyed, but avers that they reach a very considerable sum, largely in excess of one million dollars. This appears from the report of the Debt Commission of Virginia submitted on January 14, 1892, wherein, referring to the funding of the debt of $28,000,000.00 by the issuance of new bonds for $19,000,000.00 under the Act of February 20, 1892, the Commission says:

> "There is good reason to believe too that a considerable amount of the old securities of the State have been lost or destroyed, so that the maximum of $19,000,000.00 will probably never be reached."

This defendant avers that she believes that a very large part of the $5,000,000.00 referred to in the said Act of February 20, 1892, have been lost or destroyed, so that there is no longer any probability whatever that this sum will ever be presented for payment, and any liability predicated thereon.

II. She says that the State of Virginia, as this defendant is informed, has received from time to time, in addition to the amounts hereinbefore set out in paragraph six of this supplemental answer, dividends upon the

bonds, stocks and securities hereinbefore described to an amount equal to $5,782,240.09, and did likewise, at the time of the separation of the two States, retain, without accounting unto the State of West Virginia for any part thereof, all of the public buildings, including the Capitol at Richmond, the University at Charlottesville, the penitentiary at Richmond, the State Asylum at Staunton, and various other public buildings and institutions that had been constructed and equipped out of the joint funds of the two States, and worth in the aggregate many millions of dollars, as well as much personal property, consisting of libraries, arms and munitions of war. She also says that Virginia has largely scaled her debt, without West Virginia receiving her full proportionate benefit of such scaling.

And now, having fully answered, this defendant prays that the amount and value of the assets as of January 1, 1861, and as of June 20, 1863, hereinbefore set out, that were acquired prior to said first named date by the Commonwealth of Virginia with the common funds of the two States, and were owned by her on said date, and subsequently appropriated to her own use in kind, or sold, and the proceeds of such sales so appropriated, or were given away by her, and for which the State of Virginia has not accounted unto the State of West Virginia, in whole or in part, may be ascertained; that twenty-three and one-half per cent. (23½%) of the value of said assets as of the one date or of the other be likewise ascertained, and that the same be applied as a credit upon that portion of the principal of the Virginia debt assumed by this defendant, as heretofore determined by this Honorable Court, and that the balance thus found due

and payable by this defendant, if any, be decreed without interest.

A. A. LILLY,
Attorney General for West Virginia.

V. B. ARCHER,
CHARLES E. HOGG,
JOHN H. HOLT,
Associate Counsel for West Virginia.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS.

This day personally appeared before me, the undersigned Notary Public in and for the County and State aforesaid, Henry D. Hatfield, Governor of the State of West Virginia, and, being by me first duly sworn, says that he has read the foregoing answer, and is familiar with the contents thereof, and that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that, so far as they are therein stated to be upon information, he believes them to be true.

HENRY D. HATFIELD,
Governor of West Virginia.

Taken, sworn to and subscribed before me this eleventh day of March, 1914.

My commission expires on the 26th day of April, 1923.

FRANK LIVELY,
Notary Public.

EXHIBITS

"EXHIBIT A".

COMMONWEALTH OF VIRGINIA vs. THE STATE OF WEST VIRGINIA.

Washington, D. C., March 4, 1914.

HON. JOHN B. MOON,

Chairman Virginia Debt Commission,

Washington, D. C.

Dear Sir:

The West Virginia Commission has adopted a preamble and resolution embodying a proposition to the Virginia Commission for the settlement of West Virginia's equitable proportion of the Virginia debt, and has requested me to transmit the same to you, and, through you, to the Virginia Commission, in the hope that it may receive early attention and a favorable reply.

Your attention is called to the fact that a list and history of the credits referred to in the resolution are attached to the copy thereof now presented you.

With great respect, I remain,

Very truly yours,

JOHN W. MASON,
Chairman West Virginia Commission.

Enc.

PREAMBLE AND RESOLUTIONS OF THE WEST VIRGINIA DEBT COMMISSION, ADOPTED AT A MEETING THEREOF, HELD IN CHARLESTON, WEST VIRGINIA, ON THE 27TH DAY OF FEBRUARY, 1914.

WHEREAS, The Supreme Court of the United States, by its opinion rendered on the 6th day of March, 1911, in the case of the Commonwealth of Virginia vs. State of West Virginia, ascertained the gross indebtedness of the old Commonwealth of Virginia, to the payment of which the State of West Virginia should contribute an equitable proportion, to be $30,563,861.58 (220 U. S., page 1), and,

WHEREAS, in consequence of the relative resources of the two debtor populations, Virginia's portion of said debt was fixed at .7651 and West Virginia's at .235; and,

WHEREAS, as the records of the case then stood, there appeared to be *no stocks of value on hand* that could be treated as assets, and a proper proportion thereof applied to the reduction of the claims against West Virginia, its equitable proportion of the principal of said debt (subject to the correction of clerical errors) was fixed at $7,182,507.46; and,

WHEREAS, since the announcement of the opinion aforesaid, and since the joint conference of the Virginia and West Virginia Debt Commissions, held at Washington on the 25th day of July, 1913, this Commission has discovered that, prior to the establishment of the State of West Virginia out of the territory of the Commonwealth of Virginia on the 20th day of June, 1863, the Commonwealth of Virginia purchased, and became the owner of certain stocks, bonds, securities and other property, which were paid for out of the common funds of

the two States,—in fact were purchased mainly, if not altogether, out of the proceeds of the bonds that constitute the debt of the old Commonwealth of Virginia in question here—and was the owner and holder of said stocks, bonds, securities and other property on the 1st day of January, 1861, and after the 20th day of June, 1863, sold and disposed of many of said stocks, bonds and securities, and realized in cash therefor, and appropriated to its own exclusive use many millions of dollars and gave away without the consent or knowledge of the State of West Virginia other portions of said assets and property which were of great value, not only on the 1st day of January, 1861, but at the time they were so given away, and has retained and still retains other portions of said assets and property which not only have a present value, but were of great value on the 1st day of January, 1861, that is to say, of the aggregate value as of the 1st day of January, 1861, of $20,810,357.98; and,

WHEREAS, according to the apportionment of the debt made by the Supreme Court between the two States, West Virginia is entitled in equity, as a credit upon the part of said debt allotted to it, to .235 of the aggregate value as of January 1, 1861, of said stocks, bonds, securities and other property, whether the same had been sold, retained or given away by the State of Virginia; that is to say, to the sum of $4,855,312.18, including cash on hand as of that date, and the additional sum of $225,078.06 collected by the Commonwealth of Virginia, from West Virginia counties after June 20, 1863, which, if deducted from its allotment of $7,182,507.46, would leave a balance of $2,327,195.28, principal to be paid by the State of West Virginia; and,

WHEREAS, in consequence of the great lapse of time and the long delay on the part of Virginia to have its rights and the liability of West Virginia in the premises

judically determined, also in consequence of the fact that Virginia has received from time to time, in addition to the amounts heretofore set out, dividends upon the bonds, stocks and securities hereinbefore described to an amount equal to $5,782,240.09, and in consequence of the further fact that a part of said bonds has been mislaid, lost or destroyed and will never be presented for payment; and many of the remaining bonds were purchased by the present holders thereof at nominal prices, and in consequence of the fact that Virginia at the time of the separation of the two States retained, without an accounting unto the State of West Virginia for any part thereof, all of the public buildings, including the Capitol at Richmond, the Penitentiary in that City, the State Asylum at Staunton, the University at Charlottesville, and various other public buildings and institutions that had been constructed and equipped out of the joint funds of the two States, as well as much personal property, consisting of libraries, arms and munitions of war, etc., and in consequence of the further fact that Virginia has largely scaled her debt without West Virginia receiving her full proportionate benefit of such scaling, to say nothing of the legal reasons that might be presented in opposition to such a charge, no interest should be charged upon West Virginia's allotted proportion of the principal of said debt;

NOW, THEREFORE, BE IT RESOLVED AS FOLLOWS:

I. That this Commission propose, and it does here now propose, to the Virginia Commission that .235 of $20,810,357.98, or the sum of $4,890,434.12 of the value of the stocks, bonds, securities and other property hereinbefore recited, and described in the list hereto appended, be allowed by the Commonwealth of Virginia as a credit upon, and that the same be deducted from the sum

of $7,182,507.46 ascertained as aforesaid, to be the equitable proportion of the principal of the debt of Virginia assumed by the State of West Virginia, and that the balance so ascertained, that is to say, the sum of $2,327,195.28 be accepted by the Commonwealth of Virginia in full settlement, both principal and interest, of West Virginia's proportion of the Virginia debt.

II. That in the event the Virginia Commission consent to the foregoing proposition, then this Commission will at once make a report of the fact to the Governor of the State of West Virginia, accompanied with the recommendation that the State of West Virginia pay unto the Commonwealth of Virginia the sum of $2,327,195.28, in full settlement of the present controversy; and the Governor of West Virginia will at once, pursuant to the terms of the joint resolution of the Houses of the West Virginia Legislature establishing this Commission, adopted on the 21st day of February, 1913, convene the Legislature of the State of West Virginia, for the purpose of adopting or rejecting the foregoing proposition of this Commission, and for the purpose, in the event of its adoption, of providing the funds without delay for the payment of the amount so agreed upon.

III. That this proposition is made by way of settlement of the present suit and shall in no way affect the rights, or influence the action of the State of West Virginia, in the event of its rejection and future ensuing litigation.

IV. BE IT FURTHER RESOLVED, that the Chairman of this Commission at once transmit to the Virginia Commission a copy of this resolution, with the appen-

dix thereto, with the request that the same be at once considered and acted upon at an early day.

JOHN W. MASON,
WILLIAM D. ORD,
J. A. LENHART,
R. J. A. BOREMAN,
HENRY ZILLIKEN,
JOSEPH S. MILLER,
U. G. YOUNG,
JOHN M. HAMILTON,
W. T. ICE, Jr.,
West Virginia Debt Commission.

Analysis of report of Accountants, classifying the Credits to which the West Virginia Debt Commission believes the State of West Virginia is entitled, dividing the same into classes marked A to G, inclusive.

CLASS A.

CASH.

The credits assigned to Class A consists of cash on hand in the treasury of the State of Virginia on the 1st day of January, 1861, amounting to $1,104,927.06, which sum was allotted to the following funds in the following amounts; that is to say:

In the Commonwealth Fund	$252,842.67
In the Literary Fund	26,876.08
In the Board of Public Works Fund	5,958.28
In the Sinking Fund	819,250.03
Total	$1,104,927.06

CLASS B.

Stocks purchased by the State of Virginia with the common funds of the two States prior to January 1, 1861,

unsold, still owned and unaccounted for by the State of Virginia.

The asset assigned to this class consists of 2,752 shares of stock in the Richmond, Fredericksburg and Potomac Railroad Company, of the par value of $100 each. This stock was bought by the State of Virginia under acts of January 23, 1835, page 87 of Accountant's Report, and March 23, 1836, page 95 of said report, for the cash price of $275,200.00, and has never been disposed of by her, but is still owned by the State of Virginia, and had a valuation as of the 1st day of January, 1861, of at least $275,200.00.

Total $275,200.00

CLASS C.

Proceeds of sales of securities purchased with common funds of the two States by the State of Virginia prior to the 1st day of January, 1861, and sold by the State of Virginia without the knowledge or consent of West Virginia, and without accounting therefor.

1.	Orange & Alexandria Railroad Co., stock and loan	$1,156,210.98
2.	Richmond & Danville Railroad Co., stock and loan	1,653,423.04
3.	Richmond & Petersburg Railroad Co., stock	578,404.13
4.	Virginia Central Railroad Co., stock and loan	321,458.17
5.	Blue Ridge Railroad Co., built by State of Virginia	705,280.82
6.	Alexandria, Loudoun & Hampshire R. R. Co., stock	68,044.51
7.	Winchester & Potomac Railroad Co., loan reduced by annuity	83,333.33
8	Virginia & Tennessee Railroad Co., loan	992,030.32

9.	Southside Railroad Co., loan	91,897.66
10.	Norfolk & Petersburg Railroad Co., loan	165,024.49
11.	Roanoke Navigation Co., stock	3,832.00
12.	Alexandria Canal Co., stock	816.00
13.	Upper Appomattox Co., stock	16,144.26
14.	Dismal Swamp Canal Co., stock	24,839.98
15.	Loan to Washington College	2,000.00
16.	Richmond Academy Bonds	400.00
17.	Claim against U. S. Government	298,369.74
18.	Claim against Seldon-Withers Co.	152,023.04
	Total	$6,313,532.47

CLASS D.

Interests on loans and dividends on stock accrued prior to January 1, 1861, upon common investments, and collected by the State of Virginia after January 1, 1861, and still unaccounted for:

1.	Orange & Alexandria Railroad Co.	$ 18,144.29
2.	Richmond & Danville Railroad Co.	8,516.80
3.	Richmond & Petersburg Railroad Company	43,048.00
4.	Virginia Central Railroad Co.	182,436.36
5.	Winchester & Potomac Railroad Co.	833.33
6.	Richmond, Fredericksburg & Potomac Railroad Co.	157,662.07
7.	Virginia & Tennessee Railroad Co.	211,891.82
8.	Southside Railroad Co.	204,602.34
9.	Norfolk & Petersburg Railroad Co.	45,900.00
10.	James River & Kanawha Co.	250.00

11.	Loan to Washington College	60.00
12.	Richmond Academy Bonds	12.00
13.	Claim against United States Government	832,451.57
14.	The Farmer's Bank of Virginia	33,691.00
15.	Bank of Virginia	33,726.70
16.	Bank of the Valley	16,936.50
17.	Exchange Bank	30,642.50
18.	Northwestern Bank	13,104.00
19.	Fairmont Bank	1,500.00
	Total	$1,835,409.28

CLASS E.

Bank stock purchased by Virginia with joint funds prior to January 1, 1861, and in her possession on that date:

1.	Farmer's Bank of Virginia	$962,600.00
2.	Bank of Virginia	963,620.00
3.	Bank of the Valley	483,900.00
4.	Exchange Bank	875,500.00
5.	Northwestern Bank	374,400.00
6.	Fairmont Bank	50,000.00
	Total	$3,710,020.00

CLASS F.

Railroad stock purchased by the State of Virginia out of the common funds of the two States in various railroads, prior to the first day of January, 1861, and sold by her subsequent to the 20th day of June, 1863, without the knowledge or consent of West Virginia, and for which she has never accounted.

Prior to January 1, 1861, the State of Virginia, with common funds, bought stocks of and made loans to each of the following railroad companies:

Virginia & Tennessee Railroad Co.
Southside Railroad Co.
Virginia & Kentucky Railroad Co.
Norfolk and Petersburg Railroad Co.,

and from time to time sold portions of said stock until she had left on hand stock therein and residue of loans that cost her:

Virginia & Tennessee Railroad Co.,	
stock	$2,300,000.00
Southside Railroad Co.,	
stock	803,500.00
loan	708,102.34
Virginia & Kentucky Railroad Co.,	
stock	82,000.61
Norfolk & Petersburg Railroad Co.,	
stock	1,139,970.00
loan	134,975.51
Total	$5,168,548.46,

which residuary stocks she subsequently, that is to say, on the 20th day of December, 1870, sold to the Atlantic, Mississippi & Ohio Railroad Co., for the sum of $4,000,000.00, the purchase price to be paid in installments, and took a second mortgage upon the property of the said railroad company to secure the payments of the same. This sale was made and this security taken without the knowledge and consent of the State of West Virginia; and finally after the lapse of many years, the first mortgage upon said railroad company was foreclosed and the property covered thereby sold, but did not bring enough to satisfy the second mortgage and pay the $4,000,000.00 purchase price agreed to be paid to Virginia for these stocks. After the foreclosure sale, that is to say, on the 1st day of March, 1882, the re-organization of the Atlantic, Mississippi & Ohio Railroad Company paid unto the State of Virginia the sum of $500,000.00 for

her second mortgage rights, whatever they may have been. Virginia has never accounted to West Virginia, either for a proportionate part of the $4,000,000.00 original purchase price, or the $500,000.00 subsequently received.

It will be seen that the value placed upon these stocks, both by the State of Virginia and by the railway company purchasing them, was $4,000,000.00; and this can be taken as their reasonable value as of January 1, 1861.

Total	$4,000,000.00

CLASS G.

Securities purchased with joint funds by the State of Virginia prior to January 1, 1861, and subsequently given away without the knowledge or consent of West Virginia, together with certain other railroad and canal securities appropriated by her in one way and another, but not hereinbefore recapitulated:

James River & Kanawha Co., 104,000 shares	$10,400,000.00
Residue of Securities,	
Manassas Gap Railroad	2,105,000.00
Roanoke Valley Railroad	307,402.00
Fredericksburg & Gordonsville R. R.	132,399.00
Richmond & York River R. R.	490,999.52
Rappahannock Company	179,500.00
Rivanna River Navigation Co.	227,133.00
Smiths River Navigation Co.	4,083.12
Slate River Co.	21,000.00
Kempsville Canal Company	13,650.00
Hazel River Navigation Co.	63,079.58
Goose Creek & Little River Co.	58,255.35
Dragon Swamp Navigation Co.	1,464.00
Chesapeaks & Ohio Canal Company	281,111.11
Total	$14,285,076.68

The foregoing $10,400,000.00 attributed to the James River & Kanawha Company was the par value of its stock, and, although the State of Virginia by an act of the General Assembly passed on the 23d day of March, 1860, something less than nine months before January 1st, 1861, placed a value of par thereon and made purchases thereof at such valuation, yet so much time has elapsed and the evidence of the actual value of this stock as of that date has become so obscure, that it has been thought best, out of a spirit of compromise, to place a value thereon of twenty-five per cent. of its par value, or the sum of $2,600,000.00.

The other securities embraced in this class (amounting to $3,885.076.68) have been treated in the same way for the same reason, and their value placed herein at twenty-five per cent. of their par value, or the sum of $971,269.17.

Total	$3,571,269.17

In addition to the foregoing, the State of Virginia after the division of the old Commonwealth into two States, June 20, 1863, collected large amounts of money from several counties then and now located in the State of West Virginia, aggregating the sum of $225,078.06.

RECAPITULATION.

Class A	$1,104,927.06
Class B	275,200.00
Class C	6,313,532.47
Class D	1,835,409.28
Class E	3,710,020.00
Class F	4,000,000.00
Class G	3,571,269.17
Total	$20,810,357.98

West Virginia Equity .235		$4,890,434.12
Less Northwestern Bank Stock	$210,200	
Fairmont Bank Stock	50,000	260,200.00
Balance		$ 4,630,234.12
Collected from West Virginia Counties		225,078.06
Total Net Equity		$4,855,312.18

RESULT.

West Virginia's Share of Debt	$7,182,507.46
Less Net Equities as above	4,855,312.18
Balance	$2,327,195.28

NOTE.

Subsequent to the 1st day of January, 1861, the Commonwealth of Virginia has received as dividends and interest upon the securities and loan hereinbefore listed the sum of $5,782,240.09, as follows:

INTEREST AND DIVIDENDS RECEIVED BY VIRGINIA IN CASH AFTER JANUARY 1, 1861, FROM ASSETS HELD JANUARY 1, 1861, AND EXCLUSIVE OF ANY DIVIDEND OR INTEREST UP TO JANUARY 1, 1861.

Interest		Dividends	Total
Cash	Va. Bonds	Cash	
Orange and Alexandria R. R.			
$113,459.00	$81,311.34	$66,516.09	$261.286.43
Richmond & Danville R. R.			
380,497.66	281,322.35	249,605.67	911,425.68

Virginia Central R. R.			
86,385.03	72,174.40	387,404.65	545,964.08
Richmond & York River R. R.			
		54,009.94	54,009.94
Richmond, Fredericksburg & Potomac R. R.			
24,012.71	.....	1,282,198.74	1,306,211.45
Virginia & Tennessee R. R.			
137,762.86	.....	138,000.00	275,762.86
Norfolk & Petersburg R. R.			
69,561.41	.....	82,800.00	152,361.41
Roanoke Navigation Co.		2,800.00	2,800.00
Upper Appomattox Co.		6,150.00	6,150.00
Richmond & Petersburg R. R.			
1,703.81	.....	227,504.00	229,207.81
Winchester & Potomac R. R.			
4,166.67	35,184.79	.....	39,351.46
Southside R. R.			
192,000.00	.....	.....	192,000.00
Washington College			
4,140.00	.....	.....	4,140.00
Richmond Academy			
816.00	.....	.....	816.00
U. S. Government			
.....	575,837.52	.....	575,837.52
Farmers Bank of Virginia			
.....	.....	373,007.50	373.007.50
Bank of Virginia			
.....	.....	370,993.70	370,993.70
Bank of the Valley			
.....	.....	94,360.50	94,360.50
Exchange Bank			
.....	.....	343,633.75	343,633.75
Northwestern Bank			
.....	.....	42,920.00	42,920.00
Total			
1,014,505.15	1,045,830.40	3,721,904.54	5,782,240.09

"EXHIBIT B".

Washington, D. C., March 4, 1914.

HON. JOHN W. MASON, Chairman,
West Virginia Commission,
Washington, D. C.

Dear Sir:

VIRGINIA vs. WEST VIRGINIA.

I beg to hand you, herewith, the resolutions adopted by the Virginia Debt Commission in response to the proposition submitted to them this day by the West Virginia Commission.

With great respect, I am,

Very truly yours,
JOHN B. MOON, Chairman,
Virginia Debt Commission.

VIRGINIA vs. WEST VIRGINIA.

Resolutions of the Virginia Debt Commission, adopted at a meeting held in Washington, D. C., at the New Willard Hotel, Wednesday, March 4, 1914.

The Virginia Debt Commission having received the proposition submitted this day by the West Virginia Commission, which contains statements and conclusions to which this Commission cannot assent and concerning which it is unwilling to engage in any discussion, adopted the following resolutions:

WHEREAS, the Supreme Court of the United States, in its opinion delivered at the October term, 1913, (November 10, 1913), in the suit of Virginia vs. West Virginia, on motion of Virginia to proceed to a final hearing, said:

> "In March, 1911 (Virginia vs. West Virginia, 220 U. S. 1) our decision was given 'with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed.' In view, however, of the nature of the controversy, of the consideration due the respective States and the hope that by agreement between them further judicial action might be unnecessary, we postponed proceeding to a final decree and left open the question of what, if any, interest was due and the rate thereof, as well as the right to suggest any mere clerical error which it was deemed might have been committed in fixing the sum found to be due upon the basis of liability which was settled," and

WHEREAS, The matters left open and referred by the Court to the respective States for consideration and adjustment "in the hope that by agreement between them further judicial action might be unnecessary" were specifically stated to be (1) "what, if any, interest was due and the rate thereof", and (2) "the right to suggest any clerical error which it was deemed might have been committed in fixing the sum found to be due upon the basis of liability which was settled," and

WHEREAS, The proposition now submitted by the West Virginia Commission does not embrace either of said matters left open by the Court and referred to the parties litigant for adjustment between them;

IT IS THEREFORE RESOLVED, That the Virginia Debt Commission is unwilling to, and respectfully declines to consider the said proposition;

IT IS FURTHER RESOLVED, That the Virginia Debt Commission hereby expresses its regret that the West Virginia Commission has not seen its way to re-

spond to the opinion of the Court and submit a proposition to adjust the question of interest.

JOHN B. MOON,
Chairman.

J. B. BUTTON, Secretary.

Approved:

JNO. GARLAND POLLARD,
Attorney General of Virginia.

"EXHIBIT C".

Washington, D. C., March 4, 1914.

HON. JOHN B. MOON,
Chairman Virginia Debt Commission,
Washington, D. C.

Dear Sir:

In response to your communication of this date declining the proposition of the West Virginia Commission made this day looking to a settlement of the Virginia debt, we regret to be under the necessity of calling your attention to the fact that, although you deem the question of interest still open, yet you have offered nothing in reply to the reasons advanced in our proposition why no interest should be charged, and thus close the discussion upon the only point considered by you still to be open. And, so far as the credits advanced by us are concerned, you express an unwillingness even to discuss them, thus leaving us, in the absence of errors therein pointed out by you, with the conviction that they are equitable, and under the necessity of adhering to the terms of a proposition made in an effort to do justice to all.

We deemed it unnecessary to indulge in any interpretation or construction of the opinion of the Supreme Court at this time further than to say that, in our opin-

ion, the Court ascertained West Virginia's proportion of the principal of Virginia's debt to be $7,182,507.46, only because, as the record then stood, there appeared to be *"no stocks of value on hand"* to be applied to the reduction of the same. These stocks are now discovered and disclosed, and a portion of them, at least, were set forth in the proposition you have declined.

You have, therefore, closed the door to further negotiations, and it is with regret that we cease further effort along that line.

Respectfully submitted,

JOHN W. MASON,
WILLIAM D. ORD,
J. A. LENHART,
R. J. A. BOREMAN,
HENRY ZILLIKEN,
JOSEPH S. MILLER,
U. G. YOUNG,
JOHN M. HAMILTON,
W. T. ICE, Jr.,
West Virginia Debt Commission.

ARGUMENT OF

JOHN H. HOLT, ESQ.,

ON

BEHALF OF WEST VIRGINIA

ARGUMENT OF JOHN H. HOLT, ESQ.

May It Please the Court:

We have two questions for discussion, first, whether or not West Virginia shall be given permission to file the supplemental answer tendered by her, setting up certain credits discovered by her since the last continuance of this cause, and, secondly, whether or not she should be charged with interest upon such proportion of the principal of the Virginia debt as may be decreed against her.

Taking these questions in their order, the motion for leave to file the answer is based both upon the former decision of this Court and upon the discoveries made by the West Virginia Debt Commission acting upon a suggestion embodied in that decision, and a brief history of each, it is submitted, will show the equity and justice of her motion.

In the first place, this Court, speaking through Mr. Justice Holmes, on the sixth of March, 1911, held in this case that West Virginia was obligated to pay an equitable proportion of the Virginia debt existing prior to the first day of January, 1861. That matter is settled, and is finally settled by this Court, and the object of the present motion here and our appearance is not in an effort to disturb the same. We accept it as settled, and the Commonwealth of Virginia likewise so accepts it.

In the second place, it was held in that opinion that the total debt of the Commonwealth of Virginia as of the first day of January, 1861, to be apportioned between these two sovereigns amounted to the sum of $30,563,-861.56. That is likewise settled, and our motion is in conformity to that finding; nor do we seek, nor have we the temerity to suggest, any interference therewith.

In the third place, it was held that, taking into consideration the relative resources of the two debtor populations, viz., Virginia comprising now that portion of the old Commonwealth that lies east of the Alleghany Mountains, and West Virginia that portion that is situated

west of the Mountains, the debt as ascertained should be apportioned between them upon the following ratio; that is to say, 76½% should be paid by the State of Virginia, and 23½% thereof by the State of West Virginia; and that is the third matter that was finally settled by your Honors in this cause. Such was and is the basis of settlement, and we do not seek to disturb the same.

So the Court must not be deceived by any allegation that the present motion of West Virginia for leave to file a supplemental answer is an effort upon her part to run counter to the conclusions heretofore reached by this Court. We seek, on the contrary, to act in strict conformity thereto.

Finally, applying this basis of settlement, this Court ascertained that West Virginia's equitable proportion of the principal of the Virginia debt was $7,182,507.46; but, instead of entering a decree for that amount against her, either with or without interest thereon, and, believing that enough had been said "for patriotism, the fraternity of the Union and mutual consideration to bring it to an end," suggested a conference between the two States.

Virginia had theretofore appointed a Commission with power to act in the premises, and West Virginia, in obedience to the suggestion, made haste, through her Legislature and Governor, to appoint a like Commission. These Commissions first met in joint conference, to little purpose, and, thereupon, the West Virginia Commission appointed a sub-committee, with direction to investigate, as speedily as possible, all matters connected with the state of the account between the two Commonwealths, and with the view of making a proposition of settlement to the State of Virginia.

This sub-committee went to work, through its accountants, and overhauled the records and archives of the State of Virginia from the year 1820 to the present time,

with the result that it discovered that the State of Virginia had appropriated to her own exclusive use, without accounting to West Virginia for any part thereof, assets purchased with the common funds of the two States amounting, exclusive of public buildings, to twenty odd millions of dollars; and, when this fact was reported by it to the full Commission, the latter reached the conclusion that West Virginia was entitled to the same per cent. of these assets as she was charged with of the debt incurred in their purchase. In other words, if she had to pay 23½% of the bonds issued for the purchase of stocks and other properties, she would be entitled as a credit thereon to 23½% of the actual value of such stocks and properties. This was thought to be really in accordance with the opinion of this Court of March 6, 1911, heretofore referred to; for the Court, speaking through Mr. Justice Holmes, had said, in describing the investment of the common funds of the two States, that—

> "The whole State would have got the gain, and the whole State must bear the loss, as it does not appear that there are any stocks of value on hand."

(220 U. S., page 30; 55 L. Ed., 358.)

In other words, as the record stood at the time of the rendition of the opinion of March 6, 1911, no stocks, bonds or other securities of value appeared to be on hand, and there was no evidence of any credit that could be applied to West Virginia's ascertained proportion of the principal of the debt, and the same, in consequence, was permitted to stand at $7,182,507.46, without diminution or abatement in any manner, to any extent, or for any purpose. The indication, however, was clear that, had any stocks, bonds or other securities of value

been presented, they would have been considered and allowed.

The West Virginia Commission therefore, upon the report of its sub-committee, calculated and ascertained 23½% of what was supposed to be the actual value of the securities appropriated by the State of Virginia, and deducted the result from West Virginia's ascertained proportion of the principal of the debt, viz., $7,182,-507.46, leaving a balance chargeable to West Virginia of $2,327,195.27. The Commissions of the two States were then convened, and the West Virginia Commission offered to pay the balance thus ascertained unto the State of Virginia in full settlement of principal and interest, but the offer was rejected by the Virginia Commission; and, thereupon, and at once, the State of West Virginia filed the present motion in this Court, praying leave to file the supplemental answer presented with its motion for the inspection of the Court, and wherein the credits above described are set forth in detail.

Coming now to the question of our right to file this supplemental answer, we are first met with the objection that it does not contain facts discovered since the filing of the original answer in this cause, and since the opinion of this Court therein rendered on the sixth day of March, 1911, but that all the credits therein set up and all the purchases of securities with the common funds of the two States therein set forth were fully known to the State of West Virginia upon both dates, and that they should have been sooner pleaded—indeed, our learned friend, Attorney General Anderson, who has just taken his seat, went so far as to say, if I understood him, that the report of a former West Virginia Commission, known as the Bennett report, and heretofore filed in this cause, fully discloses the matters and things set up in the present supplemental answer.

Our learned friend is mistaken. It is not an allega-

tion, as these gentlemen seem to think, of the supplemental answer that we claim to be utterly ignorant of the fact that Virginia had spent some of the common funds of the two States by investing in stocks and bonds of internal improvement companies. A knowledge of that fact is not denied. We knew when we were a part of her, of course, and long before the institution of this suit, that from 1820 or 1823 clear on down to 1861, at the breaking out of the war, she was investing her moneys and our moneys from time to time in works of internal improvement; but we still deny in this supplemental answer that we had any knowledge whatever of the disposition or of the value of these assets, and we claim that the disposition thereof by the Commonwealth of Virginia and their actual values were discovered for the first time through the investigations of the West Virginia Commission, which was appointed after the filing of the original answer herein at the suggestion of this Honorable Court to imparl with our adversaries. In other words, the discoveries since the last continuance of this cause alleged in the supplemental answer do not consist of the existence of ante-bellum securities, but of post-bellum misappropriations thereof by the Commonwealth of Virginia. At the date of our severance from the old Commonwealth, these securities went into her hands as trustee, and, without our knowledge or consent, she has since appropriated them, or the proceeds from the sale thereof, to her own exclusive use, without even reporting such sales to the State of West Virginia, and without accounting unto her for any portion of the proceeds thereof. We charge the misappropriation of a trust fund, the amount and value of which we have just discovered, and the evidence of which was confined alone to the archives of the State of Virginia.

Counsel for Virginia, for the purpose of showing prior knowledge of the existence and history of the securities

set up in the supplemental answer, refer to Exhibit B of the Bennett report, and call attention to the mention therein of the purchase of stocks in and loans to four railroads, and say that the same roads, stocks and loans are set up at page twenty-six of the supplemental answer; but it will be observed that, while the supplemental answer does set up the purchase of these stocks and the loans made to these roads prior to January 1, 1861, it does not stop there, as does the Bennett report, but continues to give the history of these stocks and loans in the hands of Virginia as trustee subsequent to the creation of this State in 1863 (all of which has recently been discovered), and it appears therefrom that, on the 20th day of December, 1870, she had a residium of these stocks and loans on hand amounting at par to $5,168,548.46, and that on that day, without the knowledge or consent of the State of West Virginia, she sold the same to the Atlantic, Mississippi & Ohio Railroad Company for the sum of $4,000,000, and took a second mortgage to secure the purchase money, which was to be paid in installments. This sale was made and this security taken without the knowledge or consent of the State of West Virginia, and finally, after the lapse of many years, she collected $500,000 thereon, and covered the same into her treasury, and has not to this hour reported the fact. The Bennett report falls short, because the disposition of these assets took place after it was written, and it is only through recent discoveries that the supplemental answer is able to set forth the perversion of a trust fund and the destruction, in part at least, of a sinking fund that was created for the express purpose of discharging, or at least diminishing, the very debt that is in controversy here, and that Virginia now seeks to compel West Virginia to contribute to the payment of.

West Virginia should be given either 23½% of the

face value of these securities, or 23½% of the $4,000,000 value placed upon them by the State of Virginia and the railway to which she sold them, or, at the very worst, 23½% of the $500,000 that she actually and finally received for them; for, under the Constitution of Virginia of 1851, the latter amount, at least, should have gone into the sinking fund for the diminution of the very debt to the payment of which we are asked to contribute. I only mention this as an illustration.

Again, as an illustration of this Bennett report, by means of which they seek to charge us with knowledge of all these matters, it does not mention the purchase of the Richmond, Fredericksburg & Potomac stock by the Commonwealth of Virginia out of the funds of the two States, and still held by her, a dividend paying stock; yet, in response to this motion, they say, "Oh, well, these assets are of no value."

We will take that one by way of illustration, and I shall not try the patience of the Court by going into detail in all these matters. I shall take that one by way of illustration, your Honors. Prior to 1861, and out of the common funds of these two States, out of the proceeds of the very bonds that evidence the debt that is in controversy here, Virginia purchased $275,000 of the common stock of the Richmond, Fredericksburg & Potomac road, and has it in her strong box today. Not worth anything? The supplemental answer discloses that upon that $275,000 of common stock, in the interim, more than $1,800,000 of dividends have been declared and received. These are simply illustrations.

Well, they say "you have the James River & Kanawha Canal stock in here, and that is no account." That may be, but that is not what Virginia says about it. In March 1860, just one year—no, less than one year—only ten months before the date beyond which we should not be responsible for any indebtedness was fixed, owning $3,-

000,000 of the stock in that Company, purchased with the common funds, she concluded to buy $7,400,000 more, and, by an Act of her Legislature just nine months and ten days prior to the first day of January, 1861, took that stock at par. Well, we are only asking a credit of 23½% of 25 per cent. of that amount. We are amazed at our own moderation.

We were likewise told this morning that we were claiming 23½% of more than $3,000,000 of bank stocks, but that these stocks had subsequently become utterly worthless. All we know about them is that they were purchased with the common funds of the two States prior to 1861, and that they, with a few exceptions, went into the hands of Virginia and under her control on the 20th day of June, 1863, when West Virginia was cut off from the old Commonwealth, and that, in the month of September of the same year (that is, after the division of the two States), Governor Letcher reported to the Legislature of the State of Virginia that they were worth more than par. It is true that they may have become worthless in the latter sixties; but, if so, it was while in the hands of our trustee, and by reason of her own conduct; for, however glorious the page, it was through her conduct upon the fields of Chicamauga and Chancellorsville that these bank stocks were depreciated and destroyed. We became a State because we were opposed to secession, and because we were unwilling to take up arms against the government of the United States.

Your Honors, I only went over these in detail for the purpose of illustrating the equities that we undertake, at least, to present in our supplemental answer. Should we be permitted to file it? They tell us that John G. Carlisle argued this case once. I know he did. I knew him toward the close of his career, and I am not criticising him when I undertake to supplement his work.

I have nothing to say about him except to express my great admiration for his wonderful analytical power of statement, and to deplore his death. But we may be permitted to say on behalf of those who represent West Virginia now that, under the circumstances of the case, it would be peculiar indeed if they had not learned something more of the case in the light of subsequent developments. We have high authority for the statement that even a dwarf, standing on the shoulders of a giant, can see farther than the giant sees.

We are further told by counsel for Virginia that, even though we may have been ignorant of the value and disposition of the securities set up in the supplemental answer, yet that we had knowledge of the existence of these securities, and were put upon inquiry as to their subsequent history, and were derelict in postponing such inquiry until this late day; that all questions were regularly referred to a master, where the cause pended for a long time, and opportunity for full investigation was given. In reply, we need but call the attention of this Court to the history of this cause. The basis of settlement finally adopted by this Court, through its opinion of March 6, 1911, was not the basis of settlement alleged in the bill of Virginia, and was not the basis of settlement, as we understand it, adopted by this Court in its decision upon the demurrer to the bill, interposed by the defendant. The theory of both plaintiff and defendant seems to have been (and their pleadings were drawn in accordance therewith) that the Wheeling Ordinance should furnish the basis of settlement between the two States. This Ordinance did not call for an ascertainment or disclosure of the common assets retained by Virginia, but provided that West Virginia's proportion of the Virginia debt should be ascertained "by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expen-

ses 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." From this it will be seen that West Virginia's debit side of the account consisted only of two items, first, all State expenditures made within her limits, and, secondly, a just proportion of the ordinary expenses of the State government since any part of said debt was contracted; and that the credit side of her account consisted of but one item, viz., the moneys paid by her into the treasury of the Commonwealth from the counties included "within the said new State during the same period."

To the bill of the plaintiff, thus framed and based upon the Wheeling Ordinance, the defendant demurred, and, after elaborate discussion before this Court, the demurrer was overruled. The opinion was delivered by Mr. Chief Justice Fuller, and, with the permission of the Court I will read a short extract from his opinion. It is found on page 433 of what is called the West Virginia compilation. Beginning about the fourth line from the top thereof, he says:

> "The Act of May 13, 1862, was not made a part of the case stated in the bill, and its validity is denied by counsel for Virginia; but it is unnecessary to go into that, for when Virginia, on August 20, 1861, by ordinance provided 'for the formation of a new State out of the territory of this State', and declared therein that '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 as provided, it is to be supposed that the new State had this in mind when it framed its own Constitution, and that, when that instrument provided that its legislature should 'ascertain the same as soon as practicable,' it referred to the

> method of ascertainment prescribed by the Virginia convention. Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia,* it follows that what was meant by the expression that the 'Legislature shall ascertain' was that the Legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained.''

In consequence of this, it is respectfully submitted that this Court held upon the demurrer that this debt was to be apportioned between the two States upon the basis of the Wheeling Ordinance, and we went to the Master upon that theory, and the decree of reference entered in 1907 was in conformity to that opinion; but, after the Master had reported, this Court came to the conclusion that the method prescribed by the Wheeling Ordinance was arbitrary, and, by its opinion of March 6, 1911, established the more equitable basis of settlement hereinbefore set out, and, for the first time, the common assets retained by Virginia, and West Virginia's equitable proportion thereof, became material and important.

The Chief Justice: Do I understand you to say that the decree of reference confined the consideration before the Master to an adjustment under the terms of the Wheeling Ordinance?

Mr. Holt: It provided, your Honor, for a finding in the alternative.

The Chief Justice: Yes, that is what I thought.

Mr. Holt: But it nowhere specifically calls for an ascertainment of the assets retained by Virginia, although it did call for an ascertainment of the assets received by West Virginia.

The Chief Justice: My question to you was this: You read from the language of the Chief Justice in that decree, which I am quite familiar with, and you said

that the decree of reference to the Master conformed to that language.

Mr. Holt: I so read it, your Honor.

The Chief Justice: Did it not go farther than that, and confer upon the Master power to consider the case in a broader light?

Mr. Holt: Somewhat broader, your Honor. It permitted the defendant, or permitted the Master, upon the request of counsel, to make inquiry; but, as I read and interpret it, only along the line of the Wheelng Ordinance. We will read the decree in a moment, or the alternative provision in it. There was more than one alternative in the direction, but neither of them, as I read the decree, involved the assets retained by Virginia, or West Virginia's equitable proportion thereof.

The Chief Justice: Of course, it has been a long time ago, but my recollection is that West Virginia made a claim that the reference should be restricted to the very subject that you now state, and that was the subject of the discusion at the bar, and the briefs suggested that such did not consort with or conform to the rest of West Virginia's request on that subject.

Mr. Holt: Each side presented a form of decree of reference, and each one proceeded upon the theory that the ascertainment of the debt was—

Mr. Justice Holmes: That does not conform to the discussion that took place, that there being some difference of view as to what this was, it should cover all the matters.

The Chief Justice: Yes.

Mr. Holt: Our contention is that it was not that broad, and that the inquiry did not involve matters now presented which were not investigated nor reported upon at all. It is perfectly clear that, if the Wheeling Ordinance was taken as the basis of settlement, the Virginia assets were not, and could not have been, a material

matter for investigation. By reference to page 324 of Volume 1 of the same compilation, we find that the Attorney General of Virginia, in the oral argument, said—

> "Now, instead of letting these questions be settled upon the principles of equity and public law, that convention prescribed this artificial and arbitrary basis of adjustment."
>
> (He is speaking of the Wheeling Ordinance.)
>
> "We have to concede that we cannot go behind this; that we must accept it."

That seems to have been the theory, your Honors, of counsel upon both sides, and certainly the investigation before the Master was along that line, and none other. Whatever may have been the theory, the fact is as I now state it.

Returning, however, to the affirmative reasons why West Virginia should be permitted to file this answer, the debt grows so under the nurturing care of Virginia that the consequences to the defendant become appalling. Counsel for Virginia now tell us by their latest brief presented for perusal by your Honors how easy it would be, and what a solution of this question, to discharge the equitable proportion of a thirty million dollar debt by the payment of a hundred million dollars! That seems to be their present position, which, if I may be permitted to say so, would bankrupt West Virginia worse than any State in the South in reconstruction days. But should we be permitted, as a matter of equity, to file this answer? We should, in the first place, because the assets appropriated by Virginia were a trust fund under her Constitution of 1851, and, by the 29″ section thereof, a sinking fund was established, and it was provided that that sinking fund should be devoted exclusively to the discharge of the funded debt of Virginia, and, by the 30″ section of the same Constitution, it was further provided that the Legislature might at any time sell the

stocks or bonds that she held and owned in internal improvement or other companies; but that, in the event of a sale, the proceeds thereof should be paid into the sinking fund, provided the funded debt had not theretofore been paid, and become applicable to the discharge and the payment, or at least to the diminution, of that debt, without the privilege of diversion to any other purpose. That was the situation, your Honors, when West Virginia was cut off.

There was a sinking fund, with all of the assets that had been accumulated through the common funds of the two States, and this answer shows that it is now discovered, and that too since the original answer was filed in this cause, that all of those assets, with a very few exceptions, have been disposed of by the State of Virginia, and that she has covered millions into her treasury, and has not accounted unto West Virginia for one dollar or one dime. She sits down and arbitrarily assumes—these are the facts, I take it—that she owes only two-thirds of this debt—we will come to the history of that in a moment—and that we owe one-third; and then she proceeds further to appropriate to her own exclusive use the whole sinking fund for the purpose of discharging her two-thirds—either that, or diverts it to some other purpose utterly foreign.

They say in their briefs that, coming out of the War impoverished, they have paid over $70,000,000 on account of this indebtedness, principal and interest, and that West Virginia has not contributed a single dollar. In response to that, I want your Honors to bear in mind that they have gone off, up to date at least, with more than twenty million dollars worth of common assets, not one cent of the value of which they have either reported or accounted unto West Virginia for.

It is easy enough to pay debts, provided you use the property of other people for the purpose.

What interest did we have in it? This Court said that we were liable for the debt in the ratio of 23½% for West Virginia, and 76½% for Virginia. Our contention is that we are entitled to just the same ratio of the assets.

If an investment is created and is evidenced by a bond in the purchase of a piece of property, if one of the purchasers is compelled to contribute to the purchase money at the rate of 23½%, he is entitled to receive of the value of the thing purchased the same percentage, 23½%. In other words, it would seem to be a prime principle, to use the language of this Court again, that our equity to these assets is just as "deep-seated" as is the equity of Virginia, upon the other hand, to compel us to contribute to the payment of the debt that was incurred in the purchase of the assets. Therefore, I say, as a matter of equity, we should, in the second place, be permitted to file this supplemental answer.

Whether the decree of reference may have been broad or narrow, the fact is that no report of these assets was made. The Master did not state the account upon that line, and here we are.

In the next place, it is submitted, with all due regard to our adversaries, who are gentlemen of honor, and for whom I have a very high regard, that we be permitted to file this supplemental answer for this reason: Virginia was the aggressor. She came into this Court with the avowed purpose of bringing about an *equitable* adjustment of the Virginia debt, and, although the evidence was within her possession, in her archives and her records, which gave the history of these assets, she undertook to state the account without exposing the credits.

You will read the bill filed in this Court in vain in an attempt to find a single allegation that seeks anything but money, without allowing anything by way of credit.

There is no statement of account at all, although the whole evidence in relation thereto was exclusively within the possession of the plaintiff.

If it is an equitable adjustment that she is seeking, and the evidence was in her possession, it became her duty to expose the status of the account, to the end that justice and equity might be done. She did not do it.

The next reason: I know very well that your Honors, in proceedings of this kind, have established very few rules for the conduct of original proceedings in equity before this tribunal. The Court has wisely left the thing very much at large, because the settlement of a whole controversy at any time might become, as this has become, not so much a question of knowledge and of learning as a question of wisdom. For that reason, the rules have not been promulgated, but your Honors have prescribed rules for the conduct of equity proceedings before the inferior federal tribunals, and I take it that they are just. Among the new rules that have been recently promulgated by your Honors, having taken effect the first day of January, 1913, we find Rule 19. Of course, I do not call your Honors' attention to this rule as being anything more than persuasive. It may furnish, however, an analogy for the government of this cause. Rule 19 reads in part as follows:

> "The Court may at any time in furtherance of justice, upon such terms as it may deem just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth, in an amended or supplemental pleading."

This rule does not by its terms even require diligence. It simply requires an honest effort to get at the right, and, of course, it is always within the hands of the Court to prescribe terms, and such terms as would produce equitable results. Not only that, but we have a similar

rule prescribed by your Honors for the government of inferior tribunals. We refer to equity Rule 34, which reads in part as follows:

> "Upon application of either party, the Court or Judge may, upon reasonable notice, and such terms as are just, permit him to file and serve a supplemental pleading alleging material facts occurring after his former pleading, or of which he was ignorant when it was made."

Now, out of analogy to either of these rules, it is respectfully submitted that this supplemental answer should be received. There is, however, another reason: When we come to reflect upon the character of this case; when we come to reflect upon the reasons why jurisdiction has been given to this tribunal under the Constitution; when we remember that it is a sovereign State impleaded at the bar of this Court, the practice should not be governed by the same strict rules that govern controversies between and rights of individual citizens, and I have but to remind this Court of its own language in this cause. I refer to the opinion of March 6, 1911, where this Court, speaking through Mr. Justice Holmes, said, in substance at least, if not in words, that this controversy should be approached and should be proceeded with in the untechnical spirit that is appropriate to the settlement of quasi-international controversies, remembering all the while that there is no municipal code upon the subject; and it is in that same spirit and upon that same authority, and upon the faith of these credits —because the object is to ascertain the rights of the people—that this motion is made.

It might be answered by our friends upon the other side that, if we were permitted to file this supplemental answer it would only be a short while until we would come back with another motion for something else of like kind, and that we would be thereby permitted to turn this pro-

ceeding into an endless chain of litigation. It is enough to say by way of reply to this suggestion that it should be borne in mind that your Honors hold the matter in your own hands. It is always within the control and discretion of the Court, with the power to impose terms, and to impose such terms upon this motion, or any other motion that might be made, as would produce equitable results.

I may mention in passing too that they seem to think we are very rich—although, of course, it has nothing to do with the logic of the situation or the justice of our cause. They have us up now, I believe, to a billion or two of values, and by Fall perhaps will add a billion more. They contrast this with a much smaller valuation in the State of Virginia; but the worthlessness of all comparison between assessed values is easily illustrated. I have seen the same railroad in our jurisdiction, based upon assessed valuation, jump in twenty-four hours from an appraisement of nine millions to twenty-five millions. That, of course, is getting rich very rapidly.

As a brace-root to their contention, and in the hope that they may have our just credits disregarded, they further suggest that the internal improvement companies in which the common funds of the two States were invested started West Virginia on the road to progress, and contributed largely to her development—in other words, that she has already received a consideration for her subscriptions to these works. Nothing could be more fallacious, or with less foundation in fact. To one familiar with the history of the two States, such a contention does nothing more than to provoke a smile. West Virginia never had an opportunity to develop. She was not permitted to develop, and made no progress along that line at all until after she had been cut loose from Virginia. This was the real cause lying back of

the separation, and secession and rebellion furnished the opportunity.

Mr. Conrad: The cause of the separation was indicated and openly expressed in the convention—

The Chief Justice: Do not interrupt counsel.

Mr. Holt: It has been expressed by a great many people in a great many different ways.

It has been Virginia's boast that she sent West Virginia forth, a daughter without a dowery. That is true. She sent this daughter out with empty pockets, and with bare hands, to the conquering of a forest primeval, and she has done it. They say that these old internal improvement companies were the cause of our prosperity, whatever it may be. The answer shows, and I do not transgress the record when I make the statement, that it was West Virginia's own sons and daughters, beginning twenty years after she had been cut adrift from the Tidewater Counties, who sent men into canyons, for the construction of trunk line railways, so deep and rugged that they had to be suspended in mid-air while they did their work, and built railways costing a gold dollar for every inch of the way. This resulted in prosperity. Why, we had but a single railway—we had a wilderness. So, when they make these claims, we must be pardoned if we lose our patience in reply; and I, for one, must say that I lack for a word to euphemistically express the impression that it makes upon my mind.

Your Honors, so much for the answer. We ask it in the name of equity.

The West Virginia Commission made a proposition that was refused. It may be that the Virginians thought it was not enough; but we laid our hand upon the table. In these days of omniverous politics, States are hard to manage. The object was to make a proposition that would be paid without cavil and without contention, and

without ever dreaming of putting this Court to the necessity of devising ways and means to enforce its decrees against a sovereign State.

West Virginia is not a repudiationist. But they rejected our offer. We laid all these credits on the table before them. The answer shows that. Here they are. Did they tell us that we were mistaken? Did they tell us that the Richmond, Fredericksburg & Potomac stock was worthless? Did they deny that they had sold many of these securities, and had covered the cash into their treasury, and diverted it from the sinking fund, in violation of the Constitution? No, they denied nothing. We would have been only too glad to have stood corrected if any of these credits had been wrong; because, had they given us the truth, if they were informed, we would not have bothered your Honors with it any more. They simply repulsed our proposition without discussion, and we could reach but one conclusion, and that was an implied admission of the correctness of the credits prayed.

INTEREST.

Now, your Honors, a few words upon the subject of interest, and then I am done. I know I have tried the patience of the Court too long, but, with your indulgence, will take but a few moments on this subject.

Counsel for Virginia cite in their brief the case of *Higginbotham* v. *The Commonwealth,* 25 Gratt., and say that that case established the rule that in Virginia you could sue the Commonwealth, and that the Commonwealth was chargeable with interest just like an individual; that her law was our law, and that it should be applied to West Virginia in this case.

They further call our attention to the fact that, in the very first Constitution we adopted, by Sec. 8, Article 11, we said that the common and statutory law of the Com-

monwealth of Virginia should continue to be the common and statutory law of West Virginia, unless it be in conflict with the Constitution then proposed, and until it should be repealed by the Legislature; therefore, that Virginia law and West Virginia law upon the subject of interest were the same; and the case of Higginbotham v. the Commonwealth is cited for the purpose of showing what the Virginia law was at the time the first West Virginia Constitution was adopted. Not only that, but, in their last brief, they say—

> "The framers of the Wheeling Ordinance must be presumed to have drawn that instrument with reference to the principle of equity and justice which had then and long before that time been embodied in the laws of Virginia by the repeated decisions of her highest Court."

The truth of the business is this, that the 25" Gratt., a Virginia report, was not published, or a single case in it decided, until thirteen years after West Virginia had been established and erected into a separate State. The last Virginia report containing cases decided before the separation of the two States is the 14" Grattan, eleven volumes earlier than the 25th.

When you get back to the other Virginia cases decided before we were cut off, you will find that they, one and all, so far as I could find, certainly so wherever the point was raised, refused to allow interest in any controversy against the State, and such seems to have been the fixed law of Virginia at the time we were cut off, and at the time of the adoption of our Constitution, in which the article to which I have referred appears.

The Chief Justice: Leaving aside that fact entirely, and approaching it from a broader view—I do not mean to criticise, but, at the same time, what do you say, what have you to say, on the question of interest?

Mr. Holt: That I am coming to, sir.

The Chief Justice: I am looking at it now, irrespective of the point you have made.

Mr. Holt: I only refer to the technical position for this reason; because I had thought so little of it that I did not mention it at all in my brief; but, when I came to read the brief for Virginia, I found much said about it there, and I did not feel warranted in passing it by without any reference to it at all.

With your permission, sir, before coming to answer your question, I would like to give the Court upon that point the case of *Commonwealth* v. *Lilly,* 1st Leigh, page 525. There is something peculiar about that case too. It is recorded in the report as if interest had been allowed against the Commonwealth, but the Court of Appeals of Virginia subsequently, in 3rd Leigh, say that is a misprint. I will give you that case.

Mr. Justice Holmes: That is in the brief of West Virginia in opposition to interest?

Mr. Holt: Yes.

Mr. Justice Holmes: Will you give me that reference? What is the first page?

Mr. Holt: *The Commonwealth* v. *Lilly,* 1 Leigh 525. The other is *Auditor of Public Accounts* v. *Dugger & Foley,* 3 Leigh, page 241. Those are the cases that laid down the law so far as the awarding of interest against the Commonwealth of Virginia was concerned at the time we were a part of her; that interest will not run against a sovereign in the absence of legislative consent or some contract giving such consent made by her public officials thereunto duly authorized; and such we take to be the position of your Honors in more than one case.

Mr. Justice Day: Have you anywhere dealt with the question as though it were between sovereigns?

Mr. Holt: Yes, your Honor. One of these cases is *South Dakota* v. *North Carolina.* There they were both sovereigns. The cases to which I refer of this Court

are in the brief in opposition to interest, and the first is the *United States* v. *North Carolina*. Your Honors are so familiar with that that it is not worth while for me to make a comment upon it.

The second is *South Dakota* v. *North Carolina*, likewise appearing upon the brief. Then you have the case of the *United States ex rel. McCloud* v. *John Sherman, Secretary*. Then you have likewise the case of—

Mr. Justice Holmes: These are all in your brief?

Mr. Holt: Yes, your Honor, at page two of the brief on behalf of West Virginia in opposition to interest. There it is held, your Honors, that there must be legislative consent or contractual consent in order to fasten interest upon a sovereign, of course the theory being that the sovereign is always ready to pay the principal, thus obviating the interest.

There is no legislative enactment in the present case. We shall have to look to the contract to ascertain whether or not we have consented to the payment of interest, and I think that brings us right down to the hinge of the question, the turning or pivotal point. This Court held that our contract was composed, first, of Section Eight, Article Eight, of our Constitution of 1861—not the Wheeling Ordinance, but the Constitution; secondly, the Act of 1862 of the restored government of Virginia, consenting to the erection of our State upon the faith of the Constitution proposed, and, third, the Act of Congress of December 31, 1862, admitting us into the Union upon the faith of both. There is the contract, and we must admit that it makes a perfect one.

Now, then, we must turn to this eighth section of Article eight of the Constitution in order to see whether we have promised to pay interest. If your Honors will turn to the third page of the brief in opposition to interest, filed on behalf of West Virginia, you will find this eighth section of the Constitution set out. It reads:

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the 1st 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."

Mr. Justice Lurton: That public debt, an equitable proportion of which West Virginia assumed, was an interest bearing debt, known to be such to all the parties at the time, and these bonds being scattered over the world —if that is so—did not that assume, in equity, an assumption of interest upon that proportion of the debt?

Mr. Holt: That is the point I am just going to address myself to, your Honor. We shall have to determine that from this article, I think. That is the question in this case.

Now, going back to the constitutional provision, it is our object, your Honor, to meet that provision of the Constitution as frankly as we can, because we know that by it we must stand or fall. That constitutional provision contains two promises—there is no question about that. The first is: West Virginia promised to pay an equitable proportion of the debt—we do not deny that. The second promise made by her is that she will establish a sinking fund sufficient to meet the accruing interest thereon, and discharge the principal within thirty-four years. That is her promise number two. It will be observed, however, your Honors, that both of these promises, or each of these promises, had a qualification attached to it. The qualifications are these: In the first place, upon the promise to pay an equitable proportion of the debt, our promise was modified by the statement that it must be in existence prior to the first day of January, 1861. We fixed that as a barrier, as the date beyond

which Virginia should contract no debt to the payment of which we would contribute. That is the first limitation.

Now, if that debt on the first day of January, 1861, had had a lot of overdue and unpaid interest, I will grant you that it could have been added in as a part of the principal, and that we would be compelled to contribute our equitable proportion to the same with it added in; and, as I understand the decision of March 6, 1911, this Honorable Court took that very course. There was some interest of that character, and it was treated as principal,—well, very properly so—but not so with any interest accruing after the first day of January, 1861.

What is the qualification of the second promise? Our second promise was to establish a sinking fund for the discharge of our equitable proportion of the principal and the accruing interest thereon within thirty-four years; but that promise was necessarily conditioned upon the fact that our equitable proportion of the debt must have first been ascertained. How would it be possible for the State of West Virginia to establish a sinking fund without the debt to be discharged thereby having been first ascertained? Such a sinking fund would necessarily be built up through levies, and the amount of the levy could only be known by first knowing the amount of the debt.

The Chief Justice: Does not that bring the interest argument right back to the argument that was made on the Wheeling Ordinance, that it must be fixed by the Legislature; that the Legislature did not fix it, and, therefore, nothing was due?

Mr. Holt: No, sir. This Court exploded that theory, and I am glad they did.

The Chief Justice: But that theory was advanced at this bar?

Mr. Holt: There is no doubt about that.

The Chief Justice: That West Virginia was to fix it, and that she never had fixed it, and, therefore, she did not owe anything?

Mr. Holt: That was Mr. Carlisle's argument.

The Chief Justice: Oh, I did not say who.

Mr. Holt: And the argument of our side, of course.

Mr. Justice Pitney: That was your Legislature?

Mr. Holt: Yes, that was our Legislature. The Legislature could not have fixed it. This Court exploded that theory, because you would not sit by and permit us to be judge in our own case, nor, upon the other hand, would you permit the Commonwealth of Virginia to arbitrarily fix it, as she undertook to do, assuming unto herself two-thirds, and assigning and allotting unto us one-third.

The Chief Justice: That is the proportion that was fixed—not the interest-bearing date.

Mr. Holt: I am speaking of the action of Virginia—her funding Acts of 1871.

The Chief Justice: In fixing the proportion—she did not fix the interest.

Mr. Holt: No, she did not fix the interest. I am coming, though, to the point that it does not bring us back to West Virginia's Legislature, for this reason: Our position is this, that West Virginia, acting through her Legislature, standing alone, could never have fixed it; neither could the State of Virginia have liquidated and ascertained this amount through her Legislature, and the two States, through the whole flight of years, have never indulged in any joint action; and that this amount, West Virginia's equitable proportion, has, in consequence, remained unfixed, unascertained and unliquidated to this hour, unless it was fixed and ascertained on the sixth of March, 1911; and, if it were fixed at that time, if the supplemental answer should be admitted and its credits applied to that principal, interest would begin

to run only upon the balance, and that too after the balance shall have been ascertained.

Mr. Justice Pitney: Is not the reference to the interest that shall thereafter accrue? Does it not refer to the interest running all the time?

Mr. Holt: Our contention is that the debt must be ascertained in some way before the creation of a sinking fund, and that the failure to ascertain it has, as we shall later see, not been the fault of West Virginia.

Mr. Justice Pitney: I do not see what there is in that principle that stops the running of interest during the time while you are waiting to ascertain the amount.

Mr. Holt: It is in keeping with the doctrine of this Court and of other Courts, that unliquidated sums are not interest-bearing amounts.

Mr. Justice Holmes: Then you would have this Court put it into your hands to delay the beginning of any liability for interest so long as your ingenuity could keep the case undecided in this Court?

Mr. Holt: No, I would not take that position,—it would not be equitable, and, when applied to this case, would not fit the facts. A reference to the record will show that West Virginia has not passively been at fault; neither has she actively prevented, by her ingenuity or otherwise, the ascertainment of her equitable proportion of this debt. She could not act alone through her legislative or any other department of government, or all departments combined. She could not act as judge in her own controversy. The concurrence of the State of Virginia was necessary, and the joint action of the two States was required. They failed to agree, and we assert that West Virginia was not at fault, and cannot be punished for the delinquency of another. I venture the assertion that I can cover every hour of the time from 1861 until now, and demonstrate that West Virginia was not at fault, notwithstanding all the Commissions that these gentlemen say they have appointed to treat with

us. It is the simplest matter in the world. I say that we can cover the entire period of time. Let us see. The whole thing began on January 1, 1861. Certainly we did nothing to put us in the wrong, or to prevent, actively or in any other way, the ascertainment of this debt from the first day of January, 1861, down to the twentieth day of June, 1863. Why? We have covered that much of the period of time because we were not a State during that time. We had not been admitted into the Union. We were nobody from the first day of January, 1861, down to the twentieth day of June, 1863—therefore, I say that period of time must logically be eliminated from the controversy.

The other propositions are equally plain, if we will just take them and eliminate them.

The next period is from June, 1863, until early in 1866, or the latter part of 1865, I do not recall which. During this time, the two States were at war, and it would have been treason to have negotiated. Therefore, we have covered the period from January 1, 1861, down to 1866.

How is the next period covered? On December 1, 1866, Virginia instituted a suit in this very Court against us, attacking the integrity of our territory, and claiming jurisdiction over the Counties of Berkeley, Jefferson and Frederick—Frederick she still has, of course—and in the other two Counties, if my memory serves me, pretty nearly fifteen per cent. of the entire wealth of West Virginia was then located. We could not negotiate with her while that question pended here, because we did not know what we were. In order to apply the very basis of settlement that your Honors have fixed, that is, the relative resources of the two debtor populations, as a condition precedent thereto, you would have had to ascertain what the debtor populations were, and it could not be done with that suit pending. That suit continued to pend here

until the year 1871. Therefore, we have covered the whole period from 1861 down to 1871; and, within nine days after this Court announced its opinion in the territorial case, we sent a commission—I believe I have my dates right—to the Commonwealth of Virginia to negotiate a settlement of this debt; and they refused to negotiate with us. They had suggested a commission before that time, but when we got over there they had repealed the Act, and they had nobody to negotiate with us, and there we became stationary again. This state of affairs continued until the funding Acts began on the part of Virginia, and they took place on the thirtieth day of March, 1871, the same year.

What did they do? They said: "Well, we only owe two-thirds of this debt. We allot one-third of it to you." Then they appointed a commission to negotiate with us on that basis. In other words, they settled the subject-matter of the negotiation before the negotiation began.

Mr. Justice Pitney: What was the date of that proposition of theirs?

Mr. Holt: The funding Act was the 30th of March, 1871. That is the time they arbitrarily settled, as we contend, that they only owed two-thirds, and the matter practically remained in that condition until just before the institution of this suit.

Mr. Justice Pitney: This is the point that troubles me: I see by your argument that you agreed to pay an equitable proportion of this debt, when ascertained?

Mr. Holt: Yes.

Mr. Justice Pitney: That obligation did not become ascertained definitely until the equitable proportion was ascertained. If you postpone that determination twenty or thirty years, and the interest is in the meantime running against Virginia and being paid, does not that payment of interest by her have some bearing on the equitable proportion?

Mr. Holt: It might be so had Virginia not prevented the ascertainment herself. She put the matter, by her conduct, in such a fix that we could not negotiate a settlement with her.

Of course, these gentlemen will tell the Court that Virginia appointed commission after commission. She did, but their hands were always tied; and, when you come to the record, you will find every moment of time accounted for in the way I have heretofore suggested. It is idle to multiply words about it. And, in addition to this, even if we were to admit that Virginia was conditioned so she could properly negotiate, and West Virginia was stubborn and unwilling to meet her, she had her remedy; for there never was a time during the last forty years that Virginia could not have appealed to this Court—not a single hour; and, by her neglect and failure so to do, our contention is that she has caused the very flight of time on account of which she now seeks to charge us interest.

Mr. Justice Pitney: Was it not the obligation of the debtor to come forth and make payment?

Mr. Holt: It has recently been held by one of our Courts of last resort that it is the business of the creditor to vex his debtor until he paid.

Mr. Justice Pitney: That is a new legal obligation.

Mr. Holt: It may not be applicable to sovereigns, but it is the obligation out of which springs the doctrine of *laches* and the statute of limitations; and it may be that *laches* will be attributable even to the Crown, where it does not act in its own right, but in a fiduciary capacity, or as a trustee, like the State of Virginia in the present case.

One word more: If the somewhat technical doctrine that interest is not to be charged against a sovereign is not to obtain, and the question here for decision is to be determined upon broader lines, then, and in that event,

the fact should not be lost sight of that the credits claimed by the supplemental answer embrace only a certain per cent. of the actual value of the common assets, and do not take into consideration the fact that Virginia has had these assets, or their proceeds, in her exclusive possession ever since West Virginia was created, and has exclusively enjoyed the fruits thereof, including the whole of the interest thereon. In other words, she has not only kept the 76½% of the assets that belonged to her, and enjoyed the income derivable therefrom, but has likewise appropriated West Virginia's 23½% thereof, together with the interest thereon, or the income therefrom, from the twentieth of June, 1863, until the present time. In addition to this, no account has been taken nor any credit claimed in consequence of the many public buildings owned by Virginia and constructed in part out of West Virginia funds, except that it has been asked that, if West Virginia is to be charged with interest upon any portion of this debt, it should be offset by an application thereto of the amount contributed by her to the construction of these public buildings, together with the interest thereon from the time that they have been exclusively enjoyed by the State of Virginia.

If technical rules are not to apply in the decision of the question of interest, because thought to be too narrow, and the broader principles of equity are to be invoked, they should be invoked for the benefit of the defendant, as well as for the benefit of the plaintiff.

Finally, it may not be without equitable influence to say that it appears from the record in this cause that Virginia has very little, if any, financial interest in this controversy. The holders of that portion of the Virginia bonds that was arbitrarily allotted by Virginia, in the absence of any settlement, and without the consent of West Virginia, as West Virginia's part of the debt, could not enforce the same in the Courts, either State or

National, against the State of West Virginia. They could not sue her in this Court under the Constitution of the United States; neither could they institute proceedings against her in the West Virginia Courts, in consequence of the West Virginia Constitution. Virginia alone could implead her fellow sovereign, and these bondholders and the State of Virginia, both recognizing this fact, came to terms, the bondholders agreeing to accept from the State of Virginia in lieu of her bonds held by them the so-called West Virginia certificates issued by Virginia, agreeing to free Virginia from any liability thereon, and be satisfied with anything that might be collected against the State of West Virginia in a suit to be instituted by Virginia against her. In other words, Virginia escapes liability, upon a part of these bonds at least, by lending her name for the purposes of suit to the holders thereof. She has sold her sovereign birthright for a mess of pottage.

ARGUMENT OF

A. A. LILLY, ESQ.,

Attorney General for West Virginia

ARGUMENT OF A. A. LILLY, ESQ.

MR. LILLY: If your Honor please, as my associate counsel has covered this case so fully and ably from the standpoint of the defendant, I must necessarily be a gleaner in Boaz's field, but in my gleaning I shall try as far as I can to separate the chaff from the wheat and the grain from the tares.

In the outset, I desire to make some reference to the arguments of counsel on behalf of the plaintiff and bondholders and in doing so must depart from the order that I had expected to follow. I shall attempt to answer that which counsel for plaintiff and bondholders seem to consider important and essential.

First, with reference to what West Virginia is worth to-day. This was alluded to with emphasis by the first and the last speakers. As a matter of fact I do not see in what way this can be relevant. This court said on March 6, 1911, that West Virginia's equitable share of the debt was based upon the relative resources of the two debtor populations, not as of 1914, but as of June 20, 1863, when West Virginia became a separate sovereign state. The argument that West Virginia is worth little or much to-day is not pertinent to the controversy. It has no legal significance in this case—is immaterial and without merit. If West Virginia was torn asunder from the mother state by stress and strain of war because she liked the Stars and Stripes, because she was loyal to the Constitution and the Union, and went into the wilderness and worked out her own destiny with willing hands and honest heart, and to-day is an Empire within herself, this does not argue that West Virginia shall pay something that she is not legally bound to pay.

It has been said that in 1867 West Virginia was assessed at $126,000,000.00, and in 1908 she was assessed at $937,000,000.00. What does assessed values have to do with the actual value of property? West Virginia has the highest assessment relatively speaking, of all the States in the Union. She bases the value of her property on the "true and actual value", not the price that you might sell at a forced sale, but what it is worth. Virginia says she has only increased 84 per cent, from $354,000,000.00 to $661,000,000.00. It might be truthfully said that the City of Richmond is larger than six of our biggest towns, and that the City of Norfolk is larger than three, the City of Lynchburg larger than two.

If, by dint of energy, by honest endeavor, West Virginia has accumulated some wealth she is entitled to it. Her present wealth has no bearing on the question of her liability to Virginia. West Virginia was never able to obtain wealth while the border counties, the seaboard counties, had her tied to them. We were throttled and held down, and never prospered, while we were regarded and treated as an outlying province, and would not be prosperous to-day if we were bound to Virginia. Why? Because we had inequitable assessments; inequitable representation, unfair and discriminatory treatment. Neither capital nor labor was encouraged, and the Trans-Alleghany Counties were placed in a state of coma because of the undesirable policies of Virginia. The great benefits that ought to have been derived from this debt did not come to West Virginia, as the records will show.

Second, the main argument of the opposing counsel is that we are guilty of negligence in not bringing these equitable defenses and off-sets into the record sooner. Sometimes counsel say the off-sets were in, and then again they say if they were not in they should have been in, because we must have known of them. If our proposed supplemental answer is true, do not the allegations, as

therein set forth, constitute live, existing equities, that this Court can never settle unless they are taken into consideration? Were the arguments made on behalf of the plaintiff based on the broad equities and merits of the case as to our assets, or were they made because, forsooth, some counsel misapprehended the defense, or, for some technical reason?

Counsel for Virginia make special reference in their brief to the report of the Commission of 1871, known as the "Bennett Commission", at page 474 of the compiled record, Vol. 1. With the permission of the Court, I will refer to that to see if what is alleged in our proposed supplemental answer is true. I want to state this once and for all, that West Virginia does not claim now, does not pretend to claim, in her supplemental answer, that she did not know that there had been investments made. She knew that, but she alleges that the value and disposition thereof were not known to her. Why, of course, she knew investments had been made; because while she was poor, while she was treated like "a country cousin" from across the mountains, she was contributing in unjust proportions toward these very investments.

Now I refer you to Statement B. on page 474, volume 1 of the West Virginia compilation of record, showing the character of the investments made, the items composing the investments, aggregating $42,870,182.88. Does that say what they were worth January 1, 1861, or June 20, 1863? It does not purport to do so; but merely says that there had been $42,870,182.88 in internal improvements invested by Virginia prior to January 1, 1861. But as to what these investments were worth, whether they were worth anything or not, it does not say. It could not have said at the date of the report of that commission, because it was predicated on Governor Walker's message of March 8, 1870, and the facts are that a material part

of this property was disposed of, if the Court please, after the year 1870. These investments were either disposed of or retained to the value of more than $14,000,000.00 after that date, so that the report could not have referred to the value and disposition of the common assets.

Opposing counsel say that we play on the figures, and sometimes add them one way and sometimes another way. We will come to the schedules in the proposed supplemental answer and then show you they are mistaken. The Bennett report nowhere shows to whom these investments were disposed, or how, or for what. It discloses in part merely the investments, prior to a certain fixed date.

Now, referring to Schedule G in the same compilation, at page 487 is found a statement of the value of the public buildings of Virginia. We do not seek in this suit to have our equitable share in them as a direct set-off, although there are those of us of counsel of whom I am one, who believe that in equity and good conscience we are entitled to our direct equities therein, but as this was indirectly before the Court, and not wishing to belabor the Court in opposition to its views as already expressed, we do not ask for our equities in them as a direct credit, but we only ask for this feature to be considered on the question of interest. So this part of that report does not come in conflict with our contention.

The next Schedule, H of the same report, refers to the bank stock as of 1840. Did it say what part had been disposed of, or what it was worth, as of 1861 or 1863? It is silent as to these vital matters. So that part is not in conflict and out of harmony with our proposed supplemental pleading in this case.

There were several statements made with reference to page 1054 of the record in this case in an attempt to discredit our proposed supplemental answer. I refer the

Court now to pages 1053 and 1054, and ask where, in a line of that record, does it show the value of that property as of the date of the contract, or where it shows the disposition thereof. It merely summarized the investments which had been made prior to the 1st day of January, 1861. And why was this done? Because under the theory of the Wheeling Ordinance we were chargeable with all the money expended in West Virginia. It was necessary to see what was expended in entire Virginia, not for the purpose of her accounting for the investments, not for the purpose of ascertaining their value or disposition, but to know what the initial investment was, and knowing the whole investment, we are better able to say with what West Virginia was chargeable under the Wheeling Ordinance. That was the only purpose as shown by the entire record.

Mr. Justice Pitney: Mr. Attorney General, may I or not infer from what you have just said that all of the underlying facts out of which your new defense arose, or whatever you choose to call it—all the underlying facts, —appear to have been known and to have been recognized as having some force and effect at the time the testimony was taken before the commission in this case?

Mr. Lilly: I hardly think that is true.

Mr. Justice Pitney: You are now making to us, then, a different argument? All the facts from which your argument arises seem to have been known then.

Mr. Lilly: The facts are these, that in a general way we knew there were investments of a great amount of money, but we did not know what had been done with them. We did not know what they were worth. The records did not disclose it.

Mr. Justice Pitney: You knew that something had been done or would be done with them, and you knew they were worth something.

Mr. Lilly: But under the defense of the case, accord-

ing to our theory as shown by the pleadings and as decided upon by this Court, in 206 U. S., these facts were not material. I shall come to that a little further on, but suppose these facts were known to previous associate counsel, what effect should that have? Should that, before final decree, estop West Virginia in her plain rights?

Mr. Justice Pitney: The facts were all made public, and West Virginia was a party to the transaction.

Mr. Lilly: We were a party to the transaction until the debt was incurred, but none of the property had been disposed of until we separated. Then we had our archives of government at Charleston and at Wheeling, and Virginia had hers at Richmond, and war ensued. No investigation was then made, or accounting had. This theory of the case was not germane to the questions raised by the pleadings which were based upon settlement as provided for in the Wheeling Ordinance, and not knowing all the facts—that is the facts as to the distribution and value, they were not, taken into consideration in the earlier stages of this case.

Mr. Justice Pitney: Those facts go to show how much the State of Virginia realized.

Mr. Lilly: There are no such facts except in a limited way in the record.

Mr. Justice Pitney: The facts that you say were not in mind at that time have to do with the amount realized by Virginia?

Mr. Lilly: Yes. Also value as of Jan. 1, 1861.

Mr. Justice Pitney: But everybody must have known that they had a value in Virginia's hands, and that something would be realized from them.

Mr. Lilly: According to the complainant's bill they did not have a value. Their value is not disclosed therein. We claim they did have value, and this became mate-

rial for the first time after the decision of this Court of March 6, 1911.

Now, another question which is raised appears on page 1059 of the record, Schedule 4, and upon an examination thereof you will see what expenditures on account of banks and public internal improvements were made. That shows the expenditures, the amount invested; not the value of the property, or the disposition thereof; and very little, if any, of it was disposed of, as I said a moment ago, until after 1863. There was no necessity for, nor were we in a position, to know of these facts. A little later, as I will show you, by the law of Virginia these assets constituted a trust fund, and it was Virginia's duty to account to us therefor, and to show the value and disposition of all investments as to which she constituted herself the trustee. Plaintiff's counsel refers to pages 900 to 980 with reference to the various acts of Virginia. That is true; there were acts authorizing investments in property, but referring to the original proposition, these acts do not show the value of the property as of the date of the contract or subsequent thereto, or the disposition thereof.

Then referring to pages 867 to 900 of the same record with reference to the value of the James River & Kanawha Canal, you will find that record was not directed as to the value of the stock held by Virginia, was not directed as to the physical value of the canal proper, but was directed primarily and alone to the nature of the improvements that were made along the great Kanawha River, which consisted of a few tortuous shoots constructed to help navigation; and mind you, only three per cent of the money therefor was expended in West Virginia. Nowhere was it attempted to ascertain the physical value of the canal as of January 1, 1861 or any other time. I shall a little later show that this canal had a subsisting value, as of the date of the contract, as

well as the date when it was bartered away without our knowledge and consent, and without accounting to us therefor.

Now, with reference to the question opposing counsel raised this morning as to the value of certain stock which he stated the report of the master shows that West Virginia got amounting to $508,000.00, $471,000.00 of which was bank stock. Our position is this: If we got that much, let us account for it; but we think that we only got $260,200.00 worth of stock, and this consisted of $210,200.00 in the Northwestern Bank and $50,000.00 in the Bank of Fairmont. If we got more, the way to ascertain that fact is to refer this cause to a master.

Here is a partnership that lasted for eighty-five years, involving liabilities of a third of $100,000,000.00. We have our equity in the assets of that property upon which the debt is based and yet the plaintiff says there is no necessity for an accounting—no necessity of a reference to a master. In other words, it is counsel's purpose and intention, from their arguments here, it is the substance of their arguments, that we shall pay our equitable proportion of this debt, and the plaintiff may appropriate what the debt purchased to her own exclusive use, and to that end she says that it is not necessary to refer this accounting to a master or to pay any attention to these vast and valuable assets. If this is equity, we people beyond the mountains have no idea of what equity is.

Mr. Justice Hughes: Just to get a matter of fact straight, I would like to ascertain how much of this total amount which you say should be charged against Virginia is cash actually received by Virginia on the principal of the investments, as distinguished from interest and dividends and also as distinguished from property with which you seek to charge her, where there is no proof of cash realized?

Mr. Lilly: It will run to about $10,000,000.00 your Honor.

Mr. Justice Hughes: Are these figures separately stated?

Mr. Lilly: Yes, sir.

Mr. Justice Hughes: Whereabouts?

Mr. Lilly: If the Court please, I will refer to them a little later.

Mr. Justice Hughes: Very well, in your own time.

Mr. Lilly: If the Court please, I desire to refer hurriedly to the defendant's theory of this case. The proposed supplemental answer is a solemn pleading tendered, signed by the chief law officer of West Virginia and sworn to by its Chief Executive, and for the purpose of this motion should be given full faith, weight and credit, and be treated as true.

I hold in my hand the accounting which we have made in four months, the limited time we had. It does not show all. I think if it did show all, this Court would not have much trouble with the question of interest. There would be very little principal upon which the question of interest could be predicated. Here is an honest preliminary accounting by Mr. Dover, the able chief accountant of the Tax Commissioner's office of West Virginia. Opposing counsel say that it would be a vain, futile and unjust thing to try to account for the common investment, for the value of the property as of 1861 or 1863. Well, if that be true, whose fault is it? Was not Virginia a self constituted trustee? We answer, we have the records, although in the possession of Virginia, to guide us and the accounting does not depend to a very great extent upon the evidence of living witnesses. Here the trustee comes in after the lapse of fifty years and says an accounting would be merely guess-work. Whose fault is it? She had the record. She had the assets. She took charge of them. She sold part and appropriated the

proceeds thereof to her own use; gave away others and retains a valuable residuum. Is it not the duty of the trustee to make an accounting and say to the *cestui que trust*,—"Here is the amount of our debt and here is the value of our assets?"

Suppose on the first day of January, 1861, or the 20th of June, 1863, Virginia had on hand more than $42,000,000.00 of bonds, loans, stock and other property bought by common funds. Suppose she could have sold those assets and could have derived therefrom $30,563,861.56. Would the court have directed her to pay that upon and extinguished the debt, or would we have to pay—to help pay—the debt, and let Virginia take the entire assets, including our 23½% equitable interest therein? Or, in other words, if I owe $30,000,000.00 and I have $1,000,000.00 applicable to payment thereon the net amount of the debt is only $29,000,000.00. But counsel for Virginia say that the assets were as valueless as a corner lot in Sodom and Gomorrah after the flames had swept and devoured it. They say they were worth nothing.

We are going to show you what they were worth in current money, the recompense of human toil—23½ per cent of which assets the Court says we must pay. If we help to buy property, in common fairness, out of its wreck and ruin, be it much or little, it is a matter of degree only, we are entitled to our part of value in the residuum. We allege there were assets of at least $20,810,000.00 in value. We so state. We show you upon what such claim is based. The plaintiff did not deny the amount of assets or suggest any errors in relation to them or abatement of them, but justified herself by saying "We are unwilling to engage in any discussion", also that she "respectfully declines to consider them."

The West Virginia Commission said, "We will take the finding of the Court that we owe a just proportion of the debt, that is, 23½ per cent thereof—amounting to

$7,182,000.00—and then Virginia, you account to us for our property that is a part of the very substance of the debt, and we will pay you the rest." Is that fair? That is a statement that ought to prove itself without argument. It stands alone, four square to every wind that blows. There can be no more equitable rule on the earth than when you sever a partnership that you are entitled to a just proportion of the assets.

Now, with reference to the assets claimed, I respectfully refer the Court to the proposed supplemental answer, page 60. Therein is set forth the value of the assets. If we are mistaken we will not profit by it. It should be ascertained whether or not we are right, the manner and mode of which is under direction of this Court, over which it is the final arbiter. You determine the limitations and restrictions, if any.

Does Virginia want—ought she to want—would it be of ultimate value—a decree against West Virginia for principal, much less a decree for interest wherein Virginia had not made an accounting for the common assets? Virginia says "You have to help pay the entire debt"; and when our citizenship of a million and a half people say to her, our neighbor beyond the mountains, "Account to us for what you got," and she answers, "We will not account", "We will not engage in any discussion", "We decline to consider", what would our answer be and what ought it to be? Would mountaineers and freemen be willing to volunteer to satisfy such decree?

Class A shows that Virginia had $1,104,927.06 in her treasury on the first day of January, 1861, $819,250.03 of which was in the sinking fund which fund was established by the constitution of 1851, to satisfy the very debt in controversy. But my friend from New York said this amount was expended between January, 1, 1861, and June 20, 1863, We admit it. Our answer shows the facts are that in making up this total indebtedness of

$30,563,861.56 $977,209.89 of interest accrued between July 1, 1860, and January 1, 1861, was added to the principal of the debt and the money in the sinking fund, together with other money, paid off that interest in the month of January, 1861.

As we are charged with accrued interest of nearly a million dollars and Virginia had a million dollars, in round numbers, in the sinking fund, why do they say it makes no difference what became of the money in that fund? That money, under the solemn compact of the Constitution, under the statutes enacted in pursuance thereof, should go to liquidate the principal. Virginia added the interest, and spent the money in the sinking fund in reducing the principal, in January, 1861, and yet says that it is not equitable for us to have our proportion of the $1,104,927.06 in said fund. Is that equity? In other words, Virginia had a million dollars set aside in the sinking fund to pay on this debt, and she reduced the debt that amount from that fund and yet West Virginia is a stranger in benefit as to that payment. It was our money, 23½ per cent of it, and yet Virginia says "You shall have no part of it." She says, "It is no use going to a master to ascertain our respective rights." That was the argument of my friend from New York.

Class B embraces the much argued Richmond, Fredericksburg & Potomac Railroad. I wish to state as a sworn public official the facts in regard to this matter; and it would be worthless—yes, less than worthless—to make representations in this case that are out of harmony with the facts, because I know that I would thereby stultify myself and my acts would be without profit, and in the end there would be an indirect loss to our side. Under the statutes of 1835 and 1836 $275,200.00 was expended for stock in that railroad. That railroad is being operated to-day, Virginia being part owner. It is the chief outlet between the cities of Washington and

Richmond. We helped to pay for it. We allege that it was worth at least par on January 1, 1861. But my friend from New York in the same statement in which we allege it was worth par on January 1, 1861, hesitated and said "That is not material because it does not appear what it was worth on June 20, 1863." I presume his misstatement of fact was inadvertent, but in the same sentence the answer says, "Of a like value as of June 20, 1863."

While I am on this subject I might say that this answer was predicated on the theory and on the belief that these assets were not only worth the value alleged as of January 1, 1861, but likewise as of June 20, 1863. Not knowing the date that the Court will take, our idea is to allege the value on both dates. We believe that January 1, 1861, is supported by law, and that we ought to ascertain the value of the property as of that date. The date as of which the liability was assumed, is the date on which the assets ought to be applied thereon. But whether on January 1, 1861, or June 20, 1863, the defendant has a subsisting equity in those properties and we should have our equity out of them. If our equity is a million dollars, let us have it. If it is, upon a full investigation, sufficient to cover the entire amount of the debt, let us have it. Counsel said that on a certain basis our entire equities would be worth $5,000.00 and intimated they might possibly account for about that amount. In 1866 a stock dividend of $319,615.00 was declared on this stock which had the right to share and participate in dividends, like the principal stock, and since then that railroad has paid to Virginia $1,282,198.74 dividends, and her interest in that road to-day is worth $2,000,000.00. Virginia has eliminated competition and preempted the territory, I understand, and will not even allow a competing line to be built between Washington and Richmond. This railroad is used as the trunk line of the var-

ious railroads; but I do not want the Court to understand that we are asking for the usufruct or product of this railroad since the date as of which our liabilities were to be ascertained. We are not entitled to it. But later I shall refer, and ask this court to consider it upon the broad equitable basis that a member of this Court referred to when he asked counsel associated with me, "What do you have to say with reference to the broad equities on interest?"

Next is class C. and they avoided it as they would the bubonic plague. We charge, under oath, that they received from the proceeds of sales of securities, purchased with common funds, $6,313,000.00. Yet Virginia says there ought to be no accounting; that the lapse and flight and mist of years has so dimmed and obscured the facts that an accounting is not worth the while. That is a great answer for a trustee to make to a *cestui que trust.*

The next is class D. Prior to January 1, 1861, dividends on stock and loans made had produced $1,835,000.00 which was collected after that date. In other words, their property and ours had earned this much money before January 1, 1861, which was collected in the main after West Virginia was admitted to the sisterhood of states. Are we not entitled to our equity in this? Should not Virginia account therefor?

I shall refer the Court a little later to $5,872,000.00, which Virginia collected in the way of income on the common assets, but as this was after January 1, 1861, we only ask that this be considered on the equities of interest.

Class E. follows. We charge Virginia with $3,710,000.00 bank stock. Counsel for Virginia say it was Confederate bank stock. I believe the gentleman from New York used that argument. If you will look at Schedule H, page 488 of the compiled record, volume 1, you will see whether or not Confederate bank stock was purchased. This stock was purchased back in 1812, 1817 and

1837. If it ever become Confederate bank stock it was after the trustee assumed control of it and destroyed it against our will in the smoke of battle.

The former Attorney General of Virginia said this stock was of no value. Let us see what the Master said with reference to it. I refer the Court to the Master's report, page 192. They say it was worth nothing, but when we were settling under the Wheeling Ordinance, let us see what they said and what the master found. He found the $50,000.00 of stock in the Fairmont Bank was worth par. He found that the stock of the Northwestern Bank was worth one and a quarter because it was paying seven per cent dividends. Virginia's bank stock was paying the same or more, not in Confederate money, as they say, but in the coin of the realm. The Master said, at page 192:

> "If under these circumstances the Fairmont Bank stock was worth par, it seems that the Northwestern stock should be worth at least 1-4 more than par, and I would be justified in applying the same rule as to value, that I have applied to the public service corporations, and I therefore add 1-4 to the par value and find the value of the stock June 20, 1863, to be $427,250.00."

That included about $165,000.00 of Northwestern bank stock in the bank of Jeffersonville, Virginia, of which we never had any physical or other possession. If our bank stock was worth one hundred and twenty-five Virginia's was worth at least that much. We allege that it was worth par at least; that it was dividend paying. We insist that Virginia should account for it. How can we find out who is right, whether it was Confederate bank stock or whether it was the stock that was originally turned over into the hands of Virginia, and should have gone into the sinking fund to help pay the debt?

Mr. Justice Pitney: Where is that report? I thought that I had it here.

Mr. Lilly: That is the Master's report, and I quote from page 192.

Mr. Justice Pitney: Is it bound in with the others? I do not seem to have it separate from the other documents.

Mr. Lilly: Yes. The statement as to the bank stock is on page 60 in our proposed supplemental answer.

Mr. Justice Pitney: What I am trying to get is the master's report.

Mr. Lilly: It is in the master's official report. I might say that all of these schedules were shown to the Virginia Commission by our commissioners, acting under oath, seeking to learn and know the truth and settle this vexatious and annoying controversy that has embroiled the states, and now has many of our citizens wrought up to blood heat. The West Virginia Commission said and we say, "here they are." See them and say what is wrong. Virginia attempts to brush them aside by her mere *ipse dixit.*

Now we come to class F. I will admit that there is some argument pro and con on it as an entire charge. There were five railroad lines, aggregating five million and some odd thousand dollars. Virginia with mailed fist assumed charge and control thereof. She sold those five lines forming a trunk line known as The Atlantic, Mississippi & Ohio Railroad Company in 1892, for $4,000,000.00. The vendor and the vendee agreed what these railroads, constituting class "F" were worth, and so the amount agreed upon is chargeable. If Virginia took insufficient security without our knowledge and lost part as she did, shall we lose it? Although she has received $500,000.00 as a result of this sale and appropriated it to her own use yet she tries to confess and avoid by

saying that it was valueless and an accounting therefor a vain and useless thing.

The last is class G. and that represents $14,285.076.68 of general assets; and I may say that Governor Letcher in his message to the Legislature September 30, 1863, says that the joint assets were worth $37,000,00.00. We have asked for an accounting for less than that sum. We make these items $14,285,076.68 because of the lapse of time and Virginia failing to account as she should have done only one-forth of par. We were not able to ascertain in a satisfactory manner the value of the stocks in this schedule, but out of a spirit of compromise and an honest desire of settlement, we said "You can cut these assets down to 25 per cent of their original cost, and then give us only 23½ per cent of that amount." How are you going to find out whether they are of that value or not? We allege it; Virginia denies it. Will you ascertain their value from the statement or veracity of the counsel, or from the allegations made in the pleadings, or in the proper and orderly way by referring it to a master?

I respectfully call your attention to what Virginia said in regard to the James River & Kanawha Canal, and ask if she is not estopped from denying the value thereof as alleged. On March 23, 1860, at a time when Virginia had $3,000,000.00 invested in it, by her legislative enactment, she took stock at par—not at 25 cents on the dollar as we are charging her, but stock at par—by paying debts which the canal company owed, and cancelling certain other debts which were due her, and then she expended $200,000.00 not Confederate money, not imaginary money, but our money and hers—to purchase 2,000 shares of other stock in this very company. There was nothing that intervened in the nine months from March 23, 1860, to January 1, 1861, to make it worth less than it was on the date of the purchase of the $7,400,000.00 of stock. If this

schedule was wrong, was not fair, when we were at the New Willard Hotel trying to compromise and settle with her, under our legislative sanction, why did not Virginia say, "It was not worth this amount?"

Let us go a little further. I hope this Court will bear this in mind, even not treating it as a canal proposition, whether there was a drop of water in it or not, or whether a boat ever floated on it from 1861 to this good hour, there was 226 miles of right of way together with valuable water rights of which we owned 23½ per cent, there was a graded tow path, water level, 226 miles in length, from Clifton Forge by Lynchburg along the James to Richmond, and without our knowledge or consent Virginia disposed of them. Can a trustee convert or destroy property of that value in that way without any privity with us and make no accounting and refuse to account? We only charge her 25 per cent on the entire canal property in which Virginia had invested $10,400,000.00 of joint funds, which by her acts of legislation the same year she treated as of par, and at $12,000.00 a mile it would be worth that amount. You could not have bought the rights of way and graded it, because it was practically ready for the ties and rails at that time, for $12,000.00 per mile. Virginia can give her 76½ per cent away to Mr. Blaine and others, but she must account to us for our equities therein. We have had no report of the sale or gift yet, but she must, we believe, and in equity ought to account to us therefor.

So these classes make the item of $20,810,397.98, in which as we have to pay 23½ per cent of the debt, we claim a corresponding equity of 23½ per cent. This does not include all of our equities. The Court knows how we have been rushed for time.

Then on page 60 we give her credit for the Northwestern Bank stock, $210,200.00, and for the Fairmont Bank stock $50,000.00 making $260,200.00, leaving our remaining equity at $4,630,234.12.

Following on page 61 we charge Virginia with $225,-078.06 for money collected from West Virginia counties. We allege that the Confederate Government of Virginia, after June 20, 1863, came over into our counties and collected primarily in taxes and dividends $225,078.06, after all credits were allowed. We do not only own 23½ per cent of that amount but we own all of it. Virginia had no equity in it.

Virginia asks, dictated to, directed and controlled by the bondholders, that an immense debt, appalling in its proportions, be put upon our loyal citizens of West Virginia which would make them poor and miserable indeed,—as poor as any state in the Southland, under the days of reconstruction, if they shall have to pay $21,-000,000.00 principal and interest as claimed by the bondholders through Virginia. Why should West Virginia pay that enormous amount, or any other amount in excess of her offer to the Virginia Commission? Is it because we got much of the material benefits? Is it because we were loyal to the union and its flag. or is it because there is an avaricious aggregation of conscienceless bondholders, pooled together, who bought much of the bonds at 5c. on the dollar and now seek to extort unjustly their pound of flesh?

In Mr. Robinson's reference to page 1019 of the record, whereby he seeks to explain in regard to the $225,078.-06 it is quite apparent he was mistaken. This is entirely a different item to that claimed by us. The report of July 14, 1863, referred to by him shows the balance $225,279.83 in the treasury of the restored government of Virginia on June 19, 1863, after making certain deductions. That was striking the balance in the treasury of the restored government of Virginia as of June 20, 1863. This $225,078.06 item claimed by us was our money that the plaintiff took after June 20, 1863 and we now ask her to account to us therefor. If we must pay the Wall Street speculators, at the suit of Virginia,

she should pay us. Are we not entitled to every "copeck" thereof?

What was done with the assets? Virginia says that she has a right to appropriate them to her own exclusive use and benefit without an accounting; but her constitution of 1851, Sec. 30, says differently.

> "The general assembly may, at any time, direct a sale of the stocks, held by the Commonwealth in internal improvement and other companies; but the proceeds of such sale, if made before the payment of the public debt, *shall constitute a part of the Sinking Fund, and be applied in like manner.*"

That is, unless the debt had theretofore been paid, the proceeds from the sale of stocks must be used in discharging existing indebtedness.

Section 28 of the Constitution of the restored government of Virginia 1864 provides:

> "The general assembly may at any time direct the sale of the stocks held by the Commonwealth in internal improvements, and other companies located within the limits of this Commonwealth, *but the proceeds of such sale, if made before the payment of the public debt, shall be appropriated to the payment thereof.*"

The proceeds of these stocks, when sold, as specifically provided by law, were to go to the Sinking Fund, *not to discharge Virginia's two-thirds of the debt, or 76½ per cent of the debt, but to the discharge of the entire debt.*

The provision of Section 8 of the Constitution of 1867 is as follows:

> "The general assembly shall provide by law a Sinking Fund, *to be applied solely to the payment and extinguishment of the principal of the State debt,* which sinking fund shall be continued until the extinguishment of such State debt; and every law hereafter enacted by the general assembly

creating a debt, or authorizing a loan, shall provide a sinking fund for the payment of the same."

This was embraced in the organic law of Virginia after she had been restored to and in full fellowship with the Union.

In addition to what the constitution and statutes of Virginia provide, as to what was to be done with the assets, I appeal to a very eminent authority, the Governor of Virginia, Gilbert C. Walker, who declared what ought to be done with them, and I hope this will be borne in mind, because, except where he differs with the Court in one particular, that is the basis of liability, his views support our contention exactly. Governor Walker, in 1870, in a message to the Legislature, not in 1914, when Virginia wants to keep the proceeds of the common assets without an accounting, when she wants us to pay $21,000,000.00 for her own laches and improvident mismanagement of and destruction to our assets as I shall show a little later—said as follows:

> *"After deducting from the total debt the market or cash value of the assets or securities (bonds, stocks, etc.) held by either state, which originally belonged to the State of Virginia, the remainder of the debt should be apportioned between the two states in proportion to the population and taxable valuations of each."*

This Court said the debt should be apportioned,

> "With reference to the relative resources of the two debtor populations."

Governor Walker continuing said:

> "It is a plain and simple proposition, not unlike the closing up of a copartnership. *The assets must first be applied to the extinguishment of the liabilities,* and, if insufficient for this purpose, the deficiency must be met by the copartners in pro-

> portion to the original interest of each respectively in the adventure."

This is our contention and position. That is what we are endeavoring to maintain here, and we have the word of Virginia's Governor in support of our proposition. Virginia at that time recognized our interest in these assets. She does not do so to-day. She says they were and are valueless and denies defendants interest therein. But what did she say by her acts of legislation on Feb. 9, 1866—Sec. 1—page 458:

> "Be it resolved by the General Assembly of Virginia, That the amounts required by the said Act to be paid to the State of Virginia, shall be held by the State in trust, subject to an adjustment of the debt of the State *and a division of the public property between the States of Virginia and West Virginia,* in case the two States shall not be remitted as one State; provided West Virginia shall by law ratify the said Act."

I now quote from her Constitution of 1864, Sec. 27:

> "The general assembly shall provide by law for adjusting with the State of West Virginia the proportion of the public debt of Virginia, proper to be borne by the State of Virginia, and of West Virginia, respectively, *and may authorize, in conjunction with the State of West Virginia, the sale of all lands, and property of every description, including all stocks and other interests owned and held by the State of Virginia, in banks, works of internal improvement, and other companies, at the time of the formation of the State of West Virginia, etc.*"

Virginia said that she must cooperate with us in the sale of the common assets. Since then she has appropriated them to her own use, although our credit helped buy them, and our resources must help pay for them.

On Feb. 28, 1866, the General Assembly of Virginia further recognizing our equities in these assets said:

> "The Commissioners appointed under the foregoing resolution are also empowered and directed to treat with the authorities of West Virginia, upon the subjects of a proper adjustment of the public debt of the State of Virginia, due or incurred previous to the dismemberment of the State, '*and of a fair division of the public property;*' subject, however, to the approval or disapproval of this general assembly."

This resolution provided for "a fair division of the public property." Are we getting a fair division thereof if Virginia takes all of it?

In her Act of 1870, she said that this property should be fairly and equitably divided.

> "1. Be it enacted by the General Assembly, That three Commissioners, resident citizens of this State, be appointed by the Governor to treat with the authorities of West Virginia upon the subject of a proper adjustment of the public debt of the State of Virginia, due or incurred previous to the dismemberment of the State, '*and a fair division of the public property*', provided, however, that the action of the said Commissioners shall be subject to the approval or disapproval of this General Assembly."

Mr. Justice Pitney: I do not yet understand why West Virginia did not bring up these matters which you now refer to, at the former hearing.

Mr. Lilly: I will come to that. I will answer it now.

Mr. Justice Pitney: Here are plain provisions of the constitutional law in Virginia.

Mr. Lilly: I hope, and indeed I know, that I do not intentionally run counter to the opinion of the Court that from the date of the birth of West Virginia it was in the mind of the founders and fathers that the Wheel-

ing Ordinance should control in settling the common debt.

Mr. Justice Pitney: In whose mind?

Mr. Lilly: In the minds of the people of West Virginia, both old and young. They never heard of such a thing as Article 8, Sec. 8 of the Constitution being a basis of settlement.

Following further, when this suit was brought the bill was predicated on the Wheeling Ordinance. It is true that it quoted Section 8 of Article 8, but it did it incidentally. When the demurrer was overruled in 206 United States, this Court said that the means of ascertaining the debt would have to be, or should be, in accordance with the Wheeling Ordinance. I am showing you the reason why counsel overlooked the assets and why they were not germane.

Mr. Justice Pitney: Well, but the order of reference —the decree of reference—was made after that, was it not?

Mr. Lilly: Yes, I am coming to that. I want to say that the answer was in response to the bill, and it was defending under the Wheeling Ordinance, and that the decree of reference was primarily predicated upon it, the last five paragraphs, certainly. The master's report made the Wheeling Ordinance the basis, the arguments were made on the theory of the Wheeling Ordinance, and the case was submitted on final hearing and this, I think the record will disclose, on the theory of the Wheeling Ordinance, and not until March 6, 1911, did the Court say, "We are of opinion that her share should be ascertained in a different way."

Mr. Justice Pitney: Counsel said yesterday that Mr. Conrad agreed that the Wheeling Ordinance did not govern it.

Mr. Lilly: Yes, but the Attorney General of Virginia and the Court took a different view when it overruled

the demurrer, and gave the reasons why the Ordinance should prevail.

Mr. Justice Pitney: Was not that in the minds of the parties, and was not that the situation at the time of this order of reference?

Mr. Lilly: With due deference, I am hardly able to agree that that was the decree of reference, on the contrary, now viewing it, I think the bill was drawn with a view of studiously avoiding the question of assets.

Mr. Justice Pitney: I do not know. That is the reason I am asking the question.

Mr. Lilly: From the decree referring the cause to the master I read as follows:

> "The master will make his report with all convenient speed and transmit therewith the evidence on which he proceeds, and is to be at liberty to state any special circumstances he considered of importance, and to state such alternative accounts as may be desired by either of the parties, subject to the direction of the court."

What I understand, if the Court please, by an alternative account, is that there must be some primary account on which to base the alternative account. That is, when the master made a certain finding if the other side thought the facts justified another ruling, he made an alternative statement of the facts. We say that was the decree, we have given our reasons, and we predicate them upon the basis as first established by this very court itself, as well as on the statement of Mr. Anderson, the Attorney-General of Virginia, who said that the Ordinance was an inequitable way, but that was the law and they could not go around it. Then General Anderson said that it ought to be settled on the theory of a partnership accounting.

If through inadvertence or mistake of counsel as to the interpretation of the State's rights and a proper

defense of this suit, these equities have been left out, what is the Court going to do about it? Is the Court, in view of Rules Nos. 19 and 34, by way of analogy—and you are familiar with them—going, in a cause of original jurisdiction where sovereign states are parties and where the same strict rules do not govern, to say that even before any final decree is entered the defendant's rights shall be barred and her proposed supplemental answer shall not be filed? Rule 19 does not require any particular diligence, but we have shown diligence and given the best of reasons based on the facts why these assets were not considered before. As we view it, we think they are sufficient. But suppose they are not. Is this Court in a case of original jurisdiction, unhampered and unrestrained by court rules or legal precedent going to make us pay the debt and not get credit for our assets relating to this debt?

If the Court please, I now come to the second division of this case, and that is the question of interest. I make this assertion unchallenged, that by all the decisions of the Supreme Court of this nation, and the states of the Union, so far as I have been able to learn, with the one possible exception—the Higginbotham case, interest is not chargeable against a sovereign state unless provided for by legislative enactment or by a lawful contract of its executive officers.

The attention of the Court has been called to the adroit manner in which the opposing counsel has treated the Higginbotham case. Counsel for plaintiff say that the law of Virginia became the law of West Virginia, and hence we are bound by the Higginbotham case. That is their contention. In the Higginbotham case the question of interest was not directly raised. It was provided by Section 8 of Article 11 of our Constitution of 1861 that the Virginia statutes and Virginia decisions and the common law prior to June 20, 1863,

was to be and become our law. But this decision was rendered in 1874 and hence it could hardly be even persuasive authority.

What were the Virginia decisions? In Commonwealth v. Lilly, 1 Leigh, 525, it was held, the question being plainly raised before the Court, as I now recall, that no interest should be allowed. This opinion is binding on West Virginia, and Virginia as well, because rendered before June 20, 1863.

Then in the case of The Auditor of Public Accounts vs. Duggar and Foley, 3 Leigh, 260, interest was again refused in the case in which the Attorney General of the State raised the issue that a State in no case should pay interest. So that was the law of Virginia when we were a part of her and became the law of West Virginia. Virginia's law subsequent to that time does not concern us. But counsel say that the contract was to be performed in Virginia. I do not know upon what theory. It was West Virginia that promised to pay. But as I understand it, it makes no difference which State, because the same rule of law, that a sovereign is not chargeable with interest, prevailed in the entire Commonwealth including Virginia and West Virginia.

Mr. Justice Pitney: Now suppose that rule applies to an obligation that originated at the time of the separation? What have you to say as to the application of that doctrine to an obligation which originated before that, and provided for the payment of interest? I am speaking of it not as a new obligation but as an old obligation.

Mr. Lilly: The Court has reference to Section 8 of Article 8 of the Constitution?

Mr. Justice Pitney: I am trying to think of the real situation.

Mr. Lilly: Opposing counsel admitted in one of the briefs that a sovereign state is not liable for interest

unless provided for by statute, or by a contract legally made by its executive officers. And, of course, this answers your honor's question.

Now we come to Sec. 8 of Art. 8 of the Constitution which the Court says is the basis of the contract, and this debt of Virginia being an interest bearing obligation as between Virginia and her bondholders, as of January 1, 1861, would not interest, when we assumed to pay Virginia a part of this debt, attach by its own force to us, and would we not be liable for interest? This is what I understand the Court to ask. In order to determine this we should understand the legal meaning of the word "debt" as used in that section. The word "debt," when used in a constitution, is used in its ordinary every day meaning; and being so used in the constitution the word "debt," in the decisions, means the principal of the debt, and any previously accrued interest thereon. So, when we interpret the word "debt," as referred to in our Constitution of 1861, we must interpret it in its popular, ordinary and usual significance, and this, as the decisions say, is the principal of the debt and accrued interest, although the obligation is interest bearing. The word "debt" does not include after accruing interest. I desire to refer the Court—

Mr. Justice Pitney: Where are the creditors going to get any interest from?

Mr. Lilly: They ought to get part of it from Virginia by reason of her appropriating our assets to the payment of her debt.

Mr. Justice Pitney: That is another question entirely.

Mr. Lilly: She ought to contribute to the payment of interest, *and if those who speculate on bonds at a greatly reduced price have no legal right to collect interest from a sovereign state, who has a right to complain?*

Mr. Justice Pitney: That is another question.

Mr. Lilly: I am trying now to follow Section 8 of Article 8. On page 9 of the record, here is what the contract says:

> "An equitable proportion of the public debt."

We say that the "public debt" as used in that instance, and as Virginia must have known, meant the accrued interest and the principal, but not the future "accruing" interest.

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the 1st day of January, 1861."

Now, we are to assume an equitable proportion prior to January 1, 1861. That is the contract. It continues:

> "Shall be assumed by the State."

My friend makes the word "shall" mean "have" or "had." But it says, "shall be." We did not assume a part of this debt on the theory we should pay a part of an undivided debt and Virginia pay a part of an undivided debt, but we only assumed it as of January 1, 1861, after it should be ascertained by the legislature, and after our part was segregated from the part owed by Virginia.

Mr. Justice Pitney: But I do not see what you mean by being an assumption.

Mr. Lilly: I am trying to get to that. The main reason why interest does not follow is because the law so says. It is the common law, and so recognized by all the courts, Federal and State, that interest is not chargeable to a state unless agreed to by an act of legislation or legal contract of its executive officers. Virginia claims that interest follows the principal as the shadow follows the substance. This may be true as to private parties, but not as to a state. There was no

substance for the shadow to follow or substantive debt as to West Virginia until it had been ascertained by the legislature of West Virginia, until the debt was separated, until by the constitution the amount was known in the manner designated, and interest would not attach at least until that time. It might be different as to a private individual.

Mr. Justice Pitney: What debt are you talking about? Are you not talking about the debt of Virginia?

Mr. Lilly: Yes.

Mr. Justice Pitney: That did exist, did it not?

Mr. Lilly: Certainly, as of January 1, 1861. But it says that West Virginia shall assume her equitable portion and the same is to be ascertained by the legislature. When? Mind you, if West Virginia had meant that she was going to pay the accrued interest, she would have said so. But instead of so saying she declared she would pay the "accruing interest," interest that would accrue after the debt was ascertained. West Virginia declared that after the debt is ascertained, after it is segregated, after this has been done by the legislature, then she would establish a sinking fund to pay the "accruing interest," not the "accrued" interest. "Interest" is used only once in Sec. 8. It says it is to pay the "accruing interest." Accruing interest on what? On the debt not as of January 1, 1861, with its accumulated interest up to the time it is ascertained, but the interest on the principal of the debt after it shall have been ascertained. Not Virginia's debt, but our debt. We had no contract with the bondholders. We had a contract with Virginia, and only by it are we bound, and that contract does not obligate us to the payment of interest, until the amount of the debt is ascertained. Therefore, we shall pay the "accruing interest," the future interest after the amount of the debt shall have been ascertained.

May I suggest to the Court that on May 13, 1862, more than a year after January 1, 1861, the date when we were to assume our part of the debt, Virginia, on the condition that we would pay the accruing interest on the debt when ascertained, gave her consent to the formation of West Virginia. We were not an entity for about three years after January 1, 1861. Who was to pay the interest in the meantime? Certainly we could not. Therefore Virginia would have had to pay it. Then when she entered into the contract that we were to assume the debt as of January 1, 1861, and provide for the accruing interest in the future, why did the contract not read "and the accrued interest between the date of the assumption of liability and the date when the amount thereof would be ascertained?"

I may not have made myself plain. It is not of easy interpretation. But I believe, and the more I study it the more I am confirmed in that belief, that when you read Sec. 8, Art. 8, carefully and give the proper interpretation to it, it means this; that West Virginia said, "We will assume our part of the debt as of January 1, 1861," "debt" being used in its ordinary sense, and then there would be created a sinking fund and we would pay the "debt," and future accruing interest after the amount of the debt had been ascertained.

The law was known to be then that interest would not follow or be chargeable to West Virginia, that is that the interest would not follow—unless it was so denominated in the bond. Some one had to pay it. We could not pay it. Virginia paid it. We could not establish a sinking fund until we knew what the amount our part of the debt would be, because we had nothing to base it on. The only time that we could establish a sinking fund, was after the debt was apportioned, we were not to pay the accrued interest thereon from January 1, 1861, till the debt was apportioned. The liability

for interest was not to attach except for accruing interest after the principal has been ascertained.

We were to begin to pay accruing interest when our part of the debt was ascertained. It was thought that the amount of the debt would be soon settled, and Virginia was certainly to pay up to 1863, because she had the assets, because she had her own political entity intact until after West Virginia assumed her position in the sisterhood of states.

Counter attempts at settlement followed, and it ran along from time to time. I desire now to discuss hurriedly who was to blame for the delay. That question was asked by the Court yesterday, and quite properly so. West Virginia was not to blame from 1861, up to June 20, 1863. She had no political existence. From 1863, to April 2, 1866, she was not to blame, because the only diplomatic relations between the former friends consisted of canister, shell and the bayonet. In 1866, what occurred? Virginia said early in that year, "We want you to come back; or, if not, we will divide the public property and adjust the debt." Our legislature did not meet until 1867.

In December, 1866, a suit was instituted by Virginia attacking the integrity of West Virginia's territory, and because of that we could not adjust the debt; but being anxious and willing to adjust it, as soon as the suit was disposed of West Virginia attempted to adjust the debt, and immediately after the termination of the suit appointed a commission to treat with Virginia as to its adjustment.

In 1870 Virginia sent her commission to West Virginia to treat with us. We also appointed a commission to treat with Virginia. This is not in our brief. That commission consisted of members of the House and the Senate, of the West Virginia Legislature, who treated with the Virginia Commission, but made no report.

Then, as above referred to, in 1871, as soon as the suit attacking our territorial integrity was dismissed which was on March 6, 1871, in nine days thereafter, on March 15, the Bennett Commission was appointed, to treat with Virginia. That commission went to Virginia, but there was no consideration shown it. They said their prior commission had been surperseded and had no authority; however, the Virginia Legislature was yet in session.

In 1871, in March of that year, Virginia apportioned the debt, without our knowledge or consent, at the very time when we had a commission willing to and appointed for the purpose of treating with her. In 1871 Virginia arbitrarily divided the debt in a way that this Court has declared was inequitable, and I say advisedly from that very hour for twenty-three years Virginia was as silent as the grave on the debt toward West Virginia.

In 1894 she appointed the present commission, but said as a condition precedent, "You cannot treat, only on the two-thirds basis." That condition prevailed, regardless of the Act of 1900, up to January 25, 1905, when a sub-committee for Virginia came over with its hands tied in the same way, and early in the next year this suit was brought. Virginia says the debt never could have been settled in any other way. She had an open forum. She has waited almost one-half a century and now says that it will not oppress us if interest is added. I was born fifteen years after the War. I am in middle life, with gray hair; yet with compounded interest, the accumulation of ages, Virginia comes to me and my people to settle for a debt, from the proceeds of which we got only $2,811,000.00 in the way of improvements, Virginia retained the assets which that money in the main part bought, and now demands millions—not for her own people, but for the capitalists who spec-

ulate upon those distressed by the misfortunes of war.

Now we come to the question of interest on the broad equitable basis concerning which the Court asked. In our offer of settlement to Virginia we said: "There are other reasons why interest should not be charged." The first is that Virginia turned us without dowery into a desolate primeval wilderness, without a state institution, with only a few thousand dollars invested in a foundation in the Weston Asylum. Virginia kept her capital, her penitentiary, her educational and eleemosynary institutions, valued by the Bennett Commission at $3,875,000.00. We do not ask Virginia to account therefor except as an equitable offset to interest, but if interest is to be charged direct then as this is to be an "equitable" settlement, our equities in these assets should be allowed.

Not only that, but Virginia, after the date of the division of the state, collected $5,782,000.00 income from common assets which is another general equity to offset interest. We do not ask any part of this unless the court should be inclined to consider interest. Why? Because she earned this after the property went into her hands, after we were separated. Again we say that many of these stocks and bonds are lost, and the record shows it, the amount of which is not known, but probably amount to five million of dollars. We allege also although it may not be a strict legal defense, yet, it is an equitable one, and it is alleged in our supplemental answer and is not denied by Virginia's response, that many of these bonds, and in fact most of them, were bought on the curb, bought at small, nominal amounts, and that therefore, when you come to consider the question of interest, the man who paid five or ten cents on the dollar for them is not entitled, under the conditions, to ask for interest on bonds bought at such reduced rates.

Not only this, but under the funding acts of 1871, 1879, 1882 and 1892, Virginia scaled her debt more than $10,000,000.00 in addition to the $3,333,212.26 that was allowed by this Court because of the scaling in 1871; so that Virginia keeps the State institutions, of the value of January 1, 1861, of at least $3,875,000.00, she keeps $5,872,000.00 dividends on stocks and interest on loans; the creditors buy these stocks up practically for nothing, she has scaled her debt both principal and interest repeatedly, and after fifty years, when we think Virginia is primarily to blame for the delay, she now seeks to charge us with an unjust amount of the principal, and seeks to add millions of interest to it, thereby compounding interest, which if allowed the yearly interest would take more than the current revenue raised by the state tax, and in a land where there is peace and happiness, erected not by Virginia's help, but created by our own frugality, economy and industry, a debt appalling in its magnitude that we did not create, a debt that we got but little benefit of, is to be compounded and like a black lowering cloud overhang the giant mountains and fair valleys of West Virginia for generations unborn.

Mr. Justice Pitney: Suppose that this Court had the same jurisdiction in a suit by the bondholders, and this action were brought by bondholders upon the obligations that preceded the separation, and which were evidenced by Section 3; what would be the application?

Mr. Lilly: In the first place, it is a violent assumption, because they could not; and in the next place, if they could, they could not collect interest from us, because we limited the debt as of a certain date, and we said we would assume it as of that date. We promised as a sovereign state. If an individual had promised, it might be different, the law being as to a state that unless the contract stipulates for the payment of interest, in-

terest would not follow the debt of its own force, whether it is claimed as a matter of damages or as a matter of contract. We would say to the bondholders, although the contract was with Virginia, "Here is the contract, which provided we would assume our equitable portion of the debt, and the word 'debt' has a legal significance, which being given its ordinary and proper construction, means the principal and the theretofore accrued interest?" We would also say that as soon as we ascertain our part of the debt and segregate it, it would then become our individual debt and that then we would establish a sinking fund, not to pay the accrued interest, but the principal as it existed on January 1, 1861, and the "accruing interest."

Mr. Justice Pitney: That would be a repudiation of a part of the obligation that did exist.

Mr. Lilly: I do not think so.

Mr. Justice Pitney: If the suit was brought on the original obligation?

Mr. Lilly: Take what the obligation says. Our interpretation of that constitution is that it does not impose any liability to pay interest at all until after the debt is ascertained, and then we are to pay the "accruing interest" and not the interest that has already accrued; and I might add that Virginia, since the separation, has had the benefit of this property, that is, the proceeds of it, the usufruct, without an accounting, and that while the time has been delayed as to the settlement with her, as we view it we are not to blame, and that it was her business to make the accounting and the settlement with us. We are willing to stand on Section 8 of Article 8. By that we are to be judged. It does not impose interest till the principal has been ascertained.

In connection with that I desire to say that West Virginia's part of the debt was unliquidated, and under all authorities an unliquidated debt does not draw interest.

But the Court may say that it was liquidated because it was known how many bonds were outstanding and the amount that was due the bondholders. But our obligation was not to the bondholders; it was to Virginia, else she could not sue, and the amount of West Virginia's liability to Virginia has not been liquidated to this good hour. If the common assets are ascertained, if the accounting we desire is had, the debt not having been liquidated, it not having been ascertained, it could not draw interest. So for that reason no interest could be charged.

We say that Virginia has been guilty of laches. She says that we have been guilty of laches. That is for the Court to determine. We say that she has had more than $20,810,000.00 of the joint assets that she has not accounted for at all. We say that the debt is unliquidated, and that she could not charge interest until it is liquidated. We say that a sovereign state, unless it has contracted to pay interest, does not have to pay interest, and we say that we have not contracted to pay interest, and I bespeak a patient and careful investigation, such as I know this Court will make, of Section 8, Article 8, and an interpretation thereof—which being interpreted in the light of reason, by either a legal or equitable test, no responsibility for interest will attach to us.

When you come to the words "accruing interest," that does not revert back, but applies to the future, at the time the amount of the debt is ascertained and because of our independent debt to Virginia, and not otherwise.

We want this case settled on an equitable basis, as determined by the fixed rules of law. Regardless of who has spiked the wheels of progress, who has been derelict, who has been to blame for the delay, so long as I am Attorney General of the State of West Virginia, there will be no disposition on my part to impede the

speedy and honorable settlement of this important controversy. If this is referred to the master, it is done under such conditions as the Court may prescribe. This Court has a right to permit the filing of a supplemental answer or other pleading at any time, in its discretion, guided by its own enlightened sense of justice.

In view of the fact that this is a case of original jurisdiction wherein this Court is untrammeled by technical rules of procedure, in view also of the fact that this Court has declared that this case must be treated in the liberal untechnical manner proper for dealing with quasi-international controversies, those million and half people beyond the Alleghenies, between here and where rolls the great Ohio, believe that through the complexities and difficulties of this suit this Court will guide our footsteps aright.

OPINIONS

Supreme Court of the United States

IN THE SUIT OF

Virginia vs. West Virginia

Opinion Overruling Demurrer to Bill.

[May 27, 1907.]

Commonwealth of Virginia

v.

State of West Virginia.

1. SUPREME COURT—*Original Jurisdiction—Suits Between States.*

The original jurisdiction of the Supreme Court of the United States extends to a suit by the commonwealth of Virginia against the State of West Virginia to determine the amount due to the former by the latter as the equitable proportion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state.

2. SAME.

The question of the liability of the state of West Virginia for its equitable proportion of the public debt of the commonwealth of Virginia was not so submitted to the West Virginia legislature as to defeat the original jurisdiction of the United States of a suit between the states by the provision of W. Va. Const. art. 8, sec. 8, that an equitable proportion of such public debt shall be assumed by the state, and the legislature "shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof," since such provision, when read in *pari materia* with the Virginia ordinance of August 20, 1861, that the new state shall take upon itself a just proportion of the public debt, to be ascertained as therein provided, must be regarded as meaning only that the legislature should ascertain, as soon as practicable, the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained.

3. PLEADING—*In Suit Between States—Questions Open on Demurrer.*

The question whether the commonwealth of Virginia has been released from all liability on account of the public debt evidenced by bonds of the state outstanding on January 1, 1861, will not be passed upon on a demurrer to a bill filed by that state against the state of West Virginia, which seeks an adjudication of the amount due the former by the latter as the equitable proportion of the public debt of the original state of Virginia which was assumed by West Vir-

ginia at the time of its creation as a state, but the consideration of such question will be postponed until final hearing.

4. SAME.

Consideration of the objections of multifariousness, misjoinder of parties and of causes of action, may properly be postponed until the final hearing on a bill filed by the commonwealth of Virginia against the state of West Virginia, which seeks an adjudication of the amount due the former by the latter as the equitable proportion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state."

Messrs. WM. A. ANDERSON and HOLMES CONRAD, for Plaintiff.

Messrs. CHAS. E. HOGG, C. W. MAY, Attorney General of West Virginia, W. MOLLOHAN, GEO. W. MCCLINTIC, and W. G. MATTHEWS, for Defendant.

This is a bill filed, on leave, February 26, 1906, by the Commonwealth of Virginia against the State of West Virginia.

The bill averred that—

"On the first day of January, 1861, complainant was indebted in about the sum of $33,000,000 upon obligations and contracts made in connection with the construction of works of internal improvement throughout her then territory. By far the greater part of this indebtedness was shown by her bonds and other evidences of debt, given for the large sums of money which she from time to time had borrowed and used for the above purpose; but a portion of her liabilities though arising under contracts made before that date, had not been covered by bonds issued for their payment.

"In addition to the above liability to the general public, there was a large indebtedness evidenced by her bonds and other liabilities held by and due to the Commissioners of the Sinking Fund and the Literary Fund of the State, as created under her laws amounting, the former to $1,462,993.00, and the latter to $1,543,669.05 as of the same date.

"The official reports and records showing the exact character and amounts of the public debt thus contracted and how

the same was created, are referred to, and will be produced upon a hearing of the case.

"(2.) That portion of the territory embraced in what constitutes the present territorial limits of Virginia was prior to that date devoted mainly to agriculture, and to some extent to grazing and manufacturing, which afforded its chief sources of revenue, while that portion included in what now constitute the State of West Virginia had vast potentialities of wealth and revenue in the undeveloped stores of mineral and timber, which had been known for many years prior to the date named, and their prospective values, if made accessible to the markets of the country, were understood to be well nigh beyond computation. It was to hasten and facilitate the development of these sources of wealth and revenue by the construction of graded roads, bridges, canals and railways, extending through the State from tidewater towards the Ohio River, that the Commonwealth of Virginia, in the first quarter of the Nineteenth Century, entered upon a system of public internal improvements, which it was contemplated should include the entire territory of the State, and embraced in its design the construction of public works adapted, not to the needs of any one portion of the State alone, but of the entire State, as a unit of interest. The larger part of these works were constructed East of the Appalachian range, as leading up to the undeveloped territory West thereof, but a very considerable portion of them were, at an expense of several millions of dollars, constructed West of said range within the territory now included in the State of West Virginia; and the completion of some of the main lines of improvement beyond the said range and through to the Ohio River, since the first day of January, 1861, has increased to a very great and material extent the values of real estate, including coal and timber, in the said territory now included in West Virginia, thus carrying into effect the original scheme of improvement, which could not have been done had not the lines East of said range been first constructed; and your Oratrix believes and avers that the property values within the limits of West Virginia have been enormously enhanced in a large measure by reason of these improvements. The money appropriated to the payment of the annually accruing interest on the said debt, prior to January 1, 1861, and to the formation of the Sinking Fund for the ultimate redemption thereof, was derived from taxes imposed upon the property subject to taxation throughout the entire State. The first of this indebtedbness to be contracted was a small

amount borrowed by the State in the year 1820 and the debt was thereafter from time to time continued and increased by renewals and new loans until it reached the amount above stated in 1861.

"(3) The Commonwealth of Virginia was induced to enter upon the construction of this general system of internal improvements, in a very large measure for the purpose of developing the aforesaid resources of the western portion of the State, now constituting the State of West Virginia, thereby ameliorating the condition of her citizens residing therein; and it was with this veiw that she took upon herself the burden of the public debt for which her bonds were issued, without which debt such improvements could not have been undertaken. In corroboration of this view it will appear from an inspection of the legislative records of the State, where the vote carrying the appropriations for such public improvements was recorded, that in nearly every instance a majority of those members of the House and Senate of the original State, who then represent such appropriations. Indeed it appears from those records that a great majority of the Acts of the legislature of Virginia under which said indebtedness was created, would have failed of their passage, had the representatives from the counties embraced in what is now West Virginia opposed their enactment, and that a very large proportion of said indebtedness was actually contracted over the votes of a majority of the representatives from the counties and cities embraced in the limits of the present State of Virginia. This will be found to be true, not only in the legislature for one single session, but in the legislatures for many successive years, thus showing it to have been a fixed policy of the people in that portion of the State now constituting West Virginia to participate in, support and carry out this general plan of internal improvements in the State.

"4. The development of this system of public improvements thus entered upon was, from its character and extent, necessarily progressive, and the same extended with the general growth and increasing needs of the State, and was incomplete, as above stated, in 1861, though a very considerable portion of such improvements had, prior to that time, been constructed as above stated, in the territory now constituting West Virginia, in order to meet the needs of the people of that portion of the State for their local purposes. As early as the year 1816 a Board of Public Works was created by law for the State, the members of which were elected by the voters of the State at large, and this Board

had in charge the construction and supervision of all the works of public improvement in this State. The annual reports of this Board will be referred to for information as to the character, extent, cost and location of the public works and internal improvements constructed in the State prior to January 1st, 1861. The amounts expended upon the construction of these works in what is now West Virginia can only be accurately ascertained by an examination of the numerous entries in the records of this Board extending through a number of years and showing such expenditures as made from time to time.

"5. On the 17th of April, 1861, the people of Virginia, in general convention assembled, adopted an ordinance by which it was intended to withdraw Virginia from the Union of the States. From this action a considerable portion of the people of Virginia dissented, and organized a separate government which was known and recognized by the government of the United States as the 'Restored State of Virginia,' and will be hereafter referred to in this bill as the 'Restored State.'

"6. On the 20th day of August, 1861, the Restored State of Virginia, in convention assembled, in the city of Wheeling, Virginia, adopted an ordinance to 'provide for the formation of a new State out of the portion of the territory of this State;' Section 9 of which ordinance was as follows, to-wit:

'9. 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 the 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 said period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia.'

"7. On the 31st day of December, 1862, an Act was passed by the 37th Congress of the United States providing that the new State thus formed in pursuance of the ordinances of the Wheeling convention above referred to, should, upon certain conditions, be admitted into the Union by the name of West Virginia, with a constitution which had

theretofore been adopted for the new State by the people thereof, such conditions being that a change should be made in such proposed constitution in regard to the liberation of slaves therein; and it was provided by this Act of Congress that whenever the President of the United States should issue his proclamation stating the fact that such change had been made and ratified, thereupon the Act admitting the new State into the Union should take effect sixty days after the date of such proclamation. Such proclamation declaring these conditions to have been complied with was duly made by President Lincoln on April 20th, 1863, and West Virginia, in conformity therewith and by the operation of said Act of Congress, was admitted into the Union as a State on the 20th day of June, 1863; and thereupon the State of West Virginia became fully organized, and each of its departments of government commenced operation on the date last named.

"8. Pending the admission of the State of West Virginia to the Union the General Assembly of the Restored State of Virginia passed February 3, 1863, the following Act.:

'That all property, real, personal and mixed, owned by, or appertaining to this state, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to, and become the property of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than is herein contained, and shall include among other things not herein specified all lands, buildings, roads, and other internal improvements or parts thereof, situated within said boundaries, and vested in this state, or in the president and directors of the literary fund, or the board of public works thereof, or in any person or persons for the use of this state, to the extent of the interest and estate of this state therein; and shall also include the interest of this state, or of the said president and directors, or of the said board of public works, in any parent bank or branch doing business within said boundaries and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries, standing in the name of this state, or of the said president or directors or of the said board of public works, or of any person or persons, for the use of this state.'

'That if the appropriations and transfers of property, stocks, and credits provided for by this act, take effect, the State of West Virginia shall duly account for the same in the settlement hereafter to be made with this state, pro-

vided that no such property, stocks and credits shall have been obtained since the reorganization of the state government.' "

Complainant charged "that the property which was by the operation of this Act appropriated and transferred from the State of Virginia to the State of West Virginia, and which was subsequently received and enjoyed by the State of West Virginia, consisted of a number of items, and the value of it amounted in the aggregate, to several millions of dollars, the exact amount your Oratrix is unable at this time more definitely to ascertain and state. That of the bank stocks alone, which were transferred under the operation of this Act, the State of West Virginia realized and received into her Treasury from the sale thereof about Six Hundred Thousand Dollars; and that no part of the property so received by West Virginia had been obtained by Virginia since April, 1861"

"9. And by a further act of the General Assembly of the Restored State of Virginia passed on the next day, February 4th, 1863, it was enacted:

'1. That the sum of One Hundred and Fifty Thousand Dollars be, and is hereby appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the States of the United States.

'2. That there shall be, and hereby is appropriated to the said State of West Virginia when the same shall become one of the United States, all balances, not otherwise appropriated, that may remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States: provided, however, that when the said State of West Virginia shall become one of the United States, it shall be the duty of the auditor of this State, to make a statement of all the moneys that up to that time, have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time, have been expended in such counties and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this State.'

"And this last named sum of One Hundred and Fifty Thousand Dollars together with other sums belonging to the State of Virginia, were turned over to and received or collected by the new State of West Virginia after its formation as aforesaid.

"10. The Constitution of the State of West Virginia, which became operative and was in force when she was admitted into the Union, contained the following provisions:

"By Section 5 of Article VIII. of said Constitution it was provided:

'5. No debt shall be contracted by this State except to meet casual deficits in the revenue, to redeem a previous liability to the State, to suppress insurrection, repel invasion, or defend the State in time of War.'

"And by Section 7 of Article VIII. it was provided:

'7. The legislature may, at any time, direct a sale of the stocks owned by the State, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the State shall not become a stockholder in any bank.'

"And by Section 8 of Article VIII. it was provided:

'8. 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 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.'

"At the time the Constitution containing these provisions was adopted, West Virginia did not owe, and could not have owed, any 'public debt' or 'previous liability,' except for her just, contributive proportion of the public debt of the original State of Virginia, and for the money and property of the original State which had been transferred to and received by her under the Acts of the General Assembly of the Restored State of Virginia above set forth. By the provisions of Section 8 of Article VIII., above cited, she expressly assumed her equitable proportion of the debt of the original State as it existed prior to the first day of January, 1861. By Section 5 of the same Article VIII., above set forth, her Constitution forbade the creation of any debt 'except to meet casual deficits in the revenue, to redeem a previous liability of the State,' &c., and there was not and could not have been any such 'previous liability,' except her portion of the debt of the original State, and her liability for the money and property of the original State which had been transferred to and received by her under the Acts of the General Assembly of the Restored State. And Section 7 of the same Article of her Constitution, above cited, authorized the sale of the stocks owned by the State, in banks and other corporations, the proceeds to be applied to the liquidation of the public

debt; and she had no such stocks, except those acquired, as above stated, from the original State. This section of her constitution also expressly required the proceeds of such sale to be applied to her public debt, which public debt could only have been her proportion of that of the original State of Virginia, and her liability for the money and property of the original State which had been transferred to her.

"11. After the year 1865 and prior to the year 1872 attempts were made at different times by the public authorities of both the Commonwealth of Virginia and the State of West Virginia, respectively, to ascertain their contributive proportions of the common liability resting upon them for the public debt of Virginia, contracted prior to January 1st, 1861; but all such attempts proved ineffectual and vain, and no accounting or settlement of any kind was ever had between the two States in regard to this debt.

"12. The efforts looking to a settlement by the concurrent action of the two States having proved abortive and your Oratrix being anxious to adjust the portion of the common debt which it was right that she should assume and pay, upon terms just and equitable alike to the public creditors and to West Virginia, made several efforts to effect such a settlement.

"The first of these was made by the General Assembly which was chosen at the close of the period of 'destruction and reconstruction,' which, following closely upon the period of disastrous war, had inflicted upon her people injuries and losses, the harmful effects of which were then by no means realized.

"The purpose of the representatives of the Commonwealth, then just emerging from conditions which had impoverished her people and paralyzed their productive energies, to assume and pay to the utmost every dollar which her most exacting creditor could demand of her, was expressed in the Act of her General Assembly, approved March 30, 1871.

"By the terms of settlement embodied in this Act, your Oratrix undertook to give her obligations bearing 6% interest for two-thirds of the principal, and for two-thirds of the past due interest, and also for two-thirds of the interest on that accrued interest, which accrued interest to the extent of nearly $8,000,000, had been funded after the War in new bonds of Virginia, thus capitalizing at 6% not only the interest, but interest upon that interest.

"It was soon apparent that Virginia had by this measure assumed a heavier burden than she was able to bear, and so other plans for the settlement of the State debt were at-

tempted by the Acts of the General Assembly of the Commonwealth approved March 28, 1879, and February 14, 1882, until at length a final and satisfactory settlement of the portion of the debt of the original State which Virginia should assume and pay was definitely concluded by the Act of February 20, 1892. Your Oratrix will file copies of each of the Acts of her General Assembly herein mentioned as exhibits to this bill, and to be read as part hereof.

"13. As farther indicating the great burden which your Oratrix, notwithstanding the disaster and loss above referred to, has assumed and met on account of the common debt of the undivided State, she shows your Honors that, since January 1st, 1861, she has actually paid off, retired and discharged, or assumed and given her new outstanding obligations for the aggregate sum of over Seventy-one Million Dollars, as will more particularly appear from a statement thereof filed as an exhibit herewith and hereinafter referred to as Exhibit Number 7.

"It is proper in this connection to call attention to the fact that, while your Oratrix has made this large contribution toward the settlement of the common debt, West Virginia has not paid one dollar thereof; and although in the early years of her history she repeatedly conceded that there was some portion of that debt which should equitably be borne by her, her properly constituted authorities have for a number of years refused to recognize that any liability whatever rested upon her, on that account, and have declined even to enter into an accounting or to treat with your Oratrix in reference thereto.

"It would seem from the above statement that Virginia has already done as much under all the circumstances as she could be fairly expected to do towards paying off the common public debt of the old State. Such was the view and purpose of the General Assembly in the several Acts above recited.

"A question may be raised as to whether such was the effect of the language used in the Act of March 30, 1871, with respect to the certificates issued thereunder; but the great mass of the creditors entitled to whatever may be due upon the unfunded obligations of the undivided State, have in effect agreed, as will be hereinafter shown, to waive any such question, and to accept the adjudication of this Court in this cause against West Virginia in full discharge of all their claims, thus giving that effect to the Act of March 30, 1871, which it was the purpose of your Oratrix that it should have.

"14. By each of the Acts for the settlement of her debt

above recited, it was provided that the bonds of undivided Virginia so far as not funded in the new obligations given by your Oratrix, should be surrendered to and held by your Oratrix, who either by the express terms of the settlement provided for by said Acts, or as a just and equitable consequence therefrom, received and holds said original bonds so far as unfunded, in trust for the creditor who deposited the same with her, or his assigns; and certificates to this effect were given by your Oratrix to each creditor whose old Virginia bond was so surrendered to her.

"Having as an essential part of the contract for the adjustment of the common debt of the original State entered into this fiduciary relation in reference to these bonds, it became her obligation of duty to the creditors who had confided their securities to her keeping, as well as to her own people, whose credit and fair name required that these obligations of the old State should be fairly and honorably adjusted, to do all in her power to bring about a determination of West Virginia's just liability in respect thereto, and if possible the recognition and settlement of the same by that State.

"Only after exhausting every means of amicable negotiation, and having her overtures to that end repeatedly refused, and as a last resort, has your Oratrix been constrained at length reluctantly to apply to this, the only tribunal which can afford relief, for an adjudication and determination of this question, of such vast importance to your Oratrix and to all of her people.

"15. All of the bonds and obligations and other evidences of the indebtedness of the original State of Virginia outstanding and contracted on January 1, 1861, as stated in paragraph 1 of this bill, except a comparatively insignificant sum, not amounting to one per cent of the aggregate of those liabilities, have been taken up and are now actually held by your Oratrix, and she has the right to call upon West Virginia for a settlement with respect thereto. They are too numerous and involve too great a number of transactions running through many years, for it to be practicable to exhibit them here in detail, but the original bonds and other evidences of indebtedness so paid off or retired and now held by your Oratrix, will, when it shall be proper to do so, be exhibited to the Master, who shall take the accounts hereinafter prayed for.

"16. Of the evidences of indebtedness representing principal and interest of the liabilities of Virginia contracted before her dismemberment, those so paid off or retired by your Oratrix and now held by her in her own right, exclusive of

the amounts represented by the certificates issued under the funding Acts aforesaid, amount in the aggregate, including the interest to be fairly computed thereon to this date, to a very large sum, considerably in excess of $25,000,000, by far the greater part of it being now, of course, on account of the interest computed thereon, at the rate of 6% per annum, the then legal rate in both States.

"For all of these obligations taken up and payments made on account of the common debt, your Oratrix has in her own right, a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor.

"17. In addition to the above bonds there were outstanding on the 1st day of January, 1861, certain obligations of the State of Virginia as guarantor upon some of the securities issued by internal improvement companies, which your Oratrix was called upon to provide for and settle. They were not comparatively of very large amount, however, and the questions involved in connection therewith can be stated and settled in the account hereafter prayed for to be taken between the two states; and in such accounts your Oratrix will also ask to have included all such items of debit against the State of West Virginia on account of the property and moneys of the original State which were received or appropriated by West Virginia which may not have been specifically or accurately stated herein. These items of accounting between the two States are so numerous and varied and extend throughout a period of so many years' duration that it is impossible from the nature of the case to state all of them in this bill; and the account between the two States can only be taken and settled, and the balance due your Oratrix thereon ascertained, under the supervision of a Court of Equity.

"18. Your Oratrix charges that the liability of the State of West Virginia, for a just and equitable proportion of the public debt of Virginia, as of the time when the State of West Virginia was created, rests upon the following among many grounds which might be indicated here:

'First. The area of territory now known as the State of West Virginia formed about one-third of the territory of the Commonwealth of Virginia when this public debt was created, and its population included about one-third of that of the original State at the time of its dismemberment. And the State of West Virginia did, by the acquisition and appropriation of such territory, with the population thereof, assume therewith liability for a just and equitable proportion

of the public debt created prior to the partition of such territory.

'Second. The liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virginia, as it existed prior to the creation and erection of the State of West Virginia, forms part of her very political existence, and is an essential constituent of her fundamental law as shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861, in which the method of ascertaining her liability on account of said debt is prescribed. And this liability is imbedded in the Constitution under which she was admitted as a State into the Federal Union, and was one of the conditions under which she was created a State and admitted into the Union.

'Third. The State of West Virginia has further, by the repeated enactments and joint resolutions of her legislature, recognized her liability for a just proportion of this debt.

'Fourth. The State of West Virginia has, since her creation as a State, received from the State of Virginia real and personal property amounting in value to many millions of dollars, and held and enjoyed the same, but upon express condition that she should duly account for the same in a settlement thereafter to be had between her and the Commonwealth of Virginia.

'Fifth. While the transfer of this property, real and personal, and also certain moneys of the Commonwealth of Virginia, purport to have been made to the State of West Virginia by the Act of 'The Restored Government of Virginia;' there were in fact represented in said 'Restored Government' and in the legislature thereof no other people and no other territory than that which then, as now, constitute the State of West Virginia.'

"19. The General Assembly of Virginia being anxious to effect a settlement of the portion of the common debt of the undivided State which remained unadjusted, and if possible to bring this about with the friendly co-operation and concurrence of West Virginia. adopted: 'A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by the State of West Virginia, and for the application of whatever may be received from the State of West Virginia to the payment of those found to be entitled to the same,' approved March 6, 1894. A copy of this resolution will be hereinafter shown as an exhibit to this bill, to be read as a part thereof.

"Under this resolution a commission of seven members

was appointed for the purpose of carrying into effect the objects expressed therein.

"The efforts made by this Commission, acting under the above resolution to bring about a settlement with West Virginia having proved ineffectual, and the overture which the Commission, with the active co-operation of the Honorable Charles T. O'Ferral, the then governor of the Commonwealth made to the authorities of West Virginia for the purpose of bringing about a friendly adjustment having been declined, the General Assembly of Virginia passed the Act approved March 6, 1900, entitled 'An Act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the protection of the Commonwealth of Virginia in the premises,' the purpose of which Act is sufficiently set forth in its title, and a copy of the act will also be hereinafter shown as one of the exhibits herewith filed.

"20. The Commission acting under said last mentioned act made most earnest efforts to bring about an amicable adjustment of the matters hereinbefore set forth with West Virginia, but all of their efforts in that behalf proved ineffectual and unavailing. An application to this Honorable Court being thus left as the only alternative for Virginia, this suit has been instituted at the request and direction of the said Commission, and in strict conformity with the provisions of the said Act of March 6, 1900, all of which will be more fully and completely shown by the Report of the said Commission dated January 6, 1906, made to the General Assembly of Virginia now in session, a copy of which Report and the documents accompanying the same, and referred to therein, will be exhibited as a part of this Bill."

21. Enumerates exhibits attached to the bill and prayed to be regarded as part thereof.

22. The bill prayed: "Forasmuch, therefore, as your Oratrix is remediless save in this form and forum, and to the end that the State of West Virginia may be duly served, through her Governor and Attorney-General, with a copy of this bill, your Oratrix prays that the said State of West Virginia may be made a party defendant to this bill, and required to answer the same, that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your Oratrix, in her own right and as trustee as aforesaid; that the principles upon which such accounting shall be had may be ascertained and declared, and a true and proper settlement made of the matters and things above recited and set forth; that such accounting be

had and settlement made under the supervision and direction of this Court by such Auditor or Master as may by the Court be selected and empowered to that end, and that proper and full reports of such accounting and settlement may be made to this Court; that the State of West Virginia may be required to produce before such Auditor or Master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth, in order to a full and correct settlement and adjustment of the accounts between the two States; that this Court will adjudicate and determine the amount due your Oratrix by the State of West Virginia in the premises; and that all such other and further and general relief be granted unto your Oratrix in the premises as the nature of her case may require or to equity may seem meet."

Attached to the bill were the numerous exhibits referred to.

The State of West Virginia demurred and assigned special causes as follows:

"First. That it appears by said bill that there is a misjoinder of parties plaintiff and a misjoinder of causes of action. The said bill is brought by the Commonwealth of Virginia to recover debts alleged to be due to her in her own right from the defendant for property and money alleged to have been transferred and delivered to the defendant under certain acts of the legislature passed in 1863, and also, as trustee for the owners of certain certificates mentioned and described in said bill, to have an accounting to ascertain and declare the amount claimed to be due from the defendant as her just proportion of the public debt of the plaintiff prior to the first day of January, 1861.

"Second. That this court has no jurisdiction of either the parties to or the subject-matter of this action, because it appears by the said bill that the matters therein set forth do not constitute, within the meaning of the Constitution of the United States, such a controversy, or such controversies, between the Commonwealth of Virginia and the State of West Virginia as can be heard and determined in this court, and this court has no power to render or enforce any final judgment or decree thereon.

"Third. That it appears by said bill that the plaintiff herein sues as trustee for the benefit of a number of individuals who are the alleged owners of certain certificates in the said bill set forth and described.

"Fourth. That the said bill does not state facts sufficient to entitle the Commonwealth of Virginia to the relief prayed for, or to any relief, either in her own right or as trustee for the owners of the certificates therein set forth and described.

"Fifth. That it does not appear by said bill that the Attorney General has ever been authorized to institute and prosecute this suit in the name of the Commonwealth of Virginia in her own right, but only as trustee for the use and benefit of the owners of certain certificates mentioned in the act of March 6, 1900, which is referred to and made part of said bill.

"Sixth. That the said bill does not sufficiently and definitely set forth the claims and demands relied upon, but the allegations thereof are so indefinite and uncertain that no proper answer can be made thereto.

"Seventh. That the allegations in the said bill are not sufficient to entitle the plaintiff therein, either in her own right or as trustee, to an account or to a discovery from this defendant.

"Eighth. That the said bill does not contain any prayer for a judgment or decree or any other final relief against this defendant."

Hearing on the demurrer was had March 11, 12, 1907.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The State of West Virginia was admitted into the Union June 20, 1863, under the proclamation of the President of the United States of April 20, 1863, in pursuance of the act of Congress approved December 31, 1862, upon the terms and conditions prescribed by the Commonwealth of Virginia in ordinances adopted in convention and in acts passed by the General Assembly of the Restored Government of the Commonwealth, giving her consent to the formation of a new State out of her territory, with a constitution adopted for the new State by the people thereof. The ninth section of the ordinance adopted by

the people of the Restored State of Virginia in convention assembled in the city of Wheeling, Virginia, on August 20, 1861, entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State," provided as follows:

> "9. 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 monies paid into the treasury of the Commonwealth from the counties included within the said new State during the same period. All private rights and interests in lands within the proposed State, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia. . ."

The consent of the Commonwealth of Virginia was given to the formation of a new State on this condition. February 3 and 4, 1863, the General Assembly of the Restored State of Virginia enacted two statutes in pursuance of the provision of which money and property amounting to and of the value of several millions of dollars were, after the admission of the new State, paid over and transferred to West Virginia. The Constitution of the State of West Virginia when admitted contained these provisions, being sections 5, 7 and 8 of Article VIII thereof, as follows:

> "5. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war."
>
> "7. The legislature may at any time direct a

sale of the stocks owned by the State in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt and hereafter the State shall not become a stockholder in any bank."

"8. 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."

The "public debt" and the "previous liability" manifestly referred to a portion of the original debt of the original State of Virginia and liability for the money and property of the original State, which had been received by West Virginia under the acts of the General Assembly above cited, enacted while the territory and people afterwards forming the State of West Virginia constituted a part of the Commonwealth of Virginia, though one may be involved in the other; while the provisions of sections 7 and 8 were obviously framed in compliance with the conditions on which the consent of Virginia was given to the creation of the State of West Virginia, and the money and property were transferred. From 1865 to 1905 various efforts were made by Virginia through its constituted authorities to effect an adjustment and settlement with West Virginia for an equitable proportion of the public debt of the undivided State, proper to be borne and paid by West Virginia, but all these efforts proved unavailing, and it is charged that West Virginia refused or failed to take any action or do anything for the purpose of bringing about a settlement or adjustment with Virginia.

The original jurisdiction of this court was, therefore, invoked by Virginia to procure a decree for an accounting

as between the two States, and, in order to a full and correct adjustment of the accounts, the adjudication and determination of the amount due Virginia by West Virginia in the premises.

But it is objected that this court has no jurisdiction because the matters set forth in the bill do not constitute such a controversy or such controversies as can be heard and determined in this court, and because the court has no power to enforce and therefore none to render any final judgment or decree herein. We think these objections are disposed of by many decisions of this court. *Cohens* v. *Virginia,* 6 Wheat. 264, 378, 406; *Kansas* v. *Colorado,* 185 U. S. 125; *Kansas* v. *Colorado,* May 13, 1907, 206 U. S. p. ; *Missouri* v. *Illinois,* 180 U. S. 208; *Same case,* 200 U. S. 496; *Georgia* v. *Copper Company,* May 13, 1907, 206 U. S. p. ; *United States* v. *Texas,* 143 U. S. 621; *United States* v. *North Carolina,* 136 U. S. 211; *United States* v. *Michigan,* 190 U. S. 379.

In *Cohens* v. *Virginia,* the Chief Justice said: "In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and the citizens of another State,' 'and between a State and foreign States, citizens or subjects.' If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."

And, referring to the Eleventh Amendment, it was further said:

> "It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet

> the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the diginity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was no reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States."

By the cases cited, and there are many more, it is established that, in the exercise of original jurisdiction as between States, this court necessarily in such a case as this has jurisdiction.

United States v. *North Carolina* and *United States* v. *Michigan, supra,* were controversies arising upon pecuniary demands, and jurisdiction was exercised in those cases just as in those for the prevention of the flow of polluted water from one State along the borders of another State, or of the diminution in the natural flow of rivers by the State in which they have their sources through and across another State or States, or of the discharge

of noxious gases from works in one State over the territory of another.

The object of the suit is a settlement with West Virginia, and to that end a determination and adjudication of the amount due by that State to Virginia, and when this court has ascertained and adjudged the proportion of the debt of the original State which it would be equitable for West Virginia to pay, it is not to be presumed on demurrer that West Virginia would refuse to carry out the decree of this court. If such repudiation should be absolutely asserted we can then consider by what means the decree may be enforced. Consent to be sued was given when West Virginia was admitted into the Union, and it must be assumed that the Legislature of West Virginia would in the natural course make provision for the satisfaction of any decree that may be rendered.

It is, however, further insisted that this court cannot proceed to judgment because of an alleged compact entered into between Virginia and West Virginia, with the consent of Congress, by which the question of the liability of Virginia to West Virginia was submitted to the arbitrament and award of the Legislature of West Virginia as the sole tribunal which could pass upon it. As we have seen, the Constitution of West Virginia when admitted into the Union contained the provision: "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, one thousand eight hundred and sixty-one, shall be assumed by the State, and the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation of the same by a sinking fund and redeem the principal within thirty-four years." And it is said that, on May 13, 1862, the Legislature of Virginia passed an act entitled "An act giving the consent of the Legislature of Virginia to the formation and erection of a new State within the jurisdiction of this State," by which consent

was given to the creation of the proposed new State, "according to the boundaries and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the twenty-sixth day of November, 1861;" and that by the act of Congress the consent of that body was given to all those provisions which thus became a constitutional and legal compact between the two States. The act of May 13, 1862, was not made a part of the case stated in the bill, and its validity is denied by counsel for Virginia, but it is unnecessary to go into that, for when Virginia, on August 20, 1861, by ordinance provided "for the formation of a new State out of the territory of this State," and declared therein that "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 as provided, it is to be supposed that the new State had this in mind when it framed its own constitution, and that when that instrument provided that its Legislature should "ascertain the same as soon as practicable," it referred to the method of ascertainment prescribed by the Virginia convention. Reading the Virginia ordinance and the West Virginia constitutional provision *in pari materia,* it follows that what was meant by the expression that the "Legislature shall ascertain" was that the Legislature should ascertain as soon as practicable the result of the pursuit of the method prescribed, and provide for the liquidation of the amount so ascertained. And it may well be inquired why, in the forty-three years that have elapsed since the alleged compact was entered into, West Virginia has never indicated that she stood upon such a compact, and, if so, why no step has ever been taken by West Virginia to enter upon the performance of the duty which such "compact" im-

posed, and to notify Virginia that she was ready and willing to discharge such duty.

It is also urged that Virginia had no interest in the subject-matter of the controversy because she had been released from all liability on account of the public debt of the old Commonwealth, evidenced by her bonds outstanding on the first day of January, 1861. This relates to the acts of the General Assembly of Virginia of March 30, 1871, March 28, 1879, February 14, 1882, February 20, 1892, March 6, 1894, and March 6, 1900. According to the bill, Virginia by the act of March 30, 1871, and subsequent acts, in an attempt to provide for the funding and payment of the public debt, having estimated that the liability of West Virginia was for one-third of the amount of the old bonds, provided for the issue of new bonds to the amount of two-thirds of the total, and for the issue of certificates for the other third, which showed that Virginia held the old bonds so far as unfunded in trust for the holders or their assignees to be paid by the funds expected to be obtained from West Virginia as her "just and equitable proportion of the public debt." The legislation resulted in the surrender of most of the old bonds to Virginia, satisfied as to two-thirds, and held as security for the creditors as to one-third. We do not care to take up and discuss this legislation. We are satisfied that as we have jurisdiction, these questions ought not to be passed upon on demurrer. *Kansas* v. *Colorado*, 185 U. S. 125, 144, 145. And this also furnishes sufficient ground for not considering at length the objection of multifariousness. The observations of Lord Cottenham, in *Campbell* v. *Mackey*, 1 Mylne & Craig, 603, that it is impracticable to lay down any rule as to what constitutes multifariousness, as an abstract proposition; that each case must depend upon its own circumstances; and must be left where the authorities leave it, to the sound discretion of the court, have been often affirmed in this court.

Oliver v. *Piatt,* 3 How. 333, 411; *Gaines* v. *Relf,* 2 How. 619, 642. But we do not mean to rule that the bill is multifarious. It is true that the prayer contains, among other things, the request, "that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your Oratrix in her own right and as trustee aforesaid," but it also prays that the court "will adjudicate and determine the amount due to your Oratrix by the State of West Virginia in the premises." And we understand the reference to holding in trust to be in the interest of mere convenience, and that the bill cannot properly be regarded as seeking in chief anything more than a decree for "an equitable proportion of the public debt of the Commonwealth of Virginia on the first day of January, 1861." The objections of misjoinder of parties and misjoinder of causes of action may be treated as resting on matter of surplusage merely, and at all events further consideration thereof may wisely be postponed to final hearing. *Florida* v. *Georgia,* 17 How. 491, 492; *California* v. *Southern Pacific Company,* 157 U. S. 249.

The order will be—

Demurrer overruled without prejudice to any question, and leave to answer by the first Monday of next term.

Decree Referring Cause to Master.

[May 4, 1908.]

Commonwealth of Virginia

v.

State of West Virginia.

REFERENCE—*In Suits Between States.*

Reference to a special master decreed in a suit begun by an original bill in equity, filed by the commonwealth of Virginia against the state of West Virginia, which seeks an adjudication of the amount due the former state by the latter as the equitable proportion of the public debt of the original state of Virginia, which was assumed by the state of West Virginia at the time of its creation as a state.

MESSRS. WM. A. ANDERSON, RANDOLPH HARRISON and HOLMES CONRAD, for Plaintiff.

MESSRS. JOHN C. SPOONER, JOHN G. CARLISLE, C. W. MAY, CHARLES E. HOGG, W. MOLLOHAN, GEO. W. MCCLINTIC, andW. G. MATTHEWS, for Defendant.

This cause having been heard upon the pleadings and accompanying exhibits, it is, on consideration, ordered that it be referred to a special master, to be hereinafter designated, to ascertain and report to the court:

1. The amount of the public debt of the Commonwealth of Virginia on the first day of January, 1861, stating specifically how and in what form the same was evidenced, by what authority of law and for what purposes the same was created, and the dates and nature of the bonds or other evidence of said indebtedness.

2. The extent and valuation of the territory of Virginia and of West Virginia, June 20, 1863, and the population thereof, with and without slaves, separately.

3. All expenditures made by the Commonwealth of Virginia with the territory now constituting the State

of West Virginia since any part of the debt was contracted.

4. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the average total population of Virginia, with and without slaves, as shown by the census of the United States.

5. And also on the basis of the fair estimated valuation of the property, real and personal, by counties of the State of Virginia.

6. All moneys paid into the treasury of the Commonwealth from the counties included within the State of West Virginia during the period prior to the admission of the latter State into the Union.

7. The amount and value of all money, property, stocks and credits which West Virginia received from the Commonwealth of Virginia, not embraced in any of the preceding items and not including any property, stocks or credits which were obtained or acquired by the Commonwealth after the date of the organization of the restored government of Virginia, together with the nature and description thereof.

The answers to these inquiries to be without prejudice to any question in the cause.

It is further ordered that the Commonwealth of Virginia and the State of West Virginia shall each, when required, produce before the master, upon oath, all such records, books, papers and public documents as may be in their possession or under their control, and which may, in his judgment, be pertinent to the said inquiries and accounts, or any of them.

And the master is authorized to make or cause to be, made, such examination as he may deem desirable of the books of account, vouchers, documents and public records

of either State relating to the inquiries he is herein directed to make, and to cause copies thereof or extracts therefrom to be made for use in making up his report.

All public records published by authority of the Commonwealth of Virginia prior to the 17th day of April, 1861, and all papers and documents and other matter constituting parts of the public files and records of Virginia prior to the date aforesaid, which in the judgment of the master may be relevant and pertinent to any of said inquiries, or copies thereof, if duly authenticated, may be used in evidence and considered by the master, but all such evidence shall be subjected to exceptions to its competency. The public acts and records of the two States since the admission of West Virginia into the Union shall be evidence, if pertinent and duly authenticated, but all such evidence tendered by either party shall be subject to proper legal exceptions to its competency.

The master is empowered to summon any persons whose testimony he or either party may deem to be material, and to cause their depositions to be taken before him, or by a notary public or other officer authorized to take the same, after reasonable notice to the adverse party.

The master is authorized and empowered, subject to the approval of the Chief Justice, to employ such stenographers and other clerical assistants as he may find it desirable to employ in order to the prompt and efficient execution of this order of reference, and to agree with such stenographers and typewriters and clerical assistants upon such compensation to be made to them as the master may consider reasonable and just. He is authorized to direct their compensation to be paid out of the funds to be deposited to the credit of this cause.

The complainant shall cause the sum of five thousand dolars to be deposited with the marshal of this court to the credit of this cause, and such further sums as from

time to time may be required, on account of the costs and expenses of executing this decree; and the master is authorized from time to time to draw upon the fund so deposited by Virginia for the compensation of the stenographers, typewriters and other clerical assistants whom he may employ, and for any other costs and expenses, including stationery and printing, which may in his judgment be necessary to be incurred in executing this order of reference.

The said marshal shall receive such commission for his services in receiving and disbursing the funds so deposited with him as may be allowed by the court, and he will make a report of his transactions, receipts and disbursements in the premises.

Any notices to be given in connection with the execution of this decree may be given by and to the Attorney General of the respective States.

The master will make his report with all convenient speed and transmit therewith the evidence on which he proceeds, and is to be at liberty to state any special circumstances he considers of importance, and to state such alternative accounts as may be desired by either of the parties, subject to the direction of the court.

And the court reserves the consideration of the allowance of interest; of the costs of this suit, and all further directions until after the master has made his report; either of the parties to be at liberty to apply to the court as they shall be advised.

Opinion Adjudicating Principles of Cause.

March 6, 1911.

Commonwealth of Virginia

v.

State of West Virginia.

1. SUPREME COURT—*Original Jurisdiction—Suits Between States.*
A suit between the commonwealth of Virginia and the State of West Virginia, to determine the amount due to the former by the latter as the equitable proportion of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, is to be considered by the Federal Supreme Court in the untechnical spirit proper for dealing with a quasi international controversy.

2. SAME.
Objections as to multifariousness, laches, and the like, except so far as they affect the merits, will not be considered by the Federal Supreme Court in a suit by the commonwealth of Virginia against the state of West Virginia, to determine the amount due to the former by the latter as the equitable proportion of the public debt of Virginia which was assumed by West Virginia at the time of its creation as a state.

3. STATES—*Compacts Between—Adjustment of Public Debt Between Virginia and West Virginia.*
A contract between the states of Virginia and West Virginia, under which the latter assumed the payment of her just and equitable share of the debt of the original state of Virginia at the time of the creation of West Virginia as a state, whoever might be the persons to whom ultimately the payment was to be made, was established by the provisions of W. Va. Const. art 8, sec. 8, for the assumption of an equitable proportion of the Virginia public debt existing ed the counties now composing West Virginia, voted for prior to January 1, 1861, and of Va. act of May 13, 1862, consenting to the formation of the new state on those terms, and of the sanctioning act of Congress of December 31, 1862 (12 Stat. at L. 633, chap. 6), and the contract so established was not modified or affected in any practical way by the preliminary suggestions as to the special mode of ascertaining a just proportion of the debt, contained in the Wheeling

ordinance of August 20, 1861, for the formation of the new state, which is not mentioned in any of the other enactments.

4. SAME.

The public debt of the original state of Virginia, an equitable proportion of which was assumed by West Virginia at the time of its creation as a state, need not, because incurred for local improvements, be divided according to the territory in which the money was expended, since in form the debt was an investment which generally took the shape of a subscription for stock in a corporation, making it an adventure on behalf of the whole state, all the expenditure having the ultimate good of the whole state in view.

5. SUPREME COURT—*Original Jurisdiction—Suit Between States.*

The determination of the just and equitable proportion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state is within the original jurisdiction of the Federal Supreme Court, although by W. Va. Const. art. 8, sec. 8, it is provided that the legislature shall ascertain the proportion as soon as may be practicable.

6. STATES—*Compacts Between—Adjustment of Public Debt Between Virginia and West Virginia.*

The liability of the State of West Virginia, assumed at the time of its creation as a state, for an equitable proportion of the public debt of the original state of Virginia, was not discharged by changes in the form of the debt, nor split up by the unilaterial attempts of Virginia to apportion specific parts to the two states.

7. SUPREME COURT—*Original Jurisdiction—Suits Between States—Interest in Suit.*

The commonwealth of Virginia has a sufficient interest to enable it to maintain a suit in the Federal Supreme Court against the state of West Virginia, to determine the amount due the former state by the latter as the equitable proportion of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, although, by reason of certain transactions with her creditors, Virginia may have been discharged from all liability as to West Virginia's share, other than to turn over the proceeds of the suit.

8. STATES—*Compacts Between—Adjustment of Public Debt Between Virginia and West Virginia.*

The valuation of the real and personal property of the

two states of Virginia and West Virginia on the date of their separation, excluding slaves, is the proper basis for determining the equitable proportion of the public debt of the original state of Virginia which was assumed by the state of West Virginia at the time of its creation as a state, subject to the qualification that the difference between Virginia's share on this ratio and the amount which her creditors were content to accept from her should be deducted from the sum to be apportioned.

Messrs. HOLMES CONRAD, SAMUEL W. WILLIAMS, Attorney General of Virginia, WM. A. ANDERSON, RANDOLPH HARRISON and JOHN B. MOON, for Plaintiff.

Messrs. CHAS. E. HOGG, GEO. W. MCCLINTIC, JOHN C. SPOONER, WM. G. CONLEY, Attorney General of West Virginia, W. MOLLOHAN, W. G. MATTHEWS, and WM. M. O. DAWSON, for Defendant.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill brought by the Commonwealth of Virginia to have the State of West Virginia's proportion of the public debt of Virginia as it stood before 1861 ascertained and satisfied. The bill was set forth when the case was before this Court on demurrer. 206 U. S. 290. Nothing turns on the form or contents of it. The object has been stated. The bill alleges the existence of a debt contracted between 1820 and 1861 in connection with internal improvements intended to develop the whole State, but with especial view to West Virginia, and carried through by the votes of the representatives of the West Virginia counties. It then sets forth the proceedings for the formation of a separate State and the material provisions of the ordinance adopted for that purpose at Wheeling on August 20, 1861, the passage of an act of Congress for the admission of the new State under a constitution that had been adopted, and the admission of West Virginia into the Union, all of which, we shall show more fully a little further on. Then follows an averment

of the transfer in 1863 to West Virginia of the property within her boundaries belonging to West Virginia, to be accounted for in the settlement thereafter to be made with the last named State. As West Virginia gets the benefit of this property without an accounting, on the principles of this decision, it needs not to be mentioned in more detail. A further appropriation to West Virginia is alleged of $150,000, together with unappropriated balances, subject to accounting for the surplus on hand received from counties outside of the new State. Then follows an argumentative averment of a contract in the Constitution of West Virginia to assume an equitable proportion of the above-mentioned public debt, as hereafter will be explained. Attempts between 1865 and 1872 to ascertain the two States' proportion of the debt and their failure are averred, and the subsequent legislation and action of Virginia in arranging with the bondholders, that will be explained hereafter so far as needs. Substantially all the bonds outstanding in 1861 have been taken up. It is stated that both in area of territory and in population West Virginia was equal to about one-third of Virginia, that being the proportion that Virginia asserts to be the proper one for the division of the debt, and this claim is based upon the division of the State, upon the above-mentioned Wheeling ordinance and the Constitution of the new State, upon the recognition of the liability by statute and resolution, and upon the receipt of property as has been stated above. After stating further efforts to bring about an adjustment and their failure, the bill prays for an accounting to ascertain the balance due to Virginia in her own right and as trustee for bondholders and an adjudication in accord with this result.

The answer admits a debt of about $33,000.000, but avers that the main object of the internal improvements in connection with which it was contracted was to afford outlets to the Ohio River on the west and to the seaboard

on the east for the products of the eastern part of the State, and to develop the resources of that part, not those of what is now West Virginia. In aid of this conclusion it goes into some elaboration of details. It admits the proceedings for the separation of the State and refers to an act of May, 1862, consenting to the same, to which we also shall refer. It denies that it received property of more than a little value from Virginia or that West Virginia received more than belonged to her in the way of surplus revenue on hand when she was admitted to the Union, and denies that any liability for these items was assumed by her Constitution. It sets forth in detail the proceedings looking to a settlement, but as they have no bearing upon our decision we do not dwell upon them. It admits the transaction of Virginia with the bondholders and sets up that they discharge the Commonwealth from one-third of its debt and that what may have been done as to two-thirds does not concern the defendant, since Virginia admits that her share was not less than that. If the bonds outstanding in 1861 have been taken up it is only by the issue of new bonds for two-thirds and certificates to be paid by West Virginia alone for the other third. Liability for any payments by Virginia is denied and accountability, if any, is averred to be only on the principle of § 9 of the Wheeling ordinance, to be stated. It is set up further that under the Constitution of West Virginia her equitable proportion can be established by her Legislature alone, that the liquidation can be only in the way provided by that instrument, and hence that this suit cannot be maintained. The settlement by Virginia with her creditors also is pleaded as a bar, and that she brings this suit solely as trustee for them.

The grounds of the claim are matters of public history. After the Virginia ordinance of secession, citizens of the State who dissented from that ordinance organized a government that was recognized as the State of Vir-

ginia by the Government of the United States. Forthwith a convention of the restored State, as it was called, held at Wheeling, proceeded to carry out a long entertained wish of many West Virginians by adopting an ordinance for the formation of a new State out of the western portion of the old Commonwealth. A part of section 9 of the ordinance was as follows: "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 monies paid into the treasury of the Commonwealth from the counties included within the said new state during the same period." Having previously provided for a popular vote, a constitutional convention &c., the ordinance in § 10 ordained that when the General Assembly should give its consent to the formation of such new State, it should forward to the Congress of the United States such consent, together with an official copy of such constitution, with the request that the new State might be admitted into the union of States.

A constitution was framed for the new State by a constitutional convention, as provided in the ordinance, on November 26, 1861, and was adopted. By Article 8, § 8, "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first 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 privide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years." An act of the Legislature of the restored State of Virginia, passed May 13, 1862, gave the consent of that Legislature to the erection

of the new State "under the provision set forth in the constitution for the said State of West Virginia." Finally Congress gave its sanction by an act of December 31, 1862, c. 6, 12 Stat. 633, which recited the framing and adoption of the West Virginia constitution and the consent given by the Legislature of Virginia through the last mentioned act, as well as the request of the West Virginia convention and of the Virginia Legislature, as the grounds for its consent. There was a provision for the adoption of an emancipation clause before the act of Congress should take effect, and for a proclamation by the President, stating the fact, when the desired amendment was made. Accordingly, after the amendment and a proclamation by President Lincoln, West Virginia became a State on June 20, 1863.

It was held in 1870 that the foregoing constituted an agreement between the old State and the new, *Virginia* v. *West Virginia*, 11 Wall. 39, and so much may be taken practically to have been decided again upon the demurrer in this case, although the demurrer was overruled without prejudice to any question. Indeed, so much is almost if not quite admitted in the answer. After the answer had been filed the cause was referred to a master by a decree made on May 4, 1908, 209 U. S. 514, 534, which provided for the ascertainment of the facts made the basis of apportionment by the original Wheeling ordinance, and also of other facts that would furnish an alternative method if that prescribed in the Wheeling ordinance should be followed; this again without prejudice to any question in the cause. The master has reported, the case has been heard upon the merits, and now is submitted to the decision of the Court.

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. *Missouri* v. *Illinois,* 200 U. S. 496, 519, 520. *Kansas* v. *Colorado,* 206 U. S. 46, 82-84. Therefore we shall spend no time on objections as to multifariousness, laches and the like, except so far as they affect the merits with which we proceed to deal. See *Rhode Island* v. *Massachusetts,* 14 Peters, 210, 257. *United States* v. *Beebe,* 127 U. S. 338.

The amount of the debt January 1, 1861, that we have to apportion no longer is in dispute. The master's finding was accepted by West Virginia and at the argument we understood Virginia not to press her exception that it should be enlarged by a disputed item. It was $33,897,-073.82, the sum being represented mainly by interest-bearing bonds. The first thing to be decided is what the final agreement was that was made between the two States. Here again we are not to be bound by technical form. A State is superior to the forms that it may require of its citizens. But there would be no technical difficulty in making a contract by a constitutive ordinance if followed by the creation of the contemplated State. *Wedding* v. *Meyler,* 192 U. S. 573, 583. And, on the other hand, there is equally little difficulty in making a contract by the constitution of the new State, if it be apparent that the instrument is not addressed solely to those who are to be subject to its provisions, but is intended to be understood by the parent State and by Congress as embodying a just term which conditions the parent's consent. There can be no question that such was the case with West Virginia. As has been shown, the consent of the Legislature of the restored State was a consent to the admission of West Virginia under the provisions set forth in the Constitution for the would-be State, and Congress gave its sanction only on the footing of the same Constitution and the consent of Virginia in the last-mentioned act. These

three documents would establish a contract without more. We may add, with reference to an argument to which we attach little weight, that they establish a contract of West Virginia with Virginia. There is no reference to the form of the debt or to its holders, and it is obvious that Virginia had an interest that it was most important that she should be able to protect. Therefore West Virginia must be taken to have promised to Virginia to pay her share, whoever might be the persons to whom ultimately the payment was to be made.

We are of the opinion that the contract established as we have said is not modified or affected in any practical way by the preliminary suggestions of the Wheeling ordinance. Neither the ordinance nor the special mode of ascertaining a just proportion of the debt that it puts forward is mentioned in the Constitution of West Virginia, or in the act of Virginia giving her consent, or in the act of Congress by which West Virginia became a State. The ordinance required that a copy of the new constitution should be laid before Congress, but said nothing about the ordinance itself. It is enough to refer to the circumstances in which the separation took place to show that Virginia is entitled to the benefit of any doubt so far as the construction of the contract is concerned. See opinion of Attorney General Bates to President Lincoln, 10 Op. Att. Gen. 426. The mode of the Wheeling ordinance would not throw on West Virginia a proportion of the debt that would be just, as the ordinance requires, or equitable, according to the promise of the Constitution, unless upon the assumption that interest on the public debt should be considered as part of the ordinary expenses referred to in its terms. That we believe would put upon West Virginia a larger obligation than the mode that we adopt, but we are of opinion that her share should be ascertained in a different way. All the modes, however, consistent with the plain contract of

West Virginia, whether under the Wheeling ordinance or the Constitution of that State, come out with surprisingly similar results.

It was argued, to be sure, that the debt of Virginia was incurred for local improvements and that in such a case, even apart from the ordinance, it should be divided according to the territory in which the money was expended. We see no sufficient reason for the application of such a principle to this case. In form the aid was an investment. It generally took the shape of a subscription for stock in a corporation. To make the investment a safe one the precaution was taken to require as a condition precedent that two or three-fifths of the stock should have been subscribed for by solvent persons fully able to pay, and that one-fourth of the subscriptions should have been paid up into the hands of the treasurer. From this point of view the venture was on behalf of the whole State. The parties interested in the investment were the same, wherever the sphere of corporate action might be. The whole State would have got the gain and the whole State must bear the loss, as it does not appear that there are any stocks of value on hand. If we should attempt to look farther, many of the corporations concerned were engaged in improvements that had West Virginia for their objective point, and we should be lost in futile detail if we should try to unravel in each instance the ultimate scope of the scheme. It would be unjust, however, to stop with the place where the first steps were taken and not to consider the purpose with which the enterprise was begun. All the expenditures had the ultimate good of the whole State in view. Therefore we adhere to our conclusion that West Virginia's share of the debt must be ascertained in a different way. In coming to it we do but apply against West Virginia the argument pressed on her behalf to exclude her liability under the Wheeling ordinance in like cases. By the ordinance

West Virginia was to be charged with all State expenditures within the limits thereof. But she vigorously protested against being charged with any sum expended in the form of a purchase of stocks.

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. Apart from the language used, what is just and equitable is a judicial question similar to many that arise in private litigation, and in nowise beyond the competence of a tribunal to decide.

The ground now is clear, so far as the original contract between the two States is concerned. The effect of that is that West Virginia must bear her just and equitable proportion of the public debt as it was intimated in *Hartman* v. *Greenhow*, 102 U. S. 672, so long ago as 1880, that she should. It remains for us to consider such subsequent acts as may have affected the original liability or as may bear on the determination of the amount to be paid. On March 30, 1871, Virginia, assuming that the equitable share of West Virginia was about one-third, passed an act authorizing an exchange of the outstanding bonds, &c., and providing for the funding of two-thirds of the debt with interest accrued to July 1, 1871, by the issue of

new bonds bearing the same rate of interest as the old, six per cent. There were to be issued at the same time, for the other one-third, certificates of same date, setting forth the amount of the old bond that was not funded, that payment thereof with interest at the rate prescribed in the old bond would be provided for in accordance with such settlement as should be had between Virginia and West Virginia in regard to the public debt, and that Virginia held the old bonds in trust for the holder or his assignees. There were further details that need not be mentioned. The coupons of the new bonds were receivable for all taxes and demands due to the State. *Hartman* v. *Greenhow*, 102 U. S. 672. *McGahey* v. *Virginia*, 135 U. S. 662. The certificates issued to the public under this statute and outstanding amount to $12,703,451.79.

The burden under the statute of 1871 still being greater than Virginia felt able to bear, a new refudning act was passed on March 28, 1879, reducing the interest and providing that Virginia would negotiate or aid in negotiating with West Virginia for the settlement of the claims of certificate holders and that the acceptance of certificates 'for West Virginia's one-third' under this act should be an absolute release of Virginia from all liability on account of the same. Few of these certificates were accepted. On February 14, 1882, another attempt was made, but without sufficient success to make it necessary to set forth the contents of the statute. The certificates for balances not represented by bonds, "constituting West Virginia's share of the old debt," stated that the balance was "to be accounted for by the state of West Virginia without recourse upon this commonwealth."

On February 20, 1892, a statute was passed which led to a settlement, described in the bill as final and satisfactory. This provided for the issue of bonds for nineteen million dollars in exchange for twenty-eight millions outstanding, not funded, the new bonds bearing interest

at two per cent for the first ten years and three per cent for ninety years; and certificates in form similar to that just stated, in the act of 1882. On March 6, 1894, a joint resolution of the Senate and House of Delegates was passed, reciting the passage of the four above mentioned statutes, the provisions for certificates, and the satisfactory adjustment of the liabilities assumed by Virginia on account of two-thirds of the debt, and appointing a committee to negotiate with West Virginia, when satisfied that a majority of the certificate holders desired it and would accept the amount to be paid by West Virginia in full settlement of the one-third that Virginia had not assumed. The State was to be subjected to no expense. Finally an act of March 6, 1900, authorized the commission to receive and take on deposit the certificates, upon a contract that the certificate holders would accept the amount realized from West Virginia in full settlement of all their claims under the same. It also authorized a suit if certain proportions of the certificates should be so deposited, as since then they have been—the State, as before, to be subjected to no expense.

On January 9, 1906, the commission reported that apart from certificates held by the State and not entering into this account, there were outstanding of the certificates of 1871 in the hands of the public $12,703,451.79, as we have said, of which the commission held $10,851,-294.09, and of other certificates there were in the hands of the public $2,778,239.80, of which the commission held $2,322,141.32.

On the foregoing facts a technical argument is pressed that Virginia has discharged herself of all liability as to one-third of the debt; that, therefore, she is without interest in this suit, and cannot maintain it on her own behalf; that she cannot maintain it as trustee for the certificate holders, *New Hampshire* v. *Louisiana*, 108 U. S. 76; and that the bill is multifarious in attempting to

unite claims made by the plaintiff as such trustee with some others set up under the Wheeling ordinance, &c., which, in the view we take, it has not been necessary to mention or discuss. We shall assume it to be true for the purposes of our decision, although it may be open to debate, *Greenhow* v. *Vashon,* 81 Va. 336, 342, 343, that the certificate holders who have turned in their certificates, being much the greater number, as has been seen, by doing so, if not before, surrendered all claims under the original bonds or otherwise against Virginia to the extent of one-third of the debt. But even on that concession the argument seems to us unsound.

The liability of West Virginia is a deep seated equity, not discharged by changes in the form of the debt, nor split up by the unilateral attempt of Virginia to apportion specific parts to the two States. If one-third of the debt were discharged in fact, to all intents, we perceive no reason, in what has happened, why West Virginia should not contribute her proportion of the remaining two-thirds. But we are of opinion that no part of the debt is extinguished, and further, that nothing has happened to bring the rule of *New Hampshire* v. *Louisiana* into play. For even if Virginia is not liable she has the contract of West Virginia to bear an equitable share of the whole debt, a contract in the performance of which the honor and credit of Virginia is concerned, and which she does not lose her right to insist upon by her creditors accepting from necessity the performance of her estimated duty as confining their claims for the residue to the party equitably bound. Her creditors never could have sued her if the supposed discharge had not been granted, and the discharge does not diminish her interest and right to have the whole debt paid by the help of the defendant. The suit is in Virginia's own interest, none the less that she is to turn over the proceeds. See *United States* v. *Beebe,* 127 U. S. 338, 342. *United States*

v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120, 125, 126. Moreover, even in private litigation it has been held that a trustee may recover to the extent of the interest of his *cestui que trust. Lloyd's* v. *Harper*, 16 Ch. D. 290, 315. *Lamb* v. *Vice*, 6 M. & W., 467, 472. We may add that in all its aspects it is a suit on the contract, and it is most proper that the whole matter should be disposed of at once.

It remains true then, notwithstanding all the transactions between the old Commonwealth and her bondholders, that West Virginia must bear her equitable proportion of the whole debt. With a qualification which we shall mention in a moment, we are of opinion that the nearest approach to justice that we can make is to adopt a ratio determined by the master's estimated valuation of the real and personal property of the two States on the date of the separation, June 20, 1863. A ratio determined by population or land area would throw a larger share on West Virginia, but the relative resources of the debtor populations are generally recognized, we think, as affording a proper measure. It seems to us plain that slaves should be excluded from the valuation. The master's figures without them are, for Virginia $300,887,367.74, and for West Virginia $92,416,021.65. These figures are criticised by Virginia, but we see no sufficient reason for going behind them, or ground for thinking that we can get nearer to justice in any other way. It seems to us that Virginia cannot complain of the result. They would give the proportion in which the $33,897,073.82 was to be divided, but for a correction which Virginia has made necessary. Virginia with the consent of her creditors has cut down her liability to not more than two-thirds of the debt whereas at the ratio shown by the figures her share, subject to, mathematical correction, is about .7651. If our figures are correct, the difference between Virginia's share, say $25,931,261.47, and the amount that the

creditors were content to accept from her, say $22,598,-049.21, is $3,333,212.26; subtracting the last sum from the debt leaves $30,563,861.56 as the sum to be apportioned. Taking .235 as representing the proportion of West Virginia we have $7,182,507.46 as her share of the principal debt.

We have given our decision with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed. In any event, before we could put our judgment in the form of a final decree there would be figures to be agreed upon or to be ascertained by reference to a master. Among other things there still remains the question of interest. Whether any interest is due, and if due from what time it should be allowed and at what rate it should be computed, are matters as to which there is a serious controversy in the record, and concerning which there is room for a wide divergence of opinion. There are many elements to be taken into account on the one side and on the other. The circumstances of the asserted default and the conditions surrounding the failure earlier to procure a determination of the principal sum payable, including the question of laches as to either party, would require to be considered. A long time has elapsed. Wherever the responsibility of the delay might ultimately be placed, or however it might be shared, it would be a severe result to capitalize charges for half a century—such a thing hardly could happen in a private case analogous to this. Statutes of limitation, if nothing else, would be likely to interpose a bar. As this is no ordinary commercial suit, but, as we have said, a quasi-international difference referred to this Court in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies, we think it best at this stage to go no farther, but to await the effect of a conference between the parties, which, whatever the outcome, must take

place. If the cause should be pressed contentiously to the end, it would be referred to a master to go over the figures that we have given provisionally, and to make such calculations as might become necessary. But this case is one that calls for forbearance upon both sides. Great States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end.

True copy.

Test: JAMES H. MCKENNEY,
[Seal of Court.] *Clerk Supreme Court, U.S.*

Opinion Overruling Motion to Proceed to Final Hearing.

October 30, 1911.

Commonwealth of Virginia

v.

State of West Virginia.

SUPREME COURT—*Original Jurisdiction—Suit Between States—Motion for Final Decree.*

The disposition of the authorities of the state of West Virginia to await the next regular session of the legislature, convening more than one year hence, before considering the matters left open by the Federal Supreme Court when determining the amount which such state should pay as its equitable share of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, does not furnish sufficient reason for granting a motion on behalf of the state of Virginia, that the court proceed to settle and determine all the questions left open by its decision.

Mr. SAMUEL W. WILLIAMS, Attorney General of Virginia, for Plaintiff.

Mr. WM. G. CONLEY, Attorney General of West Virgini, for Defendant.

Mr. Justice HOLMES delivered the opinion of the Court:

This is a motion on behalf of the Commonwealth of Virginia that the Court proceed to determine all questions left open by the decision of March 6, 1911. 220 U. S. 1. The grounds of the motion are these: On April 20, 1911, the Virginia Debt Commission wrote to the Governor of West Virginia, referring to the suggestion of a conference between the parties in the decision, and requested that he would take steps that would lead to such a conference at an early date. At that time the Governor of West Virginia had called an extra session of the Legislature upon another matter. The constitution forbade the Legislature, when so convened, entering upon any business except that stated in the call, but as there were twenty-six days between the call and the session

that followed it, there was time for the Governor to issue a further proclamation on the subject of the debt. The Governor in his message to the Legislature referred to the matter, and put, as questions to be considered, whether the appointment of the Virginia Debt Commission was enough to require West Virginia now 'to take the initiative,' and whether a Commission should be appointed to meet the Virginia Commission. He also stated that if, without formal action of three-fifths of the body under the Constitution, a majority should express to him the opinion that the Legislature ought to be called into extraordinary session to consider the matter, he should deem it sufficient reason for a call. But it seems that he did not use his power of his own motion or receive such an expression as induced him to use it, and the Legislature does not meet in regular session until January, 1913. The Commonwealth of Virginia concludes from these facts that there is no likelihood of a conference with any satisfactory results.

The Attorney General of West Virginia answered that the members of the Legislature convened in May, 1911, were elected before this cause had bene argued and under conditions that left them uncertain as to the wishes of their constituents; that the Governor was of opinion that he could not constitutionally amend his proclamation so as to embody consideration of the debt, and that there is no one in West Virginia except the Legislature that has power to deal with the matter. He then suggested a doubt whether the Virginia Debt Commission was empowered to deal with the case in its present phase, in view of the provision in the Resolution creating it that it should not negotiate except upon the basis that Virginia is bound only for the two-thirds of the debt that she had provided for, and concluded that this Court ought not to act before the West Virginia Legislature at its next reg-

ular session can consider the case in the spirit anticipated by the opinion of the Court.

With regard to the doubt implied by the Governor of West Virginia whether it now is incumbent upon that State to take the initiative, and that suggestion by its Attorney General whether the Virginia Debt Commission has the necessary power, we are of opinion that neither of them furnishes a just ground for delay. The conference suggested by the Court is a conference in the cause. The body that directed the institution of the suit has taken the proper step on behalf of the plaintiff, and it is for the defendant to say whether it will leave the Court to enter a decree irrespective of its assent or will try to reach a result that the Court will accept. The conference is not for an independent compromise out of Court, but an attempt to settle a decree. The provision as to negotiations, in the Virginia Resolution preceding the Statute authorizing this suit, refers, we presume, to a settlement out of Court and has nothing to do with the conduct of the cause. If the parties in charge of the suit consent, this Court is not likely to inquire very curiously into questions of power, if, on its part, it is satisfied that they have consented to a proper decree.

A question like the present should be disposed of without undue delay. But a State cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed. Assuming, as we do, that the Attorney General is correct in saying that only the Legislature of the defendant State can act, we are of opinion that the time has not come for granting the present motion. If the authorities of West Virginia see fit to await the regular session of the Legislature, that fact is not sufficient to prove that when the voice of the State is heard it will proclaim unwillingness to make a rational effort for peace.

Motion overruled without prejudice.

Opinion Overruling Motion to Proceed to Final Hearing.

Decided November 10, 1913.

Commonwealth of Virginia

v.

State of West Virginia.

FEDERAL SUPREME COURT—*Original Jurisdiction—Suit Between States—Motion for Final Decree.*

The assurance by the attorney general of West Virginia, on behalf of that state, that a commission appointed under a joint resolution of the state legislature is endeavoring to effect a settlement of the controversy, and needs further time to complete its labors, requires the denial of a motion by the commonwealth of Virginia that the Federal Supreme Court proceed at once to settle and determine all the questions left open by it when determining the amount which West Virginia should pay as its equitable share of Virginia's public debt, which was assumed by West Virginia at the time of its creation as a state.

On motion of the Commonwealth of Virginia that the court proceed to a final hearing of the questions left open by its decision when determining the amount which West Virginia should pay as its equitable share of the Virginia public debt, which was assumed by West Virginia at the time of its creation as a state. Overruled and case assigned for final hearing on April 13, 1914.

The facts are stated in the opinion.

Mr. SAMUEL W. WILLIAMS, Attorney General of Virginia, and Messrs. RANDOLPH HARRISON, WILLIAM A. ANDERSON, and JOHN B. MOON for the Commonwealth of Virginia.

Messrs. HOLMES CONRAD and SANFORD ROBINSON, for the bondholding creditors.

Mr. A. A. LILLY, Attorney General of West Virginia, and Messrs. V. B. ARCHER, CHARLES E. HOGG, and JOHN H. HOLT for the state of West Virginia.

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

In March, 1911 (Virginia v. West Virginia, 220 U. S. 1, 55 L. ed. 353, 31 Sup. Ct. Rep. 330), our decision was given "with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed." In view, however, of the nature of the controversy, of the consideration due the respective states, and the hope that by agreement between them further judicial action might be unnecessary, we postponed proceeding to a final decree, and left open the question of what, if any, interest was due, and the rate thereof, as well as the right to suggest any mere clerical error which it was deemed might have been committed in fixing the sum found to be due upon the basis of liability which was settled. In October, 1911, we overruled without prejudice a motion made by Virginia to proceed at once to a final determination of the cause on the ground that there was no reasonable hope of an amicable adjustment. Virginia v. West Virginia, 222 U. S. 17, 56 L. ed. 71, 32 Sup. Ct. Rep. 4.

The motion on behalf of the State of Virginia now before us is virtually a reiteration of the former motion to proceed, and is based upon the ground that certain negotiations which have taken place between the Virginia Debt Commission representing Virginia, and a commission representing West Virginia, appointed in virtue of a joint resolution of the legislature of that state, adopted in 1913, make it indubitably certain that no hope of an adjustment exists. But without reviewing the course of the negotiations relied upon, we think it suffices to say that, in resisting the motion, the attorney general of West Virginia, on behalf of that state, insists that the view taken by Virginia of the negotiations is a misappre-

hension of the purposes of West Virginia, as that state, since the appointment of the commission on its behalf, has been relying upon that commission "to consummate such an adjustment and settlement of said controversy as to commend the result of its negotiations to the favorable consideration of the governor and the legislative branch of its government, and thus terminate said controversy, to the satisfaction of her people and the commonwealth of Virginia, and upon the principles of honor and justice to both states, and in fairness to the bondholders of the debt for whose benefit this controversy is still pending." The attorney general further stating that, in order to accomplish the results just mentioned, a subcommittee of the Commission of West Virginia has been and is engaged in investigating the whole subject with the purpose of preparing a proposition to be submitted to the Virginia Debt Commission, to finally settle the whole matter, and that a period of six months' time is necessary to enable the committee to complete its labors.

Having regard to these representations, we think we ought not to grant the motion to proceed at once to consider and determine the cause, but should, as near as we can do so consistently with justice, comply with the request made for further time to enable the commissioners of West Virginia to complete the work which we are assured they are now engaged in performing for the purpose of effecting a settlement of the controversy. As, however, the granting of six months' delay would necessitate carrying the case possibly over to the next term, and therefore be in all probability an extension of time of more than a year, we shall reduce somewhat the time asked, and direct that the case be assigned for final hearing on the 13th day of April next, at the head of the call for that day.

Opinion Directing Filing of Supplemental Answer and Referring Cause to Master

Decided June 8, 1914.

SUPREME COURT—*Original Jurisdiction—Suit Between States—Filing Supplemental Answer.*

The extraordinary nature of the suit between the commonwealth of Virginia and the state of West Virginia, to determine the amount due to the former by the latter as its equitable share of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, requires that, contrary to the ordinary rules of legal procedure, the state of West Virginia be permitted, after the Federal Supreme Court has adjudged the amount due, save for clerical errors and the question of interest, to file a supplemental answer asserting the existence of credits which it is averred if properly considered would materially reduce the sum so fixed, and alleging various objections to the allowance of interest, although most of the items embraced in such supplemental answer were contained in the master's report, and all were available then for every defense now based upon them if their consideration had been pressed in the aspect and with the assertions of right now made.

Argued April 16, 17, 1914. Decided June 8, 1914.

Original Bill in equity, filed by the Commonwealth of Virginia against the state of West Virginia, seeking an adjudication of the amount due to the former as the equitable share of the public debt of the original state of Virginia, which was assumed by the state of West Virginia at the time of its creation as a state. On motion of the state of West Virginia for leave to file a supplemental answer. Granted.

The facts are stated in the opinion.

Mr. A. A. LILLY, Attorney General for West Virginia, and Messrs. JOHN H. HOLT, CHARLES E. HOGG, and V. B. ARCHER, in support of the motion.

MESSRS. WILLIAM A. ANDERSON, RANDOLPH HARRISON, JOHN B. MOON, and Mr. JOHN GARLAND POLLARD, Attorney General of Virginia, opposed.

Messrs. SANFORD ROBINSON and HOLMES CONRAD also opposed.

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

This case, which was begun in 1906, was elaborately argued in 1907 on a demurrer, which was overruled. 206 U. S. 290, 51 L. ed. 1068, 27 Sup. Ct. Rep. 702. It was again argued in 1908 on a motion to appoint a master. 209 U. S. 514, 52 L. ed. 914, 28 Sup. Ct. Rep. 614. Before that officer there was an extended hearing, and a full report of all the matters involved was filed in March, 1910. It was then argued on a motion to take further testimony, and was ultimately heard in an argument which extended many days, every party in interest being represented, in the month of January, 1911.

Notwithstanding these facts, when in March, 1911, the court came to decide the controversy, although it fully reviewed and passed upon the fundamental issues, as its obvious duty required it to do, and fixed the principal sum due by the state of West Virginia to the state of Virginia, in view of the consideration due to the parties as states, and that the cause was, as then said, "no ordinary commercial suit, but, . . . a quasi-international difference referred to this court in reliance upon the honor and constitutional obligations of the states concerned rather than upon ordinary remedies," the controversy was not completely and irrevocably disposed of, but was left open for a time not specified, to the end that any clerical errors that might have crept into the calculations of the sums due could be corrected, and to give the states time to consider the subject of liability for interest in the light of what had been decided, and to agree as to the rate and period of the interest to be paid on the principal sum which was determined. 220 U. S. 1, 55 L. ed. 353, 31 Sup. Ct. Rep. 330.

On the convening of the court in the following October, 1911, a motion was made on behalf of the state of Virginia to proceed at once to a final decree. Listening

to the suggestion of the state of West Virginia to the effect that it desired further time to consider the subject, and in view of the public considerations which had prevailed when the decree was entered the motion of Virginia was overruled. 222 U. S. 17, 56 L. ed. 71, 32 Sup. Ct. Rep. 4.

Yet further, when, in November, 1913, another motion on the part of Virginia was made to set the case down to be finally disposed of at once upon the statement that no agreement between the parties was possible, again giving heed to the request of West Virginia, through its constituted officers, for a postponement for a stated time, and to the statement that they were engaged in an honest endeavor to deal with the controversy, and, if possible, to come to an agreement as to the subjects left open, the motion of Virginia was again refused (231 U. S. 89, ante, 29, 34 Sup. Ct. Rep. 29), and as it was possible to give to the state of West Virginia all the time which that state, in resisting the motion, asked, and yet secure against the possibility of the hearing being carried over to another term, the case was assigned for hearing on the 13th of April of this year. When that day was reached, the state of West Virginia, in accord with a motion filed some days before, prayed leave to be permitted to file a supplemental answer asserting the existence of credits which, if properly considered, would materially reduce the sum fixed as due to the state of Virginia, the said answer in addition asserting various grounds why interest should not be allowed in favor of Virginia and against West Virginia on the sum due. Resisting this request, the state of Virginia insists that the items embraced in the supplemental answer asked to be filed had in effect already entered into the considerations by which the principal sum due was fixed, and that if not, the case should not be postponed for the purpose of permitting the rights urged in the answer to be

availed of because every item concerning such alleged rights was proved in the case before the master, was mentioned in his report, and was known or could have been known by the use of ordinary diligence by those representing West Virginia. And it is this controversy we now come to dispose of.

Without intimating any opinion whatever as to whether the items with which the proposed supplemental answer deals entered in the processes of calculation or reasoning by which the sum due was previously fixed, and moreover, without intimating any opinion as to how far the items embraced in the answer could serve as credits upon the sum previously found due, and therefore to that extent reduce the amount, we think it is obvious that most of the items embraced in the answer were contained in the master's report and in any event all were available then for every defense now based upon them if their consideration had been pressed in the aspect and with the assertions of right now made.

The question then is, Under these conditions ought the permission to file the supplemental answer be granted? We think it must be conceded that in a case between ordinary litigants the application of the ordinary rules of legal procedure would render it impossible, under the circumstances which we have stated, to grant the request. We are of the opinion, however, that such concession ought not to be here controlling. As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between states, involving grave questions of public law, determinable by this court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not

now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must, in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice after the amplest opportunity to be heard, has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving state, also in our opinion operates no injustice to the opposing state, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy.

Because of these convictions, we therefore make the following order:

That the motion on the part of the state of West Virginia to file the supplemental answer be and the same is hereby granted; and that the averments in such answer be and the same shall be considered as traversed by the state of Virginia; that the subject-matter of the supplemental answer as traversed be at once referred for consideration and report to Charles E. Littlefield, Esq., the master before whom the previous hearings were had, with directions to hear and consider such evidence and testimony as to the matters set forth in the supplemental answer as the state of West Virginia may deem advisable to proffer, and such counter showing on the part of the state of Virginia as that state may deem advisable to make. The report on the subject to embrace the testimony so taken and the conclusions deduced therefrom, as well as the views of the master concerning the operation and effect of the proof thus offered, if any, upon the principal sum found to be due by the previous

decree of this court. Nothing in this order to vacate or change in any manner or in any particular the previous decree, and the same to stand wholly unaffected by the order now made or any action taken thereunder until the examination and report herein provided for is made and this court acts upon the same. It is further directed that the proceedings before the master be so conducted as to secure a report on or before the 2nd Monday of October, 1914.

TABLE OF CONTENTS

Notice to Virginia 1

Motion to File Supplemental Answer 3
State of Facts 4
Objects of Motion 6
Grounds of Motion 6

Supplemental Answer 11
Securities Retained by Virginia 22
Securities Purchased by Virginia 23
Residue of Securities Purchased by Virginia 26
Interest on Loans and Dividends on Stock 27
Securities and Property given away 28
Moneys Collected from West Virginia Counties 31
Cash on Hand January 1, 1861 31

Affidavit 39

Exhibit A 43
B 57
C 59

Argument of John H. Holt, Esq 63
A. A. Lilly, Attorney General 97

Opinion of U. S. Court Overruling Demurrer to Bill 137
Decree Referring Cause to Master 161
Adjudicating Principles of Cause 165
Overruling Motion to Proceed to Final Hearing 182
Same 185
Directing Filing of Supplemental Answer 188