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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA

vs.

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)
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In Equity.

STATE OF WEST VIRGINIA.

BRIEF ON BEHALF OF WEST VIRGINIA IN
OPPOSITION TO INTEREST.

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I.

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'S PROMISE TO PAY INTEREST, IF ANY SHE MADE, WAS CONDITIONAL, AND NOT ABSOLUTE.

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, and, if so, whether or not such promise was absolute or conditional.

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.

Here is a promise to pay an equitable proportion of the Virginia debt, and a like promise to establish “a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years”; but both promises have two qualifications attached thereto: *First*, she was not to contribute to the payment of any indebtedness of Virginia, whether principal or interest, accruing after the first day of January, 1861, and, *secondly*, she could not, and was not to establish the promised sinking fund until after her equitable proportion of the debt had been first ascertained.

It is true that any overdue and unpaid interest existing prior to the first day of January, 1861, might be treated as a part of the principal debt as of that date, and she compelled to contribute an equitable proportion to the payment thereof, but not so with any interest accruing upon the Virginia debt after that time; because, by her contract, she firmly fixed the first day of January, 1861, as the date beyond which no indebtedness should accrue to the payment of which she would contribute.

Evidently she contemplated the payment of interest upon her equitable proportion of the debt after the same had been ascertained, but not before. After its ascertainment, the amount so fixed would become the principal of her debt, which, according to the sinking fund provision, would bear interest from that time, but no sooner or otherwise.

This construction is in keeping with the rule of law that 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 sub-*

sequent 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.

McConnico 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.

III.

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 proportion 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.

IV.

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 Capitol 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 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.

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 Vir-

ginia'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 is, therefore, respectfully submitted that West Virginia should not be charged with interest until after the ascertainment of her equitable proportion of the debt, as promised in her Constitution.

Respectfully submitted,

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