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In the Supreme Court of the United States.

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COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

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No. 3, Original. October Term, 1910.

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NOTES OF ARGUMENT OF COUNSEL FOR COMPLAINANT.

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## PREFATORY NOTE.

### EXPLANATORY OF ARRANGEMENT OF THE RECORD AND OF REFERENCES MADE IN THE ARGUMENT.

The principal references in the argument of the case will be to—

1. The large volume of exhibits and evidence, returned by the Master with his report, entitled "Record."

This will be referred to by pages, as follows, "R. 20," "R. 55," etc.

The tabulated statements or schedules which constitute a valuable part of that volume, and embody in a condensed form the most important data in the case, have been, for convenience, also printed and bound together in a separate volume, where they will be found arranged for ready reference according to the paging and order in which they appear in the larger volume, and can be readily examined accordingly.

These schedules are designated "Plaintiff's and Defendant's Exhibit" "A-1," "B-1," etc.; or "Defendant's Exhibit" "D-1;" or Plaintiff's Exhibit" "E-3," etc. The great advantage of the method which, under the direction of the Master, was adopted in making up all of the "Joint Exhibits," and some of the more important of "Plaintiff's Exhibits," and of "Defendant's Exhibits," comes from the fact that in those exhibits, so certified by the accountants for both parties, the *figures* stated are *agreed* figures,—the only question left open being as to the proper or legal application or use to be made of those agreed amounts in making up the respective accounts to which they relate.

These tabulated statements present in concrete form the claims of the opposing parties, and contain the very gist of the case.

It is important therefore to an intelligent understanding of the numerous questions presented, to clearly understand the method adopted by the Master for presenting the claims of the parties, respectively, and the evidence in support thereof. A clear appre-

hension of this method can be had from a preliminary examination of the "Record," and the exhibits and schedules referred to, together with the master's report.

2. The Statutes, and extracts from Ordinances, and Constitutions of the two States, most material to the questions in the cause, have been compiled under the direction of the master in a separate volume, designated as "Appendix to the Record." This will be referred to as "App. p. 12, 26," etc.

3. West Virginia has caused two volumes to be compiled, printed and filed in the clerk's office of the Court, containing most of the record of the case down to the appointment of the Special Master; including also the arguments of counsel on the general hearings in this Court, and some papers and documents not a part of the record. The first volume of this compilation was edited by the Hon. Clarke W. May, the late attorney general of West Virginia; the second volume by Hon. W. G. Conley, the present attorney general of that State.

When for convenience this compilation is referred to it will be designated, "West Virginia's Compilation, Vol. 1," etc.

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PRELIMINARY STATEMENT.

This suit is a result of the dismemberment of the Commonwealth of Virginia and the formation of the State of West Virginia out of her territory.

It is instituted for the purpose of having an accounting with West Virginia, and determining her equitable share of the indebtedness of the undivided Commonwealth.

That indebtedness,—independently of the bonds belonging to the sinking fund and the literary fund, held by the corporations known as the Commissioners of the Sinking Fund and the President and Directors of the Literary fund,—amounted to \$33,897,073.82 on the 31st of December, 1860; of which \$32,919,863.93 were principal, and \$977,209.89 were accrued interest. The correctness of these figures is conceded by West Virginia.—See Master's Report, pages 1, 2, 3 and 29.

The specific relief sought by Virginia is to have West Virginia's equitable proportion of this common indebtedness fairly ascertained, and to secure the payment of the same by that State.

This large indebtedness—an enormous liability, having reference to the resources of the Commonwealth at the time it was contracted—came upon her with added force after the close of a long and disastrous war; but notwithstanding her impoverishment Virginia has, down to the present time, paid more than thirty-eight millions of dollars in interest, and has retired a considerable amount of the principal of the original debt, in addition to large payments made upon the portion of the debt, payment of which she has assumed and for which she has given her obligations. And yet there are some twenty-five millions of dollars of obligations, issued by Virginia as she exists to-day, outstanding and unpaid, upon which the interest is regularly met by the Commonwealth. So that Virginia has paid off and retired, or assumed and issued her own bonds for, over seventy-four millions of dollars, principal and interest, down to the present year, including the bonds which she has redeemed since 1865.

While the Commonwealth has made this large contribution to the payment of the principal and interest of the common debt, since the formation of the new State,—much of it made during the decades following the Civil War, at a painful sacrifice, from the scant means of an impoverished people,—West Virginia has not paid one dollar upon that common indebtedness, but has refused to pay, and denied her liability to pay, any part of the same. See Resolutions of West Virginia Legislature denying any liability for, and refusing to negotiate in reference to, the Virginia Debt.—App. 247, 248.

There is another fact which it is proper to call to mind in this connection:

The bulk of this large common debt was contracted with the sanction and by the votes of the representatives in the General Assembly of Virginia from the counties now constituting the State of West Virginia,—a large part of it having been actually put upon Virginia by the votes of those representatives over the votes



of a majority of the representatives of the counties constituting the Virginia of to-day; and but a small part of that indebtedness would have been contracted had the representatives from West Virginia counties in the General Assembly of Virginia opposed and voted against the Acts by virtue of which the debt was created.

These pregnant facts are specifically alleged in the complainant's bill, and are not denied or questioned in the defendant's answer.—See Paragraph III of the Bill, R. 4; and Paragraph III of the Defendant's Answer, R. 144.

It is also true that more than seven-eighths of the indebtedness of Virginia at the time of the formation of West Virginia was represented by equivalent sums expended on works of internal improvement, which were either designed, begun, and built for the purpose of penetrating and developing West Virginia territory, or are to-day parts of railway systems and lines of communication which serve the territory and people of West Virginia, and afford large regions of that State their best access to the Atlantic seaboard and to the markets of the world.—See Appendix I to this Note of Argument.

The foregoing statement of facts is made here, because they have an important bearing upon the broad equities of the case, and entitle Virginia to fair and just consideration in the application of rules of construction to the statutes, ordinances and provisions of constitutions which are relied upon as determining the rights and obligations of the parties.

They are tremendous facts, and have a mighty bearing upon questions which go to the very right of the cause.

This suit is brought by Virginia for her own protection and relief; and yet, to the extent that it shall result in her exoneration, it will inure to the benefit of the common creditors who have deposited their bonds in her keeping.

She actually to-day holds every bond which was issued by the Commonwealth prior to the formation of West Virginia, which is known to be in existence, and she also holds more than nine-tenths of the certificates which she issued to the common creditors of the two States, who confided those bonds to her keeping.—R. 102.

So that Virginia, and Virginia alone, has, and represents here every substantial right and interest, adverse to the defendant, in any way connected with the unsettled debt of the undivided State, or directly or indirectly involved in this suit.

Such are some of the more important facts which underlie this suit, and such generally are the relations of Virginia to, and her vital interests in, the litigation.

## ARGUMENT.

There can be no question, as a principle of public law, public justice and public right, that, on the 20th day of June, 1863, when West Virginia became one of the States of the American Union, the public debt of Virginia, then existing, constituted, independently of any stipulation between Virginia and the new State, an equitable and a moral claim against the people and the property, both of West Virginia and Virginia; and that, as has been decided by the Supreme Court of Virginia in more than one case, and has been held by this court, both States, and the people of both States, were bound for the payment of those obligations.

*Higginbotham v. The Commonwealth*, 25 Gratt., 627;

*Greenhow v. Vashon*, 81 Va., 336;

*Hartman v. Greenhow*, 136 U. S., 672.

Independently of any convention between the two States, according to recognized authorities, the debt should have been ratably apportioned between the two States.

The entire debt of the Commonwealth was created in carrying out what was known as her "Internal Improvement Policy."

The history of that policy of Virginia, from its inception nearly a century ago until 1861 when it was rudely interrupted by war and revolution, will show that the enormous debt incurred by Virginia in carrying it out, was incurred mainly upon the expectation of the return which would reasonably come to the State and her people from the *prospective* enhancement of the values of real estate which would follow the development of the regions which those works of internal improvement, built in whole or in part by the money represented by the State debt, would create and stimulate.

That these expectations have been largely realized, though not always precisely, perhaps, in the way anticipated, is impressively shown by the remarkable increase of the assessed values of the real and personal property in the two States, and particularly in West Virginia, down to 1908, the latest year for which those facts are established in the cause.

As will be seen from Plaintiff's Exhibit E-3, R. 651, which is made up from the official records of the two States, the aggregate of the assessed values of the real estate, personal, and railroad property in West Virginia were

For 1867 (the first year for which the official figures could be obtained).....	\$126,060,743.00
For 1908 .....	937,232,718.54

An increase of .....	\$811,171,975.54,
Or 643 per cent!!!	

The assessed values of taxable property in Virginia for the same period advanced from.....	\$354,848,482.69, in 1867,
To .....	661,796,631.00, in 1908,

An increase of.....	\$306,948,148.31,
Or about 84 per cent.	

While this enormous difference in the increment of the assessed values of taxable property may doubtless be, in part, accounted for by the different standards of valuation adopted in the two States, by no means all of it is ascribable to that circumstance; and the facts and figures shown by the exhibit just referred to have an influential bearing upon the essential equity of the plaintiff's claim that to determine fairly the portion of the burden of the common debt which, as a matter of justice, should be borne by West Virginia, account should be taken of the great enhancement of values which have come to the territory which the internal improvements referred to were designed to develop and have in large measure created. The debt was contracted far

more in reliance upon future and prospective values, than upon the values existing at the date of its creation.

There were certain enactments and certain conventional agreements of the restored government of Virginia, at Wheeling, and the new State of West Virginia, which have to be considered in determining what the respective rights and liabilities of the parties are in the premises.

The first of these, was the so-called "Wheeling Ordinance," an ordinance adopted on the 20th day of August, 1861, by what purported to be a convention of the people of Virginia, "to provide for the formation of a new State out of a portion of the territory of this State."—(Appendix to the Record, pp. 119 to 122, inclusive).

The ninth section of that ordinance dealt with the debt and provided—

"9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of said debt was contracted; and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new State during the same period."

That ordinance purported to be an enactment of Virginia alone. It prescribed, *upon its face*, an arbitrary and what would seem to be an inequitable basis of settlement.

In so far as it provided for the assumption by the new State of a "just proportion" of the debt of the Commonwealth, its language was free from objection. But when it came to indicate the manner in which that proportion should be ascertained, its terms were not only artificial, but *on their face*, inequitable.

And yet the dominant purpose of the enactment, expressed in the clearest terms, was to require the new State to assume a "just proportion" of the public debt of the Commonwealth prior to the first of January, 1861. Upon elementary principles of con-

struction this will be taken, certainly by a court of equity, to be its controlling purpose; and that intendment will not be suffered to be defeated by such a construction of the language of the ordinance as will lead to a result inconsistent with it, when that language can be sensibly, reasonably, and fairly construed and applied so as to operate in harmony with that expressed paramount purpose.

Fortunately, in the interest of justice, that was not the only enactment upon the subject.

There was a later, a more significant, and a more effective enactment by the legislature of the restored government of Virginia, accepting the provisions tendered by West Virginia, resulting in a compact between the two States, and creating a contractual relation governing both Commonwealths in reference to the settlement of their common debt.

These later enactments of the two States were—

First, that of West Virginia, embodied in the eighth section of the eighth article of the first Constitution of that State (Appendix to the Record, p. 125), which is as follows:

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

And, second, the act of the legislature of the restored government of Virginia, at Wheeling, passed May 13, 1862, giving the consent of the legislature of Virginia “to the formation and erection of the State of West Virginia within the jurisdiction of this State \* \* \* \* \* under the provisions set forth in the constitution for the said State of West Virginia and schedule thereto annexed.”—Appendix to the Record, p. 125.

Under section 3 of Article IV of the Constitution of the

United States the new State of West Virginia could not be formed without the consent of the legislature of Virginia.

That consent was given in this instance upon the terms, and in accordance with the provisions, set forth in the constitution adopted for the government of the new State, among the more important of which were the provisions and stipulations set forth in section 8 of Article VIII of that instrument, which required that the new State should assume "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first of January in the year one thousand eight hundred and sixty-one"; and that "the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and to redeem the principal within thirty-four years."

This proposal of the new Commonwealth, thus clearly expressed in its constitution, submitted to the legislature of Virginia and accepted by that legislature as one of the terms and conditions upon which it gave its consent to the partition of her territory and the erection of a new State out of that territory, and sanctioned by Congress, created a contractual relation between the old State and the new—a compact between them, which absolutely determined their rights, and which, whenever the provisions of the antecedent Wheeling ordinance shall come in conflict with the terms of such compact, shall prevail over the terms of that ordinance.

Now the insistence of Virginia has been, and is, that West Virginia should be charged with an equitable proportion of the debt, to be ascertained under the Wheeling Ordinance construed so as not to defeat the expressed controlling purpose of its enactment, and qualified and ruled by the provisions of Article VIII of the West Virginia Constitution, upon which the consent of the Legislature of Virginia and of the Congress of the United States to the formation of the new State, was predicated.

Agreeably to the decision of this court in its opinion, delivered by the late Chief Justice (R. 136), the view of Virginia is, and has been, that the Ordinance and the provisions of the West Virginia

Constitution should be read as being *in pari materia*; but that the constitutional provision, being the latest, must prevail, if, and whenever there is any conflict between them.

As a logical and inevitable consequence from this, the claim of Virginia was, and is, that, if the language of the Wheeling Ordinance is fairly and reasonably susceptible of such a construction as will, when fairly applied to the facts of the case, lead to an equitable result, and place upon West Virginia an equitable proportion of the debt, such construction should be given to that Ordinance; and that, if the language of the Ordinance is not reasonably and fairly susceptible of such a construction, then the Ordinance must be discarded, and the mandate of the West Virginia Constitution followed. And that, in any event, the provisions of that Constitution will govern in placing a contractual obligation upon West Virginia to pay an equitable portion of the common debt of the undivided State, and to pay interest upon the same from the date when that express contractual obligation accrued, until it shall have been discharged.

But the claim of Virginia was, and is, farther, that the provisions of the Wheeling Ordinance—fairly, justly and sensibly construed, and applied, according to its manifest purpose—places upon West Virginia a just and equitable proportion of the debt; *and that West Virginia cannot be heard to repudiate this result of her own express covenant and promise.*

On the other hand, West Virginia has insisted, and still contends, that there is no obligation upon that State to pay any part of the Virginia debt; but that, if there is any liability whatever upon West Virginia, it is a liability for a settlement and accounting which must be made under a construction of the language of the Ordinance, which would absolutely defeat its declared purpose, and, instead of placing a just proportion, or any proportion, of the debt upon West Virginia, would actually, as was contended for West Virginia, bring Virginia in debt to West Virginia.

With the issues thus made up, this court, in order to place in its possession the data necessary to enable it to intelligently and fairly decide the case, referred the cause to Special Master Charles



E. Littlefield, by its decree of reference, entered on the 4th of May, 1908, and directed the Master to take and report to the court seven separate accounts set forth in seven paragraphs of the decree.—R. 173, 174, 175 and 207.

After considering a great mass of testimony, statements, and accounts prepared by the accomplished expert accountants employed by the parties, respectively, and the elaborate arguments of counsel, and after a laborious and painstaking investigation and consideration of the case, the Master, on the 17th of March last, filed his report, in which he returns his findings upon each of the seven inquiries submitted to him, and with great fairness and great ability presents the grounds upon which those findings are based.

The cause is now submitted for final adjudication.

It comes before the court upon the pleadings and papers formerly considered by the court, upon the decisions and decrees heretofore rendered in the cause, and upon the Master's report, together with the evidence returned therewith and referred to therein, and upon the exceptions filed by the parties to that report.

Your Honors must have been already impressed with the fact that it is a cause of as much complexity as any which has ever come before you for decision, and with the novelty and difficulty of some of the problems which it presents.

Much of what appears at the threshold to be complex will disappear upon a careful examination of the bill and answer, the 9th section of the Wheeling Ordinance, the 8th section of Article VIII of West Virginia's Constitution of 1862-3, the decisions and decrees heretofore rendered in the cause, and the tabulated statements or accounts, the figures in which have, in almost every instance, been assented to by both parties.

Still a painstaking consideration of the Master's report, and of the exhibits and evidence referred to therein and in the arguments of counsel, will be necessary to any fair understanding of the issues in the cause, and to their decision according to the very right of the case.

We have, therefore, to crave the patient and indulgent attention of the court to a somewhat detailed and tedious discussion of the facts, figures, and principles upon which a righteous decision of the cause depends.

The chief points of difference are sharply presented by such of the exceptions to the Master's report as are specifically relied upon by the parties respectively, and by the "Joint Exhibits" or accounts which exhibit their opposing claims in contrast.

Upon the great majority of these the Master's findings are, and are shown by him to be, so plainly right that further discussion of them is rendered needless.

After full consideration, however, the counsel for Virginia deem it to be their duty, upon the case as it is presented, to earnestly urge objections to a few of the Master's conclusions, in reaching which we are persuaded that he is in manifest error. But it is our purpose to urge no objection to his report which rests upon a proposition which can be fairly regarded as debatable.

I.

The first paragraph of the decree directed the Master to ascertain and report to the court:

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

In the view which we take of this branch of the case and for the principal purposes of our argument it will be only necessary to consider the amount of the public debt of the Commonwealth outstanding on the 31st of December, 1860, in the hands of the general public.

Fortunately there is no controversy as to the amount of that indebtedness then so outstanding.

As ascertained by the Master, the amount of that indebtedness is, as fixed by the records of the Commonwealth, as follows:

Aggregate amount of old Virginia debt in the hands of the general public January 1, 1861:

Amount bearing 6 per cent. interest.....	\$30,842,659.43
Amount bearing 5 per cent. interest.....	2,077,204.50
Interest on 6 per cent. outstanding debt from July 1st to Dec. 31st, 1860.....	925,279.78
Interest on 5 per cent. outstanding debt from July 1st to Dec. 31st, 1860.....	51,930.11
	<hr/>
Total outstanding indebtedness.....	\$33,897,073.82

See “Plaintiff’s and Defendant’s Joint Exhibit A-1,” R. 215, and Master’s Report, pp. 1, 2 and 29.

The authority of law by which, the purposes for which, that indebtedness was contracted, and the dates and nature of the bonds or evidences thereof, are shown by the references and entries upon "Plaintiff's and Defendant's Joint Exhibit A-1;" by the copies of the bonds and certificates of indebtedness issued for much the greater part thereof—"Plaintiff's Exhibit A-2," R. 219 to 285; by the abstract of the statutes in reference to the State debt and the appropriation of the avails thereof to works of internal improvement—"Plaintiff's General Exhibit I," R. 900 to 988; and by other evidence in the case; none of which are any longer matters of controversy.

The only controverted questions which have arisen under this branch of the case have been in respect to the inclusion or exclusion of the sinking fund and the literary fund from the statement of the debt.

As to the sinking fund, frankness compels us to say that we are convinced that the finding of the Master in reference thereto is right.

As to the literary fund, we are content to rely upon the complainant's first exception to the Master's report.

## II.

The second paragraph of the decree required the ascertainment of—

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

The figures as to the area and assessed valuation of the real estate embraced in the territory of the two States, respectively, and as to the population thereof, with and without slaves, having been taken from authentic public records of the United States and of Virginia, incorporated in “Plaintiff’s and Defendant’s Joint Exhibit B-1,” the agreed statement prepared by the expert accountants of the parties,—those figures have been adopted by the Master and made the basis of his findings under this paragraph of the decree.

We are unable to conjecture how these figures, thus authoritatively established and adopted, or the results deducible therefrom, can now be brought in question. R. 366, 367.

The figures furnished for West Virginia in “Supplemental Exhibit 7,” and now relied upon by that State would be more advantageous to Virginia than those adopted by the Master, for the reason that the assessed valuation of the real estate embraced in the State of West Virginia, as given by that exhibit, is larger and the assessed valuation of the territory of Virginia is less than that adopted by the Master, taken from the assessments of Virginia. The figures submitted by West Virginia would make her share of the debt, on the basis of assessed valuation of real estate in the two States, \$154,166.09 more than she would owe under the master’s findings. But we are content to accept the values adopted by the Master, because we are satisfied that they are correct.

The Master's findings under this head are as follows:

*The Extent and Assessed Valuation of the Territory of Virginia and of West Virginia June 20th, 1863, and the Population Thereof, with and without Slaves, Separately.*

PARAGRAPH II OF DECREE.

1. EXTENT:

*Land Area*

Virginia .....	40,262	Square Miles =	62.6314%
West Virginia .....	24,022	Square Miles =	37.3686%
	<hr/>		
Total .....	64,284	Square Miles =	100%

*Total Area:*

Virginia .....	42,627	Square Miles =	63.8157%
West Virginia .....	24,170	Square Miles =	36.1843%
	<hr/>		
Total .....	66,797	Square Miles =	100%

2. ASSESSED VALUATION:

*Real Estate:*

Virginia .....	\$296,085,460.31 =	78.2188%
West Virginia .....	82,449,252.04 =	21.7812%
	<hr/>	
Total .....	\$378,534,712.35 =	100%

3. POPULATION:

*Estimated—With Slaves:*

Virginia .....	1,221,319 =	75.4855%
West Virginia .....	396,633 =	24.5145%
	<hr/>	
Total .....	1,617,952 =	100%

*Estimated—Without Slaves:*

Virginia .....	748,171 =	66.4769%
West Virginia .....	377,289 =	33.5231%
	<hr/>	
Total .....	1,125,460 =	100%

III.

The third account directed by the decree is one ascertaining—

“3. All expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted.”

This is one of the accounts which is called for under section 9 of the Wheeling Ordinance, which requires that in order to ascertain the proportion of the debt which the new State shall take upon itself, that State shall be charged with “all State expenditures within the limits thereof \* \* \* \* since any part of said debt was contracted.”

The divergent contentions of the parties are shown by the tabulated statements embodied in “Plaintiff’s and Defendant’s Joint Exhibit C-1,” pp. 1 to 6, R. 371-377.

The total of said State expenditures in the territory constituting West Virginia, as shown by plaintiff’s statements of this account (R. 371)	
was .....	\$5,639,302.66
As shown by defendants’ statements.....	1,251,288.92
	\$4,388,013.74
Difference in the two results is.....	

In considering the questions which are presented by the controverted items in the schedules filed under this paragraph, it is important always to bear in mind the precise language of the decree, which, following the terms of the Wheeling Ordinance, directs the ascertainment of:

“*ALL expenditures* made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia, since any part of the debt was contracted.”

It is manifest that that language in explicit and comprehensive terms, embraces, without exception or qualification, all expen-

ditures of whatever character or description, and on whatever account, or for whatever purpose, or in whatever manner made, which were made by the Commonwealth of Virginia in any part of the territory now constituting West Virginia, after March 19, 1823, the agreed time at which any part of the debt in question was contracted.

The only questions to be considered, therefore, in determining whether any particular expenditure made during that period should be charged against West Virginia, are: First, Was it made by the Commonwealth? and, Second, Was the money expended in West Virginia?

Now, governed by these plain requirements of the decree, the accountants engaged on behalf of Virginia have embraced in this account all such items of expenditure, and only such items of expenditure, as were made by the Commonwealth within the territory of the new State during the period stated.

To a number of these items of charge counsel for West Virginia make objection, not on the ground that the expenditures they challenge were not made, or were not made in West Virginia territory, but in some instances because of the manner in which the expenditures were made; in others because of the character of the particular expenditure, or the purpose for which it was made; and in other cases, as for instance the expenditures made in West Virginia on the Covington & Ohio Railroad, and upon the Berryville and Charlestown Turnpike, upon the ground that Virginia has, since these several expenditures were made, in some way, by acts or transactions in reference to these subjects, lost her right to embrace those items of expenditure in this account.

As appears from Joint Exhibit "C-1," R. 371, the charges upon this account allowed by the accountants for plaintiff, and excepted to by the defendant, are classified as follows:



Items of Plaintiff's Charges Excepted to by West Virginia:

Expenditures in W. Va. upon railroads.....	\$1,316,992.42
Expenditures in W. Va. upon turnpikes.....	430,252.89
Miscellaneous expenditures in W. Va.....	1,154,000.10
*Expenditures in bridges, river improvements, banks owned by joint stock companies, and loan to Town of Bath.....	1,486,768.33
	<hr/>
	\$4,388,013.74

We will consider these in the order in which they are stated in Exhibit "C-1," and are considered by the Master.

1. The expenditures upon railroads which West Virginia questions, are—

Expenditures on the Covington & Ohio R. R.....	\$1,146,460.42
Expenditures on the Winchester & Pot. R. R.....	170,532.00
	<hr/>
	\$1,316,992.42

(1) The expenditures upon the Covington & Ohio R. R. This item of \$1,146,460.42, is allowed by the master.

The Master very clearly shows the propriety of this item of charge, and little if anything need be said in support of his conclusion.

There is no question that those expenditures were made by the Commonwealth "since any part of the debt was created;" nor that they were made "within the territory now constituting the State of West Virginia."

But opposing counsel claim that in some way Virginia has lost her right to have those expenditures charged against West Virginia by reason of the public acts and transactions of Virginia and West Virginia in reference to this railroad. This ob-

NOTE:—The charge under this paragraph for amounts invested in Bank Stocks is withdrawn, as those stocks should be accounted for under Paragraph VII. and have been allowed by the Master under that Paragraph.

jection has been stated so vaguely that we are at a loss to know upon what ground it is based.

The Covington & Ohio Railroad was owned and built by the Commonwealth under the Acts of February 15, 1853; March 13, 1856; March 20, 1858, and February 29, 1860. (Appendix 33, 34.) The work was unfinished at the time of the formation of the State of West Virginia, though over \$2,787,000.00 had been then spent upon it.

How West Virginia should account for that property and the expenditures which it represented, was distinctly prescribed by section 9 of the Wheeling Ordinance (App. 119, 122), and was prescribed nowhere else.

After June 20, 1863, West Virginia owned the portion of the Covington & Ohio Railroad in that State as completely as Virginia owned the portion of that road within her limits.

As is shown by the subsequent legislation of the two States, both States were very anxious to secure the completion of that railroad from its intersection with what was then known as the Virginia Central Railroad at Covington, Virginia, to a point on the Ohio river, thus giving a through railroad connection from Richmond, Virginia, through the entire State of West Virginia to the Ohio river, at the mouth of the Big Sandy, or at the mouth of the Great Kanawha, with the right to build to both points.

Both States were, as is shown by that legislation, willing to give to the company which should complete that through line of railway, the right of way and property of each State, respectively, in the parts of the unfinished road located in each State, and the benefit of the large expenditures made in its partial construction. Virginia, though very little of the proposed new railway would be within her limits, made still more liberal concessions to the builders of the through road, in reference to the sale to the new company of the Blue Ridge Railroad wholly within Virginia, and to the sale of the stock of Virginia in the Central R. R. Co., and to the settlement of the indebtedness of the Central R. R. Co. to Virginia.

To effectuate the purposes of the two States, concurrent Acts

were enacted by their respective Legislatures for the incorporation of the Covington & Ohio Railroad Company, passed by Virginia February 26, 1866, (Appendix 35), and by West Virginia March 1, 1866, (Appendix 37), and to authorize the consolidation of the Covington & Ohio Railroad Company with the Virginia Central Railroad Company and other companies, and the formation of the Chesapeake & Ohio Railroad Company for the purpose of completing "a continuous line or lines of railroad from the waters of the Chesapeake to the Ohio river," passed by West Virginia February 26, 1867, (Appendix 40), and by Virginia March 1, 1867, (Appendix 43.)\* See also section 9 of Act of Virginia Feb. 26, 1866 (App. 36), and section 9 of Act of West Virginia March 1, 1866 (App. 39.)

It will be seen that the interests which West Virginia had in the building of the proposed railroad were far greater and more vital than those of Virginia.

West Virginia at that time had no railroad within her limits, except the Pennsylvania across the Pan Handle, and the Baltimore & Ohio through the northern portion of that State.

The New river and Kanawha valleys, and the entire southern portion of West Virginia, were without a mile of railroad, and large parts of those sections were inaccessible to the outside world by any practicable line of communication.

The enterprising young State accordingly freely donated all the property rights which she had in the Covington & Ohio Railroad, situated within her limits, to the builders of that railroad, just as the older State, in larger degree, contributed even more generously to the same important object.

The legislation of the two States upon this subject, printed in the Appendix, pp. 35 to 49, will be read in vain to discover any provision which can be so wrested as to be construed to refer in any way to the liability of West Virginia to pay some part of the

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\*By Act of January 26, 1870, the Legislature of West Virginia amended the charter of the Chesapeake and Ohio R. R. Co., and confirmed the contract made by the commissioners on behalf of the two States with the Virginia Central R. R. Co., under authority already granted by Virginia, by the Act of February 26, 1866 (Appendix p. 35-36) and by West Virginia by Act of March 1, 1866 (App. 37-39 and 46.)

Virginia debt, or to release that State from any part of that liability.

Those concurrent enactments can be construed to do only what they did do, that is, to give the consent of the two States to the establishment of, and by their respective grants to secure, a through line of railway from the waters of the Chesapeake to the banks of the Ohio, and to grant the property rights of each State in and to the portion of the respective railroads situated in each State, to the consolidated company, for that purpose.

The Wheeling Ordinance prescribed the basis on which the proportion of the Virginia debt to be assumed by West Virginia was to be ascertained, and vested in the new State the ownership of the portion of the Covington & Ohio Railroad located in West Virginia, and there is not a line or a syllable of those concurrent Acts of the two States in reference to the Chesapeake & Ohio Railroad, which can be construed to repeal or to modify the provisions of that Ordinance.

It would require a far-off and capricious flight of the imagination to construe the language of those concurrent Acts so as to make them operate to prevent Virginia, when she comes to have a settlement with West Virginia as to the part of the common debt which West Virginia should pay, from insisting that West Virginia should, according to her own agreement, be charged in making up that account with the amount expended upon the Covington & Ohio Railroad within the limits of the new State, if the Wheeling Ordinance is to control to any extent in that accounting.

There is nothing in any of those concurrent Acts of the two States to suggest that either State was conceding anything to the other. Both were conceding a great deal to the Covington & Ohio and to the Chesapeake & Ohio Railroad Companies, and for obvious reasons.

The account of this matter, as claimed by the plaintiff and found by the Master, is distinctly responsive to the decree.

That claimed by the defendant would not satisfy the decree, and cannot be set up without going counter to both the decree and the Ordinance.

(2) The expenditures upon the Winchester & Potomac Railroad in West Virginia.....\$170,532.00.

The Master rejected this item of charge—15/27th of it because it was a loan by Virginia to the railroad company, and 12/27ths of it because it was, in his view, an investment made by the State in the shares of the capital stock of this Company.—Master's Rep. 47; Joint Exhibit C-1, p. 2; R. 373.

We cannot be unmindful of the fact that there are circumstances connected with Virginia's dealings with the Winchester & Potomac Railroad Company, which sharply differentiate any charge on account of her expenditures in West Virginia upon that railroad from the other expenditures made by the Commonwealth in building works in West Virginia territory, which were built through internal improvement companies.

We are constrained to admit that the circumstance that Virginia commuted all of her claim against, and interest in, that company under the Act of February 24, 1846 (App. 30, 31), gives West Virginia a strong equity to have that charge eliminated from the account, even though it be true that the transaction was not consummated and Virginia was not paid the commuted price, until after the formation of the new State.

We, therefore, beg leave to withdraw our objection to the disallowance by the Master of this item of Virginia's claim.

We do not, however, at all assent to the reasons upon which, in part, the Master bases his rejection of so much of this item as was represented by the shares of stock which Virginia received therefor.

We will consider those grounds under the next head, when we come to discuss the question presented distinctly, as it is there, free from other complications, in connection with the large expenditures made by the Commonwealth through internal improvement companies, in building roads, turnpikes and bridges, etc., upon West Virginia soil.

(3) *Expenditures made by Virginia in West Virginia territory in the construction of works of internal improvement*

*located in West Virginia but built through the agency of joint stock companies.*

Passing over a number of items under this paragraph of the decree, as to which the findings of the Master, in so far as they are in favor of the contention of the plaintiff, afford no just ground of objection to the defendant, for the reasons clearly shown by the Master, the only items of charge against West Virginia under that paragraph of the decree, to the disallowance of which we deem it our duty to object, are the items specifically stated in complainant's second exception, as follows:

(1) For Bridges: Expenditures made by Virginia upon bridges in West Virginia territory, built by joint stock companies, owned partly by the Commonwealth—Items 57 to 65, inclusive, of Joint Exhibit C-1, p. 4; R. 375; Special Master's Report, p. 85—aggregating ..... \$ 78,412.50

(2) Expenditures made by Virginia in the improvement of the navigation of West Virginia rivers by joint stock companies—Items 66 to 69, inclusive, of Joint Exhibit, C-1, p. 4; R. 375; Special Master's Report, p. 85—aggregating ..... \$ 210,500.00

(3) Expenditures made by Virginia upon turnpikes wholly in West Virginia territory, built by joint stock companies:

(a) On Charlestown & Berryville turnpike, in West Virginia—Item No. 6 of Joint Exhibit, C-1, p. 2; R. 373; Special Master's Report, pp. 64, 84 .....\$ 11,932.52

(b) On turnpikes and roads mentioned in Items 70 to 147, inclusive, of Joint Exhibit,

C-1, pp. 4, 5 and 6; R. 375,  
376 and 377; Special Master's  
Report, pp. 78, 79 and 85.... 803,555.83

Total expenditures made by Vir- ginia, through joint stock companies, on turnpikes and roads in West Vir- ginia territory.....	\$815,488.35	815,488.35
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Total aggregate of items, the dis- allowance of which is here excepted to .....		\$ 1,104,400.85
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This exception raises one of the most important questions in the case under the Wheeling Ordinance and the provisions of the first Constitution of West Virginia as it involves \$1,104,400.85, principal sum, of the amount of the debt to be assigned to West Virginia.

With the utmost deference for the ability, learning, and fairness of the Master, we are convinced that he erred in his rejection of these items of the account against West Virginia.

We believe that there is no question as to the propriety of their being charged against West Virginia under Paragraph III of the Decree and under the language of the Wheeling Ordinance. If we fail to demonstrate this, it will be because of our inability to fairly present to the minds of the court the facts and considerations which should control in the decision of the question.

The principal grounds upon which this objection to the Master's finding is based are concisely stated in the formal exception taken thereto.—See Complainant's Exceptions, pp. 4 and 5.

The material facts as to all of these expenditures are, for the purpose of this inquiry, substantially the same, and the same principles should control in determining the proper disposition to be made of these items, in the accounting.

The money appropriated by the Commonwealth in each instance was unquestionably expended in West Virginia territory; for all of these improvements were physically located in West Virginia counties.

The chief ground relied on for excluding these items from the debit account against West Virginia is, *because of the manner in which the expenditures were made*; that is, because they were not made by the State directly through the hands of her own officers or immediate employees, but were made by the State indirectly through the medium of joint stock companies; that they were not made upon bridges, locks, dams and other improvements in rivers, and upon turnpikes, wholly owned by the State, but upon such works of internal improvement as were only partly owned by the State.

The works and highways upon which these expenditures were made in every instance had their situs in West Virginia, and the State money appropriated to them was expended in West Virginia.

The chief difference between these expenditures and those made directly by the State through its own officers and employees, which are conceded by the defendant to be proper charges under this head, was, that in the one case the State received a certificate of stock in a joint stock company (which stock usually proved valueless), as the representative of the expenditure, while in the other case the State would receive merely a receipt or voucher from her officers as an evidence of the outlay.

In either case the Commonwealth, and West Virginia as her successor, received the benefit of the bridge, improvement of navigation, or turnpike on which the State money had been expended; and it is manifest from the history of these public works that the benefits which it was hoped that the public would derive from their construction generally constituted the chief inducement and consideration both to the public and to private investors.

There can be no question that any expenditure made by Virginia, by her several and independent acts, upon any work of internal improvement, or other object, in West Virginia, during the defined period, is a proper and necessary charge against West Virginia under the terms of the 3rd paragraph of the decree, and under the Wheeling Ordinance.

This is conceded by the counsel for West Virginia.



Now, it is equally clear that any such expenditure made by Virginia in association, or in partnership, with other corporations or individuals, would be also a proper and necessary charge against West Virginia under the decree and Ordinance.

Here, in a number of cases, Virginia, instead of going into an ordinary partnership with her associates in the various enterprises in question, chose to form a limited liability company to do the same thing which could have been effected by an ordinary partnership: for a joint stock company is, in law, and in fact, nothing more than a limited liability company.

In the country from which we so largely derive our institutions and our laws, they are termed "limited liability companies."

How can it be even plausibly contended that, because Virginia, for obvious considerations of convenience and public interest, chose to expend her input in these public improvements and other enterprises in West Virginia territory, through the medium or agency of a limited liability company, such expenditure is any less an expenditure by the State than it would have been had it been made through an unlimited liability partnership?

There is no qualification of the expenditures which are to be charged, such as counsel for West Virginia have had to attempt to make, either in the decree or in the Ordinance. The words "direct" and "indirect" are not found in either decree or Ordinance. No such classification is justified by the language of either the decree or the Ordinance.

Opposing counsel are forced by the stress of their case to interpolate the word "direct" both in the decree, and in the Ordinance, an interpolation which, while deemed necessary for the purposes of their argument, is absolutely unwarranted by the decree or by the Ordinance.

But even if that word were in the decree and Ordinance, it would not justify their contention; for an expenditure such as the State made in the improvement of Coal river, or upon the Huntersville and Parkersburg Road, or upon any one of the turnpikes and roads built partly by State aid, was a *direct* expenditure by the State, though paid, for the purpose of building the road or

other internal improvement, to the treasurer of a corporation having its domicile and situs in West Virginia territory.

It is a conclusive answer to all of these objections to these items of expenditure that the account directed by paragraph 3 of the decree is not limited to such expenditures as were made directly by the State; nor to expenditures made upon bridges, locks, dams, and sluices, and upon turnpikes wholly owned by the State; nor to expenditures for which the State received no return, nominal or otherwise, in the shape of shares of stock. That account is required by the decree to include "*all expenditures* made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted."

The question considered by the Master, and which he has decided in the negative, is, as stated by him:

"Whether the subscribing and paying for stock in an internal improvement company, whose improvements were located within the limits of West Virginia, was 'an expenditure made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia' etc.?" (See Master's Report, p. 47.)

With the utmost deference, that is not an accurate statement of the question presented here.

The exact question is:

Whether the expenditures made by Virginia in works of internal improvement physically located in West Virginia lost their character as State expenditures in that territory, because those works were built by joint stock companies formed by Virginia and individuals and corporations for the purpose of building those very turnpikes, roads, bridges, &c., and the Commonwealth received stock of such companies for the money so expended by her through them upon said works?

The history of the internal improvement system, and of the legislation of Virginia in regard thereto, as shown by the records and statutes of the Commonwealth, significant portions of which are referred to by the Master in his discussion of this subject at pages 47 to 55 of his report, will show, beyond controversy, that the paramount and controlling motive of the Commonwealth in all

these expenditures of money upon works of internal improvement was, not any direct or pecuniary return for the money expended in the shape of dividends or interest thereon, but was the advancement of the local and general interests of the people by the development of the resources of the Commonwealth, and of the facilities and lines of communication between the different sections of the State and the markets of the country.

It was the "public utility" which would be served by the construction of these works of internal improvement which the General Assembly had in mind, and not the return which might be expected in the shape of dividends upon the stock which was issued for these investments.

This will be apparent from reading the extracts from the public records of the Commonwealth, which show the purpose, policy, and motive of Virginia in expending her money on works of internal improvement, built by internal improvement companies, printed with this Note of Argument as Appendix II.

Noticing further one of the grounds chiefly relied upon for the exclusion of these items of expenditure, namely, that the expenditures were "investments" made by the State with a view to realizing some profit from them, we would say: That, while it was true that the hope of ultimate financial gain, or of some profitable return from the investment, was in some instances at least one of the inducements which led Virginia to make those expenditures in works built through the agency of joint stock companies, that was in no instance the dominant or controlling motive.

But, if the hope of ultimate financial gain constitutes any reason for excluding these public expenditures from the debit account against West Virginia, then there are few, if any, of the expenditures, which were made by Virginia in West Virginia counties which would not, by the same token, be excluded upon the same ground.

There were, and in the nature of things there would necessarily be, very few, if any, expenditures made by the State of the character indicated, which were not, or would not be, made in

whole or in part in the hope that they would not prove absolutely unprofitable.

The fact is that nearly the whole of the expenditures admitted by West Virginia to have been properly chargeable under this item, amounting to \$1,251,288.92, were expenditures made in part with a view to the direct profits which it was hoped would be realized by the State from them in the shape of tolls or other income from the works thus constructed, as well as the anticipated indirect profits from the development of the territory which those works of internal improvement would serve.

For example, of the expenditures made by Virginia on turnpikes and roads in West Virginia, which are admitted by the defendant, there were expended—

On the Northwestern turnpike.....	\$469,148.53,
And on the Staunton & Parkersburg turnpike....	264,043.07,

Or .....	\$733,191.60,
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of the total admitted items of \$859,050.92.—See Plaintiff's and Defendant's "Joint Exhibit C-1, p. 2," R. 373.

Now it will be found that Virginia actually derived in tolls from these two investments the following sums:

From the Northwestern turnpike.....	\$126,339.89
From the Staunton & Parkersburg turnpike.....	17,080.71

Or a total of .....	\$143,420.60
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See Plaintiff's and Defendant's Joint Exhibit F-1, R. 805.

So we see that, of the two grounds of objection to the allowance of these charges against West Virginia:

(1) that the expenditure may be regarded as an investment made by the State, or,

(2) that anticipated profits or income may have been a motive for the expenditure, neither constitutes any just criterion or ground for either the allowance or rejection of such expenditures.

The fact is, undoubtedly, that every dollar expended by Virginia in works of internal improvement was an "*investment*."

Another pregnant fact is also unquestionably established by the record in this case, that by far the greater part of the money thus expended was expended in the hope of some direct return from the investment; and that every dollar that was expended was expended with the expectation of some indirect, ulterior, or ultimate return through the improvement and development of the territory in which the several works of internal improvement were constructed.

It is also true beyond a doubt that nearly all of these investments made by the Commonwealth in West Virginia territory, whether made in works wholly owned by the State, or made in works owned by the State in conjunction with other stockholders, proved, so far as dividends or direct earnings were concerned absolutely unprofitable and unremunerative; and that some of the investments made by the State in works wholly owned by the State proved more remunerative than the expenditures made through the agency of joint stock companies in the construction of similar works of internal improvement.\*

It is a significant fact that the view which is here urged as to the expenditures of the Commonwealth in works of internal improvement constructed in West Virginia territory and as to the classification of such of those expenditures as were made through the media, or agency, of joint stock companies is the view heretofore consistently taken by the representatives of West Virginia most familiar with the subject.

The eminent citizens of that State who constituted the Debt Commission appointed by the Governor of West Virginia pursuant to the resolutions adopted by the Legislature of that State

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NOTE:—It is an important circumstance in this connection that every expenditure made by the State on internal improvements whether built by the State or by joint stock companies, was, by the terms of the Act of February 5, 1816, and the Acts amendatory thereof, made exclusively for the purpose of building such works. Any earning or profit received from any such investment went into the Internal Improvement Fund, to be there used for building other internal improvements. So that the only hope of gain or profit, which actuated Virginia in making all of these expenditures or investments, was to provide money to build roads, bridges, turnpikes and railroads to which every dollar thus received was dedicated.

See Appendix II, to this note of argument.

February 15th and 20th, 1871, in the elaborate report made by them on the 7th of August, 1871, reviewing the entire subject of West Virginia's liability for a portion of the Virginia debt, found that the expenditures made by Virginia in the construction of turn-pikes and bridges, and in the improvement of rivers, built or improved by joint stock companies, were properly chargeable against West Virginia under the Wheeling Ordinance in like manner as were expenditures on roads constructed wholly on the State account.

Accordingly we find that in their report they charge West Virginia with \$3,343,929.29 "for amounts expended and invested in her territory," the items of which they state in detail in Statement "F," exhibited as part of their report, which sum and the items of which it consists include large amounts expended in West Virginia through the medium of joint stock companies, as will be seen by an examination of that exhibit.—See Report of West Virginia's Debt Commission, West Virginia's Compilation of the record of *Virginia v. West Virginia*, Vol. 1, pages 471, 472, and Statement "F," 479 to 486, filed by the defendant in the clerk's office of this court.

The gentlemen composing that Commission were J. J. Jackson, J. M. Bennett, and A. W. Campbell. Mr. Bennett had been the first auditor of Virginia from 1857 to 1865. Messrs. Campbell and Jackson were active participants in the movement for the formation of the new State of West Virginia. Gen. Jackson was a member of the Wheeling Convention, and Mr. Campbell was one of the leaders throughout the movement for the establishment of the new State. They were doubtless familiar with the inside as well as with the outside of that transaction, and with the true intent and meaning of the Wheeling Ordinance.

There are some very large errors of omission in Statement "F," and patent errors on the face of their report; but still it serves a valuable purpose in showing what was the construction placed upon the Wheeling Ordinance in this regard by these very intelligent representatives of West Virginia in the very earliest stage of

this controversy,—at a time when most of the framers of that Ordinance were still alive.

Two years later, in December, 1873, a Committee of the Senate of West Virginia, of which Mr. J. M. Bennett was the chairman, came to again review the question of West Virginia's liability for the debt of Virginia.

In a carefully considered report, dated December 22, 1873, that committee unanimously adopted the figures above given as to the amount expended by Virginia in West Virginia territory and which they conceded to have been "contributed to the development of the territory of West Virginia."

This last mentioned report is printed as Exhibit No. 3 with the Answer of the Defendant, R. 166, 167, 168, 169.

When, years afterwards, West Virginia was urging the payment of her claim against the United States for the refunding of the direct tax, which was being withheld because the United States held certain bonds of the old State for the payment of which it was claimed that West Virginia was liable, Messrs. Alfred Caldwell, formerly attorney general, and E. W. Wilson, former Governor of West Virginia, in their brief filed before the attorney general of the United States again adopted the construction of the Wheeling Ordinance previously approved by the West Virginia Debt Commission, and by the Finance Committee of the Senate of West Virginia.—See quotation from brief of Messrs. Caldwell and Wilson, printed as Appendix No. III to this Note of Argument.

This construction of the Wheeling Ordinance in respect to the expenditures made by the Commonwealth of Virginia through the agency of joint stock companies in the territory of West Virginia adopted by the representatives, public officials and eminent citizens of West Virginia most familiar with the subject remained unchallenged for more than a generation, until after this suit was instituted, when a new and strange light seems to have dawned upon the representatives of that resourceful State, and for the first time in all the long agitation and discussion of this subject a new, and we respectfully submit, a forced and unnatural, con-

struction is attempted to be placed upon the Wheeling Ordinance, so as to limit the amount for which West Virginia is to be charged on account of expenditures made by Virginia in West Virginia territory, so that the account shall not embrace "ALL EXPENDITURES," but so that it shall include only a portion, and much the smaller portion, of those expenditures.

The decree requires the Master to report ALL expenditures—but the Master distinguishes between expenditures, classifying them as "direct" and "indirect," and construes the decree and the Wheeling Ordinance as referring to expenditures made by the State through its officials, which he classifies as "direct" expenditures and as excluding expenditures made by the State through the agency of joint stock companies, which he classifies as "indirect" expenditures; and he states the following reasons for his finding:

"To hold these subscriptions thus made for investment to be expenditures by the State 'within the territory' it would be necessary to read into the decree the words 'either directly or indirectly' which I do not feel at liberty to do." Master's R. 62.

The language of the decree and of the Ordinance is explicit, and we agree that the Master was not at liberty to read anything into either; but in order to support the conclusion he has reached he has been obliged to read into the decree the word "direct," and by construction to hold that the court and the Wheeling convention when they used the word "All" meant something less than all; that they meant by "all" expenditures only such as the Master has classified as "direct."

We submit that this construction is not warranted, and that there is no authority for the Master under the language of the decree, which requires a report of ALL expenditures, to classify expenditures as "direct" and "indirect" and allow only such as he classifies as "direct." The effect of the Master's construction is to read out of the decree the word "ALL" and substitute for it the word "direct;" and then to give to that substituted word a narrow meaning not justified by the facts and circumstances of the case.



SUMMARY.

The Master has allowed under this paragraph of the decree as proper charges against West Virginia, items amounting to .....\$2,811,559.98

To this we are convinced that there should, beyond peradventure, be added, for expenditures made by Virginia in bridges, improvement of rivers, turnpikes and roads, through the agency of joint stock companies organized by Virginia for that purpose, the items mentioned in the tabulated statement on pages 28 and 29 of this Note of Argument, aggregating..... 1,104,400.85

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Giving a total of State expenditures in West Virginia—the aggregate amount chargeable against West Virginia under Paragraph III of the Decree..... \$3,915,960.83

See Master's Report, pp. 47 and 83; R. 399, 401, 433, 459, 478, 488 and 512.

The findings of the Master as to the other items passed upon by him in response to the third paragraph of the decree, and not here specifically objected to by counsel for the complainant, are, we think, in the main shown to be correct upon the face of his report, and by the evidence in the cause, and are accepted on behalf of the complainant.

## IV.

The fourth paragraph of the decree directs the ascertainment of—

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

The differences in the computation of the total ordinary expenses of the State government between March 19, 1823, and January 1, 1861, as stated by the Master, and as claimed by the defendant, arise entirely from the difference in the classification of the several items of State expenditures during the prescribed period.

The defendant has so classified the greater part of these expenditures as to exclude them from this account. The Master has treated most of the State expenditures during that period as being ordinary, and has included them.

This inquiry is manifestly predicated upon the language of the Wheeling Ordinance, which provides that the new State shall be charged with “a just proportion of the ordinary expense of the State government since any part of said debt was contracted.”—  
R. 6.

The decision of the issue thus presented turns upon the meaning which those words carry in that connection; and their correct interpretation is necessary to enable us to determine the items of expenditure which go into this account.

The defendant has construed that language most narrowly, and so as to exclude many items, not only of usual and ordinary public expenditures, but also many that are appropriate and necessary for meeting important and usual, if not essential, wants of the people of the State under the conditions of civilization obtaining in this country for more than a century.

Nor are the ordinary expenses of a State government merely those which are necessary and regular in their occurrence, but quite as largely such as are usual, though not periodical, and such as are appropriate, though not essential, to the needs and aspirations of an enlightened and progressive people, and as are lawful.

In the constrained and narrow meaning ascribed to those words, and the consequent classification of State expenditures, made by the defendant, the contrast has been between some selected usual regularly recurring expenditures of what are claimed to be of a purely governmental character on the one hand, and all other expenditures of the State government, however proper, lawful, appropriate, regular, or indeed necessary in a free American State, on the other hand.

Now we respectfully submit that the contrast implied here is not between the word "ordinary" on the one hand, and the word "regular," or even the word "annual," or any combination of those words, on the other hand.

The contrast is, and was manifestly intended to be, between "ordinary" and "extraordinary,"—all ordinary expenses of the State government not already embraced in the account being intended to be included, and all extraordinary expenses to be excluded from the computation of the expenses, a just proportion of which should be charged against the new State.

Nor is the inquiry limited by its terms to such expenses as may be argued to be purely governmental,—as, for instance, the "civil list," and such as are usually incurred by a government acting in its political capacity. There is no such limitation expressed or suggested by the language of the decree or of the Ordinance.

The account is required to embrace "the ordinary expenses," and therefore *all* of the ordinary expenses of the State government, during the prescribed period, not embraced in the preceding account, of whatever character, must be included in it, so that it is not necessary for us to enter upon the field of conjecture and speculation, which opposing counsel would have us traverse, in order to determine what expenses were, and what expenses were not, distinctly governmental.

The fact is that under the uniform practice of enlightened States and communities such expenses as are usual, though not regularly periodical, and as are necessary, or appropriate, and are lawful—that is, *within the legitimate powers of the State government*—are ordinary expenses, and such as are unnecessary, or abnormal, are to be considered as extraordinary expenses of a State government.

In a modern State, and particularly in a State of the American Union, caring for, conserving and promoting the economic and material, as well as the social, sanitary, physical, intellectual and moral welfare of its people, many expenditures which may not be regarded as strictly governmental, and some which may not be absolutely necessary, are proper, lawful, usual and ordinary.

It will be found that the terms “ordinary expenses of government” have been carefully considered by learned, trained, and able experts upon the subject of State revenues, expenditures, and finance, by experienced statisticians and accountants, and by courts of high standing, and that these authorities sanction the reasonable and natural construction and application of those terms which we claim to be their true meaning and intendment.

The following are some of the precedents and authorities bearing directly upon this subject, to which we have had access. They will be found to clearly and absolutely confirm the views above expressed.

We give, first, the classification as adopted by the United States government.

The ordinary expenditures of that government are classified and stated as given below.

For this we take as an example the statements for the fiscal year ending June 30, 1874, from the Report of the Secretary of the Treasury of the United States, as follows:

“For Civil Expenses .....	\$ 17,627,115.09
For Foreign Intercourse .....	1,508,064.27
For Indians .....	6,692,462.09
For Pensions .....	29,038,414.66

For Military Establishment, including Fortifications, River and Harbor Improvements and Arsenals .....	42,313,927.22
For Naval Establishment, Including Vessels and Machinery, and Improvements at Navy Yards .....	30,932,587.42
For Miscellaneous Civil, <i>Including Public Buildings, Light Houses, and Collecting Revenue</i> .....	50,506,414.25
<i>For Interest on the Public Debt</i> .....	107,119,815.21
<hr/>	
Total <i>Net</i> Ordinary Expenditures, Exclusive of the Public Debt (that is payments on the Public Debt) .....	\$285,738,800.21"

Report of the Secretary of the Treasury of date December 7, 1874, page iv.

At page v of the same report, Hon. B. H. Bristow, the then Secretary of the Treasury, gives a similar itemized summary and classification of the ordinary expenditures of the National government for the first quarter of the fiscal year ending June 30, 1875. And on page vii of same report he gives an estimate of the ordinary expenditures of the government for the fiscal year ending June 30, 1876, amounting to \$272,778,000.00, made up of the items as stated and classified in the statements of actual expenditures for the two preceding years.

In this statement there is estimated for,

Interest on the public debt .....	\$98,000,000.00
On the Pacific Railway bonds .....	3,878,000.00

as part of the ordinary expenses of the government.

The report of the Secretary of the Treasury for 1904 (House Documents, 58th Congress, Vol. 31, p. 5) gives the total *ordinary* expenditures, exclusive of Postal Service:

	For 1903	For 1904
	at \$506,099,007.04	at \$582,402,321.31
including in these aggregates the following:		
For Indian Service..	\$ 12,935,668.08	\$ 10,438,350.09
For Pensions .....	138,425,646.07	142,559,266.36
For interest on Public Debt .....	28,556,348.82	24,646,489.81

The attention of the court is called to the items which make up the above aggregate of expenses for those years which are given on pp. 3, 4 and 5 of that report, which will be found to be very interesting as showing what expenditures of the government were classified as "ordinary."

The annual report of the Secretary of the Treasury for year ending June 30, 1908, gives the following statement of the ordinary expenses of the United States government:

*"Disbursements:*

Civil Establishments .....	\$175,420,408.57
Military .....	175,840,452.99
Naval .....	118,037,097.15
Indian Service .....	14,579,755.75
Pensions .....	153,892,467.01
<i>Interest on Public Debt</i> .....	21,426,138.21
	<hr/>
	\$659,196,319.68
Postal Service .....	191,478,663.41
	<hr/>
Total <i>ordinary</i> disbursements, including Postal .....	\$850,674,983.09"

See also the classification of ordinary expenses of the National government tabulated for the ten years ending June 30, 1890, in the Eleventh Census. House Miscellaneous Documents, 1st Sess. 52d Cong., 1891-92, Vol. 50, Part II., "Wealth, Debt, and Taxa-

tion," pp. 418, 419. The more carefully these tables are examined the more confirmatory they will be found of the natural and reasonable construction of the words "ordinary expenses of the government of Virginia," adopted by the accountants for Virginia.

Examples to the same effect, as to the practice of the United States government in the classification of the expenditures which are ordinary expenses of government might be multiplied, but the above will suffice.

As to the expenses of State governments which are regarded and treated as "ordinary," we beg leave to refer to the volume of the 11th Census of the United States, just cited, where at pages 464 to 477 the annual and aggregate ordinary and other expenditures of each of the States of the American Union are stated for each year and for the decade ending with the fiscal year 1890.

It will be seen that in each instance the great mass of the expenditures of the State governments of a public character, including "charities and gratuities" (such as the maintenance of eleemosynary institutions and pensions), and including in every case "interest on State debt," are counted as ordinary expenditures of the State governments.

At pages 516 to 533 of the volume of the 11th Census just cited will be found a tabulated statement of the expenditures of 1,319 counties of the different States reporting in 1890, in which there is a compilation of such county expenses as are to be considered as "ordinary," which gives data very interesting and pertinent to our present inquiry. In every instance the "interest on county debt," as well as a number of other items of public expenditure of a more or less irregular occurrence, and not at all always politico-governmental in their character, such as expenditures coming under the heads of "Buildings, grounds, and *improvements*," "Roads, ditches, and *bridges*, charities and *gratuities*," and "*Miscellaneous*" are put in the category of ordinary expenses of government.

The same comments will be found to apply with emphasis to the returns and classification of the expenditures of cities having 50,000 or more inhabitants given at pages 556-557; and to the

tables giving the same statistics as to municipalities having 4,000 or more, but less than 50,000 inhabitants, at pages 580-590 of the same volume of the 11th Census.

Strongly confirming the reasonable classification for which we contend will be also found the practice of both the States and cities of our country on this subject.

In this connection we would call attention to the Report of the "Bureau of Inspection and Supervision of Public Offices" of the State of Ohio for 1906, which gives comparative statistics of cities of Ohio. This report give us a scientific and accurate classification of all public expenditures.

At pages 72-89 is printed a detailed schedule of ordinary expenditures of the cities of that State, each of which embraces the great mass of the expenditures of those cities for any public purpose, and in every instance counts interest upon the public debt as an "ordinary" expense.

A very valuable contribution to the law and literature upon this subject is the 46th Annual Report of the Comptroller of the City of Chicago, 1902. This particular report is of all the more significance because it is approved by Messrs. Haskins & Sells, Certified Public Accountants, of 30 Broad Street, New York, who were employed by the City of Chicago to supervise the preparation of all portions of the Comptroller's Annual Report relating to the receipt, accounting for, and disbursement of moneys for the year 1902. (See their certificate at page 43.) This is all the more interesting because Mr. Thomas Bird Dixey, the accomplished chief accountant for West Virginia, testified that he was at one time the manager of Messrs. Haskins & Sells. At pages 90 to 97 of this report will be found tabulated statements giving in considerable detail the items of the ordinary expenses of the City of Chicago for the year 1902, and the extraordinary expenses of that city for the year 1902, at page 98.

It will be seen that all interest paid, whether on bonded debt or upon miscellaneous accounts, and all cost of exchanges is charged as an ordinary expense of the city, and so also a vast number of items for salaries, maintenance of charitable and other institutions,



maintenance, repair, and renewal of buildings, etc., are treated as ordinary expenses.

Some items are by these skilful accountans for Chicago rather arbitrarily classied as "extraordinary," which are among the usual, appropriate, and necessary expenditures of city governments, such as the purchase of new boilers for fire boat, the extension or the erection of new bridges, and the enlargement of various public works, expenditures which, however expert accounts may regard them, are, according to judicial interpretation, as well as according to the uniform practice of the Federal, State, municipal and county governments, properly to be classed as ordinary expenses of a municipality or other local government.

Still the classification and system of accounting sanctioned by the City of Chicago supports the correctness of more than 95 per cent. in amount of the items which have been embraced by Virginia in the account of ordinary expenses of the State government.

Very many more examples and precedents from the well-considered and enlightened experience and practice of the National, State, county and municipal governments, in America, can doubtless be cited, but it would be merely cumulative authority for propositions which are almost axiomatic, and the precedents and authorities in the support of which are as to all of the items claimed by Virginia overwhelmingly preponderating, and as to more than nineteen twentieths in amount of those items practically unanimous.

We desire now to invite attention to the views of Doctor Bastable, a writer of recognized ability and authority upon any such question.

In his work on "Public Finance," in discussing the subject of "Public Expenditures," that eminent political economist says:

Sec. 1. "State outlay like that of an individual may be distinguished into normal or 'ordinary,' and abnormal or 'extraordinary.' These terms almost explain themselves, but may be thus contrasted: Normal expenditure is that which recurs at stated periods and in a regular manner; it is accordingly capable of being regularly estimated, and provided for. Extraordinary expenditure has to be made at indefinite times and

for uncertain amounts, and it cannot be reckoned for with any approach to accuracy."

But he adds:

"The distinction is not always applied in the same way, and indeed the boundary line is not sharply drawn." P. 130.

And again on page 132:

"There is also in modern States a greater facility for foreseeing, and so to say discounting the future. The refined financial mechanism by which public borrowing is carried out enables 'extraordinary' expenditure for a short period to be transformed into 'ordinary' expenditure for a long one."

And again at page 133:

"Abnormal expenditure also frequently occurs in a somewhat different way, as in the case of durable public works or other improvements. \* \* \* Outlay of this kind is, in mercantile phraseology, 'chargeable to capital, not to revenue,' and is clearly abnormal. The method almost invariably adopted is to meet the abnormal outlay by an abnormal receipt, viz., borrowing, or to put it in another way, to turn the extraordinary expense of a given year into the ordinary one of interest on debt."

This distinguished author wrote with reference to British precedents. In the States of the American Union there are many subjects of public expenditure which are usual, appropriate, and often necessary, though not regularly recurring, which are doubtless unknown in Great Britain, but which are none the less ordinary.

The tendency of expert accountants seems recently to be to assimilate the accounts of expenditures of governments to those of public service and other like corporations; that is, to treat those which are "chargeable to capital" as "extraordinary," and those "chargeable to revenue" as "ordinary."

A little reflection will show that there are many expenditures of a State which are necessary, proper, and usual under the condi-

tions of modern civilization, and which therefore are "ordinary," but which add to the public, though not always to the fiscal, assets of the State.

As will be seen, the rule as sanctioned by judicial decision, and by the great majority of precedents, while affirming the main doctrine as laid down by Doctor Bastable, is in this particular somewhat different from that stated by him, and is in accordance with the reasonable and just contention of the plaintiff.

See also paper prepared by Professor T. S. Adams, of the Department of Economics in the University of Wisconsin, which contains an able, learned and non-partizan discussion of this subject, printed as Appendix IV of this Note or Argument.\*

These conclusions are also supported by the decision of the Supreme Court of Alabama in the case of the *Intendant and Council of Livingston v. Pippin*, 31 Ala. 542, and by the decision in the case of *State, ex. rel. Branch v. Leapheart, State Treasurer*, 11 South Carolina, 458 and by a number of other authorities, which have been ably reviewed by the Master.—See Master's Report, pp. 87 to 113.

There were some items of expenditure which the Master has deemed it proper to reject on the ground that they were not ordinary expenses of the State government, which we think can and should be classified as ordinary expenses. Such is the item of \$258,906.28, on account of constitutional conventions, a usual, regular and ordinary expenditure, though not one of periodical occurrence, in Virginia and other States of the American Union; also

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\*NOTE.—This very instructive paper was obtained under the following circumstances:

Mr. Anderson, then Attorney General of Virginia, in 1909, wrote to Doctor Richard T. Ely, of the University of Wisconsin, (than whom there is no more learned and eminent master of the science of Economics in this country), for information as to the most trustworthy authorities upon the subject of public finance, particularly in reference to the proper definition and classification of such expenditures as are "the ordinary expenses of a State."

Doctor Ely referred Mr. Anderson's letter to Professor Adams, for whom he vouched, as being better situated to give the desired information.

Professor Adams, thereupon, prepared the able and elaborate paper which is printed as Appendix IV hereunto, a service which was generously rendered by him as a free contribution to the literature of this case.

expenditures for establishing boundary lines of the State, for making maps of its territory, and expenditures for the enlargement and improvement of the buildings and grounds of the deaf, dumb and blind institutions, and other charitable and educational institutions of the State, which we think the Master should have allowed as items of ordinary governmental expenditures, under the precedents and under the conditions of life prevailing in Virginia and the other States of the American Union, and in all other enlightened and civilized countries. If, as we are confident is true, the provisions of the Wheeling Ordinance should, under the circumstances under which it was enacted, be construed more strongly against West Virginia, whose citizens and representatives were its actual framers and enactors, then there can be no question but that all of these items of charge against her, rejected by the Master, should be allowed. We are content, however, to submit to the court the propriety of the Master's action in disallowing these several items, without further prolonging the discussion.

We are convinced that the conclusions reached by the Master under this paragraph of the decree, except as to the cost of constitutional conventions and the expenditures upon the instrumentalities and institutions of the State government rejected by him, are in general and in almost every particular, in substantial accordance with the legal and equitable rights of the parties and with the foregoing principles, and we therefore make no other exception to his findings under this head.

The reasoning of the Master and the authorities cited by him in support of his conclusions leave little, if anything, to be said in support of their correctness.

1. *As to the Ordinary Expenses of the State Government.*

The master finds the total aggregate ordinary expenditures of the Commonwealth during the agreed period, from March 19, 1823, to December 31, 1860, to have been..... \$40,274,896.70

Of this sum the defendant concedes the correctness of items aggregating ..... 18,207,784.29

The defendant contests items aggregating..... \$22,067,212.41

The most important of these items of expenditure objected to by the defendant are the payments regularly made by the Commonwealth during all of that period on account of interest on the public debt, aggregating \$18,574,747.84.—See Master's Report, pp. 87, 139.

The Master's findings on these different controverted items, and the reasons given by him in support thereof, are so clearly and fully stated by him, and so entirely supported by the record, and by reason and authority, that we are saved the necessity of any very elaborate argument in support of the correctness of those findings.

We will notice only two of the controverted items, the allowance of which by the Master, is objected to by the defendant.

(a)

The Master has allowed, as a proper item of ordinary expenditure of the State, the sum of \$3,056,239.64 expended out of the State treasury, during that period, upon schools.—Master's Report, 132.

West Virginia certainly cannot justly object to this charge. There cannot be a shadow of a doubt that this sum was expended in the several counties of the Commonwealth during that period, and that they were annual ordinary expenses of the State government for the purpose stated—the most regular and the most ordinary of all the expenditures of the Commonwealth during that period, except the annual disbursements on account of interest.

The complainant had urged before the Master that so much of the expenditures made by the State on account of schools as were actually paid out in West Virginia counties, being distinctly allocated to those counties, should be charged against West Virginia under Paragraph III of the decree, as being "expenditures made by the Commonwealth of Virginia within the territory now constituting the State of West Virginia since any part of the debt was contracted," "all" of which expenditures were required by the decree and by the Wheeling Ordinance to be charged against West Virginia.—See Exhibit C-1. p. 3, R. 374.

There was no question but that expenditures, amounting to the identical sum of \$830,865.37 as shown by that exhibit, had been made out of the State treasury distinctly in West Virginia counties on account of schools between March 19, 1823, and January 1, 1861.

The Master took a different view, his conclusion being that the expenditures made on account of schools should not be treated as distinctly expenditures made in West Virginia territory under Paragraph III of the decree, but as a part of the general, ordinary expenses of the State government; and that, instead of charging West Virginia with the sum of \$830,865.37, shown by the record to have been actually spent in the counties of that State out of the treasury of Virginia on account of schools, he would ascertain the total amount expended in the State for schools as a part of the ordinary expenses of the State government, and assign to West Virginia her proportion of those aggregate ordinary expenses.

While we think the actual expenditures should have been charged against West Virginia, and not the computed expenditures, we are disposed to waive that point; particularly if the apportionment is made on the basis of the average population *without slaves*, which certainly ought to be the basis adopted, inasmuch as the slaves received no portion of that, or of any other items of the ordinary expenditures of the State government, but as a rule all of said expenditures were made on account of the white population; and, so far as expenditures on account of schools were concerned, they were absolutely confined to white schools and to the white population, and were under the law always actually apportioned upon the basis of free white population.—Appendix to Record, pp. 146 and 147.

Apportioning the total school expenditures on the basis of average white population, as the same is ascertained by the Master (Master's Rep., 141), we have 26.6631 per cent. of \$3,056,239.84, or \$814,793.53, as the amount assignable to West Virginia; or only \$16,071.84—say, 2 per cent.—less than \$830,865.37, the agreed proved amount which was actually expended by Virginia in West Virginia counties, on that account, between 1823 and 1861.—See Exhibit C-1, p. 3; R. p. 374.

This result is significant in two particulars of great interest in connection with the question of the rule by which ordinary expenses should be apportioned, which will be considered later on under this paragraph of the decree:

*First*, in strongly supporting the justice of our contention that the true basis for the apportionment of ordinary expenses is the average white population; and

*Second*, in showing that that average should be ascertained by decades in the manner approved by the Master.

Stronger confirmation of these two contentions could not be well given than this concrete illustration where the aggregate of proved actual expenditures in West Virginia counties is so nearly the same as the same expenditures in those counties ascertained by estimating them on the basis of total average white population computed by the method adopted by the Master.—Master's Rep., 139, 140 and 141.

We are now come to consider the largest item of this account, involving a question which, because of the amount which it involves, is one of the most important which has arisen in the case, and that is—

(b)

*The interest paid by the Commonwealth upon the public debt between March 19, 1823, and December 31, 1860, amounting to \$18,574,747.84.*

There were no expenditures of the State government from 1823 to 1861, which were more regular, certain and ordinary than the annual interest on the public debt of the State.

If this was not an ordinary expense of that government, then there was no such expense.

As has been already shown all governments and all authorities, and all expert accountants and statisticians, so far as we have been able to ascertain, agree in classifying the interest on a public debt as among the ordinary expenses of government.

It is to be assumed that the framers of the Wheeling Ordi-

nance intended to do equity. At all events, a court of conscience will not put an unconscionable construction upon that enactment, particularly where a natural and reasonable construction can be given to it, and one which will tend to an equitable result.

Now, if the language of Paragraph IV of the decree, and the language of the Ordinance upon which that paragraph is predicated be so construed as not to require the new State to be charged with its just proportion of the regular and ordinary expenses of the State in the matter of the payment of interest on the common public debt, then West Virginia would be given credit in the account for all of her contributions to the treasury of the Commonwealth on account of said interest charges from 1823 to 1861, and yet she would not be charged with her aliquot just proportion of those same expenditures.

It is not to be presumed that such an unjust provision was intended to be made by the framers of the Wheeling Ordinance; nor will a court of equity give such a strained, unreasonable and unwarranted construction to the language used in that Ordinance, and used also in the decree of reference, as would lead to such inequitable and unconscionable results.

The decree, following the Wheeling Ordinance, requires West Virginia to be charged with a just proportion of the ordinary expenses of the government, and this requirement will not be satisfied, if the largest, the most important, and among the most regular, necessary, and ordinary of those items of expenditure are omitted from those accounts.

*2. As to the Basis of Apportionment of the Ordinary Expenses of the State Government:*

The decree directs that this shall be made on the average total population of Virginia, with and without slaves, as shown by the census of the United States.

In ascertaining the average population of Virginia during the period, the defendant argues that the average for the whole period should be ascertained, and the apportionment made accordingly.



The plaintiff has ascertained that average by decades.—(See Exhibit D-1, p. 2, R. 516).

The Master has adopted the method approved by the plaintiff's accountants.

The purpose of the court in requiring the average population to be struck was doubtless to get as nearly to the true population year by year, and for the very year in which the expenditures were made, as was possible.

It is manifest that this can be more nearly attained by taking the average for each decade, than by taking the average for the entire forty years in lump.

For instance, the average population for the decade from 1830 to 1840 could be fairly ascertained by taking the population as determined by the census year 1830 and in the census year 1840, and dividing the sum by two, so as to give approximately the average for each year from 1830 to 1840; and so as to each of the other decades. And this has been done accordingly in the account as stated and adopted by the Master.

In no other way can an approximation to the truth be reached, and it is the truth which the court, and which we all wish to attain.

Another important question in this connection is—

Whether the average population with slaves, or the average population without slaves, should be taken as the basis upon which to apportion the ordinary expenses of the State government between Virginia and West Virginia.

This is a question which was left open by the court in its decree of reference, which accordingly has not been passed on by the Master, but is necessary to be decided by the court.

We respectfully submit that the white population of the Commonwealth, and particularly of West Virginia, constituted the best and fairest basis for this apportionment. That is, the free population—the citizenship,—and not the total of the free and the slave population.

The care and policing of the slaves cost the State little or nothing. Those matters were regulated by the masters on the plantations.

The debt was contracted solely by the white population or their white representatives. It was expended by them or under laws of their enactment.

The taxes were levied exclusively upon the property of the free population, and the revenues were appropriated and expended as they directed.

The negroes owed no part of the debt, did not constitute a part of the citizenship of the State during any part of the period of time during which it was contracted, or the money realized from it was expended; nor did they constitute any part of the body politic.

As has been seen a large part of the ordinary expenses of the government, as classified by the Master, consisted of school expenditures, which were entirely confined to the white children.

Under these circumstances we would urge as a just criterion for the apportionment of the ordinary expenses of the State government between West Virginia and Virginia, the white population of the territory embraced in West Virginia, and of the territory still remaining to and constituting the present Commonwealth of Virginia at the period when the expenditures to be apportioned were made.

## V.

The fifth inquiry directed is, that the special Master will ascertain—

“5. Such proportion of the ordinary expenses of the government of Virginia since any of said debt was contracted, as was properly assignable to the counties which were created into the State of West Virginia on the basis of the fair estimated valuation of the property, real and personal, by counties, of the State of Virginia.”

As stated by the Master, “this paragraph is clearly in the alternative with the last clause of Paragraph IV.”

A correct response to this inquiry may have an important bearing upon the equities of the case; but it is difficult to see how the valuation of property, real or personal, in the two States would furnish any just criterion for the apportionment of the ordinary expenses of government.

It will be noted that this paragraph fixes no date as of which the fair estimated value of the real and personal property in the counties constituting what is now Virginia and what is West Virginia shall be ascertained.

The second paragraph of the decree fixed the 20th of June, 1863, the date when the formation of the new State was consummated, as the date for ascertaining the assessed valuation of the lands embraced in the two States, and that date was presumably the one contemplated in the fifth paragraph.

It will be recognized as true that the accurate ascertainment of the value of the real and personal property in a State is an exceedingly difficult problem, at any time.

Because of the conditions of disaster, confusion, loss and destruction of values occasioned by the ravages of the then pending war, the difficulty of the solution of this problem is here greatly enhanced. And yet an approximation to a result fair and just under all the circumstances can, we trust, be reached as nearly as is

practicable, by proceeding along the lines of investigation and testimony which have been pursued on behalf of the plaintiff, and as to the real estate by the Master also. The only difference between the method adopted by the Master in this regard, and that pursued by the plaintiff is that the Master has applied that just method to the ascertainment of the value of the real estate in the two States, while the plaintiff has applied it to the ascertainment of the values of both personal and real property.

The land assessments afforded, if not a fair criterion, the only now accessible standard of value of the lands in the counties of undivided Virginia in 1860.

But those valuations were made in 1856, seven years before June, 1863, at which latter date at least four-fifths of the present territory of Virginia and one-fifth of the present territory of West Virginia had been ravaged and desolated by war, so that that valuation of 1856 afforded no just measure of values in 1863. It would suffice, however, to furnish a basis by which the depreciation occasioned by the war could be approximately determined.

The lands were assessed as of their cash specie value in 1856.

The personal property in Virginia counties was assessed annually, on the 1st of February of each year, as of its then cash value, in the currency which then constituted the medium of exchange and the standard of value.

After the war became flagrant, and particularly in February, 1863, that medium of exchange and standard of value, which was the only currency of the people, and the currency with reference to which as a standard of value all their transactions were conducted, was the depreciated currency of the Confederate States.

This was uniformly true in all the regions dominated by the Richmond governments.

There can be no question that the market values of all personal property, and indeed of all property, real and personal, in Confederate Virginia was, throughout 1863, fictitiously enhanced by reason of the depreciation of the currency in circulation in those regions, in which currency alone those values were measured.

This was true also as to West Virginia counties within the Confederate lines, where the assessments were made by officials under the Richmond government.

The personal property in West Virginia counties, outside the Confederate lines, where assessments were made by officers under the Wheeling government, was valued with reference to United States treasury notes (green backs) as a measure of value. The true value of this assessed personal property in these West Virginia counties could be ascertained approximately, therefore, by applying the scale of gold to the assessment in each case.

It was impossible to get the assessed value of the personal property in a number of Virginia counties because they were so ravaged and so harried by war in 1863 that no assessments were made in them of the very small quantity of personal property which was then left there.

As to real estate, it was by no means an easy matter to get at its true value in 1863, and yet a way has been found by which, taking the assessed valuations of 1860 or 1861 as a basis, this has been reached as nearly as is now possible.

A number of witnesses of unusual intelligence, of the highest character, and most of whom had the best opportunities of ascertaining the facts as to the matters in respect to which they testified, were called on behalf of Virginia. Their testimony will be found at pages 739 to 786 of the record. By them the great destruction and deterioration in value of property, real and personal, in Virginia in June, 1863, is satisfactorily proved, and the fact that the lands had been diminished in value at least one-half, as compared with their value in 1860 or 1861, is established.

This general testimony is powerfully confirmed by the proof of a large number of facts and transactions, proof of actual sales of land in 1863 in Confederate money, and of the valuation by sworn and intelligent commissioners or appraisers of houses and lots in the city of Richmond in the spring, or in June, 1863.

For instance, Capt. Gordon McCabe testified (R. 784) that Westover, an historic estate on James river, for which the owner,

to his personal knowledge, had refused \$75,000 in 1859, was sold in 1863 by the owner for \$60,000 in Confederate money,—then worth not more than \$15,000 or \$20,000 in specie; and Major Wellford (R. 762) testified that he was offered the Moss Neck estate on the Rappahannock river, an estate worth at least \$40,000 before the war, in the fall of 1863 for \$100,000 in Confederate money, then worth about \$7,000 in good money; and by Mr. John B. Lightfoot, Jr., a number of most informing and significant facts were proved, which are set forth in the tabulated statements at pages 653 to 664 of the record, which furnish the proof of a number of contemporary sales of lands in Richmond city, Henrico, Hanover and Chesterfield counties, in 1863, at prices showing a depreciation exceeding 50 per cent., as compared with the antebellum assessed values of the same properties.

These were not selected transactions, but Mr. Lightfoot took all of the transactions of the character indicated, which took place about that time, of which the records of those counties and of Richmond City furnished any evidence as to the lands then sold or valued in Confederate money, the assessed value of which in 1860 or 1861 could be ascertained.

The evidence of these concrete facts, taken together with the testimony of the eight witnesses, and the known facts of the history of those times, fully support the contention of the plaintiff that the real estate in Virginia, and in the ten or eleven counties of West Virginia which were usually dominated by the Confederate forces and were generally within the jurisdiction of the Richmond governments, had depreciated at least one-half, as compared with the assessed valuations of the same lands in 1860 or 1861.

The Master has accordingly adopted this valuation as to real estate, and in this he was clearly justified by the proofs, as well as by the history of those times, known and accepted of all men.

To our surprise, however, the Master did not apply the same rules of depreciation to the personal property in the two States.

While he properly finds that the value of the real estate in Virginia had been cut in half and reduced from \$296,085,460.30 to \$148,042,730.15, he finds that the fair estimated value of the per-

sonal property, including slaves, in Virginia counties had increased, notwithstanding the destruction of war, from \$264,512,799 in 1861, to \$403,696,228.59 in June, 1863. (See figures given in the Master's report, at pages 167 and 168).

In this finding of the Master he estimated the value of the personal property, other than slaves, in Virginia in June 1863, at \$152,844,637.59, as compared with the estimated value of the same kind of property, as stated by him, in 1861, of \$102,114,863,—finding that, notwithstanding the depreciation and destruction caused by the war, the personal property in Confederate Virginia was actually worth, in June, 1863, \$50,729,774.59, (or nearly fifty per cent.), more than its fair estimated value in 1861.

An examination of the figures adopted by the Master, given on pages 167 to 169 of his report, will show that he gives, as the fair estimated valuation of all personal property, including slaves, in Virginia counties in June 1863.....\$403,696,228.59;

Of all personal property, without slaves, in  
the same counties..... 152,844,637.59;

And that accordingly he computes the fair estimated value of the slaves in Virginia counties, in June, 1863 to have been.....\$250,851,591.00;

While he finds that the fair estimated value of slaves in the same counties in 1861 was....\$162,537,936.00, the *agreed* valuation of slaves in those counties in that year.

The master's findings, therefore, give us the astounding result, that a considerably smaller number of slaves in Virginia counties in June, 1863, (nearly six months after Mr. Lincoln's emancipation Proclamation had taken effect, by its terms, and had become actually effective in large portions of the territory embraced in those Virginia counties), were actually worth, in good money, \$87,-329,635 more than a considerably larger number of slaves were worth in 1861, prior to the beginning of the war, and when they had a specie market value.

These results are not only in conflict with the overwhelming proofs in the case, but they are contradicted by the recognized facts of the history of those times.

The slaves in Virginia counties, as well as in West Virginia counties, were all of them then more than three-fourths, if not more than nine-tenths free. As soon as any of that territory came within the Federal lines (and at least one-third of Virginia was at that time within those lines, or dominated by the guns of Federal gun-boats), or as soon as the slaves went within the Federal lines, they became actually and absolutely free.

It is simply impossible that it can be true that the personal property, other than slaves, in Confederate Virginia, was worth anything like as much in June, 1863, as that personal property was worth in 1860 or 1861, before it had been subjected to the disastrous and destructive effects of the war which was then prevailing.

It is especially impossible that it can be true that the smaller number of slaves in Virginia in June, 1863, (395, 105. See Joint Exhibit, E-1, p. 7, R. 645), after Mr. Lincoln's Proclamation, were worth as much as, and still less that they could be worth more than the larger number of slaves (472,494, as per U. S. Census of 1860, and Report of First Auditor of Va., 1860-61, p. 75, and Exhibit West Va. 2, R. 823 and 824), in those counties prior to the beginning of the war, when the title of the master and the status of the slave were unquestioned.

The proof shows that slaves were such a precarious property at that time as to possess very little value. As an instance of this, Col. Branch testifies (R. 756), that he purchased a slave in July, 1863, for the equivalent of \$225 in gold—"a servant who would certainly have brought \$1,200 in 1860, previous to the election."

But no proof ought to be required to show that the slaves in Virginia counties were, in June, 1863, worth very much less than the slaves in the same counties were worth, in good money, in January, 1861, prior to the beginning of the war.

It will be remembered that Virginia at that time was the theatre of the war.

In 1861 large armies had encamped upon her soil.

In 1862 and 1863 armies numbering in the aggregate from 250,000 to 350,000 men had occupied her territory, and largely sub-



sisted upon what they could take from the limited resources of her people.

The Federal troops, in 1863, occupied the greater part of her tidewater counties and large portions of northern Virginia; and all of her coasts along the Atlantic ocean and Chesapeake bay, and the navigable waters of the Potomac, the Rappahannock, the York and the James were dominated by the gunboats of the United States, where not actually occupied by their troops. In all of these sections there were large numbers of slaves.

The *uncontradicted evidence* in the case shows that the depreciation in value extended not only to slaves but to all personal property, and was at least fifty per cent. as a *minimum*. There had been enormous consumption and destruction of every kind of personal property, and what remained had greatly depreciated in value.

Now, it may be that the Master is correct in holding that the plaintiff has failed to show definitely that the depreciation in value of personal property in Virginia counties was, in 1863, 75 per cent. of its value as compared with 1861.

But there can be no question, that the evidence in the cause (found at pages 739 to 786 of the record), corroborated as it is by the known and unquestioned and unquestionable facts of history, abundantly justifies the conclusion that that depreciation amounted to at least fifty per cent. in June, 1863, as compared with January, 1861.

We recognize that a similar depreciation existed in ten or eleven West Virginia counties which were generally held by the Confederate forces and controlled by the Richmond governments, during that period.

The chief importance of the question here discussed is in its bearing upon the question of an equitable proportion of the debt to be borne by West Virginia, and it is because of its bearing upon that aspect of the case that we have taken so much of the time of the court in its discussion.

## VI.

By Paragraph VI of the decree the Master is directed to take an account ascertaining—

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

The Master finds (see his report, pp. 174-179) that the total payments made into the treasury of Virginia from the counties of West Virginia, for which the latter State is entitled to a credit in the accounting under this paragraph of the decree, amounted to \$6,105,884.75.

The plaintiff is satisfied that the findings of the Master under this paragraph do substantial justice between the parties, and therefore waives any objection thereto.

The defendant objects to the Master's findings under this head because he fails to give West Virginia credit for items aggregating \$807,646.89.

These items are as follows:

Item 7.—Dividends from banks in West Virginia counties .....	\$786,666.98
Item 8.—Dividends and interest from Turnpike Companies in West Virginia counties.....	13,595.48
Item 9.—Dividends from Bridge Companies in West Virginia .....	6,028.51
Item 10.—Dividends from Interstate Turnpike Companies (proportion) .....	1,355.92
	\$807,646.89

See Joint Exhibit, F., p. 1, R. 805; Master's Report, pp. 176, 180.

The Master's finding upon these items is evidently justified by the facts, and is consistent with the language of the decree and of the Wheeling Ordinance.

The amounts received by Virginia upon the accounts and items objected to by the defendant, particularly the dividends upon bank stock, were in no sense money paid into the treasury of the Commonwealth from the counties included in the State of West Virginia.

They were the profits earned by Virginia's own money which she had invested in fiscal institutions; or the returns made to Virginia upon the investments mentioned, and, not moneys paid to Virginia from West Virginia counties, within the meaning or within the reason of the sixth paragraph of the decree and of the ninth section of the Wheeling Ordinance, on which that paragraph of the decree is based.

None of them could be regarded as contributions from West Virginia counties, but they were the legitimate earnings from the State's own money invested in the banking business, and in the properties created by its companies.

As to the banks, while they had their principal places of business in West Virginia, their assets were transitory and of a movable character, having their situs not at all necessarily in West Virginia.

It will be seen that the Master had already held, under Paragraph III, that West Virginia was not properly chargeable under that paragraph with the money paid out by the Commonwealth on account of stock subscriptions to banks, located in West Virginia, and had excluded that item from the debit account against West Virginia under that paragraph.

We are convinced that the Master's ruling upon this point was correct, and by analogous reasoning the conclusions reached by the Master under the sixth paragraph, that these dividends were not in any sense public payments, or payments from West Virginia counties, was inevitable.

## VII.

The seventh paragraph of the decree directs an account ascertaining—

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

This direction of the decree was doubtless given in response to the provisions of sections 1, 2 and 5 of the act of the Wheeling Legislature passed February 3rd, 1863.—Appendix to the Record, pp. 128, 129, 130.

There was a large amount of property, chiefly unappropriated or abandoned, and delinquent or forfeited lands, to which the Commonwealth had title, which passed to the new State by the said act of the Wheeling Legislature, and with the value of which property West Virginia was chargeable by the terms of that act upon such settlement as should be made between the two States.

After the decree of reference was entered it was ascertained by the accountants and counsel for Virginia that West Virginia had recognized the land warrants issued by Virginia prior to June, 1863, and had allowed them to be used, without additional payment to that State, in the acquisition of vacant and unappropriated lands within its limits to the extent of many thousands of acres, and that the new State received nothing for those lands. This was done although the entries were made and the warrants located upon those entries since the formation of the new State.

Under these circumstances, as the new State recognized the warrants of the undivided State, it was considered by counsel for Virginia that it would be inequitable to make any charge against West Virginia on account of those transactions.

It was also found to be impracticable, if not impossible, to find any satisfactory records of the disposition which had been made by the new State of large quantities of lands, delinquent and forfeited to the Commonwealth prior to June, 1863, for the non-payment of taxes, or for failure to enter the same upon the land books for taxation, and that inquiry, therefore, has not been pressed.

So that the only charges made by Virginia under the seventh paragraph of the decree are for money and bank stocks actually received by West Virginia from Virginia after the formation of the new State in 1863 and in 1864.

The fact as to the receipt by West Virginia from the Commonwealth of amounts aggregating \$170,771.46, stated in plaintiff's exhibit G-1, R. 819, is assented to and certified by the accountants for both parties, and is reported by the Master at page 181 of his report.

The requirement of Paragraph VII of the decree was that the master should ascertain and report "the amount \* \* \* \* \* of all money \* \* \* \* \* which West Virginia received from the Commonwealth of Virginia" \* \* \* \* \*.

Under these circumstances it is difficult to understand upon what ground the Master excluded these items, amounting to \$170,771.46, as to which the facts are unquestionable.

These sums of money were undoubtedly received by the new from the old State. At that time the officials of the restored government of Virginia consisted of West Virginians. That government was dominated by West Virginians, and the new State could appropriate and take out of the treasury of the State of Virginia, at Wheeling, whatever it chose; and it did undoubtedly receive from the "restored" government of Virginia \$170,771.46, for which sum, we think, it is fairly chargeable.

It is proper here, however, to call attention to the fact that the Special Master has included in the charges against West Virginia, under Paragraph VII, the value of the stock which represented the amounts expended by the Commonwealth on turnpikes and bridges built by the following companies:

Sweet & Salt Sulphur Springs Co.....	\$ 7,578.00
White & Salt Sulphur Springs Co.....	4,000.00
Fairmount & Palatine Bridge Co.....	12,000.00
	<hr/>
Making a total of .....	\$23,578.00

The complainant has insisted, and still urges, that, under the terms of Paragraph III, of the decree, and under the language of the Wheeling Ordinance fairly construed, the expenditures made by the Commonwealth in the construction of these internal improvements should be charged against West Virginia under the third paragraph of the decree; and by her second exception she has objected to the Master's report for not charging West Virginia with items 60, 136 and 145, Joint Exhibit C-1, R. 375, 377,—which items cover the expenditures made by Virginia on said Sweet & Salt Sulphur and White & Salt Sulphur Turnpikes, and on said Fairmount & Palantine Bridge.

If the complainant's second exception is sustained as to those items, the corresponding items charged by the Master under Paragraph VII, of the decree, aggregating \$23,578, covering the values of the expenditures in those works which were transferred to West Virginia, should be deducted from the aggregate charged against West Virginia under said seventh paragraph.

We submit herewith a statement showing the amount chargeable against West Virginia under this paragraph of the decree in accordance with the facts here stated, which are entirely sustained by the record.

*Statement of Money, Property, and Stocks received by West Virginia from Virginia on and after June 20, 1863,—Paragraph VII:*

(a) As found by the master (Master's Rep. 193).	\$500,828.00
(b) Add for cash received by West Virginia from Virginia (Master's Rep. 181 and 193).....	170,771.46
	<hr/>
Making a total of .....	671,599.46
Deduct for value of stock in the Sweet & Salt Sulphur Springs, and White & Salt Sulphur Springs Turnpike Companies, and the Fairmount & Palatine Bridge Company, the expenditures upon which are included in the total of \$1,104,400.85 which complainant claims should be charged under Paragraph III (see Plaintiff's Exceptions, p. 12, and Joint Exhibit C-1, pp. 4, 5 and 6, R. 375, 376 and 377, and Master's Rep. 193).....	23,578.00
	<hr/>
Balance chargeable to West Virginia.....	\$648,021.46

## VIII.

*What is West Virginia's Share of the Debt?*

Our rapid review of the master's report, brings us to the application of its findings—modified in the particulars covered by the few, but important exceptions, which we have taken to those findings—to the solution of the main question in the cause, namely:

*What, upon the data thus ascertained, is the proportion of the Virginia debt for which West Virginia is liable?*

## (1)

It cannot be too strongly emphasized that it is the just and equitable liability of the new State which is to be determined: for the Wheeling Ordinance imposed a just proportion of the debt upon her, and by the compact created by the provisions of section 8 of Article VIII of the West Virginia Constitution and the Acts of Virginia and of Congress, by which she was granted statehood, it was stipulated that an equitable proportion of that debt should be assumed by the new State.

Upon elementary principles there can be no question but that these provisions of the first Constitution of West Virginia constituted an essential stipulation and condition upon which the consent of the Legislature of Virginia to the creation of the new State was predicated. We have a right to assume that the consent of Virginia to her dismemberment would never have been given but for the fair and reasonable stipulation clearly expressed in that Constitution, that the new State should assume an equitable proportion of the common debt, and would provide for the payment of the accruing interest of the principal in thirty-four years.

It is equally, though no more, certain that the United States Congress would never have given its consent to the partition of Virginia and the erection of the new State out of her domain, but for the fact that the new State had undertaken to assume an equitable proportion of the then existing public debt of the Commonwealth,



and to pay the same with the interest thereon. No evidence is needed to establish this; but if it were required it would be furnished by the records of Congress, and by the statements of honorable and distinguished actors in that momentous transaction.

On the 31st of December, 1862, the Act providing for the formation of the State of West Virginia was passed by Congress.

When the bill giving the consent of Congress to the erection of the new State was under consideration in the House of Representatives, the following discussion took place:

Mr. Olin: \* \* \* \* "I desire to ask what will become of the bonds, and other obligations which Virginia has issued or incurred, by the recognition of a new State?" \* \* \* \*

Congressional Globe, Pt. I, 3rd Session, 37th Congress, p. 45.

Mr. Hutchins: "I will answer my friend from New York. Here is the provision of the Constitution of West Virginia in reference to that matter: 'An equitable proportion of the debt of Virginia prior to January the first, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as practicable.'" \* \* \* \*

Idem, page 46.

And again, while the bill was still under discussion in the House, the following colloquy occurred:

Mr. Crittenden: "Mr. Speaker, there is another question to which I invite your attention. The old State of Virginia, when she embraced east and west, owed a large debt. She owes it to this day. Who is to be bound for that debt? Is the new State? How is this debt to be divided?" \* \* \* \*

"Mr. Blair, of Virginia: "In regard to the public debt, the Constitution framed by the convention of the people of the proposed new State of West Virginia, binds the new State to pay its just proportion of whatever public debt the State of Virginia owed prior to the Ordinance of Secession." \* \* \* \*

Mr. Crittenden: "I only knew, Mr. Speaker, that in this bill there was no provision made for a division of the State

debt. The gentleman tells us there is provision made for it in the Constitution, and I am satisfied with that. That was only a question of mere expediency which I wished to suggest; but although a matter of expediency it was also a matter of justice. If it has been attended to, I have no more to say about it." \* \* \* \*

Idem, page 47.

Years afterwards when the subject of the Virginia debt was again under discussion in the United States Senate, statements of great significance and importance upon the very fact we are now considering, were given out by Senator John Sherman, and ex-Senator Waitman T. Willey. Senator Willey was one of the senators from (Restored) Virginia, was one of the makers of the new State, a member of the Wheeling convention, and was an active participant in all of the transactions which led to the formation of West Virginia, had been for years a very active, intelligent, leading and useful member of the Legislature of Virginia, and was as well acquainted with the facts as to the origin and history of the Virginia debt, and with West Virginia's relations to it as any citizen of either State. Under his leadership, and upon the views which he earnestly urged, the United States Senate passed the bill giving the consent of Congress to the creation of West Virginia. Even with his able advocacy of that measure it was only passed by a majority of six votes. Besides his intimate acquaintance with the essential facts upon which West Virginia's obligation for the payment of an equitable proportion of the debt rests, Senator Willey was a man of very high character.

Senator Sherman had been a member of Congress when the bill for the creation of West Virginia was passed. Being from Ohio, an adjoining State, he had taken a deep interest in its enactment and had actively supported it. No two men in the world knew more about the history of that transaction than those two eminent men.

We state here now upon the authority of these honorable senators that the bill admitting West Virginia would never have been

passed but for West Virginia's assumption of an equitable proportion of the debt of Virginia.

During the discussion of the subject in the 47th Congress, Senator Sherman read the following extract from a letter which he had received from Senator Willey:

"I have a pretty distinct recollection that while the application for admission was pending before the United States Senate, you suggested to me this very matter, and that when I pointed out to you the clause in the Constitution which I have above quoted, you expressed your satisfaction and stated to me that it removed one of the difficulties which had been embarrassing you; and I say to you now, what I have said to the people of West Virginia, that but for that clause in her Constitution, the State would never have been admitted. I SAY FURTHER, THAT IN MY OPINION, NO HONEST MAN, OR HONEST PARTY, IN WEST VIRGINIA, OR OUT OF IT, WILL DENY THE OBLIGATION OF WEST VIRGINIA TO PAY AN EQUITABLE PART OF THE PUBLIC DEBT OF VIRGINIA." (Capitals ours.)

After quoting this extract, and after reading the 8th clause of Article VIII of West Virginia's Constitution, Senator Sherman said:

"But for this stipulation in the Constitution of West Virginia, which was submitted to the Senate at the time of the passage of the bill to admit that State, it never would have been a State of this Union."—Congressional Record, Vol. 12, 47th Congress, p. 450.

No one can doubt, therefore, that West Virginia owes her existence to her promise to assume an equitable proportion of the debt of the old State, and to provide for the payment of the accruing interest thereon and of the principal of the same.

It is the corner-stone of her existence as a State.

The methods adopted for the purpose of ascertaining what West Virginia's share of the debt is, are merely means for reaching that end, and can be sanctioned only in so far as, fairly pursued, they shall lead to an equitable result.

It becomes important therefore to determine, what, independently of any conventional arrangement, would, under the circumstances which confront us here, be the equitable share of that debt to be borne by West Virginia?

The case presented is a peculiar one. It is *sui generis*.

History furnishes no counterpart, no precise parallel or precedent to guide us, by a clearly blazed path, to a correct conclusion.

Kingdoms, empires, and republics have been divided and subdivided, but never has a State been dismembered just as was Virginia in 1863.

And yet there are certain established rules of right and principles of equity which will enable us to reach a conclusion which will do substantial justice between these parties.

According to the authorities upon public, or international law, copious quotation from which will be found in the Appendix No. 1 to the reply brief for Virginia upon the motion to refer the cause to the master, printed in Vol. II of West Virginia's Compilation, pp. 163 to 167, the accepted doctrine seems to be, as the same is stated by Mr. John Bassett Moore in his Digest of International Law, as follows:

"In the event of a State being divided into two or more independent sovereignties, the obligations which had accrued to the whole before the division are ratably binding on the different parts; for as Story says, 'the division of an empire creates no forfeiture of previous vested rights of property.'"

1 Moore's Digest Int. L., p. 334, citing  
Abdy's Kent, p. 96, and

Lawrence's Wheaton, 52 (m) 20.

The debt should, therefore, be apportioned "ratably" between the old and the new State.

For reasons already abundantly appearing in this case it is exceedingly difficult, to determine accurately the true taxable values of the property in Virginia as at present constituted and in West Virginia, on the 20th of June, 1863. There is less difficulty in determining the relative values as to the real estate in the two

States, respectively, than as to the personal property in the two States.

The destructive and exhausting effects of the war then flagrant, the depreciation of the currency in general use in Confederate Virginia, were much more disastrous in their operation in what is now Virginia than they were in the greater portion of what is now West Virginia. The destruction of personal property was far more final and complete than of real property. When horses or cattle were carried off, or wagons or farming implements were worn out or destroyed, that was an end of them as property to their owners.

The lands might be, and were, greatly impaired in value by the destruction of fences and buildings, and by neglect, but these ravages of war could be, and in fact, in the forty-five years of peace, have been in great part remedied.

Moreover, land existed as property, and as a subject of taxation much more uniformly throughout the territory embraced in both States than did any other species of property.

It constituted therefore a more uniform, as well as a more permanent and stable measure of the wealth and taxable resources of the two States, at any time, and particularly at the date of the formation of West Virginia.

The court must have been influenced by these considerations in framing the second paragraph of the decree of reference, in directing the ascertainment of the "assessed valuation of the territory of Virginia and of West Virginia June 20, 1863," and in excluding from that account the value of the personal property therein.

Now taking up the Master's findings and applying them *seriatim*, as they should be applied, we will endeavor to ascertain what the result is, or should be, as to the part of the debt to be paid by West Virginia:

(1)

There need be no farther discussion under the first paragraph, by which the amount of the debt is ascertained.

(2)

Under the second paragraph it is ascertained that West Virginia had 36.1843 per cent. of the total area of the undivided State.

Apportioning the admitted \$33,897,073.82 of the common debt on that basis would assign to West Virginia \$12,265,418.88, of which \$11,911,822.32 would be principal, and \$353,596.56 would be interest.

West Virginia had 33.5231 per cent. of the total population, excluding slaves. On that basis West Virginia would owe \$11,363,349.95, of which \$11,035,758.90 would be principal, and \$327,591.05 interest.

West Virginia had 24.5145 per cent. of the total population, including slaves. On that basis she would owe \$8,309,698.16, of which \$8,070,140.04 would be principal, and \$239,558.12 interest.

West Virginia had 21.7812 per cent. of the total values of real estate upon the basis of the assessed valuation of 1863. Upon this basis she would be charged with \$7,383,189.44, of which \$7,170,341.40 would be principal, and \$212,848.04 would be interest.

*What part of the debt does West Virginia owe?*

While taxable property seems, as a rule, to be the measure accepted by writers on public law for dividing a common debt between two states formed by the division of a State into two states, it may not be inequitable to bring population into the account here along with property; for population, such as that of these two States certainly constitutes an important factor of productive wealth.

Bringing the total population and the assessed valuation of the real estate into the account as factors, and combining the two and taking the average, we have \$7,846,443.80 as West Virginia's portion of the debt, of which \$7,620,240.73 would be principal, and \$226,203.07 interest.

If, discarding the method defined in the Wheeling Ordinance, the apportionment should be made according to the fair value of the taxable property in the two States in June 1863, taking for those values the figures arrived at in our consideration of the

Master's findings and the evidence under paragraph V, we will have the following results:

*Fair estimated value of the taxable property in Virginia and West Virginia Counties, June 20, 1863:*

Fair estimated value of real estate in Virginia counties, as ascertained by the Master and accepted by the Plaintiff (Master's Report, p. 168) .....	\$148,042,730 15
Fair estimated value of personal property, other than slaves, in Virginia counties— not exceeding one-half of \$152,844,637.59, its Confederate inflated assessed valuation in 1863, .....	76,422,318.79
Fair estimated valuation of slaves in Virginia counties, not exceeding in good money as a possible maximum, one-half of \$162,537,936, the agreed value on January 1, 1861, of the slaves in Virginia* .....	81,268,968 00
<hr/>	
Fair estimated value of all property, real and personal, in Virginia counties .....	\$305,734,016 94

\*Note.—(Explanatory of the item of \$81,268,968.00).—Upon the hearing before the Master on the first of January, 1910, the following agreement was made between the counsel for the parties, and made a part of the record:

"*It is agreed*, between the counsel for Virginia and West Virginia that there were 490,865 slaves in the Commonwealth of Virginia on the 31st of December, 1860, and that the fair estimated valuation of such slaves was \$344 apiece; that of them, 472,494 were within the territory of the present Commonwealth of Virginia, and that their fair estimated valuation at that time was \$162,537,936; and that there were 18,371 of such slaves on the same date in the counties that now constitute the State of West Virginia, and that the fair estimated valuation of such slaves was at that time in the aggregate \$6,319,624.

"(Upon request the foregoing agreement was read aloud by the stenographer, and there was no objection to it by counsel for either party).

"Mr. Anderson: The Commonwealth of Virginia does not admit that the facts here conceded to be true are either relevant, material, or responsive to any issue in this case or any direction of the decree. Counsel for Virginia further object to the consideration of these facts by the Master in this case for the reason that both parties have down to the present day construed Section 5 of the decree as referring to the fair estimated value

Fair estimated value of real estate in West Virginia counties as per Master's Report p. 168 .....	\$ 67,676,127 44
Fair estimated value of personal property, excluding slaves, in same counties (Master's Report, 168, 169) .....	24,739,894 21
Fair estimated value of slaves in West Virginia counties, as conceded by Defendant, (Master's Report 169-170) .....	6,319,624 00
<hr/>	
Total fair estimated value of all property, real and personal, in West Virginia .....	\$ 98,735,645 65
Fair estimated value of all taxable property in Virginia and West Virginia as of June 20, 1863, .....	\$404,469,662 59
Of which there was in Virginia .....	\$305,734,016 94
And in West Virginia .....	\$ 98,735,645 65
or 24.4111 per cent. in the latter State.	

Upon the basis of the fair estimated value of all property in the two States in June, 1863, according to the Plaintiff's statement of those values. West Virginia's share of the debt would be 24,4111

of the real and personal property in Virginia as of the 20th day of June, 1863, and have taken their testimony, prepared their schedules and exhibits, and until to-day argued the case upon that basis; and they object to the introduction of this new issue into the case at this stage of the litigation."

\* \* \* \* \*

"The Special Master: Have you any objection to adding this to the agreement?

"*It is further agreed*, inasmuch as Paragraph 5 requires a report of the real and personal property by counties, it is agreed that the aggregate number of slaves stipulated for in the foregoing agreement was taken from the United States Census of 1860, and that in apportioning the number of slaves and the valuation thereof to the various counties, the same census, showing the slaves in the various counties as the basis for making that distribution, shall be used.

"Mr. Anderson: There is no objection to that. Let it be stated in the record that this agreement was made at the close of the argument, on the 1st day of January, 1910."

Stenographic Report of the Hearings before the Master, Vol. 20, pp. 3153-3154.



per cent. of \$33,897,073.82, or \$8,274,648.58; of which \$8,036,100.90 would be principal and \$238,547.68 accrued interest.

These estimates are more than liberal to West Virginia, for they include the slaves, both those still nominally in bondage, and those who were actually free, at a valuation equivalent to more than half what those slaves were individually or collectively worth in January, 1861.

We most earnestly and confidently insist that the slaves in Virginia and West Virginia in June, 1863, as a mass constituted no such description of property as to be any just basis upon which to rest any State indebtedness.

The tenure by which they were held was so precarious, both by reason of Mr. Lincoln's Emancipation Proclamation, and because of the facility with which they could secure actual freedom by escaping into the lines of Federal occupation, where they were not already within those lines, as very many of them were, that they constituted no fair basis for the ascertainment of the share of the common debt with which either State should be charged.

The above conservative figures seem clearly to demonstrate that, ascertaining West Virginia's share of the common debt, independently of the Wheeling Ordinance, her equitable share of that liability, computing it upon any basis which would be fair or just, would be \$7,383,189.44, with interest on \$7,170,339.47 from January 1, 1861,—*as a minimum*, if it be ascertained on the *assessed* values of real estate in the two States June 20, 1863; and that it would be \$8,274,648.58, with interest on \$8,036,100.90 from January 1, 1861, if the apportionment be made on the basis of fair *estimated* value of both real and personal property (including slaves) in the two States June 20, 1863, and estimating the slaves at a very large value considering all of the facts of the case.

These figures will be found not to vary very radically from the results which will be reached by applying the terms,—(and using the method prescribed by the Wheeling Ordinance, which West Virginia in her answer insists, determined the nature and extent of her liability), to the ascertainment of West Virginia's share of the debt, construing that Ordinance fairly with reference to the established facts and circumstances of the case.

(3.)

*West Virginia's Just Share of the Debt Computed under the terms of the Wheeling Ordinance.*

We ask the attention of the Court to the question of the amount of West Virginia's liability ascertained in accordance with the findings of the Master's report under paragraphs III, IV, VI and VII of the decree.

We beg leave to file at this point as part of this argument alternative statements prepared by Mr. A. G. Potter, the accomplished expert accountant under whose immediate direction the accounts for the plaintiff were made up in this case, showing the amounts due by West Virginia applying the figures as ascertained by the Master, under each of the paragraphs of the decree. (Appendix V to this Note of Argument).

Mr. Potter has also, at our request, prepared a statement showing what would be the result under the alternative directions of Paragraphs III, IV, V, VII and VI of the decree, if the Wheeling Ordinance is construed and applied in accordance with the contentions of West Virginia, which statement is filed as Appendix VI to this printed argument.

Examination of this statement will show that, if West Virginia's attempt, by *construction*, to defeat the expressed purpose of the Ordinance, and to repudiate the compact which was the condition of her statehood, should be successful, then, instead of West Virginia owing anything, the balance on the accounting would be in her favor, to the extent of from \$769,073.57, as a minimum, to \$3,123,618.76!!!

These astounding results are reached by ignoring or distorting the unmistakable requirements of the Wheeling Ordinance:

(1) By charging West Virginia with only *some* and a comparatively small part of the actual expenditures made by Virginia in West Virginia territory during the debt period, when the decree and the Ordinance requires the new State to be charged with ALL of those expenditures.

(2) By omitting to charge West Virginia with any share whatsoever of the largest items of the "ordinary expenses," and failing to charge her with a *just proportion* of such expenses as West Virginia concedes to have been "ordinary."

(3) By taking credit for large sums as having been paid into the treasury of Virginia from West Virginia counties, which were never in fact paid into the Virginia treasury, from those counties; and

(4) By omitting to charge West Virginia with money and the fair value of bank stocks which she received from Virginia on and after June 20, 1863.

These results are so unconscionable as to absolutely discredit the data upon which, and the methods by which they are reached.

We will submit alternative statements, showing the amount of West Virginia's liability upon the basis of the Master's report under paragraphs III, IV, VII and VI of the decree, modified as we consider it should be in respect to the so-called "indirect" expenditures made by Virginia in building roads, turnpikes, bridges, &c., in West Virginia territory, and by the addition of the money received by West Virginia from Virginia in 1863 and 1864.

These paragraphs, following the Wheeling Ordinance, direct West Virginia to be charged with three classes of debits:

- (1) With all State expenditures in West Virginia counties;
- (2) With a fair proportion of the ordinary expenses of the State Government during the specified period; and
- (3) In addition to these items under the Ordinance, West Virginia is chargeable with the value of certain bank stocks and with the money which the new State received from Virginia on and after June 20, 1863.

West Virginia is to be credited under the Ordinance and Paragraph VI of the decree with all payments made into the treasury of Virginia from West Virginia counties during the same period.

As we have already seen, the chief points of difference arise in the determination of

(1) What expenditures were made by Virginia in West Virginia territory;

(2) What were the ordinary expenses of the State;

(3) What was West Virginia's fair proportion of those ordinary expenses; and

(4) What payments were made into the State Treasury from West Virginia counties?

These questions have been, already, fully discussed in a general way.

The points of divergence between opposing views will be clearly presented by the following concise tabulated statements, showing the results in dollars and cents:

## STATEMENT I.

Stating West Virginia's liability, apportioning ordinary expenses on basis of total population, *including slaves*:

*Debit Charges: . . . .*

Paragraph III.—Actual expenditures made by Virginia in West Virginia counties:

- |  |                 |                |
|--|-----------------|----------------|
| (a) Amount allowed by the Master . . . . .   | \$ 2,811,559 98 |                |
| (b) Add amount actually expended by Virginia in West Virginia territory through public improvemnet companies . . . . | 1,104,400 85    | \$3,915,960 83 |

Paragraph IV.—Proportion of ordinary expenses, on basis of total population including slaves, ascertained under this paragraph of the decree by the Master (Master's Report, p. 140)

8,147,455 92

Paragraph VII.—Money, property and stock received by West Virginia from Virginia:

- |  |               |
|--|---------------|
| (a) As found by the Master . . . . .<br>(Master's Report p. 193)                             | \$500,828 00  |
| (b) Add for cash received by West Virginia from Virginia (Master's Report, p. 181) . . . . . | .. 170,771 46 |

---

\$671,599 46

Deduct for value of stock, as charged by Master under Paragraph VII,

of the Sweet & Salt Sulphur Springs and White & Salt Sulphur Springs Turnpike Companies, and the Fairmount & Palatine Bridge Co., the expenditures upon which are included in the above total of \$1,104,400.85 (para. III)—See p. 12 Complainant's Exceptions, and Joint Exhibit C-1, pp. 4, 5, 6, R. 375, 376, 377

	23,578 00	648.021 46
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	\$12,711,438 21	
--	-----------------	--

*Credit West Virginia:*

Paragraph VI.—By receipts from West Virginia counties (Master's Report, p. 179) .....		6,105,884 75
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On this basis West Virginia's share of the debt, as of January 1, 1861, would be....\$ 6,605,553 46

## STATEMENT II.

Stating West Virginia's liability, apportioning ordinary expenses on basis of population, *excluding slaves*:

*Debit Charges:*

Para: III.—Expenditures made by Virginia in West Virginia counties, as shown in Statement I .....	\$ 3,915,960 83
Para: IV.—Proportion of ordinary expenses, on basis of population without slaves (Master's Rep. 140) .....	11,452,862 66
Para: VII.—Money and stocks received by West Virginia from Virginia on and after June 20, 1863,—as shown in Statement I .....	648,021 46
	\$16,016,844 95

*Credit West Virginia:*

Para: VI.—By receipts from West Virginia counties (Master's Report, p. 179) .....	6,105,884 75
---	--------------

On this basis West Virginia's share of the debt, as of January 1, 1861, would be ..... \$ 9,910,960 20

For reasons already shown to the Court, we consider this a fair, just and equitable basis of adjustment—far fairer than it would be to include the slave population as a factor in making this apportionment. It is the amount assignable to West Virginia under the Wheeling Ordinance, reasonably, and fairly construed and applied.

But, following a suggestion made by Mr. Justice Harlan during one of the former hearings of the case (See West Virginia's Compilation, Vol. II, p. 227), we have had an alternative statement prepared, apportioning the ordinary expenses of the State Government on the Federal basis, by which *three-fifths* of the slaves would be counted, as follows:

## STATEMENT III.

.. Ascertaining West Virginia's liability, apportioning ordinary expenses on the basis of total white and three-fifths of the slave population:

*Debit Charges*

Para: III.—Expenditures made by Virginia in West Virginia counties, as shown in our Statement I, *supra* ..... \$ 3,915,960 83

Para: IV.—West Virginia's share of ordinary expenses, averaged by decades, on basis of total white and three-fifths of slave population, as follows:

Mar. 19, 1823 to Sept. 30, 1830..	\$ 584,731 27	
Oct. 1, 1830 to Sept. 30 1840..	1,087,063 53	
Oct. 1, 1840 to Sept. 30, 1850..	2,017,673 93	
Oct. 1, 1850 to Dec. 31, 1860.	5,472,521 32	9,161,990 05
		<hr/>

Para: VII.—Money and stocks received by West Virginia from Virginia on and after June 20, 1863,—as shown in Statement I, *supra*, .... 648,021 46

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\$13,725,972 34

*Credit West Virginia*

Para: VI.—By receipts from West Virginia counties (Master's Report, p. 179) ..... 6,105,884 75

On this basis West Virginia's share of the debt, as of January 1, 1861, would be ..... \$7,620,087 59



It is a significant circumstance that the amount which West Virginia would have to pay upon this basis is so nearly the same as the sum which would be assigned to her, if, discarding the Wheeling Ordinance, the apportionment were made on the basis of the assessed value of the real estate in the two States as of June 20, 1863 which gives West Virginia's share of the debt as being \$7,383,189.44, the difference being only \$236,898.15, or only about 3 per cent.

Following the Master's report, we will now submit statements of the amount of West Virginia's liability, under the directions of paragraphs III, V, VII and VI of the decree:

## STATEMENT IV.

Giving West Virginia's liability, apportioning the ordinary expenses of the State on fair estimated value June 20, 1863 of real and personal property, *with slaves*—estimated values of personal property and slaves being those adopted by the Master but excepted to by Plaintiff:

*Debit Charges*

Para: III.—Expenditures by Virginia in West Virginia territory, as shown in our Statement I, above .....	\$ 3,915,960 83
Para: V.—Proportion of ordinary expenses of State Government on basis of estimated value of real and personal property, <i>including slaves</i> , counted at the figures reported by the Master for said personal property and slaves on June 20, 1863,—excessive as we believe, and as we think we have shown those valuations to be (Master's report, p. 172) .....	6,078,367 96
Para: VII.—Bank stocks and money received by West Virginia from Virginia, on and after June 20, 1863, as shown by Statement I, above	648,021 46
	<hr/>
	\$10,642,350 25

*Credit West Virginia:*

Para: VI.—By receipts from West Virginia counties (Master's report, p. 179) .....	6,105,884 75
	<hr/>

On this basis West Virginia's share of the debt as of January 1, 1861, would be ..... \$ 4,536,465 50

## STATEMENT V.

showing West Virginia's share of the debt on same basis as No. IV, except that the *slaves* are *excluded* from the computation of estimated values of real and personal property in June, 1863:

*Debit Charges:*

Para: III.—Expenditures in West Virginia territory, as shown in our Statement I, above....	\$ 3,915,960	83
Para: V.—Proportion of ordinary expenses, apportioned according to fair estimated value of real and personal property, <i>without slaves</i> , (Master's Report 172) .....	9,463,553	58
Para: VII.—Value of stocks and money received by West Virginia from Virginia on and after June 20, 1863, as shown in our Statement 1 (Master's Rep. 193).....	648,021	46
	<hr/>	
	\$14,027,535	87

*Credit West Virginia:*

Para: VI.—By receipts from West Virginia counties (Master's Report, p. 179) .....	6,105,884	75
	<hr/>	

On this basis West Virginia's share of the debt as of January 1, 1861, would be .....	7,921,651	12
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These Statements IV and V are given, *not* because we consider that property values constitute the fairest or a fair criterion for the apportionment of the ordinary expenses of a State, or because we consider the Master's large estimates of the value of the personal property and slaves in Virginia in June 1863, as at all justified by the proofs, but merely to indicate that even upon those excessive valuations the indebtedness of West Virginia would be \$4,362,964.50, on January 1, 1861, if personal property and slaves be

counted as being worth in Virginia in June 1863, very much more than they were in January, 1861, and would be \$7,921,651.12, if slaves is excluded from the calculations, as they ought to be as a matter of fair dealing, in apportioning the ordinary expenses of the State.

## STATEMENT VI.

Showing West Virginia's share of the debt, apportioning ordinary expenses on basis of property values, as of January 1, 1861:

*Debit Charges:*

Para: III.—Expenditures made by Virginia in West Virginia territory, as shown in our Statement I, above .....	\$ 3,915,960 83
Para: V.—Proportion of ordinary expenses on basis of fair estimated property values, <i>including slaves</i> , on January 1, 1861. (Master's Rep 173)	6,805,289 57
Para: VII.—Value of money and Bank stocks received by West Virginia from Virginia on and after June 20, 1863, as shown in Statement I, above .....	648,021 46
	<hr/>
	\$11,369,271 86

*Credit West Virginia:*

Para: VI.—By receipts from West Virginia counties (Master's Report, p. 179) .....	6,105,884 75
	<hr/>

On this basis West Virginia's share of the debt, as of January 1, 1861, would be ..... \$ 5,263,387 11

## STATEMENT VII.

Showing West Virginia's share of the debt, apportioning ordinary expenses on basis of property values, *excluding slaves*, as of January 1, 1861:

*Debit Charges:*

Para: III.—Expenditures made by Virginia in West Virginia territory, as shown in Statement I, above .....	\$ 3,915,960 83
Para: V —Proportion of ordinary expenses on basis of fair estimated valuation of property, <i>excluding slaves</i> , as of January 1, 1861, (Master's Report 173) .....	8,586,648 25
Para: VII.—Value of stockss and money received by West Virginia from Virginia on and after June 20, 1863, as shown in our Statement I, above, .....	648,021 46
	<hr/>
	\$13,150,630 54

*Credit West Virginia:*

Para: VI.—By receipts from West Virginia counties (Master's Report, p. 179) .....	6,105,884 75
---	--------------

On this basis West Virginia's share of the debt, as of January 1, 1861, would be ..... \$ 7,044,745 79

These last two tables are given not because we consider the principle on which they are stated a correct one, but merely to show that even upon the inaccurate basis upon which they rest, West Virginia will owe a very large sum.

The more we consider the problems presented in this case the stronger our conviction is that the amount of West Virginia's liability, ascertained under the terms of the Wheeling Ordinance—if that ordinance be sensibly, reasonably, and fairly construed—is

justly and equitably ascertained in Statement II, hereinabove submitted by us. That statement, which is supported by strong considerations of reason and justice, ascertains that indebtedness to be \$9,910,960,20, as of January 1, 1861.

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In any case and upon any amount for which West Virginia shall be decreed to be liable, we most respectfully and most earnestly insist that interest should be decreed against her according to her moral and legal obligation under the terms of her contract.

With entire deference for the sincerity of the divergent views of our honorable opponents upon these questions, we are persuaded that less than this would not do justice to the complainant, and to the common creditors of the complainant and the defendant here.

(4)

*The Liability of West Virginia for Interest.*

Is West Virginia justly, legally, equitably, and contractually chargeable with interest?

In this connection, we must remember that the contract which we are considering was a Virginia contract.

Under the law of Virginia as repeatedly adjudicated by her highest court, the interest is incident to the obligation, and whenever a debt is due, the debtor is bound to pay interest unless relieved from this obligation by agreement. This is, and has been the law of the Commonwealth for more than one hundred years.

*In Jones v. Williams*, 2 Call, 106, decided in 1799, Edmund Pendleton, who was one of the great Judges of our country, delivering the opinion of the court said:

“Interest is allowed because it is natural justice that he who has the use of another’s money should pay interest for it.”

Cited with approval in *Baker v. Morris*, 10 Leigh 284, *McVeigh v. Howard*, 87 Va., 599, and *Stuart v. Hurt*, 88 Va., 343.

In *Hatcher v. Lewis*, 4 Randolph 152, 157, the court laid down the rule in the following expressive language:

*“The interest follows the principal as the shadow does the substance.”*

In *Chapman v. Shepherd*, the court said:

“In contracts for the payment of money, interest is not given as damages at the discretion of the court, or jury, but as an incident to the debt, which the court has no discretion to refuse.”

*Chapman v. Shepherd*, 24 Grott, 377, 384

*Roberts v. Cocke*, 28 Gratt, 207.

*Tidball v. Shenandoah National Bank*, 100 Va. 741.



"Interest is favored both by the legislative and judicial bodies of the State."

*Tazewell v. Saunders*, 13 Gratt. 354, 370.

In *McVeigh v. Howard*, 87 Va. 599, the Supreme Court of Appeals of Virginia said:

"It is the settled rule that when no day is named in the bond or note given for the payment of a precedent debt, it is due and payable on the day of its date, and bears interest from that date, though no interest be reserved. Such an instrument like a bond or note payable, in Virginia, on demand, is payable presently, and bears interest from date. This doctrine is founded in good conscience and correct morals." \* \* \*

Citing *Jones v. Williams* and *Hatcher v. Lewis*, quoted above.

Such is the law of Virginia as to interest.

The law of West Virginia in regard thereto is the same.

In *Shipman v. Bailey*, 20 W. Va. 140, 146, Judge Snyder, announcing the unanimous opinion of the Supreme Court of Appeals of that State, after citing a number of authorities upon the question, stated the rule as follows:

"Other authorities of the same character might be cited, but, we think, we have given sufficient to establish the rule which seems to be, that in contracts for the payment of money interest on the principal sum is a legal incident of the debt and a part of the contract, and wherever there is a contract for the payment of a specified legal rate of interest, whether such rate is fixed by the contract itself or by the law of the place where the contract is made, the obligation of the contract extends to the payment of such interest as fully as it does to the principal sum, and courts have no more power to change the rate of interest thus fixed, than they have to dispense with the enforcement of the contract either in whole or in part."

That decision reaffirms another proposition, applicable to this case, already a part of the jurisprudence of West Virginia, by the

adjudications of the Supreme Court of Virginia rendered before the birth of the new State, namely, that the *lex loci contractus* controls in the matter of the interest chargeable against a debtor.

In *Pickins v. McCoy*, 24 West Va. 344-352, the court affirms *Shipman v. Bailey*, and adopts the language just quoted from that decision.

Independently of these West Virginia decisions, such parts of the common law and of the laws of the State of Virginia as were in force on the 20th of June, 1863, when the first Constitution of West Virginia went into operation, and as are not repugnant to said Constitution, were continued and declared to be the law of West Virginia. Section 8 of Article XI, of the first West Virginia Constitution. And see present West Virginia Constitution.

The effect of this provision was to adopt for the new State the body of the common and statute laws of the Commonwealth, so far as the same were in force within the boundaries of the new State on the 20th of June, 1863.

As a part of this body of laws, the law of Virginia as to interest became, and has continued to be, a part of the laws of West Virginia.

Such, then, was the law of Virginia before, at the time of and since the formation of West Virginia, as to the legal and equitable liability of a debtor or contractor to pay interest. Such has been the law of West Virginia since the hour of her birth. And such was, and is, the law of the contract evidenced by the public Acts of Virginia and West Virginia set forth in complainant's Bill.

*This is the rule in Virginia as to debts due by the Commonwealth.*

The question was presented in the celebrated case of *Higginbotham's Executrix v. Commonwealth*, 25 Gratt. 627.

That was a suit against the Commonwealth to recover the amount due Higginbotham's Executrix on certain past due dividends on stocks which had been guaranteed and assumed by Vir-

ginia by the Acts cited in the opinion of the Court.—26 Gratt. 630, 631.

There was no express contract by the State to pay interest upon said dividends. The petitioner's claim was for the amount of the dividends "with its accruing interest."

The unanimous decision of the Supreme Court of Virginia was that "judgment should be entered for the petitioner for the amount of her demand with interest."—*Idem*, p. 641.

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

To Virginia and West Virginia lawyers of that day, as since that time, Judge Coalter's apt formula that, "the interest follows the principal as the shadow does the substance," was as familiar as any other accepted rule of equity or of law.

Under the law of Virginia in force at the time of these transactions, interest upon the portion of the debt which West Virginia was to take upon herself, was an essential incident of the debt, and its payment as much a part of the obligation as was the payment of the principal.

But, even if the *lex loci contractus* had not brought us to this conclusion, the language of the ordinance itself, fairly construed, leads to the same result.

That language is that:

"The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861," etc.

Now, that debt was an interest bearing debt. It was represented by obligations of the undivided State, some of them payable at a future day, some of them at a future day and thereafter at the pleasure of the Commonwealth, but all of them interest bearing obligations, obligations in which the payment of the stipu-

lated interest was made as much a part of the debt as was the payment of the principal.

The interest was an integral part of the debt, and as many of the bonds were payable thirty-four years after date, and over \$10,000,000 of them at the pleasure of Virginia, with interest from date, the interest as to much of the debt constituted much the greater part of it.

It was the manifest intention of the enactors of that ordinance, unless we are to ascribe to them the sinister purpose of perpetrating flagrant wrong and injustice, that the new State should take upon itself, and relieve what remained of the old State of a part of the burden of debt which rested upon both States. They knew that that burden consisted as well of interest, as principal, and as much, of interest as of principal.

It was not proposed that the new State should, as soon as she became a State, pay in cash a sum to be ascertained in the manner indicated in the Ordinance. The framers of the ordinance understood too well that under the conditions then existing, it would be impossible for the new State to raise and pay any considerable sum in cash.

Why the new State was dependent upon the old State for the money necessary to enable her to begin business and she did not have and in the nature of things could not command a sufficient amount in cash to pay off one-tenth or even one-twentieth of the then Virginia debt.

The stipulation was not that the new State should pay a sum in cash on account of its share of a common indebtedness; but that it should take upon itself a just proportion of that debt, to be ascertained as in the Ordinance prescribed.

Are we to understand that a court of conscience is to be asked to construe that stipulation to mean that the new State shall take upon itself only a proportion of a part of that debt? That it shall assume a share of the principal only of the debt, but shall be exonerated from any part of the interest which was, and is, as integral a part of the Virginia debt, and of the obligations which

represent it, as the branches are a part of the tree from whose trunk they spring?

In their elaborate arguments in this case, opposing counsel have heretofore devoted very little attention to this important question, although it was plainly in their minds when they prepared their draft of decree, and although their attention was challenged to it by the argument for Virginia. In so far as they have discussed it, they have ignored the facts and principles upon which West Virginia's legal, "equitable," and "just" obligation to assume and pay the interest as well as the principal of her share of the debt, rests.

But West Virginia's equitable and legal liability to pay interest upon her share of the debt of Virginia does not at all depend alone upon the Wheeling Ordinance, or upon the law of Virginia and West Virginia, which makes the interest an essential part of the debt; but it rests still more and beyond the possibility of question upon the express terms of the Constitution under which West Virginia became a State.

The fact, the character and the legal effect of the compact created by that important transaction have already been fully discussed.

West Virginia's solemn covenant in regard to the equitable proportion of that debt which she assumed was that her Legislature should "provide for the liquidation thereof by a Sinking Fund, sufficient to pay the accruing interest and redeem the principal within thirty-four years."

This was precisely in accordance with the plan which had long theretofore been adopted by the Commonwealth for the payment of her debt.

This plan was embodied not only in the statutes but also in the Constitution of Virginia, in force when West Virginia became a State.

It was embodied in that Constitution in the following terms:

"29. There shall be set apart annually, from the accruing revenues, a sum equal to seven per cent. of the State debt existing on the first day of January in the year one thousand

eight hundred and fifty-two. The fund thus set apart shall be called the sinking fund, and shall be applied to the payment of the interest of the State debt, and the principal of such part as may be redeemable. If no part be redeemable, then the residue of the sinking fund, after the payment of such interest, shall be invested in the bonds or certificates of debt of this Commonwealth, or of the United States, or of some of the States of this Union, and applied to the payment of the State debt as it shall become redeemable. Whenever, after the first day of January, a debt shall be contracted by the Commonwealth, there shall be set apart in like manner, annually, for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon at the time of its contraction; which sum shall be part of the sinking fund, and shall be applied in the manner before directed. The General Assembly shall not otherwise appropriate any part of the sinking fund or its accruing interest, except in time of war, insurrection or invasion."

Section 29 of the Constitution of Virginia, in force from January 1, 1852, Code of Virginia for 1860, p. 47; Appendix to the Record, p. 200.

It was expressed and given further effect by the second section of the following Act passed by the General Assembly of Virginia:

"Chap. 17. An act establishing a sinking fund and providing for the payment of the semi-annual interest on and redemption of the public debt.  
Passed March 26, 1853.

"2. Whenever after the said first day of January, eighteen hundred and fifty-two, a debt shall be contracted by the Commonwealth, there shall be set apart, in like manner, annually for thirty-four years, a sum exceeding by one per cent. the aggregate amount of the annual interest agreed to be paid thereon at the time of its contraction, which sum shall be part of the sinking fund, and shall be applied in the manner hereinbefore directed."

Acts of General Assembly of Virginia, session of 1852-3, p. 29; Appendix to the Record, pp. 200, 201.

Its effect was, therefore, well understood to be to conform the undertaking of West Virginia in regard to the time and manner of the payment of her share of the debt to the plan and scheme of payment which had been adopted by the Commonwealth, and which experience had approved.

That scheme was, the creation from the annual revenues of the State, of a fund equivalent to seven per centum of the principal of the debt. Of this, six per centum went to pay the annually accruing interest, and one per centum was invested and set apart to retire the principal sum due, within thirty-four years, and this arrangement was defined as a sinking fund.

It was found, and if the calculation is made it will be shown to be true, that one *per centum* of any sum invested and compounded at six *per centum* interest per annum, will in thirty-four years produce an amount equal to such sum.

This was the theory and the plan which Virginia had adopted for the liquidation of her debt.

It was a plan with which Messrs. Willey, Van Winkle, Hall, Brown, Haymond, and other members of the first West Virginia Convention, who had been previously members and some of them able members of the General Assembly of Virginia, were doubtless entirely familiar: And it is the same plan which we find incorporated in the scheme of settlement which constitutes a part of the foundation upon which West Virginia's existence as a State rests.

By this clause of West Virginia's Constitution, therefore, it was required, not that the new State should pay a lump sum in cash, to be ascertained in the manner prescribed, but that she should *assume* "an equitable proportion of the public debt of the Commonwealth" existing on the 31st of December, 1860, and should "provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

The framers of the West Virginia Constitution thus manifestly adopted, and engrafted upon that instrument, the plan which for nine years or more had been a part of the organic and statutory

law of Virginia for the extinguishment of her public debt, and the Legislature of Virginia accepted and approved that plan.

That plan included, (as the West Virginia Constitution also expressly included), an undertaking on the part of the State to pay the accruing interest, and to liquidate or redeem the principal of each bond representing the debt, within thirty-four years.

In simple language, the stipulation of West Virginia expressed in her Constitution, and accepted and acted upon by Virginia, was, that West Virginia would pay the accruing interest on her share of the debt, as it should accrue, and the princippal thereof within thirty-four years.

That such was her express undertaking, appears from the language of her first Constitution, interpreted according to the reasonable and natural meaning of that language.

That such was the purpose, meaning, and effect of that language, is conclusively shown when we read it in the light of the plan established by the Constitution and statute of Virginia, then in force, for the establishment of a sinking fund for the liquidation of her public debt which plan was adopted by the new State as to its share of that debt.

And so, we find that both by the express terms of the Wheeling Ordinance fairly construed, and by the express terms of the Constitution under which Virginia and the National Congress consented that West Virginia should become a State, this new State has become expressly obligated to pay interest upon the share of the principal of the common public debt for which she is liable.

These positions are not at all in conflict with the general rule of American and of public law, as clearly defined by this court in *United States v. North Carolina*, 136 U. S., 211, as the law governing that case, that,

1. "Interest, when not stipulated by contract or authorized by statute, is allowed by the courts as damages for the detention of money or property;"
2. "Interest is not to be awarded against a sovereign unless its



consent has been manifested by an act of its legislature, or by a lawful contract between executive officers;"

3. "By decisions in North Carolina that State, unless by or pursuant to an explicit statute is not liable for interest, even on a sum certain which is over due and unpaid."

See also *South Dakota v. North Carolina*, 192 U. S., 286.

The question presented in the case at bar is taken out of the reason and the decision of this court in the North Carolina cases by the following circumstances:

(1) The obligation to pay interest is determined by the *lex loci contractus*, and under the settled law of Virginia which was the law of the contract between West Virginia and Virginia, and under the law of West Virginia also, interest is not and never has been allowed as damages for the detention of money, but in those jurisdictions interest is allowed as an essential incident of a contract, whether express or implied, for the payment of money, and as a matter of right and justice.

This court, in its opinion in *United States v. North Carolina*, expressly rested that decision upon the fact that under the law of North Carolina no interest was payable on such a contract.

(2) The payment of interest is here an obligation imposed by statute—first by the Wheeling Ordinance, and second by the Constitution under which West Virginia became a State.

(3) The express contract of West Virginia upon which her existence as a State was conditioned requires her to pay interest on the part of the debt which she assumed.

This is a very much stronger case for a decree for interest than *United States v. State of New York*, 160 U. S. 600,, righteous as was the allowance of interest there.

Paraphrasing the language of this court in that case, p. 621, "It would be a reflection upon the" honorable motives of the members of the Conventions which framed the Wheeling Ordinance

and the West Virginia Constitution "if we did not place a liberal interpretation upon those acts and give effect to what, we are not permitted to doubt, was intended by their passage."

Another question which arises in connection with the consideration of this subject, is, from what time is West Virginia justly and equitably bound to pay that interest?

Answer to this is furnished by the Wheeling Ordinance and by the section of the first West Virginia Constitution above quoted.

The settlement by the terms of both instruments was to be made as of the arbitrary date of January 1, 1861, or to be precisely accurate, as of December 31, 1860. That, accordingly, is the date from which fairly equitably, and legally, (because it accords with the express terms of both the ordinance and the Constitution), the interest should be computed.

As already shown, the debt, a proportion of which as of that date, West Virginia was to assume and pay, was an interest bearing debt, and the interest was as integral a part of it as was the principal.

A farther kindred inquiry to the last is: To what time should West Virginia be required to pay such interest?

Our response to this is, that she is justly, equitably and legally bound to pay this interest,

(1) *By the terms of the Wheeling Ordinance*; certainly, for the period during which the debt of the Commonwealth existing on the 31st of December, 1860, would continue to be an interest bearing debt: And we have seen that that was not only until the obligations representing the debt became due, but under the just rule of the law of Virginia as to interest, in force during the whole period of the creation of the debt, until that principal should be fully paid.

(2) By the terms of the section of her Constitution above quoted, accepted by Virginia and by the Congress, West Virginia undertook to pay all the accruing interest on, and the principal of, her share of that debt in thirty-four years.

She has failed and refused to pay that share, or any part of it.

The interest accruing thereon from December 31, 1860, has continued to accrue, as to her, until it now amounts to vastly more than the principal. It was that interest which West Virginia agreed to pay, and it was that principal for the payment of which West Virginia's Legislature was to make provision, so that the same should be paid within thirty-four years.

We are unwilling to anticipate that the learned counsel for the defendant will argue that West Virginia, by the language of that provision of her Constitution, is only bound to pay interest for thirty-four years from December 31, 1860, or from June 20, 1863, because we are unwilling to assume that our distinguished opponents would contend that a State, any more than an individual, should be allowed to take advantage of her own wrong, or profit by her own procrastination, and neglect of duty.

Here, West Virginia has not only not paid a just, or any other proportion of the common public debt, nor provided for the payment of the accruing interest thereon, and for the payment of the principal, but she has persistently failed and refused to do either of these things, and has by the votes of her Legislature, again and again repudiated any and all liability whatever for any part of that indebtedness.

(See Resolutions of Legislature of West Virginia, App. 247, 248.)

With all deference for the distinguished counsel for the defendant, we venture to believe that a court of equity will not allow any defendant, and particularly a State, which should be an exemplar of fair and honorable dealing in all of its transactions, to make gain out of its own palpable dereliction of duty.

And so, our response to such contention, if it shall be urged, is, that equity will not suffer any party to take advantage of his own wrong.

#### CONCLUSION

It is, true that the amount which West Virginia is thus equitably bound to pay, including the interest fairly and justly due thereon, will, as of this date, aggregates a very large sum; but

that constitutes no argument for her exoneration from the payment of the same.

Fortunately for West Virginia this indebtedness, even if the very largest sum which under any of the alternative statements in the case could by possibility be found to be due by her, should be decreed against her, would, in the affluence which the record shows she now enjoys, wealth largely resulting from the construction of the very improvements upon which the expenditures made by Virginia in roads, turnpikes, railroads and bridges, and in the improvements of the navigation of her rivers were made,—impose upon her a burden easy to be borne, and light, as compared with what Virginia, during the period of her greatest impoverishment, has assumed and borne.

Virginia not only assumed two-thirds of the original debt and two-thirds of the accumulated interest upon it down to January 1st, 1871, and in addition thereto the accumulated interest upon over \$8,000,000 of bonds issued by her on account of unpaid and accumulated interest prior to January 1st, 1871, but she paid off in full large amounts of interest accruing after December 31st, 1860, and before January 1st, 1871; and she has paid off, also, in full very large amounts of the principal of the original debt; and has, also, paid off large amounts of the principal of the two-thirds of the debt assumed by her in 1871.

In addition to this Virginia has paid, as of this date, over \$38,000,000 of interest.

It must be remembered that these payments, made by Virginia, have been distributed through a period of more than forty-five years.

Large portions of these payments were made by the people of Virginia out of limited resources, in the period of their greatest poverty and distress.

If interest were to be computed upon the payments thus made by Virginia during the last forty-eight years on account of this common debt,—which would have to be done in order to equalize West Virginia with Virginia in regard to these transactions,—the average period upon which interest should be so computed upon

the payments so made by Virginia in order to thus equalize her with West Virginia, would be considerably more than twenty years; and the amount assumed and paid by Virginia, including the upwards of \$25,000,000 of her recognized and regularly met obligations still outstanding, and including the payments she has heretofore made on the whole debt, and on the two-thirds she has specifically assumed, would aggregate considerably over \$100,000,000, as of this date.

Large portions of West Virginia would to-day be a wilderness, but for the building of the works of internal improvement whose construction was secured by the expenditures above referred to, and the building of other works of internal improvement which have resulted from the construction of the great lines upon which Virginia expended so many millions of dollars of her substance.

The people of West Virginia are to-day enjoying the fruits of the enterprise and liberality of the Commonwealth in those expenditures,—not only those expended within the limits of West Virginia, but also in the expenditure of millions of dollars on works outside of the territorial limits of West Virginia, but which were built in large part for the purpose of developing the resources of the territory now constituting that State.

Too much emphasis cannot be laid upon these facts and considerations.

Nor can it be forgotten that almost the entire indebtedness which is the subject matter of this investigation was created by the votes of the representatives of West Virginia, and that very little of it ever would have been created but for the support they gave to the Acts by which this large indebtedness was imposed upon the Commonwealth.

The complainant desires and asks only that a decree which is in accordance with the legal and equitable rights and obligations of the parties shall be entered.

Such a decree, she is satisfied, will impose upon the new State the duty of paying a very large sum on account of this long ignored obligation, but a sum, every dollar of which West Vir-

ginia justly owes and the complainant is righteously entitled to recover.

Her earnest plea is that West Virginia is bound both by the terms of the Wheeling Ordinance, and of her first Constitution to pay a just and equitable part of this debt with interest until the same shall be fully paid, and that she shall not be suffered to repudiate either obligation.

She respectfully asks that a decree may be entered for such sum as is thus equitably due, with interest thereon from the 1st day of January, 1861, until the obligation shall be fully discharged.

SAMUEL W. WILLIAMS,

Attorney General of Virginia.

WILLIAM A. ANDERSON,

RANDOLPH HARRISON,

JOHN B. MOON,

Of Counsel for Complainant.

## APPENDIX NO. 1.

## TO NOTES OF ARGUMENT FOR THE COMPLAINANT.

Statement showing the principal expenditures made by Virginia prior to June 20, 1863, on railroads, canals, and other internal improvements designed and built for the purpose of opening up and developing West Virginia territory, or which are to-day parts of railway systems and lines of communication which serve the territory and people of West Virginia and afford them outlets to the markets of the world:

1. On railroads which constitute parts of the Chesapeake and Ohio Railway:	
On the Virginia Central R. R. ....	\$2,484,134.00
On the Blue Ridge R. R. ....	1,744,723.00
On the Covington & Ohio R. R. ....	3,206,461.83
	<hr/>
Total on Chesapeake & Ohio R. R. ....	\$7,435,318.83
II. On Railroads which now constitute parts of the Norfolk & Western Railway:	
On Norfolk & Petersburg R. R. ....	\$1,341,341.00
On Southside Railroad ....	1,833,500.00
On Virginia and Tenn. R. R. ....	3,755,000.00
	<hr/>
	\$ 6,929,841.00
On Winchester & Potomac R. R. ....	\$ 270,000.00
On Alexandria, Hampshire & Loudoun R. R. ....	1,017,248.00
On Marietta & Cincinnati R. R. ....	202,611.00
	<hr/>
Amount expended on Railroads ....	\$15,855,018.83
III. Canals:	
On James River & Kanawha Canal ....	\$10,400,000.00
On Chesapeake & Ohio Canal ..	250,000.00
	<hr/>
	\$10,650,000.00

IV. Bridges in West Virginia .....	81,412.00
V. On Turnpikes and Roads chiefly in W. Va...	2,849,579.71
VI. On Navigation Companies in West Virginia..	210,500.00

Total on works built to develop or serving

West Virginia .....\$29,646,510.54

For above figures see message of Governor Walker to the General Assembly of Virginia March 8, 1870, Report of West Virginia Debt Commission, West Va.'s Compilation Vol. 1, page 474, and Joint Exhibit C-1, R. 374 to 377; Reports of Auditor of Public Accounts of Virginia 1861, of 2d Auditor, 1872, Journal of House of Delegates of Virginia 1871-2, Document VI.

The above amounts do not include considerable sums expended on roads and turnpikes wholly in what is now Virginia, but which connect with roads or turnpikes lying wholly in West Virginia and constitute lines of travel which serve West Virginia as well as Virginia.



## APPENDIX NO. II.

containing extracts from the public records and statutes of the Commonwealth showing the nature, motive, and object of her expenditures through joint stock internal improvement companies:

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*Report of the Committee on Roads and Internal Navigation to the General Assembly, submitted December, 1815 (Board of Public Works Reports, Vol. 1. p. 43):*

“Whatever difference of opinion may have at any time existed as to the expediency of controlling the voluntary direction of the wealth and the labor of individuals by the application of legal constraint, there never has existed a doubt but that it is the duty as well as the interest of every good government to facilitate the necessary communication between its citizens.

“Next to the enjoyment of civil liberty itself, it may be questioned whether the best organized government can assure to those for whose happiness all governments are instituted, a greater blessing than an open, free and easy intercourse with one another by good roads, navigable rivers, and canals. Their tendency, by extending commerce to promote the agriculture and manufacture of a nation and thereby to augment its wealth and population, is too obvious to require much illustration.

“The planter and farmer realize their share of this benefit, in the augmented value of their lands; the manufacturer and the merchant, in the increased and diversified demands for their industry and capital. Nor are the higher interests of society less indebted for their advancement to the multiplication and improvement of these channels of useful intercourse. They afford the means of exploring the natural resources of a country and invite the genius of speculation to fit them for the uses of man. Lands too remote from markets to tempt cultivation; forests, hitherto

regarded as inaccessible; beds of minerals and fossils unknown or neglected, are brought within the reach of ordinary enterprise and rendered subservient to the convenient comfort of the citizen or to the defense and safety of the State. They confer on an extended empire the promptitude and energy of action, which are considered peculiarly characteristic of one of narrow dimensions; since without contracting the limits of its territory they reduce the distance and expedite the communication between the seat of its government and its remotest extremities.

“Whether the public force is to be spread out for defence or combined for attack, they alike contribute to the rapidity and vigor of its operations.

“In a republic, especially, where public opinion exerts a controlling influence, and public virtue should be the spring of all public action, they may be considered an important auxiliary, if not a necessary ingredient of public liberty. They tend to diffuse more equally the knowledge which experience acquires and the leisure which wealth alone can purchase; they strengthen the cords of social union and the quick and generous feeling of patriotism, which is ever ready to exclaim at the contemplation of an extended scene of public improvement. ‘I love my country because she is worthy of my affection.’

“The duty, which is obligatory upon all governments, is peculiarly incumbent upon one, whose territory like that of Virginia, nature has done so much both to unite and separate—to whom she has presented so many advantages to improve and so many obstacles to overcome.

“No State of the Union is intersected by so many navigable rivers or divided by so many chains of lofty mountains; none perhaps abound with such happy varieties of climate and soil, so many resources for internal commerce. In her coal, iron, lead, tin and salt, she is unrivalled. Her tobacco and grain command the highest prices abroad. The fertile banks of her rivers and the moist valleys of her mountains yield abundant crops of flax and hemp. Her lowlands would supply her with cotton for her own consumption, and the fleeces of the flocks which pasture on her hills are not surpassed in quality.

“Notwithstanding these advantages, the principal part of her commerce and almost the whole of her navigation, pass out of her hands to enrich the coffers of her neighbors. There is scarcely a village to the west of the Blue Ridge and very few above tidewater, from the Roanoke to the Potomac, which derive any part of their supply of manufactured commodities, either foreign or domestic, from the seaports of Virginia.

“While many other States have been advancing in wealth and numbers with a rapidity which has astonished themselves, the ancient Dominion and elder sister of the Union has remained stationary.

“A very large proportion of her western territory is yet unimproved, while a considerable part of her eastern has receded from its former opulence.

“How many sad spectacles do her lowlands of wasted and deserted fields present? Of dwellings abandoned by their proprietors. of churches in ruins? The genius of her ancient hospitality benumbed by the cold touch of penury, spreads his scanty board in naked halls, or seeks a coarser but more plenteous repast in the lonely cabins of the West. The fathers of the land are gone, where the outlet to the ocean turns their thoughts from the place of their nativity and the affections from the haunts of their youth. Beyond the Alleghanies an unexpected revolution threatens the Atlantic States in general, the accomplishment of which will create new interests and views in that flourishing and important section of America, and probably, for them, the hope of reuniting it by commercial ties to the markets of the East.

“If it be true, as your committee confidently believe, that in a connection between the Roanoke, the James, and the Potomac, with the waters of the Kanawha or Ohio, this Commonwealth possesses the best means of arresting the progress of this revolution, it is a duty which she owes not only to her self, but to the Atlantic States and to the Union at large to call those means into action  
\* \* \*

“Your committee are far from intimating that the General Assembly of Virginia has been totally unmindful of those natural advantages or wholly regardless of their improvement.

"The Commonwealth required time to recover from pecuniary losses which she sustained during the War of the Revolution. It found her citizens laboring under very heavy private debts, and left her government encumbered with a public debt of much greater magnitude.

.....

"Yet in circumstances so inauspicious the statesmen of that day and especially the illustrious man to whom, under heaven this nation was indebted for the establishment of its freedom, did not disdain to enquire into the humblest means of giving to that freedom value. From his zealous exertions sprung the Potomac and James River canal companies. To the first of these the Commonwealth is indebted for a water communication 338 miles; and upon it and the contemplated works of the Shenandoah she relies for the further improvement of a navigation of 390 miles. She has shared with a sister State the benefits of the labor already performed on this river; in that which remains to be accomplished on the south branch of the Potomac and Cacapehon and the Shenandoah, she has an extensive interest.

"The James River Company have opened a navigation of 300 miles.

"The Appomattox and Dismal Swamp canal naturally followed into existence those which were indebted for their origin to the patriotism of General Washington. The former opened a navigation of 100 miles. The latter was designed merely to connect waters already navigable, but in its present use and remote consequences is not inferior in importance to any public work in the Commonwealth.

"The expense of the first of the preceding work does not exceed \$1,500 per mile upon the navigation already opened; that of the second is about \$1,200; the average expense will be annually diminished in the history of future improvements on the branches of those rivers as the principal obstructions to their navigation were removed before their waters could be brought into partial use.

"The actual cost of those public works does not exceed one-third of the expense usually attendant upon the structure of turnpike roads; which in the absence of navigation are the only substitute

for them. It is due to the latter, however, to remark that the addition recently made to them of parallel lines of rails, immovably set in the earth at proper intervals for the wheels of wagons, has more than equalized the advantages of such roads with the best ascending navigation which the resources of Virginia afford above their principal falls; and that the additional cost which this improvement gives to the structure of the turnpike, although great in itself, is inconsiderable when compared with its effect in reducing the expense of loads carried. The turnpike roads of the Commonwealth except a few short pieces of particularly mountainous, and a road recently begun from Fredericksburg towards the Blue Ridge, are confined principally to the county of Loudoun, the adjacent counties of Fairfax, Fauquier, Frederick, and to the vicinity of the seat of Government,

“There is but one to which the funds of the Commonwealth have contributed any aid.

“All of these public works are alike in one respect. They purpose to defray the expense of their first cost and of their subsequent repairs, out of the tolls collected upon them; and these are equitably levied upon those who use them in sums proportionate to the benefit which they respectively derive from such use. Where it is absolutely certain that such works can subsist upon this basis alone, the revenue of the Commonwealth, although it may expedite their progress, is not indispensably necessary to their creation.”

“Private wealth will of itself take the direction which personal interest prompts. But there are many such works essential to the prosperity of the Commonwealth, the persons immediately interested in which have not capitals sufficient to commence their foundation, and there are many others of like utility which if completed would require the lapse of many years to make them profitable to the individual subscribers to their stock. The population and commerce which infallibly follow their direction, spread out upon their borders and swell their tolls, cannot be expected to precede their existence.

“Although almost all the turnpike roads within the Commonwealth of Virginia have been made without any other legislative

aid than their respective acts of incorporation, yet it is probable that neither the Potomac nor James River would have been rendered navigable above tidewater with such assistance alone. Maryland and Virginia subscribed more than one-half of the capital stock of the former, and Virginia alone more than one-third of the latter. The tolls hitherto collected on the one would not have justified a subscription to its stock with a view to mere profit; and though those of the latter have for some time realized the most sanguine expectations of its friends and its stock is 80 per cent. above par, yet the revenue of the company apart from the appreciation of its stock, would not net to its members 6 per cent. per annum upon the sums which they have actually expended upon that river from the commencement of their labors to the present period.

“Your committee, however, confidently believe there is not an individual within the Commonwealth alive to a sense of her true interests who would have desired for the sake of a higher profit to the treasury upon the stock of the public in either of these works, to withdraw the funds which were required for their completion and permit this noble resource to return to a state of nature.

“Those who reside near to their banks directly participated in the benefits thus afforded them of a cheaper mode of transporting the productions of their labor to market; and those even who accidentally possessed the superior advantages of tidewater, or who were compelled by their distance from both to resort to the common highways in order to reach the same markets, have greatly profited by those improvements of navigation which augment the extent and value of that market, could not fail proportionately to enhance the price for their produce. So true it is that whatever contributes to increase the population and wealth of the towns must contribute to the growth and improvement of the country. And this effect is wrought not solely on the vicinity of those towns, it is seen not merely in the wealth which collects in their suburbs; but is discovered in the augmentation of their means of consumption and the enlargement of their commercial capitals.

“In this necessary and reciprocal relation of commerce and agriculture, the country below tidewater in Virginia has an immed-

iate and even local interest in the progress and perfection of all those public works exclusive of its general interest in whatever advances the growth and prosperity of the Commonwealth. The inhabitants of the lowlands will therefore partake of the benefit of every application of public revenue to the improvement of the connection between their market towns and the country above them. It should be peculiarly their policy to turn the commerce to the west from its northern direction into the bosom of their own territory. In the efforts which are contemplated to improve the roads passing immediately through their own country they have an interest more sensible to the eye but less so to the understanding.

“Although much has been done for the improvement of the interior of Virginia, more yet remains to be accomplished.”

“If nature has divided the territory of the Commonwealth by numerous chains of lofty mountains it is only to incite the genius of mankind to climb them, and the period is not unthinkable—nay, it rests with the legislature to determine whether it be remote, when the roads which cross those natural and formidable barriers shall not be surpassed by those which run along their base \* \* \*

“Should the General Assembly determine to patronize by the application of the public revenue all such works as are likely to be of great public utility, it becomes important to decide whether an improvement may not be made in the mode heretofore pursued of extending to them patronage.

“Your committee are fully satisfied that much loss has been sustained by all the canal companies which have been incorporated hitherto for want of skill in their conduct. Their directors have served, it is true, without compensation. They have generally been public spirited private gentlemen, but neither professional engineers nor capable from experience and observation of guarding against the errors and frauds of agents who pretended to be so.

“No single company could afford to purchase or could fully employ in a country where a few public works were begun, the services of a distinguished engineer; and yet without the previous surveys, plans and estimates of such an officer, no very arduous public work could be confidently begun or successfully conducted. To

supply the defect of such an officer would be the obvious interest of the Commonwealth, and if he were not sufficiently compensated by the general utility of his labors, he might demand of each company such an interest in its stock as would be equivalent to the value of the service rendered to the company by such officer.

“Whatever funds the legislature may be inclined to appropriate for internal improvements, a difficulty must occur in settling the relative importance of its principal objects; and if the appropriation were also required to designate some particular object it would be often impracticable from the variety of opinion—always existing in an Assembly representing many local interests—to procure an union in the choice of any one.

“The first of these difficulties may be obviated by organizing a proper body to collect and prepare for the General Assembly the facts and information necessary to cast upon every application for a portion of the fund light enough to guide the sound discretion of the Legislature in the selection of subjects.”

“And these facts will be entitled to the higher confidence if reported under the sanction of official responsibility.”

“To allay such local jealousies as might obstruct an agreement in favor of any single object of internal improvement, a fund may be previously segregated and set apart for the accomplishment of all by one appropriation. If the term by future application to any, be at the same time prescribed, a like participation in the benefit of the fund would be assured to every interest which it is calculated to promote; and the speedy enjoyment of that benefit will be secured to each by apportioning the magnitude of the fund so set apart to the number and importance of the objects for which it is designed to provide.

“It may be sound policy for the Commonwealth, in order to accomplish some great commercial or political purpose, to throw open to general use, without the charge of toll, a particular canal or road; but it can never be to its interest, for many reasons, to become the sole proprietor of all the public works within its territory.

“Experience testifies that they will be more economically im-



proved and better repaired if their management be left to the individuals who subscribe to their stock, with a view to private gain, than if confined to public officers or agents.

“The Commonwealth should subscribe so much to their stock and on such terms as will suffice to elicit individual wealth for public improvement—and the control which she retains over the conduct of the individual subscribers should extend no further than to prevent or correct such abuses upon the community at large, as might be apprehended from the too eager incentive of gain.

“By yielding to the individual subscribers the profit of the State on its shares of the stock of any company where required to secure such individuals against temporary loss, a much smaller subscription of the public money will suffice to draw forth private enterprise.

“The Commonwealth can never be a loser if a public work judiciously begun be finally perfected—and the public security against such loss will be found in the discretion which the legislature retains over the choice of the object for which its patronage is sought.

“As the market rate of interest decreases in every commercial country with the growth of its capital, the maximum profit of the stock of each company may be reduced after the lapse of a limited period of time.

“The principles laid down in the preceding part of this report the committee has embodied in the resolutions which are subjoined to it; but they would not have performed their duty to the House if before they recommended the application to objects of internal improvement of all the public stock of the Commonwealth as well as the premium which may be hereafter received from the incorporation of new, the extension of the capitals or the duration of the charters of the existing banks, they had not enquired into the actual state of the debts and of the annual revenue and expenditure of the Commonwealth.”—

“That inquiry resolves itself into the establishment of the following propositions:

“1st. That for fifteen years prior to the commencement of the

late war, the ordinary revenue of the Commonwealth has not only been adequate to meet the ordinary expenditures charged upon it, but to enable the Commonwealth to arm from time to time a large part of her militia—to lay the foundation of her literary fund, to erect several very costly public edifices, and to complete the purchase of the stock subscribed by the Commonwealth to the Bank of Virginia; objects which occasioned a disbursement from the ordinary revenue of a sum exceeding one million of dollars.

2ndly. That since the commencement of that war the revenue of the Commonwealth more than doubled by additional taxes and farther augmented by considerable loans from the bank, has not only sufficed for the ordinary possible expenditure, but enabled the legislature to assume the State's quota of the direct tax of 1814 and to apply to the defense of the United States a sum exceeding eighteen hundred thousand dollars, exclusive of the interest paid upon those loans.

“3rdly. That the Commonwealth has at present a claim upon the United States of unquestionable justice for more than seventeen hundred thousand dollars of the above amount, together with the interest on such portions of it at least as were obtained on loans, which claim when satisfied will furnish a sum competent to discharge all the debts of the Commonwealth, to provide for the expenditures of the current fiscal year and to leave at the end of that year a balance in the treasury of three hundred and fifty thousand dollars to be applied to any other object of internal interest.

“4thly. That the present taxes may be reduced to the amount levied before the late war, provided the United States shall reimburse the sums advanced for the defense of the Commonwealth; and even should the payment of those sums be withheld, which a just confidence in the good faith of the General Government forbids your committee to expect, a repeal may yet be effected of such proportions of the war taxes as are not absolutely pledged for the payment of the interest, and the redemption of the principal of the public debt.

“From all of which it evidently appears that the fund which it is proposed to apply to the purposes of internal improvement

may be spared from the revenue of the Commonwealth without any embarrassment of her finances, any violation of her engagements or pressure upon her citizens.

“Should the appropriation recommended by the committee receive the sanction of the legislature, the fund for internal improvement will consist of the following stock:

“5,547 shares of stock of the Bank of Virginia on which a dividend is now received, which computed at par is worth five hundred and fifty-four thousand, seven hundred dollars .....	\$554,700.00
“2,400 shares of the stock of the Bank of Virginia whereupon no dividend will ac- cruce until after the first day of May, 1818.	240,000.00
“3,344 shares of the stock of the Farmers’ Bank of Virginia .....	333,400.00
“250 shares of the stock of the James River Company, also estimated at par .....	50,000.00
“125 shares of the stock of the Appomattox Company .....	12,500.00
“70 shares of the stock of the Dismal Swamp Canal Company .....	17,500.00
“70 shares of the stock of the Potomac Company.	31,111.11-1-9
“100 shares of the stock of the Little River Turnpike Company .....	10,000.00
“Making a total of .....	\$1,249,211.11-1-9

“Of which, the sum of \$938,100 is now productive of an annual revenue exceeding \$98,000; and \$240,000 will become alike productive after the first day of May, 1818.

“In the present state of the fund the progress of the public works to which it may be expected to give rise will be until the first day of May, 1818, at the rate of \$245,000 per annum. After that period it will be further augmented by the addition of \$60,000.

“So that the total value of the internal improvements of ten years will be \$2,777,500, and this calculation is grounded on a sup-

position that a portion of the stock which is now unproductive will continue to be so; and that no augmentation of the fund will have been made by the creation of new banks. \* \* \* \* \*

“Be it therefore resolved”

\* \* \* \* \*

“8. That the president and directors of the Board of Public Works be authorized to subscribe in behalf of the Commonwealth to such public works as the General Assembly may from time to time agree to patronize such portions of the revenue from the fund for internal improvement as may be directed by law; but that no part of the fund shall be subscribed towards the stock of any canal or turnpike company until three-fifths at least of the whole stock necessary to complete such canal or turnpike shall have been otherwise subscribed; nor until of the stock so subscribed one-fifth shall have been paid in by the respective subscribers or the payment thereof effectually secured.” (B. P. W. Reps., Vol. I, p. 55 and 59(11) .)

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APPENDIX NO. II. . . . .

1st Annual Report Board of Public Works, for year 1816, Vol. 1, pt. 1 p. 81.

\* \* \* \* \*

“The appeal which the board has thus made to the public spirit of the country has not been in vain. Great efforts have been made to fill the subscriptions for opening the navigation of the Roanoke.”

\* \* \* “There are several objects within the scope of the system devised by the General Assembly for the improvement of the interior of Virginia which in the present state of her wealth and population it is beyond the reach of her unassisted ability to ac-

comply; but which being equally interesting to her sister States and the Government of the United States, it may not be impossible to further by their co-operation."

"The failure of the stock of those companies which have already been incorporated to yield an immediate income to the subscribers is to be imputable to their tardy progress in building the works which they had begun; and delay which arose from their having commenced their labors with inadequate funds; and which discouraged new adventurers from uniting with them or hazarding their fortunes in similar enterprises.

"The foundation which the General Assembly have now laid for future works of this description is calculated to remove this impediment to their progress, and to assure to the Commonwealth a speedy return for such sums as the General Assembly may authorize the Board of Public Works to subscribe out of the funds for internal improvement.

"It is not in the power of the Board in the infancy of their institution to include in this report a detail of the report and condition of any public work commenced under the auspices of the act of their incorporation. With a view, however, of early arousing the enterprise and patriotism of their fellow citizens in general to embark their private fortunes in the career of internal improvement opened to them by the liberality of the General Assembly, the Board of Public Works adopted at their extraordinary session the accompanying resolution:

"In a country so diversified as the territory of Virginia by rivers and mountains, possessing such a variety of staples and so many markets for their exploitation, the board could be expected to recommend to the General Assembly but a very small number of those public works which the future policy of Virginia may be inclined to patronize, and the fund for public internal improvements hereafter competent to aid:

"To open the navigation of those rivers, penetrate deeply into the interior of the country; to unite by commercial and political ties the widely extended territory of the Commonwealth, are in the estimation of the board objects of the first

magnitude in the scale of improvements contemplated by the General Assembly.’”

Resolution “B” p. 87, *idem*.

\* \* \* \* \*

“That the making of an artificial road from Staunton to some point on the Ohio River in the county of Wood or Tyler is an object of great importance to the interests of this Commonwealth.”

“That the making of an artificial road from some point on Jackson’s River to some other point on the navigable waters of the Kanawha River and the extension of the navigation of those rivers as high up the same as practicable, are objects of great importance to the interests of this Commonwealth.”

“Resolved, That the making of an artificial road from Salem in the county of Botetourt, to Winchester, is an object of great importance to the interests of this Commonwealth.”

“Resolved, That the improvement of the navigation of the Monongalia River is an object of great importance to the interests of this Commonwealth.”

“Resolved, That the making of an artificial road from Winchester to a point near the eastern base of the Alleghany Mountain, on the road which the Government of the United States is extending from Fort Cumberland to Wheeling, is an object of great importance to the interest of this Commonwealth.”

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2d Annual Report Board of Public Works, Vol. I. pt. 2, p. 29, 1817 (In re improvements on Kanawha River.)

\* \* \* \* \*

“The report made pursuant to this instruction is now respectfully submitted marked ‘N’ and will enable the legislature to decide between the different modes of forming the connection;”—

“Much of the richest territory of the State is on the Kanawha and Ohio Rivers, a great proportion of which was granted in large tracts to individuals for military service, many of which tracts have been kept entire, and the greatest part of them remain unsettled to this day; this circumstance, combined with the sparse population of the counties through which the improvement was to be made, induces the belief that the usual contributions from individuals cannot be expected in that quarter of the country. It is therefore respectfully suggested that the salutary restriction that requires three-fifths of the stock to be taken by individuals be dispensed with or modified in this instance, or that the co-operation of capitalists may be drawn to the aid of this work by combining a more immediate and profitable employment of capital with its execution.”

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3rd Annual Report Board of Public Works, Vol. 2, pt. 1, p. 13, 1818.

“The president and directors of the Board of Public Works beg leave to submit to the legislature whether it is not expedient to appropriate such a portion of the income of the fund for internal improvement not exceeding one-fourth of the annual income, to the aid of turnpike companies, as that, while it shall produce an immediate advantage to many considerable districts of country which cannot otherwise receive any direct benefit from the fund, shall not obstruct the execution of other more important and extensive works. This policy seems to be recommended by the consideration that extensive districts cannot otherwise participate directly in the benefits of the fund, and that all the advantages arising from works on a small scale will be speedily realized.

“If the legislature should adopt this policy, then the board recommends to the patronage of the legislature”—

“The latter of these companies” (referring to the Leesburg Turnpike Company) “has also completed a considerable portion of the road, and a subscription by the Board of Public Works of \$33,600, payable in four annual instalments, equal to two-fifths of the stock of the company, of which three-fifths are already taken by individuals, would enable them to complete the road. A statement of the situation of this company is subjoined.”

Report of Swift Run Gap Turnpike Co., to Board of Public Works. B. P. W. Reps, Vol. 2, pt. 1, p. 56, 1818.

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“That experience has too fully and universally evidenced the great advantages resulting from good roads, for the transportation to market of the surplus products of a country, to render it necessary for them to enforce it by any remarks on their part, especially when addressing a body whose very name and the object of whose creation must satisfactorily indicate the growth and diffusion of liberal and enlarged views upon the propriety of internal improvement and the extinction of those prejudices which have but too long retarded a measure deeply involving the best interests of the Commonwealth. \* \* \* \*

Report of Leesburg Turnpike Co., to Board of Public Works. B. P. W., Reps. Vol. 2, pt. 1, p. 60, 1818.

\* \* \* \* \*

“It is further resolved that it be made known to the said president and directors that upwards of one-fifth part of said road is now completed, and that this board are of the opinion that unless the said president and directors of the Board of Public Works shall aid in the completion of said road by subscribing two-fifths of the stock aforesaid, every exertion to produce the desired object must prove abortive, and the public be deprived of a great and important internal improvement.”



4th Annual Rep. Board Public Works. Vol. 2, pt. 1, p. 11, 1819.

\* \* \* \* \*

“In reviewing the progress and condition of the various improvements now in process of execution under the patronage of the legislature, the Board of Public Works are inspired with a just confidence that the valuable and highly important objects for the attainment of which the fund for internal improvement was created, will be fully attained by a patient perseverance in the application of the daily increasing capital of the fund to those objects.”

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Supplement to same, idem p. 4, Statement of Thos. W. Randolph, pres. B. P. W.

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“The subject is now mature for the decision of the legislature; and upon that depends what Virginia shall be twenty years hence; whether as now, or with a great and flourishing commerce, populous and wealthy cities, reoccupied plains on the east, and peopled mountains on the west, a connection founded on mutual interests with the great population of the Western States for the most part driven originally by want of profitable employment from her own territory; and the mighty influence such advantages cannot fail to create for the preservation of order, free principles and union in the confederacy.”

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5th Annual Rep. Board of Public Works, Vol. 2, pt. 5, p. 13, 1820.

\* \* \* \* \*

“A review of the state of the fund and of the report of the principal engineer, together with the other reports accompanying

this, affords gratifying proof that whilst the territory of the Commonwealth abounds with objects of valuable internal improvement in every district, the fund appropriated for that purpose is adequate, upon the principles upon which it is founded, to give effectual aid to such improvements to the full extent of the demands which can probably be made upon it; and that several public works of great importance to extensive districts of the State are under the patronage of the legislature rapidly advancing to completion which, without such patronage, might have languished for years, and perhaps have been wholly abandoned.”

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9th Annual Rep. Board Public Works Vol. 4, p. 168, 1824.  
(In re improvements on Kanawha River).

\* \* \* \* \*

“Your committee cannot close this report without calling the attention of the legislature to the growing importance of the salt trade upon the Kanawha River. At a very early period of this great undertaking, this subject engaged the attention of the legislature; and whilst the magnitude of those manufactories, yielding at this time about one million bushels of salt per annum, promised a large revenue to the Commonwealth, a reciprocal advantage was expected to accrue to them in the increased facilities of their carriage to their markets upon the Ohio River.

“We cannot, if we would, disguise it from ourselves that Virginia, if not deteriorating, is certainly not advancing with the same rapidity as many of her sister States of this Union. Her population is passing to the West, contributing by their wealth and industry to raise up new and as yet unknown interests in that important part of the United States. It is in this point of view, as your committee conceive, that this subject becomes most deeply interesting, and regarding this great chain of improvement as a social link uniting the East and West, it deserves the highest consideration of Virginia.”

10th Annual Rep. Board Public Works, Vol. 4, p. 190, 1825.

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“But few of the stocks of the canal and turnpike companies acquired by the application of the income of the fund, under the acts of the General Assembly and the resolutions of the board, as yet pay any dividend, and the revenue derived from that source is at present very inconsiderable. The appropriations made to companies with which this board has thus become connected, though unproductive of revenue, have not failed in producing a good effect.”

“A spirit of improvement, it is believed, has been excited in some sections of our State where none existed before; and the assistance afforded in several instances has led to the undertaking of improvements which otherwise would not have been commenced and could not have been accomplished. The board, however, entertains the expectation that in addition to the benefit thus conferred, a revenue will in time be derived which will enable it to extend the sphere of its utility.”

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14th Annual Rep. Board Public Works, Vol. 6, p. 10, 1819.

\* \* \* \* \*

“Although it was not the original purpose of the legislature in creating the fund for internal improvement that the aid to be extended to joint stock companies should be afforded upon the principle of mere money making, yet its productiveness cannot fail to be gratifying not only as yielding income, and thus enlarging the capability of the fund for extended usefulness, but particularly as affording conclusive proof of the beneficial application of its income in the execution of important work.”

“There are other companies with whom the fund for internal improvement stands connected whose prospects, though not so bright, are nevertheless encouraging. There are yet some others whose reports scarcely justify the faint expectations of even

deferred income from the capital expended, but whose work nevertheless affords important facilities to the trade of extensive and fertile districts of the State, and thus contributes to the general weal.

"This view of the condition and prospects of the companies who have been arduously engaged in making extensive and valuable improvements in our country, and to whom the aid of this fund is extended, is presented not only to excite attention to the certain and contingent advantages of such improvements, but also to repress, as far as practicable, that spirit of impatience which so frequently manifests itself throughout the country by murmurs at the tardiness and the expense with which the works are prosecuted, and that the unprofitableness of the public investments. These murmurs seemed to indicate the idle expectation that these great public works ought to be conducted as rapidly as the ordinary operations of a farm, and a belief that the public investments are made upon the principles of common stock jobbing."

"This spirit of impatience opposes all its energies to that public spirit which should animate every community in its march to high prosperity. The latter ought to be cherished as being of inestimable value, while the former ought to be suppressed as tending to desolation only. Although it is far from being desirable that the stocks subscribed by the Board of Public Works, under the direction of the General Assembly, should be unproductive of income, yet if the enhancement of real and other property in the country be equal in amount to the investment made, the community has surely lost nothing, and if the enhancement be indefinitely greater, so also is the common benefit. That such enhancement does occur in every community where the improvements of the country are vigorously prosecuted, is abundantly and irrefragably demonstrated by the experience of Pennsylvania, New York, and New England, where lands naturally less valuable command a price from four to ten times greater than they do in Virginia; and although their public stocks should yield them no income, yet the communities are otherwise benefited by them in a ratio of arithmetical progression. Public spirit and due perception of common and mutual interest is the great desideratum in Virginia. Were it to awaken, it would readily find subjects of improvement munificently spread before them. Surely, no country possesses greater capabilities than Virginia."

15th Annual Rep. Board of Public Works, Vol. 6, p. 113, 1830

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“This prosperous state of the fund, combined with the increased solicitude of the public on the subject of internal improvements, a solicitude created by the real necessities that exist for the construction of various improvements throughout the State, and which has been heightened by the example of some of the neighboring States who have been guided by an enlightened and liberal policy on this subject, has urged on the Board of Public Works an inquiry into the capacity of the fund of internal improvement to complete the works already commenced and to construct such others as the interests of the public may render necessary. In administering the fund to the wants of so extensive a country, presenting great varieties of situation, soil, and products, with a population in some instances separated by mountains and forests, any uniform rule founded upon the principles of justice and equality seems to be impracticable.

“If the principle of only applying the funds in combination with individuals in the form of stock companies, according to the provisions of the eleventh section of the act creating the fund, should be adopted and adhered to, the consequence would be that the energies of the fund will be exhausted upon local objects of partial benefit and extent, to be found most generally in such parts of the State where the population has already acquired sufficient surplus wealth to enable them to embark in such enterprises, and where the end to be gained is the advancement of individual interest rather than the public good. On the other hand, if only the income that arises upon the capital stock or investments of the fund is to be applied as it annually accrues, the amount is totally insufficient to effect any extended scheme of improvement commensurate with the great interests of the State.

“The act creating the fund contemplated the ‘rendering navigable and uniting by canals of the principal rivers, and of more intimately connecting, by public highways, different parts of the Commonwealth.’ The objects embraced by it are so extensive and important in their nature as to be excluded from the reach of individual enterprise and capital; besides it may happen that improvements are required essential to the best in-

terests of the country, but from which no direct income will be realized, although the State would be abundantly remunerated by the stimulous it would give to industry by the development of new sources of wealth, by enhancing the value of lands, and by the increase of population, thereby adding to the moral and physical ability of the State to sustain itself in time of war and peace."

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26th Annual Rep. . . . . Works, Vol. 12, p. 9.—1841.

\* \* \* \* \*

"In connection with the subject of railroads, the board respectfully begs leave to submit the following remarks:

"It is well known that the capital of all our railroad companies proved to be entirely insufficient to complete the formation of the roadbeds and superstructure and to provide depots, work-shops, engines and all other necessary appendages for carrying on the business of the roads. It is equally well known that much of the capital was wasted in consequence of the necessarily imperfect knowledge of the subject which was possessed by engineers at the time of the introduction of railroads into the United States; and partly owing to neglect and want of economy, method and proper supervision in the transaction and management of their affairs at the outset and for some time after.

"The result has generally been that the companies have found the aid so liberally extended to them in the shape of loans very inadequate to their real necessity. They are mostly still involved in heavy debts, exclusive of those to the State, and the urgent demands upon them for the payment of principal and interest which they are compelled to meet promptly in order to keep their works in operation, absorb their profits to such an extent as to deprive them, in a great measure, of the ability to keep the roadbeds and the motive power, and so forth, upon them in the perfect order they should be to insure regularity, safety and expedition.

*"It must be remembered that these improvements were not fostered by the legislature through contributions in subscription and loans merely as investments of so much money in*

*profitable stocks, but that they were actuated by a higher consideration, that of promoting the prosperity of the State at large by contracting to build up the local prosperity, of its different sections.*" (Italics not in original.)

"That the most beneficial results have been experienced by every railroad that has been established is not a matter of conjecture. Industry has received from them a new impetus. The cultivation of the soil in every part of the country within the range of their influence has been greatly extended; arts, trades, and commerce flourish to a greater extent, and a greater reduction has been effected in the expense of transporting the produce of the farmer and the goods of the merchant to market, and a speedy and cheap transportation between the citizens of our own State with each other and with the citizens of other States has been established. \* \* \* \* \*

EXTRACTS FROM ACTS OF ASSEMBLY OF VIRGINIA WITH REFERENCE TO  
EXPENDITURES FOR INTERNAL IMPROVEMENT, THROUGH  
JOINT STOCK COMPANIES.

CHAP. XVII.

An Act to create a fund for Internal Improvement.

[Passed February 5th, 1816.]

1. *Be it enacted by the General Assembly,* That a fund shall be, and the same is hereby created, to be denominated "The Fund for Internal Improvement," and to be applied, exclusively, to the purpose of rendering navigable, and uniting by canals, the principal rivers and of more intimately connecting by the public highways, the different parts of this Commonwealth.

\* \* \* \* \*

3. *And be it further enacted,* That, for the purpose of preserving and improving this fund, and of disbursing such portions of it as the General Assembly may, from time to time, direct, to be ap-

plied to any object of internal improvement, it shall be and the same is hereby vested in a corporate body, to be styled, "The President and Directors of the Board of Public Works" in which name they shall have a common seal, and perpetual succession, subject to the limitation hereinafter provided, shall be capable of suing and being sued, pleading and being impleaded, and shall have and enjoy all the rights and privileges of a corporation.

4. *And be it further enacted*, That the Governor of the Commonwealth shall be ex-officio President of the Board of Public Works; that the directors a majority of whom shall constitute a Board for the transaction of any business devolving on the corporation, shall consist of the Treasurer and the Attorney General of the Commonwealth, for the time being, and of ten citizens thereof; of whom three shall reside westward of the Alleghany mountain; two between the Alleghany and the Blue Ridge; three between the Blue Ridge and the great post road, which, passing through the territory of the Commonwealth, crosses the principal rivers thereof at, or about the head of tidewater, and the residue between that road and the sea coast.

\* \* \* \* \*

8. *And be it further enacted*, That the President and Directors of the Board of Public Works shall hold an annual meeting in the City of Richmond, or at such other place as may be designated by law, to begin on the first Monday in November of every year, and to continue until the business of the board is transacted—But, that the President of the Board may, at his own pleasure, or shall, at the request of any three Directors thereof, convene an extra meeting of the Board, for the transaction of any extraordinary business which may devolve on the corporation.

\* \* \* \* \*

10. *And be it further enacted*, That the fund for internal improvement, subject to the order of the President and Directors of the board, shall be deposited in the Treasury of the Commonwealth and kept distinct and apart from all other public money: It shall



be paid out or delivered by the Treasurer of the Commonwealth to the order of the board, certified and subscribed by the Secretary, and countersigned by the President; that the Treasurer shall keep a fair and regular account of all such disbursements, and carefully preserve the certificates upon which the same shall have been made, and shall render an account thereof, to the General Assembly, at the same time at which he renders his annual account of the disbursements of the ordinary revenue; that once in every year the Board of Public Works shall depute a committee of their body to examine the accounts of all disbursements made by order of the board, during the year next preceding the annual meeting of the board, and to compare these accounts with the Treasurer's books, and the certificates giving authority for the payment of the several sums of money, or stock, entered therein; that their reports shall certify to the board, that the same have been fully accounted for, or otherwise, as the case may be.

11. *And be it further enacted*, That the President and Directors of the Board of Public Works shall be, and they are hereby authorized to subscribe in behalf of the Commonwealth, to such Public Works as the General Assembly may, from time to time, agree to patronize, such portions of the revenue of the fund for internal improvement, as may be directed by law but that no part of the said fund shall be subscribed towards the stock of any canal, turnpike, or other Company, until three-fifths at least of the whole stock, necessary to complete such canal, turnpike, or other public work, of such company, shall have been otherwise subscribed; nor until, of the stock subscribed, one-fifth thereof shall have been actually paid in by the respective subscribers, or the payment thereof effectually secured by bond with approved security, or a deed of trust upon the real estate of such subscriber, of twice the value of such fifth part; such bond to be taken payable to the President, Directors and Company authorized to complete such public work, and to be recoverable against the obligor or his securities, on motion after ten day's notice, in any court of record within the Commonwealth having jurisdiction thereof; and such deed of trust to be proceeded

upon whenever the trustee therein named shall be required to do so by such President, Directors and Company

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13. *And be it further enacted*, That the President and Directors of the Board of Public Works shall vest in some productive fund the unappropriated dividends accruing upon any of the stock committed to their charge, until the same shall be specially applied by law to some object of internal improvement; and shall have power subject to the control of the General Assembly, to sell, from time to time, as may be ordained by law, the whole or any part of the shares held by the Commonwealth, in the stock of any canal, turnpike or other company subscribed for under the provisions of this Act, for the purpose of investing the proceeds of sale in the stock of some other similar company, subject to the like conditions as have been before expressed in this Act.

14. *Be it further enacted*, That the President and Directors of the Board of Public Works shall have power to appoint, in behalf of the Commonwealth, so many directors of every Public Work, as shall bear to the whole number of the directors of such work the proportion of the Commonwealth's shares of stock in such work, which may be subscribed in pursuance of this Act, to the whole number of shares subscribed thereto; *provided, however*, that whenever it shall be found expedient by the Legislature to authorize the subscription of any part of the fund hereby created to any company already incorporated, the provisions of this section shall not be construed as applying to such company unless it be otherwise directed by the Act authorizing the subscription.

15. *Be it further enacted*, That it shall be the duty of the President and Directors of the Board of Public Works, to keep a fair and accurate record of all their proceedings, which shall be at all times open to the inspection of the members of the General Assembly, and of the President, Directors and other officers of any company interested therein; that they shall report to the General Assembly, at or near the commencement of every annual session thereof, the exact state of the fund for internal improvement; the progress and

condition, noting especially the net income, of all the public works within the Commonwealth; the surveys, plans and estimated expense of such new works as they may recommend to the patronage of the General Assembly, together with such other important information as they may have it in their power to collect, in relation to the objects committed to their trust.

16. *And be it further enacted*, That the public faith shall be and the same is hereby solemnly pledged to fulfill the appropriation made by this Act; and that the said appropriation shall continue in force until the first day of January, of the year one thousand eight hundred and sixty-six, except at such times as the United States of America may be involved in war, or the safety of this Commonwealth may, in the opinion of the General Assembly require; when the General Assembly may withdraw (during the period of actual hostilities, or of such imminent danger), the whole or any part of the said fund for the purpose of defense; provided such withdrawal can be made without a violation of any engagement entered into under this Act.

17. This Act shall commence and be in force from and after the passage thereof.

## APPENDIX III.

Extract from brief filed on behalf of West Virginia, with the Attorney General of the United States, by Hon. Alfred Caldwell, former Attorney General, and Hon. E. W. Wilson, former Governor of West Virginia, upon the question of the right of the United States to set off any claim against West Virginia on bonds of the Commonwealth of Virginia acquired by the United States before the formation of West Virginia, against the claim of West Virginia against the United States for a refund of the Direct War Tax.

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“Upon the adoption of the ordinance of secession, by the Virginia Convention, in April, 1861, the Wheeling Convention which, June 11, 1861, had assembled for the reorganization of the government of Virginia after adopting an ordinance for such reorganization, proceeded to, and did, August 20, 1861, adopt ‘An ordinance to provide for the formation of a new State out of a portion of the territory of this State.’

Section 3 of said ordinance provided for changing the boundaries of the proposed new State, so as to include other counties therein named, among which were Jefferson and Berkeley, upon a favorable majority vote by the people of said counties, respectively.

Section 9 of said ordinance is as follows:

‘The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period.’

From this proposition West Virginia has never receded. She proposed to be, was taken, received and admitted as a State of

the Union, by the Congress of the United States, with this provision as of the basis of settlement with the State of Virginia. The government of the United States is the creator of the new State, and is therefore precluded absolutely, and under any possible contingency from avoiding the provisions of this ordinance, in order to retain West Virginia's money. The Supreme Court of the United States has decided this ordinance to be binding as between Virginia, West Virginia and the United States. *Virginia v. West Virginia*, 11 Wall, 39.

\* \* \* \* \*

The public debt of Virginia, January 1, 1861, was incurred almost exclusively in works of public improvement, railroads, turnpikes, canals, bridges, etc., and amounted to \$31,779,067.32.

Of this sum there was incurred for public improvements in West Virginia, \$2,784,329.29; for all other expenditures in West Virginia \$559,600.00, making a total of \$3,343,929.29.

The commission, summarizing from the various tabulated statements, strike the following account between the two States.

West Virginia to the State of Virginia,	Dr.
For the amounts expended and invested in her territory, as set forth in statement F..	\$3,343,929 29
	Cr.

By one-fourth of the estimated value of the public buildings and other assets, as given in statement G .....	\$968,750 00	
By three-thirteenths of the United States surplus fund, as per statement, .....	446,032 92	
By three-sevenths of the literary fund, as per same.....	647,079 92	
By the amount collected in West Virginia after January 1, 1861, as per statement E.....	328,706 22	2,390,569 06
Balance .....		\$953,360 23

Under the resolutions creating and defining the duties of this commission, its report was made subject to the approval and ratification of the Legislatures of West Virginia and Virginia.

Under resolutions introduced into the Senate of West Virginia, the finance committee thereof made further examination of

the matter, in 1873, and reported to the Senate the result of its labors. Hon. J. M. Bennett, a member of the commission heretofore mentioned, was Chairman of this Senate Committee. Its report appears in the appendix. We quote the following:

“The report of the debt commissioners hereinbefore referred to, shows that all State expenditures within this State, prior to January, 1861, amounted to \$3,366,929.29, and although it is apparent that bonds for quite a large amount of this sum were never issued, nevertheless the expenditures would seem to import an obligation upon our people to return every dollar which has been so contributed to the development of the territory of our State.

“The committee have not entered into the tedious process of calculating the interest, for the obvious reason that there would be as much interest on our contributions, as upon the receipts from Virginia.

“The committee have therefore assumed the foregoing sum of \$3,366,929.29 as importing a debt upon West Virginia to be gathered and itemized from the report of the debt commissioners aforesaid.

“From the amount of the foregoing expenditures must be deducted the moneys paid into the Treasury of the Commonwealth of Virginia from the counties included in this State during the same period.” \* \* \* \* \*

(Extracted from pamphlet presenting West Virginia's claim for the refund of the U. S. Direct War Tax, pp. 5 and 6.)

NOTE.—There were palpable errors in the *ex parte* statement of the account between the two States, contained in the reports referred to and approved in the above brief, in crediting West Virginia with items for which she could claim no credit under the Wheeling Ordinance under which those statements of that account were attempted to be made, and in failing to charge West Virginia with its “just proportion of the ordinary expenses of the State government” and other items of charge expressly required to be made by that Ordinance.

With these corrections made, the account would show as large a balance due from West Virginia as Virginia has now shown in this suit to be due by the new State.

## APPENDIX IV.

Paper prepared by Professor T. S. Adams of the University of Wisconsin, defining what are the "ordinary expenses" of a State.

## UNIVERSITY OF WISCONSIN.

## MADISON.

## DEPARTMENT OF POLITICAL ECONOMY.

T. S. ADAMS.

Nov. 5, 1909.

Honorable Wm. A. Anderson,  
Attorney General of Virginia,  
Richmond, Virginia.

My dear Sir:

Some time ago Dr. Ely referred to me a letter from yourself concerning the question of ordinary and extraordinary expenditures. While I of course had some general knowledge of the distinction between these two terms, as used in the budget of various countries, my knowledge on the subject was not of that specific and certain character which your problem demands. It was necessary for me to do some reading and make some examinations of authorities before I could make the reply which I herewith enclose. It is very imperfect and I particularly regret that I have not had time to go through the material in our library containing the public accounts of the various States and cities of this country. I am doubtful also whether what I have written will be of any material assistance to you, but I enclose it, hoping that it may contain a suggestion or two.

Our collection of public documents in the University Library is particularly good; and if you can wait a month or so and will express the desire to have it, I will endeavor to get some student to run through this material with a view to collecting as large a

number as possible of illustrations bearing upon the use of the terms 'ordinary' and 'extraordinary' in American public accounting.

Very truly yours,

TSA/EB

(Signed) T. S. ADAMS.

## ORDINARY AND EXTRAORDINARY EXPENDITURES.

Ordinary expenditures are usual expenditures. What is usual in one country is not usual in another, and what is usual in a given country at one time may be unusual at another time. We should therefore expect to find, and, as a matter of fact, we do find, all sorts of expenditures included in the extraordinary budgets of various countries. Precedent can be found for almost anything. In France, for example, since 1833, the substance of the extraordinary budget has consisted of expenditures for the establishment of great public works, but prior to 1789 the costs of establishing and improving public works were carried in the ordinary budget.

The best treatment of this general subject is found in Wagner's 'Finanzwissenschaft,' Vol. 1, p. 135-142. Great authority is to be accorded to this treatment, inasmuch as Wagner bases what he has to say not only upon economic theory and study of the law, but upon the experience of the greater European nations. According to Wagner, there is a three-fold distinction between ordinary and extraordinary expenditures:

1. The first distinction turns upon the time at which the expenditure becomes necessary. Extraordinary expenditures from this viewpoint arise out of unexpected demands. Wagner notes, however, that in a great state the great number of trivial or small items of expense which are unforeseen assume, in the aggregate, a certain regularity which makes it possible to provide for them by a contingent or reserve fund. Although Wagner refers to these items as 'diese kleinen Posten ausserordenlicher Ausgeben,' he really suggests that they should, in the aggregate, be regarded as regular or ordinary expenses; while the individual items are not foreseeable, their aggregate is.



II. The second and most important distinction turns upon the durability or permanence of service for which the expenditure is made and rests upon a contract similar to that made in private economics between circulating and fixed capital.

Under ordinary expenses here, Wagner mentions interest on the public debt and his language suggests that payments on the principal of the public debt when made periodically or annually in accordance with the terms of the loan should also be included among the ordinary expenses (although he protests that there is no general economic principle which requires the regular payment of a public debt).

(It will be noted that under the first distinction which turns upon the certainty or accuracy with which an expense may be anticipated, interest payments are even more clearly and logically included among the ordinary expenses, because no expense is more certain or more specifically fixed with respect to time than that of interest payment).

The extraordinary expenditures under this head are those regular or intermittent expenditures for things whose use or service extends over far more than one fiscal year or period. Wagner distinguishes three special groups here:

1. Capital outlays giving rise to a lasting use, either for—

(a) quasi-private industries and undertakings capable of yielding profit to the State (e. g., forests, railroads, mines, postal and telegraph systems;

(b) or for the establishment and betterment of what may be called the 'immaterial capital of the state' (e. g., expenditures for the introduction and execution of great public reforms such as the land cadastre, reconstruction of judicial system, enfranchisement of serfs, etc.)

2. Irregular productive and remedial expenditures to correct conditions which threaten the life or property of the State, (e. g., war, famine, floods, insurrection, etc.)

“The fact that Wagner nowhere mentions expenditures for hospitals, insane asylums, prisons, etc., is significant and indicates a belief on his part that they are ‘ordinary’ expenses.”

III. The third distinction is the purely legal one and corresponds for the most part to the well-known difference between standing and annual appropriations.

Wagner mentions here as the most characteristic items of ordinary or standing expenses, payments of interest on the public debt and the payments of such parts of the principal as are regularly retired in accordance with the terms of the loan. Legislative expenses (i. e., those necessary for the assembling and functioning of the legislature) furnish another characteristic item.

(It seems difficult to imagine how any claim can be made for the inclusion of interest payments among the extraordinary expenditures. Borrowing, with its necessary corrolary of regular interest payments, is the specific device by which irregular things are made regular, unbearably heavy burdens divided into those which may be borne with ease; and as surely as the principal of the loan is to be classed among extraordinary receipts, so surely must the interest payments be classed among the ordinary expenditures. Interest is the instrument by which extraordinary difficulties are converted into ordinary problems. (øSee foot note.)

øThe last point is well brought out in the article entitled *Budget sur Resources Extraordinaires* in Say's *Dictionnaire des Finances*, Vol. I, p. 723:

‘Ce n'est que de notre temps qu'il a été institué une théorie pour la défense des Budgets Extraordinaires systématiques. Les budgets ordinaires sont, dit-on, les budgets de la vie normale et annuelle du pays, son compte industriel d'exploitation, et ont l'impôt et les revenus des biens de l'Etat pour fonds d'entretien; les budgets extraordinaires répondent à leur compte industriel de premier établissement, indéfiniment continué comme se continue indéfiniment l'expansion de l'activité d'un peuple qui vit de siècles et non d'années et son fonds de service est l'emprunt, dont le budget

ordinaire ne se ressent que par l'obligation ou il est d'en payer les intérêts pour la part de jouissance qui lui en revient.'

The country which has, perhaps, made the widest use of the extraordinary budget is France. The experience of France is discussed in a most illuminating way in Chapters 9 and 10 of René Stourm's 'Le Budget.' We find here a number of definitions of an official character. One of these definitions, made in 1862 and often quoted in French law and financial debate, is as follows:

'The credits of the ordinary budget ought to provide for the obligatory and permanent services of the State, assuring the payment of the debt, the execution of the laws, the administration of justice, collection of revenues, and the public defense,' p. 176.

The public debt included in the ordinary budget covers the consolidated, perpetual bonds and annuities, all kinds of terminable bonds and annuities, and 'la debt viagere' (Pensions, life annuities, etc.)

The definition of 'extraordinary' expenditures made by the same author in 1862 is as follows:

(The extraordinary expenditures comprehend those for great public works, new constructions, abnormal military demands required for the protection of our exterior or foreign interests; in a word, all those expenditures corresponding to monetary needs and destined to disappear ought not to figure among the permanent charges.) Stourm, p. 196.

See foot note.ø

øThe comment of the then Minister of Finance, M. Magne, upon this definition is exceedingly illuminating, p. 196, Stourm.

'En général, on ne prend pas assez garde aux différents rôles de L'Etat. En même temps qu'il est tenu de solder, avec ses ressources ordinaires, ses dépenses courantes . . . en même temps, il est propriétaire, il a un actif immobilier et mobilier, qu'il est tenu, non seulement d'entretenir, mais de perfectionner, dans l'intérêt de tous et de chacun. Lorsque L'Etat se procure une ressource, par voie extraordinaire, par

voie d'emprunts, et que cette ressource, est appliquée à cette nature de dépenses, il ne fait qu'un placement, qu'une transformation de valeur, il augmente la fortune immobilière et mobilière de chacun. Ainsi donc, on a raison de ne pas confondre ces deux natures de dépenses, les unes, qui sont fongibles, qui disparaissent, le laissent à l'avenir ni charges, ni résultats; celles, au contraire, qui se consolident, qui s'incorporent au sol, qui augmentent la fortune de l'Etat . . . .'. Corps législatif, 6 avril 1869.

Finally it may be interesting to summarize the great French minister de Freycinet's discussion of this subject.

M. de Freycinet's divided extraordinary expenditures into three classes, Necessary, Optional, and Illegitimate.

A. "The necessary expenses are those which result from events which it is not within the power of nations to prevent or at least the financial consequences of which it is impossible to avoid, as, for example, the war of 1870 and the enormous fiscal burdens which it has entailed upon the country."

B. "The optional expenses represent essentially expenses for public works. I characterize these expenses as optional because they do not inevitably impose themselves upon a country. The government is never forced absolutely to assume these expenses and especially is never obliged to assume them at any particular time."

C. "I call all those expenses illegitimate which ought to find no place at all in the extraordinary budget. When the extraordinary budget comes to be but a covert means of increasing the ordinary budget, I consider that the expenditure is badly placed and that the extraordinary budget ought to be abolished. The extraordinary budget should not serve as a revenue for those expenses that one does not wish or dare to classify in the ordinary budget but which by their nature belong there." Stourm, p. 204.

There have, for instance, been included in the extraordinary budget at times expenditures for books for the library, gratuities to the employees of the central administration, relief to widows,

expenditures for the celebration of July 14th, and for carpenter's work, subscriptions to telephone companies, provision of oil for light houses, etc.

The preceding paragraph merely emphasizes my opening statement to the effect that precedent may be found for almost anything in this connection. But, while this is true, the great weight of usage favors the inclusion among the extraordinary expenditures, of the costs of war and public calamity (which, because of their size, have to be defrayed by public loans) and also the costs of introducing or establishing great public works of an industrial character. Capital outlays for hospitals, asylums, prisons, educational institutions, and the like, are exceedingly doubtful. But it may be said with certainty that according to the prevailing usage, only such (i. e., for hospitals, asylums and the like) capital outlays as necessitate public loans can be placed among extraordinary expenditures. Interest payments on the public debt, regular payments on the principal prescribed in advance either by law or contract, and pensions, belong, by the overwhelming mass of precedent, among ordinary expenditures.

I append a few scattering illustrations which may be of interest.

(1) The budget of the German Empire is regularly divided into ordinary and extraordinary receipts and expenditures. The ordinary expenditures are divided into permanent and temporary. The regular expenditures for industrial undertakings, (post, telegraph, railroads, government printing offices, etc.) as well as most of the expenditures for the public debt and for pensions, appear under the permanent ordinary expenditures.

(2) The budget of Algeria regularly contains the following caption: *Depenses extraordinaires*, subdivided into the two following heads: (a) *Emploi des fonds d'empreunt*, (b) *Emploi de L'excédent des fonds de reserve*. Among the other and presumably the "ordinary" heads, we find debt, public works, agriculture, colonization, and diverse works of benevolence and public utility (poor relief, etc.)

(3) The budgets of Austria and Hungary regularly contain the item extraordinary expenditures. Just what this covers I do not know, but it has been reduced to very small compass in recent years, particularly in Austria. Expenditure for public debt, however, including regular payments on the principal of the debt, is included in the ordinary budget.

(4) Payments of interest and the regular payments on the principal of the public debt are classified in the ordinary expenditures in Belgium.

(5) In Egypt, according to a brief resume of the budget given in Fenn "On the Funds," edition of 1898, p. 323, the following expenditures appear in ordinary budget: Pensions, tribute, debt payment, expenses of the army of occupation, expenditures for the "suppression of the corvee," and "unforeseen expenditures."

(6) According to the same authority, the Russian budget includes under ordinary expenditures, payments on the State debt—interest and capital—payments on the railway debt—interest and capital—and also "unforeseen expenditures."

(7) Professor F. R. Clow, an exceedingly able and careful writer in the *Quarterly Journal of Economics*, Vol. 10, pages 461-4, cites as instances of extraordinary expenditures payments for the purchase of land, for the construction of permanent works, and the redemption of public debt. Under the ordinary expenditures, he includes interest payments on the public debt. According to Professor Clow, the accounts of the City of Cleveland, at the time he was writing, included under ordinary expenditures everything except repayment of loans, refunds, investments, and similar items."

## APPENDIX V.

*Claim against West Virginia computed from the Master's findings of March 17, 1910, under Wheeling Ordinance.*

A.	
Par. III.	Expenditures in West Virginia counties, (page 83)..... \$ 2,811,559.98
"	IV. Proportion of Ordinary Expenses on Population Basis, with slaves, (p. 140) ..... 8,147,455.92
"	VII. Money, Stock, Property, etc., received by West Virginia, (p. 193). 500,828.00
	<hr/>
	\$11,459,843.90
"	VI. Receipts from West Virginia counties, (p. 179)..... 6,105,884.75
	<hr/>
	\$ 5,353,959.15
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B.	
Par. III.	Expenditures in West Virginia counties, (page 83)..... \$ 2,811,559.98
"	IV. Proportion of Ordinary Expenses on Population Basis, <i>without</i> slaves, (p. 140)..... 11,452,862.66
"	VII. Money, Stock, Property, etc., received by West Virginia, (p. 193). 500,828.00
	<hr/>
	\$14,765,250.64
"	VI. Receipts from West Virginia counties, (p. 179)..... 6,105,884.75
	<hr/>
	\$ 8,659,365.89
	<hr/> <hr/>

## C.

Par. III. Expenditures in West Virginia coun- ties, (page 83).....	\$ 2,811,559.98
“ V. Proportion of Ordinary Expenses on Fair Estimated Valuation Basis June 20, 1863, <i>with</i> slaves, (p. 172)	6,078,367.96
“ VII. Money, Stock, Property, etc., re- ceived by West Virginia, (p. 193).	500,828.00
	<hr/>
	\$ 9,390,755.94
“ VI. Receipts from West Virginia coun- ties, (p. 179).....	6,105,884.75
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	\$ 3,284,871.19
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## D.

Par. III. Expenditures in West Virginia coun- ties, (page 83).....	\$ 2,811,559.98
“ V. Proportion of Ordinary Expenses on Fair Estimated Valuation Basis June 20, 1863, <i>without</i> slaves, (page 172) .....	9,463,553.58
“ VII. Money, Stock, Property, etc., re- ceived by West Virginia, (p. 193).	500,828.00
	<hr/>
	\$12,775,941.56
“ VI. Receipts from West Virginia coun- ties, (p. 179).....	6,105,884.75
	<hr/>
	\$ 6,670,056.81
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## E.

Par. III. Expenditures in West Virginia coun- ties, (page 83).....	\$ 2,811,559.98
“ V. Proportion of Ordinary Expenses on Fair Estimated Valuation Basis Jan. 1, 1861, <i>with</i> slaves, (page 173) .....	6,805,289.57



“ VII. Money, Stock, Property, etc., received by West Virginia, (p. 193).	500,828.00
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	\$10,117,677.55
“ VI. Receipts from West Virginia counties, (p. 179).....	6,105,884.75
	<hr/>
	\$4,011,792.80
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F.

Par. III. Expenditures in West Virginia counties, (page 83).....	\$ 2,811,559.98
“ V. Proportion of Ordinary Expenses on Fair Estimated Valuation Basis Jan. 1, 1861, <i>without</i> slaves, (page 173) .....	8,586,648.25
“ VII. Money, Stock, Property, etc., received by West Virginia, (p. 193).	500,828.00
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	\$11,899,036.23
“ VI. Receipts from West Virginia counties, p. 179).....	6,105,884.75
	<hr/>
	\$ 5,793,151.48
	<hr/> <hr/>

*Note:* See A. By using Proportion of Ordinary Expenses on Defendant's method of arriving at *Average Population with* slaves, the amount of claim as in A. is reduced by \$644,967.61. (See page

141).

*Note:* See B. Same *without* slaves the amount of claim as in B. is reduced by \$714,326.68. (See page 141).

The Master has adopted the plaintiff's method, so these figures are of comparative interest only.

APPENDIX VI.

Showing Results Under West Virginia's Construction and Application of Wheeling Ordinance.

VIRGINIA vs. WEST VIRGINIA.

RESULT OF WEST VIRGINIA'S ACCOUNTING UNDER THE WHEELING ORDINANCE.

	Using Total Population Basis for Division of Ordinary Expenses	Using Population without Slaves for Division of Ordinary Expenses.	Using Fair Estimated Valuation of Real and Personal Property for Division of Ordinary Expenses.	Using Fair Estimated Valuation of Real and Personal Property on Gold Basis for Division of Ordinary Expenses.
Paragraph III of Decree Joint Exhibit "C" I—Page 1.				
Expenditures by Va. in W. Va. as computed by West Virginia . . .	\$1,251,288 92	\$1,251,288 92	\$1,251 288 92	\$1,251,288 92.
Paragraph IV of Decree Joint Exhibit "D" I—Page 1.				
Ordinary Expenses of Government, \$18,207,684.29, as computed by West Virginia. Joint Exhibit "D" I—Page 4 . . . . .	3,891,763 84	4,854,733 07		
Paragraph V of Decree Joint Exhibit "E" I				
Defendant's method of determining Fair Estimated Valuation of Real and Personal Property, per Joint Exhibit "E" I—Page 4 including Slaves and Income as Personal Property . . . . .			2,499,987 88	
Defendant's Alternative Method Defendant's Exhibit "E" III—Page 3, using Gold Basis for Assessments, and including Slaves as Personal Property . . . . .				3,773,269 45
Paragraph VII of Decree Defendant's Exhibit "G" I—Page 1.				
Value of Money, Stock, Property, and Credits acquired by West Virginia . . . . .	176,120 00	176,120 00	176,120 00	176,120 00
Paragraph VI of Decree Joint Exhibit "F" I				
All moneys paid into the Treasury of Virginia from West Virginia counties, West Virginia claim . . . . .	\$4,819,172 76	\$6,282,141 99	\$3 927,396 80	\$5,200,678 37
Excess of Receipts by Virginia over payments made by her as computed by West Virginia . . . . .	7,051,215 56	7,051,215 56	7,051,215 56	7,051,215 56
Excess of Receipts by Virginia over payments made by her as computed by West Virginia . . . . .	\$2,232,042 80	\$ 769,073 57	\$3,123,818 76	\$1,850,587 19



