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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 2 ORIGINAL.

COMMONWEALTH OF VIRGINIA
)
vs.) In Equity.
)
STATE OF WEST VIRGINIA.

ADDITIONAL BRIEF OF WEST VIRGINIA IN SUPPORT OF THE MOTION FOR LEAVE TO FILE A SUPPLEMENTAL ANSWER.

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I.

STATEMENT OF FACTS.

The motion of West Virginia is for leave to file the supplemental answer presented with the motion for the inspection of the Court, and it is based, as we understand it, and certainly as it was intended,

upon the decision of this Court in this cause of March 6, 1911, and upon the investigations and discoveries of the West Virginia Commission that was appointed to negotiate with a like Commission of the State of Virginia an amicable settlement of the controversy, pursuant to the suggestion of this Court in said opinion.

Very briefly, and by way of premise, we will look to both in order to determine whether or not the motion is justified.

The decision of March 6, 1911, held—

First, that West Virginia was obligated to pay an equitable proportion of the Virginia debt existing prior to the first day of January, 1861. So much has been settled, and finally settled, by this Court, and its conclusion is not questioned, either by Virginia or by West Virginia;

Secondly, that the total debt existing as of that date to be apportioned between the two States amounted, in round numbers, to $30,000,000.00, and,

Third, that, taking the relative resources of the two debtor populations, exclusive of slaves, the debt should be apportioned in the ratio of 76½% to Virginia, and 23½% to West Virginia, and, upon this basis, West Virginia's equitable proportion of the principal of said debt was ascertained to be $7,182,507.46.

The Court, however, did not enter a decree for this amount against West Virginia; but, believing that enough had been said "for patriotism, the fraternity of the Union and mutual consideration to bring it to an end", suggested a conference between the two States.

Va. v. W. Va., 220 U. S., page 1.

Pursuant to this suggestion or warning, West Virginia, as speedily as practicable, appointed a Commission for the purpose of negotiating with a like Commission upon the subject from the State of Virginia. The first meeting of the Commissions amounted to little or nothing; but, after their adjournment, a sub-committee of the West Virginia Commission was appointed, for the purpose of investigating in detail the existence, disposition and value of any assets purchased with the common funds that Virginia might have appropriated to her own use, and for the proper per cent. of which West Virginia should be allowed a credit. This investigation was suggested by and based upon another statement in the opinion of March 6, 1911. It was there said by the Court, speaking through Mr. Justice Holmes, that—

> "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."
>
> (220 U. S., page 30; 55 L. Ed., 358.)

The investigation was made upon the theory that West Virginia was entitled to a proper per cent. of the assets, and upon the belief that, had they been presented to the Court, they would have been allowed. The sub-committee employed expert accountants, who investigated as best they could, in the time left them, the records of Virginia from the year 1820 until the present time, with the result that they reported to the Commission that Virginia had

appropriated to her own exclusive use, outside of public buildings—they were not taken into the account at all—assets that had been purchased with the common funds of the two States prior to January 1, 1861, and disposed of by Virginia, without any accounting at all, since June 20, 1863, amounting in actual value to $20,000,000.00 and more. Twenty-three and one-half per cent. of this amount was taken and deducted from the $7,182,507.46 of principal ascertained by this Court to be West Virginia's equitable proportion of the debt, leaving a balance of $2,327,195.27, which amount the West Virginia Commission offered to the Virginia Commission to pay in full satisfaction of the controversy. The proposition, however, was declined, and then the present motion was made.

Such is the history of the motion; and the proposed supplemental answer alleges that the disposition and value of the assets now presented were unknown to West Virginia at the time she filed her original answer herein, and were likewise unknown to her at the date of this Court's opinion of March 6, 1911.

II.

VIRGINIA'S RESPONSE TO THE MOTION.

The main point in the response of Virginia to the motion is an allegation to the effect that West Virginia was fully informed all the time concerning the common assets now presented by her, and 23½% of which she claims as a credit upon her proportion of the principal of the debt; that it is not true

that she obtained her information in relation thereto, as alleged in her proposed supplemental answer, subsequent to the filing of her original answer, and subsequent to the opinion of the Court of March 6, 1911; but that all of the matters and things now set up by her were fully set forth in detail in the report of a Commission appointed by her, known as the "Bennett Commission", in the year 1871, and heretofore embodied in the record of this cause.

In answer to this contention, it will be sufficient to say that it is inaccurate and misleading.

In the first place, the proposed supplemental answer does not allege that West Virginia had no knowledge whatever of the fact that Virginia had from time to time prior to the first day of January, 1861, invested certain of the common moneys of the two States in works of internal improvement, but it alleges that she did not know at the time of the filing of her original answer of the disposition and value of the stocks and securities evidencing these investments; that she only learned since the oppointment of, and through her recent Commission, that these securities had any actual value at all, and that they had been either retained by Virginia or sold by her subsequent to June 20, 1863, and the proceeds of such sales appropriated to her own exclusive use, without any report of the fact or accounting unto her *cestui que trust,* the State of West Virginia.

The Bennett report lists some, but not all, of the investments of the Commonwealth of Virginia in internal improvement companies, and contents itself with stating the amount of moneys that had been originally so devoted; but it does not anywhere

undertake to show which of these securities, if any, were still on hand, or what the actual value of any of them was. Neither does it show their disposition or sale, or the appropriation of the proceeds thereof by the State of Virginia. Indeed, the fact is that, with rare exception, all of these assets have been disposed of by the State of Virginia since the year 1871; that is to say, since the Bennett report.

West Virginia had no record of these sales, or of the amounts received thereon. She had no knowledge, as alleged in her answer, of the fact that they had any value at all. These matters were not in her archives, but in the archives and records of Virginia, which she has caused to be examined through her Commission since the last continuance, and the facts to be reported to her officially and reliably for the first time.

It is now easy for Virginia to say that her records were open all the time to West Virginia, and that, if she had taken the pains to examine the same, she would have been informed concerning these matters long since; but such was not the reception that was given, as shown by the record in this cause, to the West Virginia, or so-called Bennett Commission, in the year 1871.

In addition to this, attention is called to the fact that, when this case was originally argued upon demurrer, it was upon the theory that the settlement was proceeding upon the basis of the Wheeling Ordinance, which would not call for an ascertainment of these assets, and the decree of reference was along that line. After the report of the Master, however, the Court reached the conclusion that a settlement

in accordance with the Wheeling Ordinance would be arbitrary and inequitable, and proceeded to ascertain West Virginia's equitable proportion of the principal of the debt by another and more equitable method, and, finding no stocks or other securities on hand of value, left the ascertainment at $7,182,507.46 without abatement for any reason.

III.

REASONS WHY THE MOTION SHOULD PREVAIL.

1. The assets in question constituted a trust fund under the Constitution of Virginia of 1851, to be devoted to the payment of the Virginia debt, and, if Virginia has diverted this fund to other purposes, she must account, and an accounting between her and West Virginia, upon the basis of West Virginia's liability as fixed by this Court, would compel her to give credit to the latter for 23½% of the actual value of such assets.

New Orleans v. Warner, 175 U. S., 120.

Section 29 of the Constitution referred to reads in part as follows:

> "29. There shall be set apart annually, from the accruing revenues, a sum equal to 7% 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."
>
> (Code of Virginia 1860, page 47.)

And Section 30 of said Constitution reads

> "The Generaly Assembly may, at any time, direct a sale of the stocks held by the Commonwealth in internal improvement and other companies; but the proceeds of such sale, if made before the payment of the public debt, shall constitute a part of the sinking fund, and be applied in like manner."
>
> (Code of Virginia 1860, page 47.)

2. The debt in question was created in the purchase of the assets presented, and, if West Virginia must pay 23½% of the debt, she should, in equity, receive a credit for 23½% of the actual value of the assets.

3. The fact that these assets had any actual value was discovered by West Virginia since the last continuance of this cause.

4. Virginia had full knowledge of the value and disposition of these assets all the time, and the evidence thereof was confined to her own records, but she did not voluntarily disclose the same, although her suit was instituted for the purpose of ascertaining West Virginia's *equitable* proportion of the debt.

5. The decree of reference herein proceeded upon the theory that the Wheeling Ordinance was to furnish the basis of settlement, and this basis did not call for a disclosure of the existence, disposition or value of these assets.

6. This Court has wisely prescribed few rules for the conduct of original proceedings before it, but it has prescribed rules for the conduct of such proceedings in equity before inferior federal tribunals, and, upon analogy to these rules, the supplemental answer should be received.

Equity Rule No. 19 reads in part as follows:

> "The Court may, at any time, in furtherance of justice, upon such terms as it may deem just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading * * * * * * * *."

And Equity Rule No. 34 reads in part as follows:

> "Upon application of either party, the Court or Judge may, upon reasonable notice, and such terms as are just, permit him to file and serve a supplemental pleading alleging material facts occurring after his former pleading, or of which he was ignorant when it was made * * * * * * * * *."

7. "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 * * * *."

Va. v. W. Va., 220 U. S., page 27.

8. Neither is it any answer to say, as has been attempted, that such a proceeding would make an endless chain of the litigation, because it must be

remembered that the whole matter is always within the discretion of the Court, and that it can, and will, prescribe such terms and conditions in granting this, or any other motion, as may be sufficient to accomplish an equitable result.

Respectfully submitted,

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