IN THE

Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 2 ORIGINAL.

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

ARGUMENT BEFORE MASTER IN SUPPORT OF WEST VIRGINIA CREDITS UPON HER ASSIGNED PROPORTION OF THE PRINCIPAL OF THE VIRGINIA DEBT.

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JOHN H. HOLT,
Associate Counsel.

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STATEMENT OF CASE.

The State of Virginia, on the twenty-sixth day of February, 1906, filed her bill in the Supreme Court of the United States against the State of West Virginia, seeking to have West Virginia's equitable proportion of the Virginia debt as it existed prior to

the first day of January, 1861, ascertained, and the amount thereof decreed against her; and such proceedings were had that the Supreme Court, on the sixth day of March, 1911, Mr. Justice Holmes delivering the opinion, ascertained and decided the following matters and things:

1. That the sum total of the debt of the old Commonwealth of Virginia existing prior to the first day of January, 1861, and to be apportioned between the two States, was $30,563,861.56;

2. That, governed by the relative resources of the two debtor populations, Virginia should pay 76½ per cent. of that amount, and West Virginia the remaining 23½ per cent;

3. That West Virginia's part of the principal so calculated amounted to $7,182,507.46, which amount was permitted to stand undiminished and undisturbed, for the reason that, as the record then stood, it did not appear that there were any stocks of value on hand;

4. The question of interest was left open, and,

5. Without entering a decree, the two Commonwealths were invited to imparl, and report some arrangement of their differences without the further compulsion of the Court.

Virginia v. West Virginia, 220 U. S., pages 1-36; 55 L. ed., 353-61.

Virginia already had a Debt Commission, and, pursuant to this suggestion of the Court, West Virginia appointed a Commission, with authority and direction to confer with the Virginia Commission, and ascertain what could be accomplished in the

way of compromise. Pending negotiations between the two Commissions, the West Virginia Commission appointed a sub-committee of its own membership, with direction to investigate the ownership, value and disposition of any assets purchased with the common funds prior to and held by Virginia on the first day of January, 1861, which might be applicable to the discharge or diminution of the common debt. This investigation was directed with the view of making it the basis of a proposition of settlement to the State of Virginia; and, after the sub-committee's work had been completed, it reported to the full West Virginia Commission that it had discovered, through an examination of the archives of the State of Virginia, that Virginia was, on the first day of January, 1861, the owner of cash, railroad and bank stocks and other securities, purchased out of the proceeds of the bonds evidencing the debt in question, of the reasonable value of $21,000,000, and applicable to the discharge of the debt; that some of these securities were still owned and enjoyed by Virginia; that others had been sold by her for large sums of money, and still others given away by her, without the knowledge or consent of West Virginia, and without ever having reported to her a single transaction in relation thereto.

In other words, this investigation made it perfectly plain that Virginia was seeking to compel West Virginia to pay a large proportion of the debt unaided by common assets, while she, Virginia, was making away with the whole of the common assets, for the purpose of applying the same, and the proceeds thereof, exclusively to the payment of her part of the debt.

The full Commission, upon receipt of this report, feeling that if West Virginia were obligated to pay 23½% of the bonds, with the proceeds of which the assets in question were purchased, she would undoubtedly be entitled to 23½% of the assets so purchased, took 23½% of the value of the assets so reported, and subtracted the same from West Virginia's ascertained proportion of the principal of the debt, viz., $7,182,507.46, leaving a balance of $2,327,195.28, and offered this amount to the State of Virginia in settlement of West Virginia's proportion of the debt, both principal and interest, upon the theory that she was not chargeable with interest.

Supplemental Answer, pages 48-52.

This proposition was rejected by the State of Virginia, and she immediately moved the Supreme Court to proceed to a final decree. At the same time, the State of West Virginia moved said Court for leave to file a supplemental answer to the original bill of the State of Virginia, setting up the assets in detail hereinbefore described, and claiming her proportion thereof as credits upon the part of the principal of the debt ascertained to be hers. The proposed supplemental answer was tendered with the motion for the inspection of the Court, and both motions were argued together, with the result that, on June 8, 1914, the Supreme Court entered an order directing the supplemental answer of the defendant to be filed, entered a general traverse thereto for the State of Virginia, and referred the cause to the Hon. Charles E. Littlefield, Special Master, "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 ad-

visable to proffer, and such counter showing on the part of the State of Virginia as that State may deem ~~mony as to the matters set forth in the supplemental~~ 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."

Virginia v. West Virginia, 231 U. S., 89.

THE EVIDENCE.

The Master has heard the testimony of both States, and has given unto each the full latitude of opportunity to be heard directed by the decree.

The burden was upon West Virginia to prove her credits, and she has done so, according to the judgment of her counsel, by the following witnesses, documents and schedules, which it is thought best to briefly summarize before discussing the questions of law springing thereout.

The testimony was confined to the ownership, value and disposition of the securities and cash set forth and classified in the defendant's supplemental answer, and it will be here treated in that order.

CLASS A.

CASH IN HANDS OF THE TREASURER OF THE COMMONWEALTH OF VIRGINIA TO THE CREDIT OF VARIOUS FUNDS JANUARY 1, 1861.

Mr. C. W. Hillman, an expert accountant of long

and comprehensive experience, after a detailed examination of the books and records of the State of Virginia, as well as an examination of the records of such of the companies issuing the securities described in the supplemental answer as could be found, prepared schedules showing the result of his examination, and was called to the stand to testify in relation thereto.

The first schedule is Defendant's Exhibit No. 1, and covers Class A. It is based upon the undisputed records of Virginia, and shows that that Commonwealth had in her treasury on the first day of January, 1861, to the credit of the Literary, Board of Public Works, Commonwealth and Sinking Funds, the sum of $1,102,036.16. And this schedule was checked over by Mr. Potter, the expert accountant for Virginia, and declared by him in open Court to be correct as appears from the records of that State. About this, then, there is no contention, and the only question is whether or not the whole amount was applicable to the payment of the debt existing prior to the first day of January, 1861. And, whatever may be said about the moneys in the Literary, Board of Public Works and Commonwealth Funds, there can be no doubt about the amount in the Sinking Fund. That fund was created under the Virginia Constitution of 1851 for that, and for no other, purpose, and the amount of cash found in it on January 1, 1861, was $819,250.03. In other words, it represented more than two-thirds of all the cash on hand; but as the entire debt was to be settled or apportioned as of that date, the entire assets on hand should likewise be considered.

CLASS B.

RICHMOND, FREDERICKSBURG & POTOMAC R. R. CO. STOCK.

The second schedule introduced through Mr. Hillman, and constituting Defendant's Exhibit No. 2 (pages 2-12 of printed exhibits), consists of the main exhibit with four sub-sheets or supporting exhibits. These exhibits were based upon the records in the second Auditor's office of the State of Virginia, and upon the annual reports of the Richmond, Fredericksburg & Potomac Railroad Company on file in the office of its Treasurer in the City of Richmond, and both the main and the underlying exhibits were checked by Mr. Potter, accountant for the State of Virginia, and announced by him to be correct.

The main exhibit shows that the par value of this stock was $100 per share, and that the State of Virginia had purchased prior to the first day of January, 1861, and was still the owner on that date, of 2,752 shares, with a par value of $275,200. It further shows, by a comparison of the assets and liabilities of this Company, that its stock had a book value on the first day of January, 1861, of $150 per share, and that the book value on that date of the 2,752 shares owned by the State of Virginia amounted to $412,800.

This book value was ascertained by taking the balance sheets of the Richmond, Fredericksburg & Potomac Railroad Company, ascertaining the surplus of its assets above its liabilities, and calculat-

ing the consequent premium upon the stock. Sub-sheet one shows the trial balance of that road for the year ending March 31, 1859, disclosing a surplus of $461,134.54, and a consequent book value of its stock as of that date of 144.2. Sub-sheet two shows its trial balance for the year ending March 31, 1860, disclosing a surplus of $505,403.22, and a consequent book value of its stock upon that date of 148.4. Sub-sheet three gives the trial balance for the year ending March 31, 1861, and discloses a surplus of $562,819.05, and a consequent book value of the stock upon that date of 150.4. Sub-sheet four covers the trial balance for the year ending March 31, 1862, wherein a surplus of $656,577.85 is shown, and a consequent book value of the stock upon that date of 157.4.

From these calculations, it will be seen that the increase in the book value of the stock for the year ending March 31, 1861, over the year preceding was 2%, but this overruns January 1, 1861, by one-fourth of a year; so that, in order to get the book value for January 1, 1861, instead of March 31, 1861, three-fourths of said 2%, or 1½% should be added to the book value of March 31, 1860, of 148.4, making a book value for the first day of January, 1861, of 149.9, or, as the schedule puts it, of 150.

If, therefore, the book value of this stock is to be taken, under the circumstances of this case, as its true and actual value, then, in order to ascertain the amount of West Virginia's credit on account of Class B, we would take 23½% of $412,800, that being the total book value of the shares owned and held by Virginia on January 1, 1861.

This exhibit also gives a table of dividends paid by this road upon its stock from 1850 to 1864, inclusive, and shows an average 7% annual dividend during that period. If, therefore, the dividends should be taken as the test of value, and stock should be considered worth par that pays 6% dividends, this stock on January 1, 1861, would be worth $116.66, or the total value of the shares held by the State of Virginia would have been $321,048.32; but this method of valuation could not be adopted, under the circumstances of this case, because the exhibits herein show that the surplus or excess of assets over liabilities upon which the valuation of $150 per share is based was ascertained after these same dividends had been deducted. In other words, the book value still stands at $150 per share, even after the deduction of rather handsome dividends, and on account of the large surplus that was laid away.

Nothing was shown in opposition to this evidence by the State of Virginia, excepting the introduction of alleged market quotations upon the stock. These quotations for January 1, 1861, only showed a market value, if they showed anything, of seventy-six dollars on the hundred; but in our argument to follow, where we shall undertake to show the legal value of book values in the absence of dependable market quotations, we will likewise undertake to show from the plaintiff's own schedule upon the subject of market quotations that the market quotations here relied upon are utterly worthless and inadmissible.

CLASS C.

SECURITIES PURCHASED AND LOANS MADE BY VIRGINIA OUT OF THE COMMON FUNDS PRIOR TO THE FIRST DAY OF JANUARY, 1861, WHICH SECURITIES WERE SOLD AND WHICH LOANS WERE COLLECTED BY HER AFTER THAT DATE WITHOUT THE KNOWLEDGE OR CONSENT OF WEST VIRGINIA, AND WITHOUT ACCOUNTING THEREFOR.

The schedules introduced and proven upon this subject constitute Defendant's Exhibit No. 3, which consists of its main exhibit No. 3, found on pages 12a and 12b of the printed exhibits (being a substitute for the exhibit on page 13) and the underlying exhibits designated Defendant's Exhibit No. 3, Asset 1 to Asset 19, inclusive, found on pages 14 to 45, inclusive, of the printed exhibits.

The main exhibit No. 3 (pages 12a and 12b) consists of nineteen items, exclusive of the Manassas Gap Railroad, which should be omitted therefrom because discussed and claimed elsewhere, and shows a total book value as of January 1, 1861, after excluding the Manassas Gap Railroad, of $12,711,175.78.

This main exhibit discloses a stock ownership by the State of Virginia in nine different railroad, canal and navigation companies prior to and on the first day of January, 1861, and further shows nine loans made by her prior to that time, and still uncollected on that date, made to the same railroad, canal and navigation companies; also a claim

against the Government of the United States, Selden-Withers & Company, a loan to Washington College, and the ownership by Virginia of certain Richmond Academy bonds and of dividend bonds issued by the Virginia Central Railroad Company.

The amount of these loans is undisputed, and it further appears upon the main exhibit that they were all subsequently paid in full, principal and interest, including the loan to the Washington College, the claim against the United States and the claim against Selden-Withers & Company, except the loan to the Richmond & Danville Railroad Company and the one to the Virginia & Tennessee Railroad Company. From this the conclusion is inevitable (with the two exceptions already made) that these loans were at the least worth their face on the first day of January, 1861 (and that is all that is claimed for them); because the money was actually advanced, and was subsequently paid, principal and interest. In other words, the sums therein set down were loaned to solvent and responsible borrowers. The details of these loans and their final payment are set down in the underlying exhibits made a part of Defendant's Exhibit No. 3 (see Defendant's Exhibit No. 3, asset 1, page 16; asset 2, page 21; asset 4, page 26; asset 7, page 29; asset 8, pages 30-1; asset 9, page 32; asset 10, pages 33-4; asset 15, page 39; asset 17, page 41; asset 18, pages 42-3, and asset 19, page 44).

With respect to the loan to the Richmond & Danville Railroad, it had a face value, as shown by the books of Virginia, on the first day of January, 1861, of $565,803.34 (all that is claimed for it), although it was settled by Virginia in the years 1882 and 1884

by the receipt of a less sum, viz., the sum of $438,900 (see Defendant's Exhibit No. 3, asset 2, page 21, printed exhibits).

With respect to the loan to the Virginia & Tennessee Railroad Company, it was for the sum of $1,000,000, and was carried upon the books of the State as of that value on the first day of January, 1861, although it was never paid in full, the State having received thereon through various payments in the year 1863 the sum of $886,685 (see Defendant's Exhibit No. 3, asset 8, page 31, printed exhibits).

Coming now to the railroad stocks embraced in this exhibit, we find that the book value as of January 1, 1861, of the stock of the Orange & Alexandria, the Richmond & Danville, the Richmond & Petersburg and the Virginia Central Railroad Companies was ascertained by taking the last balance sheet of these roads obtainable, viz., September 30, 1856, and ascertaining therefrom the surplus on hand at that time, and from the reports of said companies to the State of Virginia the profits for the years 1857, 1858, 1859, 1860 and 1861, which were added to the surplus, and the book value of the stock was derived therefrom (see Defendant's Exhibit No. 3, asset 1, page 14, printed exhibits; asset 2, page 19; asset 3, page 22, and asset 4, page 24). This book value was multiplied by the number of shares of stock in the case of each railroad, for the purpose of ascertaining the total amount of the book value as of January 1, 1861, the same being the amount claimed in the schedule, and going to make up with the loans and the other stocks therein set down the sum of $12,711,175.78.

With respect to the residue of the stock embraced in this schedule; that is to say, the stock owned in the Alexandria, Loudoun & Hampshire Railroad Company, the Roanoke Navigation Company, the Alexandria Canal Company, the Upper Appomattox Company and the Dismal Swamp Canal Company, nothing was ascertainable but the fact that Virginia had, up to the first day of January, 1861, purchased a certain number of shares of stock in each company, and the amount paid by her for each, and, in consequence, the amounts paid for this stock, being the amounts at which it was carried upon the books of the State of Virginia, were taken as the presumptive value thereof on the first day of January, 1861; and the State of Virginia has offered no evidence to the contrary. (See Defendant's Exhibit No. 3, asset 6, page 28, printed exhibits; asset 11, page 35; asset 12, page 36; asset 13, page 37, and asset 14, page 38.)

This leaves the Blue Ridge Railroad Company. Virginia owned no stock therein, but built the same out of the proceeds of the bonds that evidence the debt to the payment of which West Virginia is asked to contribute herein; and, on the first day of January, 1861, she had spent $1,604,723.23 in the construction thereof; and as there is nothing in her archives to show beyond the fact of this expenditure what the real value of the property was on the first day of January, 1861, the cost of construction has been taken as making a presumptive case against her. If the value of the investment be less than that amount, it is up to the State of Virginia to show the fact, through the misapplication of funds, or other-

wise, and she has offered nothing of that character (see Defendant's Exhibit No. 3, asset 5, page 27).

We have here again involved, among other questions, the question whether or not the book value of stocks, under the circumstances of this case, shall be taken as proof of their real value, and, as heretofore indicated, it will be discussed hereinafter.

CLASS D.

INTEREST 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.

The schedule upon this class constitutes Defendant's Exhibit No. 4, and its underlying exhibits (see page 46, printed exhibits). This exhibit shows, as appears from the records of the State of Virginia, the amount of the dividends accrued prior to the first day of January, 1861, upon the stocks owned by the State of Virginia in the railroad, canal and navigation companies named in Class C, and collected by her after that date. It likewise shows the interest that had accrued upon the loans made by her prior to January 1, 1861, and described in Class C, which was collected by her after that date. In addition to this, it shows the tolls that were received by her from the Blue Ridge Railroad Company named in Class C. It also shows a dividend received upon the stock owned by the State of Virginia in the James River & Kanawha Company, and the dividends received by her accruing upon stock owned by

her in the Farmer's Bank of Virginia, the Bank of Virginia, Bank of the Valley, Exchange Bank, Northwestern Bank and Fairmont Bank, all of which had been earned prior to January 1, 1861, but collected after that date. The sum total of these dividends and this interest, as shown by Defendant's Exhibit No. 4, amounts to $1,638,810.93.

CLASS E.

BANK STOCKS PURCHASED BY VIRGINIA WITH THE JOINT FUNDS OF THE TWO STATES PRIOR TO JANUARY 1, 1861, AND IN HER POSSESSION FROM THAT DATE UNTIL AFTER JUNE 20, 1863.

This class is covered by Defendant's Exhibit No. 5, embracing six banks, and consisting of six sheets, found upon pages 48 to 55, inclusive, of the printed exhibits.

The first sheet treats of the Farmer's Bank of Virginia, and shows that the par value of its stock per share was $100, and that the State of Virginia owned therein prior to, upon and after the first day of January, 1861, 9,626 shares, with an aggregate par value of $962,600.

It further shows the balance sheet of that Bank on the first day of January, 1861, embracing a complete list of its assets and liabilities upon that date, as reported by the officers of the Bank under oath to the State of Virginia, pursuant to the requirements of an Act of that State. This statement shows a surplus upon that date of assets over liabilities amounting to $475,168.23, from which it is ascer-

tained that the book value of the stock on January 1, 1861, was $115.07 per share; but, as a dividend of 3½% was paid on that day, this amount is subtracted from the book value so ascertained, reducing it to a net book value as of that date of $111.57 per share; and, multiplying the 9,626 shares then owned by the State of Virginia by the book value of $111.57, it is found that the total net book value of the holdings of the State of Virginia in this Bank on January 1, 1861, amounted to $1,073,972.82.

Sheet two treats of the Bank of Virginia, and shows that the par value per share of its stock was $70, and that the State of Virginia owned therein prior and subsequent to the first day of January, 1861, 13,766 shares, with a total par value of $963,620. The balance sheet, however, of this Bank for the year 1861 was likewise taken from the reports made by that Bank under the laws of the State to the Commonwealth of Virginia, and it was ascertained therefrom that there was a surplus of $332,235.32, from which it is found that the stock was at a premium, and had a book value of $78.75 per share; but a dividend was paid upon that day, which reduced the book value to $76.30 per share; and, multiplying this last book value by the number of shares owned by the State of Virginia, it gives a total book value of $1,050,345.80.

Sheet three shows the situation with respect to the Bank of the Valley, and it appears therefrom that the par value of this stock per share was $100.00, and that the total number of shares owned by Virginia therein prior to, on and subsequent to the first day of January, 1861, was 4,839 shares, with

an aggregate par value of $483,900; that the surplus of assets over liabilities on January 1, 1861, was $178,520.10, putting the book value of the stock on that date at $114.70 per share. It also appears that a dividend of 3½% was declared on January 1, 1861, which, when deducted from the book value of $114.70, left a net book value of $111.20 per share, which, multiplied by the total number of shares then owned by Virginia, gave a sum total of book value of $538,096.80.

Sheet four of Exhibit No. 5 treats of the Exchange Bank, and it appears therefrom that the par value of this stock per share was $100.00, and that Virginia, at the period in question, owned 8,755 of its shares of stock, with an aggregate par value of $875,500. It further appears from the balance sheet of this Bank that it had a surplus on January 1, 1861, of $342,170.29, and a consequent book value of $110.90 per share, from which a 3½% dividend, declared on January 1, 1861, is deducted, leaving a net book value on January 1, 1861, of $107.40 per share, which, when multiplied by the number of shares, gives a total book value to the stock of Virginia owned in that Bank upon that day of $940,287.

Sheet five of Exhibit No. 5 shows the situation with respect to the Northwestern Bank. The par value of its stock was $100.00 per share, and Virginia owned therein 3,744 shares, of an aggregate par value of $374,400. The book value of the stock, however, was ascertained in the same way as in the other banks, and was found to be on January 1, 1861, $111.90 per share, from which a dividend declared upon that day of 3½% is deducted, reducing the book value to $108.40 per share; which, when multiplied

by the total number of shares owned by Virginia, gave a net book value to her ownership of $405,849.60.

Sheet six of Defendant's Exhibit No. 5 treats the Fairmont Bank in the same manner. Its shares were of the par value of $50.00, and Virginia owned 1,000 shares therein, with a total par value of $50,000. The book value of this stock per share on January 1, 1861, without deducting the dividend of 3%, declared upon that day, was $53.44 per share, and, after making said deduction, was $51.94 per share; which, when multiplied by the total number of shares owned by Virginia, gave a book value to her ownership in this Bank on January 1, 1861, of $51,935.

Her holdings, therefore, taken at their book value, in the six Banks aforesaid, as of January 1, 1861, amounted to $4,060,487.02.

These schedules also show the dividends paid by these Banks during the year 1861, the years prior thereto and subsequent thereto. The Farmer's Bank of Virginia, from the year 1856 down to and including the year 1861, paid dividends running from seven and a fraction to eight per cent. The Bank of Virginia, during the same years, never paid less than a seven per cent. dividend, and frequently seven and a fraction per cent., and as high as eight. The Bank of the Valley, during this same period, paid dividends running from six and a fraction to ten per cent. per annum; the Exchange Bank from seven and a fraction to nine and ten per cent; the Northwestern Bank from five to ten per cent., and the Fairmont Bank, during the year 1860, 4½%.

These schedules were all made up from the records of Virginia, and were checked over by the expert

accountant for that State, Mr. Potter, and declared to be correct; and Virginia has offered nothing in opposition to the values therein claimed, except certain newspapers of the period purporting to publish the market quotations of these Bank stocks at that time. These quotations placed all these stocks above par, but not quite so far above par as Defendant's Exhibit No. 5. However, they were not such quotations, as we shall undertake to show hereafter, as were, or are, dependable, and do not constitute the best evidence of value.

CLASS F.

STOCKS PURCHASED AND LOANS MADE BY VIRGINIA PRIOR TO JANUARY 1, 1861, AND SOLD BY HER DECEMBER 20, 1870, TO THE ATLANTIC, MISSISSIPPI & OHIO RAILROAD COMPANY.

It appears that, prior to January 1, 1861, the State of Virginia, with common funds, bought stocks of and made loans to the Virginia & Tennessee Railroad Company, the South Side Railroad Company, the Virginia & Kentucky Railroad Company and the Norfolk & Petersburg Railroad Company, and from time to time sold portions of these stocks and loans, but had a residium on hand on the twentieth day of December, 1870, at which time she sold the whole balance of stocks and loans to the Atlantic, Mississippi & Ohio Railroad Company for the sum of $4,000,000, the purchase price to be paid in installments, and took a second mortgage upon the property

of the Atlantic, Mississippi & Ohio Railroad Company to secure the payment of the same.

Defendant's Exhibit No. 6, page 56 of printed exhibits, shows the details of this transaction as appears from Journal D, Internal Improvement Fund of the State of Virginia, pages 178-9. The number of shares of stock in each road is given, and the value placed thereon both by the vendor and the vendee. The bonds and notes that were transferred, as well as the unpaid balance on loans, are likewise given in detail, and the whole is set down at $4,000,000, or at the par of the stock and the face of the notes, bonds and loans. Defendant's Exhibit No. 6a, however (page 57, printed exhibits), ascertains the book value of the securities listed in this transfer at the nearest determinable date to January 1, 1861, and shows a premium of $276,044.39 thereon, which, when added to the $4,000,000 sale price, makes an aggregate of $4,276,044.39.

CLASS G.

SECURITIES PURCHASED BY VIRGINIA WITH JOINT FUNDS PRIOR TO JANUARY 1, 1861, AND SUBSEQUENTLY GIVEN AWAY WITHOUT THE KNOWLEDGE OR CONSENT OF WEST VIRGINIA, OR STILL RETAINED BY HER.

The first company in this list is the James River & Kanawha Canal Company, and the schedule filed by the defendant in relation thereto is Defendant's Exhibit No. 7, consisting of sheets numbered one and two (pages 58, 59 and 60, printed exhibits).

This Company was capitalized at $12,400,000, and on and prior to January 1, 1861, as well as on the 20th day of June, 1863, and as late as the year 1880, the State of Virginia owned $10,400,000 of its stock; and, at the last named date, by an Act of her Legislature, authorized the James River & Kanawha Canal Company to transfer all its rights, property and interests of every character and description to the Richmond & Alleghany Railroad Company, upon condition that the latter would build a railroad on the old tow-path of the canal from the City of Richmond to the town of Clifton Forge, in the State of Virginia, and would, in addition thereto, pay certain outstanding debts of the Canal Company. This practically amounted to a gift by the State of Virginia to the Richmond & Alleghany Railroad Company of this property. It was a fully completed and equipped canal, with water ways, locks, dams and tow-path, on the first day of January, 1861, two hundred and thirty miles in length, and was still in operation on June 20, 1863, as well as in the year 1880, when it was given to the Richmond & Alleghany Railroad Company. It owned, in addition to this, very valuable docks and water powers in the City of Richmond, and really the James River front from Seventh Street in said City to Twenty-eighth Street. West Virginia was not consulted in the premises, and this action was taken without her knowledge or consent.

The schedule referred to, or Defendant's Exhibit No. 7, consists of a statement taken from the first balance sheet of the Richmond & Alleghany Railroad Company in 1881, showing the value of this property as it was absorbed and capitalized by that Railroad

Company, and the value as ascertained therefrom at that time was $5,437,341.38. It may be true that this is an *ex parte* appraisement or valuation by the Richmond & Alleghany Railroad Company with which the State of Virginia would have nothing to do, and by which she would not be bound; but it is nevertheless true that it is the estimate of value placed upon this property by the State's vendee or donee immediately after the gift, and has been included here for what it may be worth.

Another exhibit, Defendant's Exhibit No. 12 (page 67, printed exhibits), throws some light upon the value of this property as of the first day of January, 1861. This exhibit consists of an Act of the General Assembly of the State of Virginia, entitled, "An Act to amend the Charter of the James River & Kanawha Company," passed March 23, 1860, just nine months and eight days prior to the first day of January, 1861, and the same constitutes a legislative declaration or admission upon the part of the State of Virginia of the value of this stock as of that date. The State at that time, as shown by Section Two of the Act, purchased a large number of additional shares, and paid for the same with the bonds of the State at par.

The only remaining evidence upon the value of this stock was that introduced by the plaintiff in the shape of newspaper reports of alleged market quotations of this stock as of January 1, 1861. These quotations, if they show anything, show a market value on that date of eighteen cents on the dollar.

The second item in this class is the Manassas Gap Railroad Company, and the schedule in relation thereto is Defendant's Exhibit No. 7a, (page 61

printed exhibits), and it appears therefrom, as shown by the records of Virginia, that, in the year 1860, $3,322,164.67 had been expended in the construction of this road and its equipment; that the paid up stock of the Company at that date amounted to $3,188,312.97, and that, on June 1, 1861, the State of Virginia held stock in this road to the value, at par, of $2,105,000, the whole of which she gave away in the year 1869, without the knowledge or consent of West Virginia, to the Orange & Alexandria Railroad Company.

The residue of the stocks and securities described in Class G are set up in Defendant's Exhibit 7b (pages 62-3), and will be mentioned again hereinafter.

These exhibits cover the whole of the Classes from A to G, inclusive, set up in the defendant's supplemental answer, and, in addition thereto, the defendant introduced, proved and relied upon another schedule, marked Defendant's Exhibit No. 10 (page 65), showing that certain counties of West Virginia had paid into the treasury of Virginia after June 20, 1863, taxes, fines, etc., amounting to $224,799.63. The whole of this amount, however, is claimed, instead of 23½% thereof.

This brings us to the defendant's last exhibit for the year 1861, being Defendant's Exhibit No. 11 (page 76), and the same is a summary of the claims made by West Virginia covering all the classes from A to G, inclusive, as well as the taxes, etc., paid by West Virginia counties after they had been cut off from the State of Virginia, and this schedule or exhibit, being short, is here repeated, for convenience of reference.

*DEFENDANT'S EXHIBIT No. 11.

STATE OF WEST VIRGINIA.

SUMMARY OF CLAIMS OF WEST VIRGINIA FOR CONSIDERATION IN SETTLEMENT OF DEBT AS SET UP IN HILLMAN EXHIBITS, JANUARY 1, 1861.

	Value as shown
Class A—Exhibit 1	$1,102,036.16
Class B—Exhibit 2	412,800.00
Class C—Exhibit 3	12,711,175.78
Class D—Exhibit 4	1,638,810.93
Class E—Exhibit 5	4,060,487.82
Class F—Exhibit 6	4,276,044.39
Class G—Exhibit 7	5,410,429.54
Class G—Exhibit 8	2,105,000.00
Total	$31,716,784.62
23½% of above being West Virginia's proportion	$7,453,444.39
Taxes paid by West Virginia as per Exhibit No. 10	224,799.63
Total West Virginia claim	$7,678,244.02

*Corrected copy, superseding page 66-a following.

The foregoing exhibits were all made to speak of values as of the first day of January, 1861, and at this point, or earlier, the State of Virginia, through

her counsel, moved the Master to exclude all of these exhibits, and any and all other evidence that might tend to show the value of the securities in question as of January 1, 1861, upon the ground that their value should be ascertained as of the 20th day of June, 1863, the time when West Virginia was established into a State, upon the theory that she could not receive a credit before that time. This motion was resisted, however, by the State of West Virginia, upon the ground that January 1, 1861, was the proper date, instead of June 20, 1863, for the reason that the former date was the time at which her proportion of the debt was fixed, and at which her credit should likewise be ascertained. It was further answered that, if she were enough of an entity to have a debt charged against her on the first day of January, 1861, she was likewise sufficiently an entity to have a credit given her on the debt as of that date. The Master, however, overruled the motion, stating that he would receive evidence with reference to both dates, and subsequently decide the legal proposition involved.

The State of West Virginia, feeling quite confident that January 1, 1861, was the proper date for fixing the valuation of the securities in question, but at the same time feeling that the Master might possibly reach the conclusion that June 20, 1863, was the proper date, and desiring, without waiving her position, to take no chances, proceeded then to introduce schedules showing value based upon June 20, 1863. It is not worth while to go into a detailed discussion of these schedules at this point. They are very similar to those for January 1, 1861, and are based upon the same theories and evidence, except

that they are carried to a later date. It will be sufficient to give the summary of the claims based thereon, and this is found in Defendant's Exhibit No. 11-1863. It is as follows:

DEFENDANT'S EXHIBIT No. 11—1863.

STATE OF WEST VIRGINIA.

Summary of claims of West Virginia for consideration in settlement of debt as set up by Hillman Exhibits, June 20, 1863.
(Corresponds with similar report for Jan. 1, 1861.)

	Value as shown by West Virginia	
Class A—Exhibit 1	$2,459,216.29	
Class B—Exhibit 2	507,744.00	
Class C—Exhibit 3-A	13,787,316.86	
Class D—Exhibit 4-B	1,357,480.66	
Class E—Exhibit 5	4,060,487.82	
Class F—Exhibit 6	*4,566,015.61	
Class G—Exhibit 7	5,410,429.54	
Class G—Exhibit 8	2,105,000.00	
Class G—Exhibit 9		
23.5%—West Virginia's proportion	$33,453,690.78	$7,861,617.33
West Virginia paid in taxes assessed after Jan. 1, 1861		224,799.63
Total Claim		$8,086,416.96

Although the schedules for June 20, 1863, apparently show a larger credit for West Virginia than

her schedules for January 1, 1861, still June 20, 1863, was right in the middle of the Civil War, when all the ordinary business transactions in the State of Virginia were carried on in Confederate currency, which, according to the contention of the State of Virginia, had become so greatly depreciated as of that date that the apparent values set down in the schedules of 1863, when reduced to a gold basis, would show a very small credit indeed in favor of West Virginia.

The State of Virginia, outside of its cross-examination of the defendant's witnesses, offered practically no evidence upon the subject of values as of the first day of January, 1861, except the market quotations upon certain stocks hereinbefore referred to; and, with respect to the schedules of June 20, 1863, confined herself, outside of the market quotations upon securities for that date, to a reduction of the values then found to a gold basis.

THE LAW OF THE CASE.

The foregoing analysis of the evidence not only suggests, but necessarily involves, the discussion and decision of the following questions of law:

I. Whether or not West Virginia is entitled to a credit upon her part of the principal of the debt amounting to 23½% of the actual value of the assets purchased by Virginia out of the proceeds of the bonds evidencing the debt;

II. Taking it for granted that she is entitled to such credit, as of what date should the assets be valued, that is to say, upon the first day of January, 1861, the date as of which her part of the debt was

apportioned, or upon the 20th day of June, 1863, the date of her establishment as a State;

III. In proving the value of stocks, does the par value thereof, when shown, establish a *prima facie* case, and throw the burden upon him who desires to show a greater or less value;

IV. Where stocks have a known market value, is that value conclusive, or is it permissible, as a matter of law, to show a greater or less intrinsic or actual value;

V. What market quotations are of that dependable character that will make them admissible as evidence;

VI. If stocks have no known market value, or if the quotations thereof be not obtainable, or, if obtainable, be not dependable, may the actual value of the stock be ascertained by a comparison of the assets and liabilities of the company issuing them, coupled with its activities as evidenced by dividend declarations or otherwise;

VII. In case there be no known market value of stock, or dependable market quotations thereon, and recourse is had to the balance sheets of the company issuing them for the purpose of comparing its assets with its liabilities and arriving at the book value of its stock, is a *prima facie* case of such book value made against the stockholders of the company by the production of such balance sheets, and does the burden rest upon such stockholders, if the assets have been inflated or the liabilities understated, to show that fact, and,

VIII. Was the evidence introduced by the defendant with respect to the moneys in Class A, and with respect to the value of the stocks and loans in

Classes B, C, D, E, F and G the best evidence upon those subjects, and competent under the rules of law?

We will now consider, in connection with the authorities, each one of these propositions in its order.

I.

WEST VIRGINIA ENTITLED TO 23½% OF THE ACTUAL VALUE OF ALL ASSETS OWNED BY THE STATE OF VIRGINIA ON JANUARY 1, 1861, AND APPLICABLE TO THE DISCHARGE OR DIMINUTION OF THE BONDED DEBT OF THAT COMMONWEALTH.

It was stipulated, according to the fact, by and between counsel for the States of Virginia and West Virginia, as well as counsel for the bondholders, that all the stocks, securities and loans described in the supplemental answer of the defendant, and embraced in Classes A to G, inclusive thereof, were purchased by the State of Virginia prior to the first day of January, 1861, out of the proceeds of the sales of the bonds of Virginia that evidence the debt to be apportioned between the two States. The exact language of this stipulation is as follows:

> "It is stipulated of record by counsel for the States of Virginia and West Virginia, as well as by counsel for the bond-

holders, that the stocks and loans mentioned in Classes B, C, D, E, F and G of the Defendant's supplemental answer filed herein were subscribed for and made (under) the authority of legislative enactment by the State of Virginia, and were paid for and made out of the proceeds of the sale of a part of the bonds representing the debt of Virginia existing prior to January 1, 1861."

(Printed Record, page 711.)

In addition to this, the Supreme Court decided on the sixth of March, 1911, that West Virginia should pay 23½% as against Virginia's 76½% of these bonds; and these two things, the stipulation, upon the one hand, and the decision of the Court, upon the other, must forever set at rest the question now under discussion; for, if the two States are compellable to pay in a certain ratio the common debt, they are entitled to receive in a distribution of the assets the same ratio or per cent. of their value. In other words, if A and B discount their joint note for $10,000, and apply the proceeds thereof to the purchase of a stock of goods, the measure of the final liability of each on the debt will measure his interest in the goods so purchased. If he owes one-half of the debt, he owns one-half of the goods purchased through its creation; and likewise, if he owes 23½% thereof, he would be entitled to 23½% of the property purchased with it.

II.

THE STOCKS AND OTHER SECURITIES SET UP IN THE SUPPLEMENTAL ANSWER SHOULD BE VALUED, FOR THE PURPOSE OF GIVING WEST VIRGINIA HER PROPER CREDIT, AS OF THE FIRST DAY OF JANUARY, 1861.

The constitutional promise and contract of the State of West Virginia to pay an equitable proportion of the Virginia debt is couched in the following language:

> "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 * * * ".
>
> W. Va. Constitution 1861, Art. 8, Sec. 8.

The promise, therefore, was to pay the debt as it stood on the first day of January, 1861, and the amount of the debt to be apportioned had, according to the promise of the contract, to be ascertained as of that date. Any portion of the debt that may have been theretofore paid off would necessarily have to be deducted, in order to ascertain the then existing debt, and the creation of any additional debt after that time could not be added, because the contract did not extend the promise beyond the first day of January, 1861.

Such are the plain words of the promise and the

clear terms of the contract, and the total debt to be apportioned, and the per cent. set apart to be paid by West Virginia, have both been ascertained in this way by the Supreme Court.

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

The total debt was created while the two Virginias were one, and it was incurred in the purchase of securities still owned and held by the common State on the first day of January, 1861. The real debt, therefore, to be ascertained and apportioned would be measured by the sum total of the outstanding obligations, less the full value of the common assets. To illustrate: If the outstanding indebtedness was $30,000,000, and the available assets amounted at the time to $10,000,000, the latter would have to be deducted from the former, leaving an actual indebtedness as of January 1, 1861, of $20,000,000, and of this West Virginia's promise would compel her to pay an equitable proportion. The balance could not be struck as of any other date, because it would be unfair and inequitable to both States to ascertain the amount of the obligations as of January 1, 1861, and leave the ascertainment of the value of the assets then on hand as of a later day; because these assets, with the passage of time and under the management of Virginia, they still remaining in her possession, might, upon the one hand, greatly appreciate in value, thereby reducing West Virginia's portion of the debt to an inequitable minimum, and, upon the other hand, they might, during the possession and under the management of Virginia, if their appraisement should be postponed, depreciate in value, and become so worthless as to

make West Virginia pay the whole of her proportion of the outstanding liabilities without receiving any credit for an equitable proportion of the assets. If, therefore, these assets are to be taken into account at all, their value, in order to ascertain West Virginia's equitable proportion of the debt, must be fixed as of January 1, 1861.

Neither would there be anything unusual or contrary to principle in this. To illustrate: If a firm composed of two partners were to dissolve, the first thing that would be done would be to turn the assets into money, ascertain the indebtedness of the partnership, and deduct the liabilities from the assets, and, if there were a balance left upon hand, this would be divided between the partners according to their interest in the firm; and, if there should prove to be a deficit, this deficit would be assumed or paid by them in proportion to their respective interest. In other words, the amount of the debts and the value of the assets must be, of necessity and in equity, considered together, and as of the same time.

Or, to further illustrate, if the dissolution of the partnership should be brought about by a bill in equity, and its affairs should be wound up by a receiver, the Court would necessarily carry the assets and liabilities along together, and apply the one to the other. The firm's debts would not be ascertained as of January 1, 1861, and the value of its assets determined as of June 20, 1863, or some later date.

And so with the State of West Virginia. Her real rights and true proportion of the debt could, and can, only be determined by striking a balance

sheet upon the affairs of the State of Virginia as of January 1, 1861.

It is answered, however, upon the part of Virginia that West Virginia did not become a State until the 20th day of June, 1863, and that she could not, in consequence, receive a credit until that date; but it may be replied that, if she were enough of a State or an entity or contractual quantity to be charged with a debt on the first day of January, 1861, she would be sufficiently in existence in point of law for the purpose of receiving a credit at the same date upon that debt.

The very exhibits and schedules offered in evidence by the State of Virginia upon the subject of Confederate currency and the depreciation thereof as of the date of June 20, 1863, furnish conclusive proof of the injustice of ascertaining the debt in 1861 and postponing the valuation of the credits until 1863. To pursue that course, if the contention of Virginia be correct, the result would be to fasten upon West Virginia a debt as of January 1, 1861, measured by bonds at par, and deny her as a credit thereon her proportion of securities then owned, and of a par or greater value, postponing the valuation of such securities until a later date when they had fallen in value below par. If they were in existence at that time, why ignore or withhold them, in an equitable ascertainment of West Virginia's proportion of the debt, until a later day? The securities then existed, and must be accounted for as of that time.

III.

THE VALUE OF STOCK IS PRESUMPTIVELY ITS PAR VALUE.

In an action to recover damages for a failure to deliver shares of stock according to contract, it became necessary to ascertain the value of the stock as of the date when it should have been delivered, and, in the absence of proof to the contrary, it was held by the Supreme Court of Pennsylvania that the value of the stock was its par value.

Appeal of Harris, 12 Atl. Rep., 743.

The fourth point of the syllabus to this case reads as follows:

> "The measure of damages for the non-delivery of corporate stock according to contract upon a certain date is *prima facie* the par value of such stock, and the burden of proving the actual market value is upon the party seeking to reduce the damages."

The opinion therein was delivered by Judge Paxson, and, among other things, he said, toward the close of his opinion:

> "The claim that these shares should not be deducted at all is not well founded. It was a part of the contract entered into by Col. Wells that he was to deliver these shares,—a portion of the consideration for which he was to receive, one million and fifty thousand dollars. Having failed to deliver them, they must necessarily be charged to his account. The only remain-

ing question is, at what price? *Prima facie,* they must be charged at par, $100 per share. The appellants contend, however, as before stated, that, if charged at all, it should only be at their market value. The burden of proof upon this point is upon the appellants. It is alleged in a note to their paper book, upon reargument, that the market value of this stock was only $30 per share. No evidence has been pointed out to us bearing upon this point, and it is too much to ask us to go through two thousand pages of testimony to search for what may not be found. I do not understand the Master or the Court below to say anything about it. Desiring, however, that no injustice may be done, if before this record goes down the learned counsel will call my attention to any facts which would justify us to do so, I will gladly, with the assent of my colleagues, amend the decree to conform to such facts.

The decree is affirmed, and the appeal dismissed, at the costs of the appellants."

To the same effect is the case of Henry v. North Am. Ry. Construction Co., 158 Fed. Rep., 79 (Circuit Court Appeals 8th Circuit, November 29, 1907). The first point of the syllabus therein reads as follows:

"The measure of damages for breach of a contract to deliver bonds of a corporation the consideration for which has been paid is the value of the bonds at the time they should have been delivered under the contract, with interest, and such value is *prima facie* their face value."

And, in the body of the opinion, at page 80, Judge Phillips says:

> "It being conceded that the plaintiff had fully performed its undertaking, but the defendant had failed to keep and perform his contract by delivering to the plaintiff the $6500, face value, of bonds, in the action for breach of contract the essential question is: What is the measure of damages? The answer the law makes is: The value of the bonds at the time they should have been delivered under the contract. *Prima facie* the amount expressed upon the face of the bonds is the value thereof. 3 Sutherland on Damages (3d ed.), p. 1921; 2 Clark & Marshall on Corporations, p. 1170; Moffit v. Hereford, 132 Mo., 513, 34 S. W., 252; Menkins v. Menkins, 23 Mo., 252-3; Meixell v. Kirkpatrick, 29 Kan., 679, 685; Potter v. Merchants Bank, 28 N. Y., 641, 86 Am. Dec., 273; Baldwin v. Central Savings Bank, 17 Colo. App., 7; 67 Pac., 179; Express Co. v. Parsons, 44 Ill., 312-317; Hersy v. Walsh, 38 Minn., 521; 38 N. W., 613; 8 Am. St. Rep., 689.
>
> When, therefore, the plaintiff had shown that the defendant had failed to deliver the bonds in question when they should have been delivered, it had made out a *prima facie* case entitling it to judgment for the face value of the bonds, with interest from date of default. The defendant then assumed the laboring oar to show, if he could, that the actual value was less."

Circuit Judge VanDevanter, now Mr. Justice VanDevanter, sat in the case, and concurred in the opinion.

See also Brinkerhoff-Farris Co. v. Home Lmbr. Co., 118 Mo., 447.

IV.

EVEN WHERE STOCKS HAVE A KNOWN MARKET VALUE, WHILE THAT MARKET VALUE MAY BE SUFFICIENT TO MEET THE *PRIMA FACIE* CASE OF THE PRESUMPTION IN FAVOR OF THE PAR OF ANY STOCK OR BOND, WHETHER TO LIFT IT ABOVE OR PLACE IT BELOW SUCH PAR IN POINT OF VALUE, STILL IT IS NOT CONCLUSIVE, AND THE INTRINSIC OR ACTUAL VALUE OF THE SECURITY MAY BE SHOWN TO BE GREATER OR LESS THAN THE MARKET VALUE.

A plain and clear announcement of this proposition is made in the case of Henry v. North American Ry. Construction Co., *supra* (158 Fed. Rep., 79). The second syllabus in this case reads as follows:

> "Where the bonds of a corporation have been sold in market, or there is an established demand therefor, this may be shown as a means of fixing their value in measuring the damages for breach of contract for non-delivery, but such market value is not conclusive, and it may be shown that their real intrinsic value is either greater or less, and, where there is no established market value, the real value is to be ascertained from such elements of value as are obtainable."

And, beginning toward the close of page 80 and

concluding near the top of page 81 of the opinion, we find the following language used by the Court:

> "Where a given article or commodity or stocks and bonds of an association or corporation have been sold in market, or there is an established demand therefor, this may be shown as a means of fixing the value in measuring the damages for breach of contract for non-delivery. This for the reason that, if they can be bought in the market, the vendee or person entitled to them can thereby 'replace himself;' but even this market value may not be conclusive in the sense of a conclusive legal presumption. 'It stands as a criterion of value, because it is a common test of the ability to purchase the thing. In such cases, what is called the market price or the quotations of the articles for a given day is not the only evidence of value. The true value may be drawn from other sources.' 3 Sutherland on Damages (3d ed.), p. 1894; Sedgwick on Damages (8 ed.), Sec. 250; 2 Cook on Corporations (4 ed.), Sec. 581; Colebrook on Collateral Securities (2 ed.), 546; 2 Clark & Marshall on Private Corporations, p. 1170."

V.

MARKET QUOTATIONS, TO BE ADMISSIBLE AS EVIDENCE, MUST BE OF A RELIABLE AND DEPENDABLE CHARACTER.

We take it that printed price lists and market reports, in order to be admissible as testimony, must

in the case of price lists, be "a printed list of prices at which a class of goods is for sale to any purchaser," and, in the case of a market report, should be "a printed report of the prices obtained at an actual sale in an open market."

Wigmore on Evidence, Vol. 3, Sec. 1704.

A mere bid or "asked," in the absence of a sale, would scarcely establish a market price or value, and the newspaper itself in which they appear should be of such a character as is relied upon by the Commercial World. In Whelan v. Lynch, 60 N. Y., 474, Judge Miller said:

> "The Court was also in error, I think, in admitting the shipping and price current list as evidence of the value of the wool without some proof showing how or in what manner it was made up, where the information it contained was obtained, or whether the quotations of prices made were derived from actual sales or otherwise. It is not plain how a newspaper containing the price current of merchandise of itself, and aside from any explanation as to the authority from which it was obtained, can be made legitimate evidence of the fact stated. The accuracy and correctness of such publications depends entirely upon the sources from which the information is derived. Mere quotations from other newspapers, or information obtained from those who have not the means of procuring it would be entitled to but little, if any, weight. The credit to be given to such testimony must be governed by extrinsic evidence, and cannot be determined by the newspaper itself without some proof of knowledge of the mode in which the list was made out."

Newspaper publications of market quotations furnished by an established stock exchange would, we take it, meet the requirements of the above case.

VI.

IF STOCKS HAVE NO KNOWN MARKET VALUE, OR IF THE QUOTATIONS THEREOF BE NOT OBTAINABLE, OR, IF OBTAINABLE, BE NOT DEPENDABLE, THE ACTUAL VALUE OF THE STOCK, BY ALL THE AUTHORITIES, MAY BE ASCERTAINED BY A COMPARISON OF THE ASSETS AND LIABILITIES OF THE COMPANY ISSUING THEM, COUPLED WITH ITS ACTIVITIES, AS EVIDENCED BY DIVIDEND DECLARATIONS, OR OTHERWISE.

Julia v. Critchfield, 147 Fed. Rep., 65.
Nelson v. First Nat'l Bank, 69 Fed. Rep., 798.
Henry v. North Am. etc. Co., 158 Fed. Rep., 79.
Butler v. Wright, 103 N. Y. App. Div., 463.
Cabbel v. Cabbel, 111 N. Y. App. Div., 426-33.
Vonau v. Magenheimer, 126 N. Y. App. Div., 257; 196 N. Y., 510.
Leurey v. Bank of Baton Rouge, 58 So. Rep., 1022 (La.).
Beaty v. Johnson, 66 Ark., 529.
McDonald v. Danahy, 196 Ill., 133.
Greer v. Lafayette County Bank, 128 Mo., 559.
State v. Carpenter, 51 Ohio State, 83.
White v. Jouett, 147 Ky., 197.

To illustrate the character of the cases above

cited, the rules established by them and the pertinency thereof, we take brief extracts from a few of them.

In Critchfield v. Julia, *supra* (147 Fed., 65), it is said, in the body of the opinion at page 73, that—

> "Where no proof is available as to whether stock has market value, intrinsic value, ascertained from value of corporate assets and amount of liabilities, may be taken as the basis for the assessment of damages. Redding v. Godwin, 44 Minn., 355; 46 N. W., 563; Industrial & General Trust, Ltd. v. Tod, 180 N. Y., 215-232; 73 N. E., 7."

The seventh point of the syllabus in the case of Luerey v. Bank of Baton Rouge, *supra* (58 So. Rep., 1022), is as follows:

> "Where stock has never been offered upon the market, and hence cannot be said to have had a market value, its value at a past time, for the purposes of an action in damages, may be taken to have been its due proportion of the net value of the assets of the corporation and of its good will or money-earning capacity."

In White v. Jouett, *supra* (147 Ky., 197), the following statement is made in the sixth point of the syllabus:

> "In an action for the value of shares of stock in a corporation, the measure of damage is the value of the stock at the time of the conversion, or a reasonable time thereafter; if there is no known market value,

the value may be proven by showing the value of the property and business of the corporation, less the amount of its liabilities."

VII.

WHERE STOCK HAS NO KNOWN MARKET VALUE, OR DEPENDABLE MARKET QUOTATIONS THEREON ARE NOT OBTAINABLE, AND RECOURSE IS HAD, UNDER THE AUTHORITIES ABOVE, TO A COMPARISON OF THE ASSETS AND LIABILITIES OF THE COMPANY ISSUING IT FOR THE PURPOSE OF ASCERTAINING ITS ACTUAL VALUE, THE BALANCE SHEETS OF THE COMPANY, EMBODIED IN ITS REPORTS TO ITS STOCKHOLDERS, WHEREIN THE ASSETS OF THE COMPANY ARE LISTED AND ITS LIABILITIES ARE SET FORTH, SHOWING THE EXISTENCE OF A SURPLUS, THE REPORTS THUS MADE CONSTITUTE A *PRIMA FACIE* CASE AGAINST THE STOCKHOLDERS OF THE COMPANY, ESPECIALLY WHERE THE REPORTS ARE UNDER OATH, AND ARE MADE PURSUANT TO THE REQUIREMENTS OF LAW. IN OTHER WORDS, THE ASSETS AND LIABILITIES THUS LISTED ARE PRESUMPTIVELY CORRECT, AND IF THE STOCKHOLDER AGAINST WHOM THE VALUE OF THE STOCK IS THUS ATTEMPTED TO BE ASCERTAINED DESIRES TO SHOW THEM TO BE INCORRECT, THE BURDEN IS UPON HIM SO TO DO.

VIII.

THE EVIDENCE INTRODUCED BY THE DEFENDANT WITH RESPECT TO THE MONEYS SET FORTH IN CLASS A, AND WITH RESPECT TO THE VALUE OF THE STOCKS AND LOANS EMBRACED IN CLASSES B TO G, INCLUSIVE, OF THE SUPPLEMENTAL ANSWER, WAS THE HIGHEST EVIDENCE OBTAINABLE UNDER THE CIRCUMSTANCES, AND IS ADMISSIBLE AND COMPETENT TESTIMONY UNDER THE RULES OF EVIDENCE.

So far as Class A is concerned, the defendant's Exhibit No. 1 in relation thereto was made up from books of original entry; that is to say, from the Literary Fund Ledger, the Board of Public Works Ledger, on file in the Second Auditor's Office of Virginia, and the Sinking Fund Ledger of that State; and, while the books themselves were not produced, nor certified copies thereof taken, yet the figures taken therefrom and set out in Defendant's Exhibit No. 1 were checked by the Accountant for the State of Virginia, and ascertained to be correct, and counsel for the plaintiff, when the defendant offered to produce the books themselves, or certified copies thereof, relieved her from that necessity, as shown by page 17 of the printed evidence in this cause.

In response to an offer made by Mr. Holt on behalf of West Virginia to produce the original books, if desired, Mr. Harrison, of counsel for Virginia, made the following response:

> "Mr. Harrison: So far as the introduction of the original source from which

the exhibits are prepared, as a matter of course we reserve the right upon cross-examination to test the accuracy of the exhibits, and, if it be necessary to refer to those original sources, then, of course, we will do it, and, if not, we will not. There is no necessity now, as Judge Holt suggests, for them to take upon themselves the labor and trouble of introducing those original records.

The Master: Or copies of them?

Mr. Harrison: Or copies of them."

(Printed Record, page 17.)

The next is Class B (Richmond, Fredericksburg & Potomac Railroad Stock), and the par per share thereof and the number of shares owned by the State of Virginia on the first day of January, 1861, as set forth in Defendant's Exhibit No. 2, is based upon the original entries in Ledger B in the Second Auditor's office of that State; and, when we turn to the sub-sheets of Defendant's Exhibit No. 2, we find that they are based upon the annual reports themselves of the Richmond, Fredericksburg & Potomac R. R. Co., on file in its principal office at Richmond, and checked over by the accountants for the State of Virginia.

The evidence in relation to the stocks and loans embraced in Class C (Defendant's Exhibit No. 3, with its underlying exhibits) is all embodied, as appears from the face of the exhibits themselves, in and taken from original entries in the books of the various public offices of Virginia, or from what is known as Document 17, being reports made to the State of Virginia by various railroad companies and banks under legislative requirement of that State,

and subsequently published by the State of Virginia as a public document.

The same is true of Defendant's Exhibit No. 4, with its underlying exhibits marked No. 4, assets 14 to 19, inclusive; and every original entry is cited in the exhibit, whether it be the treasurer's cash book of the State of Virginia or the journal of the Internal Improvement Fund, or the cash book of the Literary Fund. This covers Class D of the supplemental answer.

When we arrive at Class E, being Defendant's Exhibit No. 5, consisting of six sheets, and covering all the banks in which Virginia at the time owned stock, we find that the evidence upon which these exhibits are based is derived either from books of original entry in the offices of the State of Virginia, or from Document 14, consisting of reports made to the State of Virginia by these banks under the requirements of law, and published by the State of Virginia as a part of the annual report of her Auditor.

Defendant's Exhibit No. 6, covering Class F, and showing the details of the sale of certain roads to the Atlantic, Mississippi & Ohio Railroad Company by the State of Virginia, is based entirely upon and copied from Journal D of the Internal Improvement Fund of the State of Virginia.

The first item embraced in Class G, being the James River & Kanawha Canal Company, is based upon the records of the Richmond & Alleghany Railroad Company, and the second item therein, the Manassas Gap Railroad Company, is taken entirely from the Board of Public Works Report of Virginia,

Document 17, Folio 218, and from Ledger B of her Internal Improvement Fund.

Thus it will be seen that the entire exhibits of the defendant are based either upon books of original entry kept by the public officials of the State of Virginia, or upon documents published by her as official, except in one or two instances, where recourse was had to the records or official reports of the particular railway company in question.

It would scarcely be necessary to cite authority upon the question of the admissibility of books of original entry, and we shall content ourselves with one or two citations upon the admissibility of officially printed copies of miscellaneous documents:

Wigmore on Evidence, Vol. 3, Sec. 1684.

Houston v. Spruance, 4 Harrington, 117-9 (printed official pamphlet showing mail routes admitted).

Doe v. Roe, 13 Fla., 602 (American State papers admitted).

Lurton v. Gilliam, 2 Ill., 577 (State register received to prove Governor's proclamation).

Dutillet v. Blanchard, 14 La. An., 97 (American State papers received).

Whiton v. Ins. Co., 109 Mass., 30 (official volume foreign relations admitted).

Nixon v. Porter, 34 Miss., 697 (American State papers admitted).

Radcliff v. Ins. Co., 7 John., 50 (officially printed diplomatic correspondence received).

Watkins v. Holman, 16 Peters, 55 (American State papers admitted).

Bryan v. Forsythe, 19 How., 334-8 (report printed in American State papers).

Fulham v. Howe, 60 Vt., 351-7 (officially printed copy of Federal census compendium).
Biddis v. James, 6 Binn., 326.
Jones v. Maffett, 5 S. & R., 532.
Emery v. Berry, 28 N. H., 573.
Wilt v. Cutler, 38 Mich., 196.

APPLICATION OF LAW TO EVIDENCE.

CLASS A.

CASH.

This class embraces only cash, and no proof of value is involved; for cash speaks for itself, and is itself the measure of value, especially on January 1, 1861, prior to the creation of Confederate currency, and before Virginia's treasury contained a single dollar of it.

CLASS B.

RICHMOND, FREDERICKSBURG & POTOMAC STOCK.

We are justified in saying, so far as this stock is concerned, that it was not shown to have had a market value on the first day of January, 1861, and that the alleged market quotations in relation thereto embraced in the plaintiff's revised exhibit No. 2 (page 334), taken from the Richmond Dispatch of that date, do not show a single sale of this stock, or a single completed transaction in relation thereto, or show the market quotations thereon in a single stock exchange of this country for that time. Under

such circumstances, the quotations are inadmissible, irrelevant and unreliable, and we are driven, under the authorities in such a case, especially where we desire to show the stock to be worth more than par, to a comparison of the assets and liabilities of the Richmond, Fredericksburg & Potomac Railroad Company, and this comparison, as we have heretofore shown, gives us an actual value for this stock per share on the first day of January, 1861, of $150.00, or a total value for the shares owned by Virginia of $412,800.00.

CLASS C.

RAILROAD STOCKS AND LOANS.

Upon the stocks embraced in this class there were either no quotations at all at any time, or simply a published statement of an unaccepted bid or offer, without any sale at all; and again, in the absence of market quotations or known market value, we turn, under the authorities, to a comparison of the assets with the liabilities of the various companies issuing them, and ascertain the actual or intrinsic value of the stock; and, so far as the loans embraced in this class are concerned, we have heretofore shown that our schedule gives the true amounts loaned, and further discloses the fact that they were subsequently paid, thereby demonstrating the solvency of the companies to which they were made, and at the same time establishing the face value of the loans. These stocks so valued and these loans so made aggregate as of January 1, 1861, $12,711,175.78.

CLASS D.

DIVIDENDS AND INTEREST.

This class embraces the dividends upon the stock and the interest upon the loans described in Class C upon and prior to January 1, 1861, and collected after that date. No question of value is here involved, for the reason that these matters were either paid in cash or in securities of the State canceled at par, and so the total claimed here of $1,638,810.93 would seem to be correct.

CLASS E.

BANKS.

There were no market quotations upon the stocks of these Banks of a dependable character, and the defendant was at liberty, under all the authorities under such circumstances, to resort to a comparison of their assets with their liabilities, bearing in mind the activities of the institutions, and ascertain therefrom the actual value of the stock. This resulted in the discovery that the stock in each one of these Banks on the first day of January, 1861, was worth considerably above par, and that the holdings of the State of Virginia therein, multiplying the number of her shares in each bank by the book value of its stock, aggregated the sum of $4,060,487.82.

CLASS F.

ROADS SOLD TO A. M. & O. R. R. CO.

There was no known market value for the stock of these roads, and not a single market quotation upon the stock of either of the four was obtainable for the year 1861; so again, under the circumstances, the defendant not only had the right, under the law, but was driven to ascertain the value of this stock in some other way, and this she did by a comparison of the assets and liabilities of the companies issuing it, with the result that the stock in the four companies sold to the A. M. & O. Railroad Company had, on January 1, 1861, an aggregate actual value of $276,044.39 more than the price received for it; that is to say, it was worth upon that date the sum of $4,276,044.39.

CLASS G.

JAMES RIVER & KANAWHA CANAL COMPANY AND MANASSAS GAP RAILROAD COMPANY.

If the schedules of the defendant, made up from the balance sheets of the Richmond & Alleghany Railroad Company, wherein that Company placed a value in 1881 upon the property received by it from the James River & Kanawha Canal Company of $5,410,429.54, are to be deemed to be mere *ex parte* appraisements made by that Company without participation by Virginia, and at a time too remote to

be of any evidentiary value in this case, then, and in that event, there are but two pieces of evidence left in the record concerning the value of this asset. These are, first, the presumption established by the authorities hereinbefore cited that stock is worth its par, in the absence of any other proof; and the par of this James River & Kanawha Canal Company stock was $100 per share; and this presumption is strengthened by Section 2 of the Defendant's Exhibit No. 12 (page 67), which is a legislative declaration or admission made by the State of Virginia on the 23rd day of March, 1860, just nine months before the first day of January, 1861, that this stock was worth par, and she gave that amount for it at that time. The second is an effort by the plaintiff to offset this legal presumption and legislative admission, but she has offered nothing but an alleged market quotation upon this stock for January 1, 1861, published in the Richmond Dispatch, and this quotation meets none of the requirements of the law. It does not record a single sale, and utterly fails to show that this stock was dealt in at all, or had any market value at that time.

This, therefore, would establish a *prima facie* value upon the stock held by Virginia in this Company of $10,400,000, instead of a value of $5,410,429.54, as set down in Defendant's Exhibit No. 11, and based upon the balance sheets of the Richmond & Alleghany Railroad Company.

There was no market value ascertainable or market quotations discoverable for January 1, 1861, in the case of the stock of the Manassas Gap Railroad Company; but defendant's exhibit shows that Virginia, on January 1, 1861, owned at par $2,105,000

worth of this stock, all of which had been paid for, and the road itself had practically been completed and was in operation in part.

Amending, therefore, West Virginia's summary schedule No. 11 (page 66) by taking thereout $5,410,429.54 claimed on account of the James River & Kanawha Canal Company stock, valued according to the balance sheets of the Richmond & Alleghany Railroad Company, and substituting in lieu thereof the sum of $10,400,000, being the par value of that stock, and its actual value as shown by the legislative declarations of the State of Virginia, and we will have a total value of assets for January 1, 1861, of $36,706,355.08, instead of $31,716,784.62. Twenty-three and one-half per cent. would represent West Virginia's interest therein, and is $8,625,983.44. To this should be added taxes paid by West Virginia Counties, as per Defendant's Exhibit No. 11, amounting to the sum of $224,799.63, making the total claim of West Virginia $8,850,783.07.

From this, however, should be deducted $260,000 received by West Virginia on account of the Northwestern Bank, and $51,935 on account of the Fairmont Bank, or $311,935, leaving a balance of $8,538,848.07.

THE SUBJECT OF INTEREST.

If the amount of West Virginia's credits should be ascertained by the Master to be as great as hereinbefore set down, then, and in that event, it would be a waste of time to discuss the question of interest, for West Virginia would owe no principal upon which interest could be computed; but, for fear the

Master might differ with us upon the amount of credits, and not desiring to pass the question of interest by without some little discussion thereof, we will now briefly review what we consider to be the rules of law governing States upon that subject.

I.

SOVEREIGN STATES NOT CHARGEABLE WITH INTEREST IN THE ABSENCE OF A LEGISLATIVE OR OFFICIAL PROMISE.

It is a firmly fixed rule of universal recognition that interest is not to be awarded against a State unless its consent has been manifested by an Act of its Legislature, or by a lawful contract of its executive officers.

U. S. v. State of North Carolina, 136 U. S., 211; 34 L. Ed., 336.
South Dakota v. North Carolina, 192 U. S., 321; 48 L. Ed., 462.
U. S. ex rel. McCloud v. Jno. Sherman, Secy., 98 U. S., 535; 25 L. Ed., 235.
U. S. v. Sargent, 162 Fed. Rep., 81.
Nat'l Home for Disabled Volunteer Soldiers et al. v. Parrish, 194 Fed Rep., 940.
U. S. v. Bayard, 127 U. S., 251-60.

II.

WEST VIRGINIA DID NOT PROMISE TO PAY INTEREST.

Pursuant to the above rule, therefore, and in order to determine whether or not West Virginia is

chargeable with interest upon her equitable proportion of the principal of the Virginia debt existing prior to January 1, 1861, it becomes necessary to ascertain from the terms of her contract by which she became responsible for a part of the principal whether or not she also promised to pay interest thereon.

As held by this Court (Va. v. W. Va., 220 U. S., 1), the contract of West Virginia springs out of Section 8 of Article 8 of her constitution of 1861, the Act of the Legislature of the restored State of Virginia passed May 13, 1862, giving consent to the erection of the new State under the provisions of said Constitution, and the Act of Congress passed December 31, 1862, consenting, upon the faith of both, to the creation of said State.

The constitutional provision, therefore, must be looked to for the purpose of ascertaining the terms of the agreement, and it reads as follows:

> "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand, eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."
>
> W. Va. Constitution 1861, Art. 8, Sec. 8.

That part of the constitutional provision that constitutes the contract ends with the words "shall be assumed by this State," and the residue of the

provision, beginning with the words "and the Legislature shall ascertain," etc., has been held by the Supreme Court to constitute no part of the contract. If it had been a part of the contract, the Legislature of West Virginia, as one of its terms, would have had the ascertainment of the equitable proportion of the debt to be paid by West Virginia; but the Court said that the West Virginia Legislature could not be permitted to do that, and, in consequence, the remaining terms of the provision must pass out of consideration. This, then, leaves a naked promise upon the part of the State of West Virginia to assume an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, while the contract is utterly silent upon the subject of interest.

Virginia v. West Virginia, 206 U. S., page 290.

III.

INTEREST IS NOT CHARGEABLE UPON AN UNLIQUIDATED AMOUNT.

Redfield v. Ystalyfera Iron Co., 110 U. S., 174; 28 L. Ed., 109.
Stevens v. Phoenix Bridge Co., 139 Fed. Rep., 248.

In Redfield v. Ystalyfera Iron Co., *supra,* Mr. Justice Matthews said:

> "In ordinary practice, it may be convenient, and certainly would not be improper nor unjust, that interest properly allowed on the real amount, subsequently

> ascertained, should be calculated from the date of such a verdict; but in such cases it is not interest on the verdict in fact, because, *until the amount is liquidated by the subsequent action of the Court, there is no sum certain due on which interest could be computed.*"

And in Stevens v. Phoenix Bridge Co., *supra,* it was said that—

> "Interest is not recoverable on a demand which is unliquidated, and which is subject to a counter claim also unliquidated."

The Virginia authorities upon the subject are:

Auditor of Public Accounts v. Dagger & Foley, 3 Leigh (Va.), 241.
Phillips et al. v. Williams, 5 Gratt. (Va.), 258.
M'Connico et al., Exrs. of Holloway, v. Curzen, 2 Call (Va.), 358.
Skipwith v. Clinch, 2 Call (Va.), 253.
Waggoner v. Gray's Admrs., 2 H. & M. (Va.), 603.
Stearns v. Mason, 24 Gratt. (Va.), 484.

IV.

WEST VIRGINIA'S EQUITABLE PROPORTION OF VIRGINIA DEBT WAS NOT ASCERTAINED, IF FIXED AT ALL, UNTIL THE DECISION OF THIS COURT ON MARCH 6, 1911.

Neither the Legislature of West Virginia nor the Legislature of Virginia, standing alone, had the power to ascertain West Virginia's equitable pro-

portion of the Virginia debt, and the two States, through all the years that have passed, have taken no joint action, and, in consequence, the ascertainment of West Virginia's proportion of the debt has remained unliquidated and unfixed. There has never been a moment of time from the adoption of the West Virginia Constitution of 1861, or from the establishment of the State in 1863, that West Virginia could have established the sinking fund promised in the Eighth Article of her Constitution. She could lay no levy, and could fix no rate, because she did not know what she had to meet. She did not have the power to fix the amount herself, and she was unwilling to permit Virginia to do so arbitrarily. For the first time in fifty years, the basis of liability was fixed by this Court in its finding and opinion of March 6, 1911, and that finding was provisional; and, if West Virginia should be permitted by this Court to apply the credits thereto that she now claims, interest could only be calculated upon the balance from the time the balance is ascertained, unless this Court should be of the opinion that West Virginia has actively prevented the ascertainment of her proportion of the debt, and to this suggestion we will now briefly address ourselves.

V.

WEST VIRGINIA NOT AT FAULT.

From the adoption of her Constitution in 1861 until her admission into the Union in 1863, West Virginia had no power to act, because she had not become a State. From 1863 until 1866, the two

States were at war, and nothing could be done. In 1866, Virginia filed a bill in this Court against West Virginia, attacking the integrity of her territory, and claiming jurisdiction over the Counties of Berkeley, Jefferson and Frederick, which suit was not decided until the sixth day of March, 1871, and, during its pendency, it was uncertain what constituted West Virginia, and her action upon the debt question was thereby prevented and postponed. Immediately following this, that is to say, upon the 15th day of March, 1871, the Governor of West Virginia, pursuant to a joint resolution of her Legislature, appointed a Commission to negotiate a settlement of the debt question with the Commonwealth of Virginia. This Commission proceeded without unnecessary delay to the Capital of Virginia for the purpose of carrying out the objects of its appointment, but was met with a refusal upon the part of Virginia to negotiate, and West Virginia was once more powerless. Shortly after this, that is to say, on March 30, 1871, the State of Virginia, without consulting West Virginia, took the matter into her own hands, and, by legislative enactment, arbitrarily fixed West Virginia's portion of the debt as one-third, thus making it impossible for West Virginia to do anything in the premises; and there the matter remained practically until immediately before the institution of this suit. West Virginia, it is therefore respectfully submitted, has not been at fault, and has not been the cause of the postponement of this settlement.

VI.

VIRGINIA GUILTY OF LACHES.

Upon the other hand, Virginia has had it in her power for more than forty years to institute this suit, and ascertain through this tribunal West Virginia's equitable proportion of her debt. Instead, she neglected so to do, and has caused, by her neglect and delay, the very time to run upon which she now seeks to charge interest.

It may be said, however, that *laches* cannot be attributed to the Crown or to a sovereign State, and this is true where the Crown or the State acts in its own right; but does the doctrine obtain where the Crown or the State has no interest, and is simply acting in a fiduciary capacity, or as a trustee? It must be remembered that the fact here is that Virginia has no interest in the result of this suit. By an agreement between her and the bondholders, she is simply acting as trustee for them, and, under that arrangement, Virginia must be relieved of all liability on account of West Virginia certificates, and the bondholders must be satisfied with the result of the suit, whatever that result may be.

Respectfully submitted,

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