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IN THE

Supreme Court of the United States

BEFORE SPECIAL MASTER CHARLES E. LITTLEFIELD.

VIRGINIA

v.

WEST VIRGINIA.

NOTE OF SOME POINTS AND AUTHORITIES RELIED UPON FOR VIRGINIA.

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I.

As abundantly appears, Paragraphs 3, 4, 5 and 6 of the decree of reference are predicated upon the provisions of the Wheeling Ordinance in reference to the assumpsit by the new State of a part of the debt of the Commonwealth of Virginia exsisting prior to the 1st of January, 1861; and the accounts therein directed cannot be intelligently taken without reference to the terms of that Ordinance.

It becomes necessary, therefore, in executing these paragraphs of the Decree to consider the Wheeling Ordinance, and to determine the meaning and effect of its provisions.

The basis of accounting prescribed by Section 9 of that Ordinance is undoubtedly arbitrary.

Upon its face it is unjust and inequitable.

The terms which it prescribes are palpably contrary to common right, to common law, to the precedents and practice of nations, and to public or international law.

Such an enactment clearly comes within the time-honored rule that a statute in derogation of common right or common law must be strictly construed—and so construed as to conform it in its operation and effect to the principles of right and justice, and of the common law, so far as this can be done without violating the manifestly *expressed* purpose of the statute.

In other words, such an enactment must be literally construed in the interest of fair play, and a "square deal."

See this rule as applied to acts in derogation of the common law.

> Enlich on Interpretation of Statutes, Sec. 127, citing
> *Brown* v. *Barrow*, 3 Dall. 365;
> *Shaw* v. *R. R. Co.*, 101 U. S. 557;
> *Newell* v. *Wheeler*, 48 N. Y. 476, and other cases.

This salutary rule, especially as to statutes in contravention of common right, but also as to those in derogation of the common law, is embodied in the jurisprudence of both Virginia and West Virginia.

> *Commonwealth* v. *Gaines*, 2 Va. Cases 172-175;
> *Richmond City* v. *Daniel*, 14 Gratt. 485, 487;
> *Delaplain* v. *Crenshaw*, 15 Gratt. 457, 470;
> *Virginia & S. W. R. R. Co.* v. *Clower*, 102 Va. 867, 871;
> *Wheelright* v. *Commonwealth*, 103 Va. 512, 519;
> *Davis* v. *Commonwealth*, 17 Gratt. 617;

Alexandria and Fredericksburg R. R. Co. v. *Alexandria and Washington R. R. Co.*, 75 Va. 780, 788;
Harrison v. *Leach*, 4 W. Va. 383;
Harrison v. *Smith*, 4 W. Va. 97;
Pendleton v. *Barton*, 4 W. Va. 496;
McGugin v. *O. R. R. Co.*, 33 W. Va., 63, 68;
Richardson v. *N. & W. R. R. Co.*, 37 W. Va. 641.

To the same effect are a large number of decisions of other States, a few of which are:

Webb v. *Baird*, 6 Ind. 13;
Sewell v. *Jones*, 9 Pick. 412;
Mayor of Savannah v. *Hartridge*, 3 Ga. 23;
Chapin v. *Persee and Brooks Paper Works*, 30 Conn. 461;
Phillips v. *Dunkirk R. Co.*, 78 Pa. 177.

While the basis of settlement prescribed by the Wheeling Ordinance is, *upon its face*, unjust, we are satisfied that its framers *built fairer than they knew, and probably fairer than they intended to build.*

Nevertheless, in construing that Ordinance, and in applying its provisions, we have a right to invoke the just rule of construction stated above, and sanctioned by principle, and by an unbroken line of authorities.

By the express terms of Section 9 of the Ordinance, it is declared that:

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

That is the paramount and controlling mandate and stipulation of the clause which prescribes what portion of the debt the new State shall assume and pay.

Our insistence is, that the residue of the clause should be so construed as to give effect to the righteous principle thus expressly made the rule by which West Virginia's liability under it shall be determined.

The enactment should be interpreted and applied so as not to defeat that purpose: *ut res magis valeat quam pereat.*

And so, whenever in stating the account between the two States under the provisions of the Ordinance, a question shall arise as to whether a particular item of charge against West Virginia shall be included in the account, such construction should be given to the Ordinance as will tend to place upon the new State a just proportion of the common indebtedness, rather than a construction which will tend to exonerate West Virginia from her just and equitable share thereof.

In other words, in the application of the arbitrary scheme prescribed by the Ordinance, Virginia should, according to the equitable rules of construction which are especially applicable in this case, be given the benefit of every reasonable doubt.

It cannot be forgotten that there was not a man in either the Virginia or the West Virginia Wheeling Conventions of 1861-2-3, from any of the counties or cities which now constitute Virginia, except four men admitted to seats in the Virginia Wheeling Convention of August, 1861, two of them from Alexandria, and two from Fairfax county, in the present State of Virginia; that there was no pretense that there was any representation whatever in said Convention, or in the Legislature of the Restored Government of Virginia, from more than two-thirds of the territory and people of Virginia; and that in

a number of instances the very same men acted as the representatives both of the people of Virginia, and of the people of West Virginia in said Convention and Legislature.

The indisputable facts are that it was the people of the counties and cities now constituting West Virginia, or their representatives, who were dealing with the people of the same counties and cities, or their representatives, and undertaking to make covenants and stipulations with themselves which would bind all of the people of the entire Commonwealth of Virginia in matters of the utmost importance to them.

That is to say, the framers of the Wheeling Ordinance, while purporting to represent Virginia, were in fact acting as West Virginians for West Virginia, though undertaking to bind Virginia by those stipulations.

It is the province and practice of a court of equity to look at the substance rather than the form of things—at the truth rather than at a fiction, even though it be a legal fiction, if the dominance of that fiction shall result in injustice and wrong.

No court nor judicial officer in passing upon the questions involved in this case can close their eyes to these pregnant and unquestionable facts.

These facts make it all the more proper—indeed essential to justice—that the Wheeling Ordinance should not be strictly construed against Virginia, who, without the actual consent of her people, or their representatives, was to be bound by its terms. On the contrary, it should be strictly construed against West Virginia, in whose interest it was manifestly conceived and made.

The foregoing propositions are largely taken from the brief filed by me in this case at the October Term, 1907, upon the motion to refer the case to a Master, which will be found printed at pages 133 to 172 of Volume II. of Attorney-General Conley's

Compilation of the record in this case, to which brief I beg leave to refer the Master, and particularly to the authorities cited in the appendix to that brief.

However, it is not so much a liberal as a fair and just construction of the Wheeling Ordinance that we ask for Virginia.

What we most earnestly insist upon is that that enactment shall be neither strictly construed against Virginia, nor liberally construed in favor of West Virginia; but that it shall be fairly and justly construed according to its reasonable intendment.

What we oppose is the forced, strained, and unreasonable interpretation for which the defendant has contended throughout this litigation.

If the Ordinance be given a just, a reasonable, and natural construction, and one in harmony with its declared purpose, we have no question that the result will be a ''just'' result, whatever may have been the real purpose of its authors.

Although Virginia is entitled to have that instrument liberally construed, and to have reasonable doubts solved in her favor, and I would not be justified under the circumstances of this case, in yielding anything of her rights in this regard, all we ask for her is fair treatment in the interpretation and application of enactments which, whatever their legal effect, are, as to her, in fact legal fictions, with the making of which she, in very truth, had nothing whatever to do.

II.

UPON THE QUESTION AS TO WHAT CONSTITUTE THE ORDINARY EXPENSES OF A STATE GOVERNMENT.

We rely upon the following precedents and authorities in support of the classification adopted by the accountants for

Virginia in stating the accounts directed by the 4th and 5th paragraphs of the decree:

(1) United States Government:

See report of Hon. H. B. Bristow, Secretary of Treasury, December 7, 1874, pp. iv & v.

Report of Secretary of Treasury for 1904, House Documents Fifty-eighth Congress, Volume 31, p. 5.

Special attention is called to the items which are classified as ordinary expenditures on pp. 3, 4, & 5 of this report.

Annual Report of Secretary of Treasury for the year ending June 30, 1908.

See also classification of ordinary expenses of the National Government tabulated for ten years ending June 30, 1890, 11th Census, House Miscellaneous Documents, First Session Fifty-second Congress, 1891-92, Volume 50, Part II, "Wealth, Debt and Taxation," pp. 418-419.

(2) As to what are the ordinary expenses of State Governments and their classification:

See Volume just cited, 11th Census, pp. 464-477, where the ordinary expenses of the States of the American Union are given for each ten years ending 1890.

(3) As to what are ordinary expenses of counties:

See statistics as to 1,319 counties for ten years ending 1890, Volume above cited U. S. Census, pp. 516-553.

(4) As to the ordinary expenses of cities of 50,000 or more inhabitants:

Id. pp. 556-557.

(5) As to the ordinary expenses of the governments of municipalities of 4,000, and not less than 50,000 inhabitants:

Id. pp. 580-590.

(6) Report of "Bureau of Inspection and Supervision of Public Offices" of the State of Ohio, 1906, which gives a scientific and accurate classification of all public expenditures. At pp. 72-79 is printed a detailed schedule of the ordinary expenditures of the cities of that State.

(7) Forty-sixth Annual Report of Comptroller of the City of Chicago, prepared under the supervision and sanction of Messrs. Haskins & Sells, Certified Public Accountants, 30 Broad Street, New York.

(8) As indicating that interest on the public debt of a State, and all other usual, proper, or necessary expenditures of a State government are to be considered "ordinary," see Bastable on Public Expenditures, pp. 130 & 133.

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(9) I beg leave also to refer the Master to the following judicial decisions:

"Ordinary expenses are the expenditures which are necessary to carry into effect the ordinary powers of the corporation. These terms are used in contradistinction to *extraordinary expenses*, which would be a necessary means of carrying into effect *extraordinary powers*. Under the rule above laid down, the implied and incidental powers of corporations must be classed as ordinary powers, because they pertain to all corporations, unless they are taken away by legislation."

Intendant and Town Council of Livingston v. *Pippin*, 31 Ala., p. 542.

"When bonds have been issued to raise money to meet an 'extraordinary expenditure,' they become a standing liability of the State, and the interest as it falls due, becomes an 'ordinary expense,' to be included among the 'estimated expenses' to make up the amount to be levied annually and appropriated annually."

Concurring opinion of Judge Haskell in *State ex rel Branch* v. *Leaphart, State Treasurer,* 11 S. C. 458.

Opinion of the Court in same case, p. 472.

See also incidentally "In re Limitation of Taxation," opinion of Supreme Court of South Dakota, 54 N. W. Reps. 417, 419.

WILLIAM A. ANDERSON.

December 9, 1909.