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Supreme Court of the United States.

No. 3, Original.—October Term, 1910.

Commonwealth of Virginia
vs.
State of West Virginia.
} In Equity.

[March 6, 1911.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill brought by the Commonwealth of Virginia to have the State of West Virginia's proportion of the public debt of Virginia as it stood before 1861 ascertained and satisfied. The bill was set forth when the case was before this Court on demurrer. 206 U. S. 290. Nothing turns on the form or contents of it. The object has been stated. The bill alleges the existence of a debt contracted between 1820 and 1861 in connection with internal improvements intended to develop the whole State, but with especial view to West Virginia, and carried through by the votes of the representatives of the West Virginia counties. It then sets forth the proceedings for the formation of a separate State and the material provisions of the ordinance adopted for that purpose at Wheeling on August 20, 1861, the passage of an act of Congress for the admission of the new State under a constitution that had been adopted, and the admission of West Virginia into the Union, all of which we shall show more fully a little further on. Then follows an averment of the transfer in 1863 to West Virginia of the property within her boundaries belonging to West Virginia, to be accounted for in the settlement thereafter to be made with the last-named State. As West Virginia gets the benefit of this property without an accounting, on the principles of this decision, it needs not to be mentioned in more detail. A further appropriation to West Virginia is alleged of $150,000, together with unappropriated balances, subject to accounting for the surplus on hand received from counties outside of the new State. Then follows an argumentative averment of a contract in the Constitution of West Virginia to assume an equitable proportion of the above-mentioned public debt, as hereafter will be explained. Attempts between 1865 and 1872 to ascertain the two States' proportion of the debt and their failure are averred, and the subsequent legislation and action of Virginia in arranging with the bondholders, that will be explained hereafter so

far as needs. Substantially all the bonds outstanding in 1861 have been taken up. It is stated that both in area of territory and in population West Virginia was equal to about one-third of Virginia, that being the proportion that Virginia asserts to be the proper one for the division of the debt, and this claim is based upon the division of the State, upon the above-mentioned Wheeling ordinance and the Constitution of the new State, upon the recognition of the liability by statute and resolution, and upon the receipt of property as has been stated above. After stating further efforts to bring about an adjustment and their failure, the bill prays for an accounting to ascertain the balance due to Virginia in her own right and as trustee for bondholders and an adjudication in accord with this result.

The answer admits a debt of about $33,000,000, but avers that the main object of the internal improvements in connection with which it was contracted was to afford outlets to the Ohio River on the west and to the seaboard on the east for the products of the eastern part of the State, and to develop the resources of that part, not those of what is now West Virginia. In aid of this conclusion it goes into some elaboration of details. It admits the proceedings for the separation of the State and refers to an act of May, 1862, consenting to the same, to which we also shall refer. It denies that it received property of more than a little value from Virginia or that West Virginia received more than belonged to her in the way of surplus revenue on hand when she was admitted to the Union, and denies that any liability for these items was assumed by her Constitution. It sets forth in detail the proceedings looking to a settlement, but as they have no bearing upon our decision we do not dwell upon them. It admits the transactions of Virginia with the bondholders and sets up that they discharged the Commonwealth from one-third of its debt and that what may have been done as to two-thirds does not concern the defendant, since Virginia admits that her share was not less than that. If the bonds outstanding in 1861 have been taken up it is only by the issue of new bonds for two-thirds and certificates to be paid by West Virginia alone for the other third. Liability for any payments by Virginia is denied and accountability, if any, is averred to be only on the principle of § 9 of the Wheeling ordinance, to be stated. It is set up further that under the Constitution of West Virginia her equitable proportion can be established by her Legislature alone, that the liquidation can be only in the way provided by that instrument, and hence that this suit cannot be maintained. The

settlement by Virginia with her creditors also is pleaded as a bar, and that she brings this suit solely as trustee for them.

The grounds of the claim are matters of public history. After the Virginia ordinance of secession, citizens of the State who dissented from that ordinance organized a government that was recognized as the State of Virginia by the Government of the United. States. Forthwith a convention of the restored State, as it was called, held at Wheeling, proceeded to carry out a long entertained wish of many West Virginians by adopting an ordinance for the formation of a new State out of the western portion of the old Commonwealth. A part of section 9 of the ordinance was as follows: "The new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, since any part of said debt was contracted; and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new state during the same period." Having previously provided for a popular vote, a constitutional convention, &c., the ordinance in § 10 ordained that when the General Assembly should give its consent to the formation of such new State, it should forward to the Congress of the United States such consent, together with an official copy of such constitution, with the request that the new State might be admitted into the union of States.

A constitution was framed for the new State by a constitutional convention, as provided in the ordinance, on November 26, 1861, and was adopted. By Article 8, § 8, "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first of January in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years." An act of the Legislature of the restored State of Virginia, passed May 13, 1862, gave the consent of that Legislature to the erection of the new State "under the provisions set forth in the constitution for the said State of West Virginia." Finally Congress gave its sanction by an act of December 31, 1862, c. 6, 12 Stat. 633, which recited the framing and adoption of the West Virginia constitution and the consent given by the Legislature of Virginia through the last mentioned act, as

well as the request of the West Virginia convention and of the Virginia Legislature, as the grounds for its consent. There was a provision for the adoption of an emancipation clause before the act of Congress should take effect, and for a proclamation by the President, stating the fact, when the desired amendment was made. Accordingly, after the amendment and a proclamation by President Lincoln, West Virginia became a State on June 20, 1863.

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

The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this Court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone. *Missouri* v. *Illinois,* 200 U. S. 496, 519, 520. *Kansas* v. *Colorado,* 206 U. S. 46, 82-84. Therefore we shall spend no time on objections as to multifariousness, laches and the like, except so far as they affect the merits, with which we proceed to deal. See *Rhode Island* v. *Massachusetts,* 14 Peters, 210, 257. *United States* v. *Beebe,* 127 U. S. 338.

The amount of the debt January 1, 1861, that we have to apportion no longer is in dispute. The master's finding was accepted by West Virginia and at the argument we understood Virginia not to press her exception that it should be enlarged by a disputed item. It was $33,897,073.82, the sum being represented mainly by interest-bearing bonds. The first thing to be decided is what the final agreement was that was made between the two states. Here again we are not to be bound by technical form. A State is superior to the forms that it may require of its citizens. But there would be no technical

difficulty in making a contract by a constitutive ordinance if followed by the creation of the contemplated State. *Wedding* v. *Meyler*, 192 U. S. 573, 583. And, on the other hand, there is equally little difficulty in making a contract by the constitution of the new State, if it be apparent that the instrument is not addressed solely to those who are to be subject to its provisions, but is intended to be understood by the parent State and by Congress as embodying a just term which conditions the parent's consent. There can be no question that such was the case with West Virginia. As has been shown, the consent of the legislature of the restored State was a consent to the admission of West Virginia under the provisions set forth in the Constitution for the would-be State, and Congress gave its sanction only on the footing of the same Constitution and the consent of Virginia in the last-mentioned act. These three documents would establish a contract without more. We may add, with reference to an argument to which we attach little weight, that they establish a contract of West Virginia with Virginia. There is no reference to the form of the debt or to its holders, and it is obvious that Virginia had an interest that it was most important that she should be able to protect. Therefore West Virginia must be taken to have promised to Virginia to pay her share, whoever might be the persons to whom ultimately the payment was to be made.

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

mode that we adopt, but we are of opinion that her share should be ascertained in a different way. All the modes, however, consistent with the plain contract of West Virginia, whether under the Wheeling ordinance or the Constitution of that State, come out with surprisingly similar results.

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

But again, it was argued that if this contract should be found to be what we have said, then the determination of a just proportion was left by the Constitution to the Legislature of West Virginia, and that irrespectively of the words of the instrument it was only by legislation that a just proportion could be fixed. These arguments

do not impress us. The provision in the Constitution of the State of West Virginia that the Legislature shall ascertain the proportion as soon as may be practicable was not intended to undo the contract in the preceding words by making the representative and mouthpiece of one of the parties the sole tribunal for its enforcement. It was simply an exhortation and command from supreme to subordinate authority to perform the promise as soon as might be and an indication of the way. Apart from the language used, what is just and equitable is a judicial question similar to many that arise in private litigation, and in nowise beyond the competence of a tribunal to decide.

The ground now is clear, so far as the original contract between the two States is concerned. The effect of that is that West Virginia must bear her just and equitable proportion of the public debt as it was intimated in *Hartman* v. *Greenhow,* 102 U. S. 672, so long ago as 1880, that she should. It remains for us to consider such subsequent acts as may have affected the original liability or as may bear on the determination of the amount to be paid. On March 30, 1871, Virginia, assuming that the equitable share of West Virginia was about one-third, passed an act authorizing an exchange of the outstanding bonds, &c., and providing for the funding of two-thirds of the debt with interest accrued to July 1, 1871, by the issue of new bonds bearing the same rate of interest as the old, six per cent. There were to be issued at the same time, for the other one-third, certificates of same date, setting forth the amount of the old bond that was not funded, that payment thereof with interest at the rate prescribed in the old bond would be provided for in accordance with such settlement as should be had between Virginia and West Virginia in regard to the public debt, and that Virginia held the old bonds in trust for the holder or his assignees. There were further details that need not be mentioned. The coupons of the new bonds were receivable for all taxes and demands due to the State. *Hartman* v. *Greenhow,* 102 U. S. 672. *McGahey* v. *Virginia,* 135 U. S. 662. The certificates issued to the public under this statute and outstanding amount to $12,703,451.79.

The burden under the statute of 1871 still being greater than Virginia felt able to bear, a new refunding act was passed on March 28, 1879, reducing the interest and providing that Virginia would negotiate or aid in negotiating with West Virginia for the settlement of the clams of certificate holders and that the acceptance of certificates 'for West Virginia's one-third' under this act should be an

absolute release of Virginia from all liability on account of the same. Few of these certificates were accepted. On February 14, 1882, another attempt was made, but without sufficient success to make it necessary to set forth the contents of the statue. The cerificates for balances not represented by bonds, "constituting West Virginia's share of the old debt," stated that the balance was "to be accounted for by the state of West Virginia without recourse upon this commonwealth."

On February 20, 1892, a statute was passed which led to a settlement, described in the bill as final and satisfactory. This provided for the issue of bonds for nineteen million dollars in exchange for twenty-eight millions outstanding, not funded, the new bonds bearing interest at two per cent. for the first ten years and three per cent. for ninety years; and certificates in form similar to that just stated, in the act of 1882. On March 6, 1894, a joint resolution of the Senate and House of Delegates was passed, reciting the passage of the four above mentioned statutes, the provisions for certificates, and the satisfactory adjustment of the liabilities assumed by Virginia on account of two-thirds of the debt, and appointing a committee to negotiate with West Virginia, when satisfied that a majority of the certificate holders desired it and would accept the amount to be paid by West Virginia in full settlement of the one-third that Virginia had not assumed. The State was to be subjected to no expense. Finally an act of March 6, 1900, authorized the commission to receive and take on deposit the certificates, upon a contract that the certificate holders would accept the amount realized from West Virginia in full settlement of all their claims under the same. It also authorized a suit if certain proportions of the certificates should be so deposited, as since then they have been—the State, as before to be subjected to no expense.

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

On the foregoing facts a technical argument is pressed that Virginia has discharged herself of all liability as to one-third of the debt; that, therefore, she is without interests in this suit, and cannot maintain it on her own behalf; that she cannot maintain it as trustee

for the certificate holders, *New Hampshire* v. *Louisiana,* 108 U. S. 76; and that the bill is multifarious in attempting to unite claims made by the plaintiff as such trustee with some others set up under the Wheeling ordinance, &c., which, in the view we take, it has not been necessary to mention or discuss. We shall assume it to be true for the purposes of our decision, although it may be open to debate, *Greenhow* v. *Vashon,* 81 Va. 336, 342, 343, that the certificate holders who have turned in their certificates, being much the greater number, as has been seen, by doing so, if not before, surrendered all claims under the original bonds or otherwise against Virginia to the extent of one-third of the debt. But even on that concession the argument seems to us unsound.

The liability of West Virginia is a deep seated equity, not discharged by changes in the form of the debt, nor split up by the unilateral attempt of Virginia to apportion specific parts to the two States. If one-third of the debt were discharged in fact, to all intents, we perceive no reason, in what has happened, why West Virginia should not contribute her proportion of the remaining two-thirds. But we are of opinion that no part of the debt is extinguished, and further, that nothing has happened to bring the rule of *New Hampshire* v. *Louisiana* into play. For even if Virginia is not liable she has the contract of West Virginia to bear an equitable share of the whole debt, a contract in the performance of which the honor and credit of Virginia is concerned, and which she does not lose her right to insist upon by her creditors accepting from necessity the performance of her estimated duty as confining their claims for the residue to the party equitably bound. Her creditors never could have sued her if the supposed discharge had not been granted, and the discharge does not diminish her interest and right to have the whole debt paid by the help of the defendant. The suit is in Virginia's own interest, none the less that she is to turn over the proceeds. See *United States* v. *Beebe,* 127 U. S. 338, 342. *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.,* 118 U. S. 120, 125, 126. Moreover, even in private litigation it has been held that a trustee may recover to the extent of the interest of his *cestui que trust. Lloyd's* v. *Harper,* 16 Ch. D. 290, 309, 315. *Lamb* v. *Vice,* 6 M. & W., 467, 472. We may add that in all its aspects it is a suit on the contract, and it is most proper that the whole matter should be disposed of at once.

It remains true then, notwithstanding all the transactions between the old Commonwealth and her bondholders, that West Virginia

must bear her equitable proportion of the whole debt. With a qualification which we shall mention in a moment, we are of opinion that the nearest approach to justice that we can make is to adopt a ratio determined by the master's estimated valuation of the real and personal property of the two States on the date of the separation, June 20, 1863. A ratio determined by population or land area would throw a larger share on West Virginia, but the relative resources of the debtor populations are generally recognized, we think, as affording a proper measure. It seems to us plain that slaves should be excluded from the valuation. The master's figures without them are, for Virginia $300,887,367.74, and for West Virginia $92,416,021.65. These figures are criticised by Virginia, but we see no sufficient reason for going behind them, or ground for thinking that we can get nearer to justice in any other way. It seems to us that Virginia cannot complain of the result. They would give the proportion in which the $33,897,073.82 was to be divided, but for a correction which Virginia has made necessary. Virginia with the consent of her creditors has cut down her liability to not more than two-thirds of the debt, whereas at the ratio shown by the figures her share, subject to mathematical correction, is about .7651. If our figures are correct, the difference between Virginia's share, say $25,931,261.47, and the amount that the creditors were content to accept from her, say $22,598,049.21, is $3,333,212.26; substracting the last sum from the debt leaves $30,563,861.56 as the sum to be apportioned. Taking .235 as representing the proportion of West Virginia we have $7,182,507.46 as her share of the principal debt.

We have given our decision with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed. In any event, before we could put our judgment in the form of a final decree there would be figures to be agreed upon or to be ascertained by reference to a master. Among other things there still remains the question of interest. Whether any interest is due, and if due from what time it should be allowed and at what rate it should be computed, are matters as to which there is a serious controversy in the record, and concerning which there is room for a wide divergence of opinion. There are many elements to be taken into account on the one side and on the other. The circumstances of the asserted default and the conditions surrounding the failure earlier to procure a determination of the principal sum payable, including the question of laches as to either party, would

require to be considered. A long time has elapsed. Wherever the responsibility for the delay might ultimately be placed, or however it might be shared, it would be a severe result to capitalize charges for half a century—such a thing hardly could happen in a private case analogous to this. Statutes of limitation, if nothing else, would be likely to interpose a bar. As this is no ordinary commercial suit, but, as we have said, a quasi-international difference referred to this Court in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies, we think it best at this stage to go no farther, but to await the effect of a conference beween the parties, which, whatever the outcome, must take place. If the cause should be pressed contentiously to the end, it would be referred to a master to go over the figures that we have given provisionally, and to make such calculations as might become necessary. But this case is one that calls for forbearance upon both sides. Great States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end.

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Test:

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