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OF

HON. CHAS. J. FAULKNER,

COUNSEL FOR WEST VIRGINIA,

BEFORE THE

SUPREME COURT OF THE UNITED STATES,

IN THE CASE OF

The Commonwealth of Virginia

vs.

The State of West Virginia.

DELIVERED FEBRUARY 14, 1871.

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MAY IT PLEASE THE COURT:

By the courtesy of this court I appear in this cause, not merely as one of the counsel of the State of West Virginia, but more particularly and specially as the counsel for the counties of Berkeley and Jefferson, which counties, although not parties to the record, are the subjects of this litigation, and have a deep and decided interest in the result of this controversy. This, permit me to say, is a just recognition by this court of that great principle of our institutions, which secures to the people, so far as it is practicable, and consistent with the due administration of law, the opportunity of being heard on all questions affecting their political welfare. It is in their name and on their behalf that I propose now to address you. My authority to speak in their name and to represent their interests, wishes, and opinions, is embraced in the documents now before me. If any gentleman who may succeed me in this argument, shall assume to speak a different sentiment for that people, I trust he will produce a commission to speak for them as authentic, as that which I lay before the court. Since the institution of this suit, now nearly five years, these two counties have been held in a condition of painful uncertainty and suspense. This uncertainty which has hung over their future, resulting from the pendency of this suit, has checked immigration, impaired public enterprise, and deprived them of many advantages which, in the distribution of the public institutions of a new State, they might have enjoyed if this suit had never been commenced, or had been earlier decided. It is not, I beg to assure this court, a matter of indifference to the people of those two counties whether they shall be remanded to the State of Virginia or shall remain in their present connection with West Virginia. Their feelings on this subject are far deeper and more intense than it would be proper for me to develop before this judicial tribunal, and especially in the present condition of the pleadings in the cause.

The State of Virginia, which some eight years ago made a free and voluntary cession of the counties of Berkeley and Jefferson to form part of the State of West Virginia, now seeks to revoke that cession of ter-

ritory, and to evade the legal effect of the free and voluntary agreement which she then made.

By the bill filed in this cause she places her justification for this change of purpose upon two grounds:

1. That the fundamental condition upon which she made that cession,—the concurrent assent of the people of those counties,—has not been complied with.

2. That before the ratification by Congress of that cession, the Legislature of Virginia repealed the law, and thus withdrew the consent which she had previously given to that cession.

These are the two grounds upon which the State of Virginia has filed her bill, and asks this court, by its decree, to change the *political* relations of 30,000 citizens of this country; to transfer two organized and populous communities from the jurisdiction and sovereignty of one State to the jurisdiction and sovereignty of another State; to declare null and void a compact which Congress, in the exercise of the function devolved upon it by the Constitution, has declared valid, and made the basis of its subsequent legislation; and to review and reverse a political arrangement made by the political authorities of two States, and approved by the political department of the Government of the United States.

If such results are within the scope of judicial power, I must confess that I have lived to this day in ignorance of its nature, and of the extent of the jurisdiction of this court.

The Constitution of the United States has carefully separated the *political* from the *judicial* powers of this Government, conferring the first upon the President and Congress, the latter upon this court and the other inferior courts ordained by law. From the organization of the Government this court has rigidly observed this constitutional partition of powers, and it has only been sufficient in any case to make it manifest, that the relief prayed for in the bill involved a departure from this uniform course of adjudication, to cause the bill to be dismissed for want of jurisdiction.

To the bill the defendant has filed a general demurrer. Denying, as this demurrer does, that the bill upon its face presents a proper case for relief, it is based upon two propositions:

1. That notwithstanding the vague and general allegations of the bill, the *official evidence* and legally conclusive *certificates* to which it refers show "that the fundamental condition upon which the cession was made, to-wit, the concurrent assent of the people of the two counties, *was complied with.*"

2. That all other questions raised by the bill are strictly *political* and not *judicial*, and involve inquiries over which this court has always heretofore abstained from the exercise of jurisdiction.

Before proceeding to an examination of the points involved in this

demurrer, I will very briefly call the attention of the court to some few facts of public and admitted history which may throw some light on the legal questions under consideration.

It is a recognized fact in our history that the existence of West Virginia, as a separate State, sprang from the agitations of the late civil war. Its territory embraces that northwestern portion of the then State of Virginia which, commencing at the Blue Ridge Mountain where the Baltimore and Ohio railroad penetrates that State, extends in a southwestern direction to the Ohio river. It presents a succession of mountain ranges from east to west, and might well be characterized as the Switzerland of America, not simply because of its striking and sublime mountain scenery, but because of the frugality, independence, love of liberty, and primitive habits of its population. These people were ardently attached to the Constitution and Union of these States; they had never received with favor the theories of nullification or secession; they valued the blessings of a united people and one common Government, and so feeling and so thinking, they were not the people to acquiesce tamely in any movement or revolution which was calculated to deprive them of those blessings. Accordingly, so soon as the State of Virginia, by her ordinance of secession of April, 1861, declared her separation from this common Government, and combined with other Southern States to enforce that separation by arms, these people immediately organized an antagonistic State government to defend their interests, and to maintain the interests and integrity of the Union. The idea, however, of a separate State government soon developed itself in the public mind, and as that idea was favored by the people, and was acceptable to the reorganized government of Virginia, and was encouraged by the Government of the United States as a measure of national policy, it was finally carried into effect, and West Virginia became a State of the Union on the 20th of June, 1863.

The counties of *Berkeley* and *Jefferson* were not among the counties represented in the convention that framed the constitution of West Virginia, nor are they among the counties enumerated in the act of Congress admitting that State into the Union; and yet there is not an ordinance, nor an act of the Legislature of Virginia, nor an ordinance, nor act of the Legislature of West Virginia, touching that subject, from the first agitation of the idea of a new State until the final annexation of those two counties to West Virginia, that does not prospectively contemplate them as a part of the new State. Their geographical position, if not their political sympathies, pointed them out as a convenient and desirable part of the proposed State. That they were not represented in the Constitutional Convention of November, 1861, is to be ascribed to the fact that, from the 1st of June, 1861, to the 1st of March, 1862, during which time these proceedings for the formation of a new State were held, those counties were in

the possession, and under the absolute control, of the forces of the Confederate States. Any attempt to hold meetings in those counties to promote the formation of the new State would have been followed by immediate arrest and imprisonment. West Virginia, at that day, was a name synonymous with loyalty to the Union.

Now, to enable this court to determine how far Congress, when it admitted West Virginia into the Union on the 31st of December, 1862, *at that time* gave its consent to the annexation of these two counties to the new State, it will be necessary to call your attention to three acts of these States, all of which were before Congress on that day, and may fairly be presumed to have formed the basis of its action.

1. *The ordinance of Virginia of the 20th of August*, 1861. This ordinance gives the consent of the State of Virginia to the erection of a new State within its limits; it enumerates the counties to form that new State; fixes the 4th Thursday in October for the election of delegates to a State convention, and names the 26th of November for the meeting of that convention. This ordinance expressly provides and gives the consent of Virginia that the counties of BERKELEY and JEFFERSON may be included and form a part of the new State, if a majority of the votes given by these counties shall declare their wish to form a part of the proposed State.

2. In pursuance of this ordinance a convention of delegates representing the people of West Virginia convened in Wheeling on the 26th of November, 1861, framed a constitution of government for West Virginia, applied for admission as a State, and adjourned on the 18th of February, 1862. The constitution was submitted to the people on the 3d of April following and adopted. In this *constitution*, which is the second act referred to, the people of West Virginia *accept* the *proposal* of Virginia to include the counties of Berkeley and Jefferson in their political organization, subject to the condition imposed by Virginia, that it shall meet with the concurrence of the people of those counties at the election to be held, as provided in the schedule to the constitution. No elections were held in Berkeley or Jefferson at the times indicated in that schedule for reasons apparent in the then condition of those counties. In this constitution provision was made for the representation of Berkeley and Jefferson in the Senate and House of Delegates, and their places assigned them in the judicial circuits.

3. We come to the third act touching this subject, the *act of the 13th of May*, 1862, giving the consent of the Legislature of Virginia to the formation and erection of a new State within the jurisdiction of that State. The 1st section indicates the counties, 48 in number, to form the new State. The 2d section declares "that the consent of the Legislature of Virginia be, and the same is hereby given, that the counties of Berkeley, Jefferson,

and Frederick shall be included in and form part of the State of West Virginia *whenever* the voters of said counties shall ratify and assent to the said constitution at an election held for that purpose.

This ordinance, constitution, and act of the legislature were all before Congress when it admitted West Virginia as a State into the Union. The constitution and act of May 13, 1862, are referred to in the preamble of the law, and thus are virtually made a part of that statute. And may we not very fairly argue that Congress, having given its consent to the admission of West Virginia as a State, based upon a compact between the two States, in which one makes the *proposal*, and the other *accepts* that proposal, to include these counties, that this was such a consent by Congress to that proposal and to its acceptance, as fulfills the requirements of the Constitution?

Compacts between States, like treaties between independent nations, may be made without any particular form of words. The mutual consent of the parties may be given expressly or tacitly.—(Wheaton's Law of Nations, p. 441.)

So it has been decided by the Supreme Court of the United States in the case of Green vs. Biddle, (8 Wheat., p. 35,) that the Constitution prescribes no particular form or mode in which *Congress* shall signify its consent to a compact between two States, leaving that fact to be ascertained according to the ordinary rules of law and of right reason. This consent may be given in anticipation of a compact—contemporaneous with it, or subsequent to it. It may be absolute or conditional. All that is required is that Congress shall, by some positive act, signify its concurrence or consent to the agreement. There never was any resolution of Congress consenting to the compact between Virginia and Kentucky. This court, in Green vs. Biddle, *inferred* that consent from the reference in the preamble to the act of Virginia giving her consent to the erection of the district of Kentucky into a State, and prescribing the terms of that consent, and the acceptance of those terms by the constitution of Kentucky. So the preamble of the law admitting West Virginia into the Union in like manner refers to the constitution of that State and to the law of Virginia, both giving their consent to the annexation of the two counties; and may it not then fairly be regarded as having received the consent of Congress? It is true our case differs from the Virginia and Kentucky compact, in the fact that Virginia, in giving her consent to the admission of Kentucky, annexed certain *conditions* to that consent, whilst in our case she imposes no conditions, but simply makes her consent, free and unconditional.

There is another clause in the constitution of West Virginia which merits the consideration of the court—the 16th section, 4th article.

"Additional territory may be admitted into and become part of this State, with the consent of the legislature."

This clause is a very novel one in State constitutions, and is perhaps the only instance of its occurrence in any similar instrument in this country. The reason of its insertion in the State constitution of West Virginia is obvious. The constitution of that State, in three of its articles, contemplated that Berkeley and Jefferson, with some other counties named, might, by a future vote of their people, become included in that State, and this clause was inserted, to authorize the legislature to receive those counties as a part of the State whenever the people expressed, by their votes, a willingness to be incorporated into her political organization.

The counsel for Virginia, (Mr. Curtis,) in his very able printed argument, in referring to this clause of the constitution of West Virginia, says:

"It must be conceded that the admission of the State to the Union *did express the consent of Congress* that the people of West Virginia might properly confer on their legislature all the power they could confer to acquire additional territory. But surely it is a groundless assumption that Congress thereby gave its assent that the new State might acquire additional territory in a manner prohibited by the Constitution of the United States. Did Congress assent that the new State might wage war and acquire additional territory by conquest?"

Certainly not; and the clause admits of no such forced construction. The fair inference from it is this: that if Congress, by the admission of West Virginia as a State *under that constitution*, consented to her acquiring *additional territory*, as seems to be conceded by the counsel, it also gave its consent, that the additional territory *particularly named* and set forth in that instrument (these counties), might be acquired; not *by waging war*, but by submitting the question to the people of the counties for their concurrence, as the constitution prescribes.

Upon a fair consideration of all these facts, I think it may be assumed that the annexation of these two counties to West Virginia had now received the assent of Virginia, of West Virginia, and of Congress, and nothing now remained under the terms of the compact, but to have the consent of the people of the counties, which were to be transferred.

Accordingly, on the 31st of January, 1863, and 4th of February, 1863, the Legislature of Virginia passed two special acts to take the vote of those two counties on the fourth Thursday in May, 1863.

The day prescribed for this election was not *for that vote alone*, nor was it, by any political trickery, fixed at an inclement season of the year when the voters could not attend..

It was the day which for years before, and now is, the day prescribed by law for holding the *general elections* throughout that State. On that

day a governor, lieutenant-governor, attorney-general, a member of Congress, a State Senator, and members of the House of Delegates were to be elected. The civil war was at that time in progress, and the law contemplated at its enactment that the vote should be taken during that war, and the Legislature of Virginia deemed it not improbable that the Confederate forces might be in possession of those two counties on that day, and looking to such a probable state of things it conferred upon the Governor the power, by proclamation, to postpone the election to some future day if he thought the polls could not be safely and properly held on the day named. No such obstruction to the election existed. From the passage of the law in January, 1863, to 15th of June, 1863, that northern tier of counties from the Blue Ridge to the Ohio was in the quiet and undisturbed possession of the Government of the United States. The election proceeded without disturbance, and the people voted for candidates for the various Federal and State officers, and also upon the question of the annexation of these two counties to West Virginia. I believe the original records of that election were destroyed during the war, but copies of some of them, and the results of all of them, have been preserved in a report growing out of a contested election before the House of Representatives in the case of *McKenzie* and *Kitchen*. The record of the elections in these two counties was forwarded by the commissioners of election to the Governor of Virginia, and he, after taking two months in the case of the county of Berkeley, and four months in the case of the county of Jefferson, to ascertain all the facts connected with said election, certified the results to the Governor of West Virginia, by whom they were laid before the legislature of that State, and upon the faith of those official certificates, Berkeley was duly incorporated into the State of West Virginia on the 5th of August, and Jefferson on the 2d of November, 1863.

I will now proceed to examine the first ground taken by Virginia in her bill to invalidate the cession made of these two counties to West Virginia, and that first objection is that to the fairness and legality of the election.

It is alleged that no notice was given of the election; that it was impracticable for the voters to attend the polls by reason of the civil war then being waged and actively carried on; that there was not a full and free expression of the opinion of the people concerning the proposed annexation, and that the certificate of the Governor of Virginia was ignorantly given by him upon false and fraudulent suggestions made to him.

The law requires no notice other than that which the passage of the act itself gives, and it having been passed *four months* before the day fixed for the vote, at the general elections throughout the State, the notice must be regarded as most ample. A reference to the public history of

the country will show that those two counties were then under the undisturbed jurisdiction of the reorganized government of Virginia and of the United States, so that there was no obstruction to voting, certainly none to any of the loyal inhabitants of those counties, and to such as were not in arms against the Government. The charge of *fraud* is too vague and indefinite to be a ground of relief. It is not charged that West Virginia had any knowledge of or participation in any fraud. It is not charged that the Governor of Virginia, nor even that the commissioners of the election, had knowledge of or participation in any fraud. The allegation simply is that the Governor ignorantly acted upon *false and untruthful suggestions.* By whom and when those suggestions were made, is not stated. The Governor could legally receive his suggestions or information only through the commissioners of elections, and it is not alleged that the returns of the commissioners were not according to the truth of the case. It is said by the Vice-Chancellor, in the case of Monday vs. McNight, 3 Hare, 501: "Where there is a [specific] charge of fraud and the defendant demurs, he admits the charge to be true, and the demurrer must be overruled; but if the allegation is so vague that it is impossible to make out what the pleader means to represent, the court must treat such general charge as too indefinite and uncertain to be regarded;" (and the demurrer was sustained.)

The Attorney-General of Virginia, who preceded me in this argument, and who must have obtained his information from a very questionable source, says that the election held in the county of Jefferson on the 28th of May, 1863, was an undisguised fraud, and that of the 2,000 voters of that county, *not one hundred* cast their votes on that day. The information embraced in Report No. 14, 1st session 38th Congress, on the contested election between Lewis McKenzie and B. M. Kitchen, shows that 337 votes were cast in the county of Jefferson on that day, and although that is a small vote compared with the population of the county, yet in times of civil war men do not attend the polls as freely as they would in a period of profound peace. I will state two facts bearing on this subject, neither of which will be controverted, and both of which I think are fully sufficient to repel all imputations upon the fairness and legality of that election.

Mr. JUSTICE STRONG. Do you think, Mr. Faulkner, that you can properly go in that inquiry as to the facts upon this demurrer to the bill?

I do not, may it please your honor. I only claim the privilege of correcting a statement of facts made by the Attorney-General of Virginia.

The two facts that I ask to bring to the attention of the court are:

1. That the vote cast on the 28th of May, 1863, is a larger vote than was cast in the same county at the general elections of 1867 and 1868, and not very considerably less than was cast at any general election in

that county from 1863 to 1869, inclusive. It is true suffrage was much restricted in that county and elsewhere by the constitution and policy of West Virginia, and by the system of registration then enforced. Yet such was the existing state of suffrage in that county, whether right or wrong, and this court cannot look beyond the actual condition of things in any State. It cannot supervise the constitution and laws of any State, nor the administration of that constitution or of those laws in the matter of suffrage.

2. That the two commissioners who conducted that election at one of the places of voting are among the most reputable and respectable citizens of that county—one of whom was, last October, re-elected by the people by an overwhelming vote, as CLERK, and the other was elected as RECORDER of that county.

But the certificate of the Governor of Virginia is *conclusive* of all the facts set forth in it, and the State of Virginia is precluded by well established principles of law from controverting what she gave her highest and most trustworthy agent plenary authority to do in her name. He was clothed by the act of 1863 with full and exclusive power to see that the election was safely and properly conducted, and he was required to certify its results to the Governor of West Virginia, with a view to the action of that State upon the facts so certified. No appeal was provided from his decision; no report required to be made by him to the Legislature of Virginia. But upon his certificate "that a majority of the votes cast in those counties was in favor of becoming a part of West Virginia," then, with the consent of the legislature of that State, they were "to become part of the State of West Virginia," and "all jurisdiction of the State of Virginia shall cease."

The doctrine upon this branch of the case has been repeatedly announced by this court. In The United States vs. Aredondo, 6 Peters, 728, it is said: "It is an universal principle that where power or jurisdiction is delegated to any *public officer* or tribunal over a subject-matter, and its exercise is confided to his discretion, the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the power and authority conferred. The only questions that can arise between an individual claiming right under the act done and the public, or any person denying its validity, are power in the officer and *fraud in the party.* All other questions are settled by the decision made or act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for, or other revision by some appellate or supervisory tribunal prescribed by law."

The bill in this case makes no charge of FRAUD against the State of West Virginia.

Again, in the case of The Philadelphia & Trenton R. R. Co. vs. Stimpson, 14 Peters, p. 458, it is said: "Where proofs are to be laid before a *public officer*, and he is *to do an act* on being satisfied of *certain facts*, his doing the act is prima facie evidence that the proceeding was regular, and the sufficiency of the proof cannot be *controverted* or *re-examined* before *another tribunal*, if the law has made him *their proper judge*."

In the case of The Commissioners of Knox County, Indiana, vs. Aspinwall, &c., 21 Howard, 539, the court says:

"This view would seem to be decisive against the authority on the part of the board to issue the bonds, *were it not for a question that underlies it;* and that is, *Who is* to determine whether or not the election *has been properly held?* Is it this court or the board? The court is of the opinion that the question belonged to the board. The act makes it the duty of the sheriff to give the notices of the election for the day mentioned, and then declares if a majority of the votes given shall be in favor of the subscription, the county board shall subscribe the stock. The right of the board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription, and to have acted without first ascertaining it would have been a clear violation of duty; and *the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose.* This board was one, from its organization and general duties, fit and competent to be the depositary of the trust confided to it. We do not say that the decision of the board would be conclusive in a *direct* proceeding to inquire into the facts *previously to the execution of the power*, but after the authority has been executed it would be too late, even in a direct proceeding, to call it in question."

The same principles are sustained in 24 How., 287; 2 Black., 722.

The Attorney-General of the State of Virginia inquires whether this court will preclude that State from an inquiry into the facts of that election by the narrow technical doctrine of *estoppel.* Estoppel is not, in all cases, a narrow and technical doctrine. It rests for its support upon great principles of public policy. There must, of necessity, in the affairs of mankind, be something to give *stability* and *certainty* to the assurances and representations upon which both States and individuals act. This is the foundation of the doctrine of estoppel. "It is," as Smith, in his Notes on Leading Cases, says, "in the highest degree reasonable and just, that some solemn mode of declaration should be provided by law for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act. *Interest republicæ sit finis litium;* but if facts, once solemnly affirmed, are to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion. It is wise, therefore, to provide certain means by which a man may be concluded, not from saying the truth, but from saying that which, by the intervention of himself or his, has once become

accredited for truth, if false; and probably no code, however rude, ever existed without some such provision for the security of men acting, as all men must, upon the representations of others."—(Leading Cases, 656; Bert's Law of Evidence, 674.)

This election was conducted under a law of Virginia by commissioners of election designated by Virginia, under the control of a governor of that State, having full authority to secure the most perfect fairness in that election, and it is repugnant to good faith and to every principle of law, for Virginia, now to assume that *her own agents* acted ignorantly or fraudulently, and gave their official certificate to what was not true.

The SECOND ground taken by Virginia in her bill is, that by an act of her legislature, passed on the 5th of December, 1865, and before the ratification of the cession by Congress, she *withdrew her consent* to said compact, and from that moment it ceased to be obligatory upon her.

The first inquiry which presents itself here, is, Was the body which assembled in Richmond on the 4th day of December, 1865, a legally constituted legislative assembly under the *then existing constitution of that State*, and capable of withdrawing the consent of Virginia from a compact previously made by her? That legislature admittedly convened under the Alexandria constitution of 1864. This is fully conceded by the Attorney-General of Virginia, who has devoted a portion of his argument in this case to establish that proposition, citing the authority of Chief Justice Chase in support of his views. The Alexandria constitution was certainly not the work of statesmen; it was not the product of the popular mind of Virginia. It might have operated without impediment in loyal States like Massachusetts and Vermont, but it was not adapted to the condition of affairs in which the close of the late civil war found the people of Virginia. It disqualified from holding office in that State every man who, since the 1st of January, 1864, "had voluntarily given aid, *in any way*, to those in rebellion against the Government of the United States." No provision existed in that instrument by which it could be amended, so far as the *disqualification to hold office* was concerned; and yet it is a well-known fact that a majority composing that body were incapable of taking the oath prescribed by that constitution, and were disqualified from holding office under its provisions. It is true a peaceable *revolution* was effected through the legislature, by which this constitution was amended, but as that amendment, however, demanded by imperious State necessity, was without the sanction and authority of the constitution itself, the courts may very well inquire into the validity of such a proceeding. But even this amendment, invalid as it may be regarded, was not made until the 8th of December, 1865, three days *subsequent* to the act repealing the consent of Virginia to the compact with West Virginia.

But suppose it to be possessed of valid legislative power, could it withdraw the consent of Virginia to the compact made with West Virginia in 1863?

It is a principle of law, that a contract once accepted is irrevocable, and cannot be withdrawn. This is especially so where possession has been delivered under that contract, and everything done by the parties to perfect and complete it. No arbitrary caprice of mind,—no change of policy,—no mutations of party can for a moment justify a withdrawal of the agreement. This is not only the law of this country, and of that from which we derive our institutions, but it is the municipal law of all Christendom, and an established canon of international law. It is true in most countries sovereign States may revoke and repudiate their contracts, and there is no judicial tribunal to enforce them. But such is not the case under our constitutional system, and of it, it may, as truly as beautifully, be said, that here, at least—

> Sovereign o'er all, Eternal Law
> On men and STATES imposes awe.

But it is argued by the counsel of Virginia (Mr. Curtis) that no compact in law was made between these States in 1863; that a State is *incapable*, under the Constitution, of making a compact or agreement with another State; that it is *Congress* that makes the agreement, and not the *States*. To use his own language, "they may negotiate, they may express a mutual willingness to agree to the same thing, but this is all; they can enter into no contract or agreement." If this is not a mere verbal criticism on the language of the Constitution, it certainly presents the State in a most humiliating condition of pupilage to the Federal Government. It makes their condition inferior to minors and *feme coverts*, for there are some contracts which even minors and *feme coverts* may make, but, according to his reading of the Constitution, there are *none* that can be made by the States.

This view of the incapacity of the States to make contracts has been presented by the counsel of Virginia (Mr. Curtis) with great force and confidence, as the controlling point of the controversy now before the court. I do not concur in the constitutional view taken by the counsel, and, if held sound by the court, I do not perceive its decisive influence upon the result of this case; for if it be true, that it is *Congress* and not the States that makes these compacts, then we shall expect to show that Congress, if not in December, 1862, at least, certainly in March, 1866, did make the compact under which West Virginia holds these counties.

The Constitution of the United States, it is true, uses the language that "no State shall, without the consent of Congress, enter into any agreement or compact with another State or a foreign power." And yet this court, in construing that clause, has uniformly held that the sole pur-

pose of the framers of that instrument was to protect the rights and interests of the Federal Government, and of States that were not parties to the compact; and that it never was intended to prevent the States from settling their own boundaries or other matters so far as they affected solely their relations to each other. Such was the opinion of this court in the case of The State of Rhode Island vs. Massachusetts, 12 Peters, 726. "The power is given to Congress to dissent from the compacts of the States. Not to prevent the States from settling their own boundaries so far as merely affected their relations to each other, but to guard against the derangement of their federal relations with the other States of the Union, and the Federal Government, which might be injuriously affected if the contracting parties might act upon their boundaries at pleasure." Again, in the case of Florida vs. Georgia, 17 How., p. 494, the court says:

"This provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States which might affect injuriously the interests of the others.

"In the case of a compact it is by the Constitution made the duty of Congress to examine into the subject, and to determine whether or not the boundary proposed to be fixed by the agreement is consistent with the *interests of the other States of the Union.*"

The cession by Virginia to West Virginia of the two counties of Berkeley and Jefferson could by no possibility affect the rights and interests of the Federal Government, nor of any other State in the Union.

In construing an instrument like the Constitution of the United States this court will give it a fair and reasonable construction, such as will reach the mischief sought to be guarded against, but will not extend its disabling operation beyond the object contemplated by its framers.

Such reasonable construction was given to that clause of the Constitution in the leading case of Poole vs. Fleeger, 11 Peters, 209:

"It cannot be doubted that it is a part of the general right of sovereignty belonging to independent nations to establish and fix the disputed boundaries between their respective territories. This is a doctrine universally recognised in the law and practice of nations. It is a right belonging *to the States of this Union,* unless it has been surrendered under the Constitution of the United States. So far from there being any pretence of *such a general surrender of the right,* that it is expressly recognised by the Constitution and guarded in its *exercise* by a *single limitation* or *restriction* requiring the consent of Congress."

In this opinion I see nothing to justify that idea of absolute *disability* and utter *incapacity* of the States to make contracts, as maintained by the counsel of Virginia. The right of the States to contract is declared to be unimpaired by that instrument, subject only to the limitation or restriction of the consent of Congress. Prior to the consent of

Congress the compact is obligatory as between the States which make it. After the consent of Congress, it is obligatory upon all the other States and upon every department of the General Government. And it seems to me that the very submission of such a contract to Congress for its approval, implies that a contract has been previously made by parties having full capacity to contract as between themselves. Can Congress be asked to give its consent to that which has no legal existence or validity? The Constitution does not expect Congress to give its consent to *negotiations* between the States, to *proposals* between the States, but to *compacts* and *agreements* between the States.

To maintain this idea of the incapacity of the States to contract with each other, reference has been made to an expression used by the court in the case of Florida vs. Georgia, 17 How., 494. "If Florida and Georgia, say the court, had by negotiation and agreement proceeded to adjust *this* boundary, any compact between them would have been *null* and *void* without the assent of Congress." Why null and void? Contracts may be null and void, not solely because of the *incapacity* of the parties to contract, but because of the *illegality* of the subject-matter of the contract. Such, I apprehend, was the meaning of the court in the language referred to. The territory in dispute embraced upwards of 1,200,000 acres of land which was ceded to the United States by Spain as a part of Florida, and which public domain had been reserved to the United States when Florida was admitted into the Union. Now, manifestly any adjustment between Florida and Georgia, which would have deprived the United States of its interest in that territory would have been *null* and *void*, without the consent of Congress.

Is there any necessity for giving to the Constitution the harsh and disparaging construction contended for by the counsel of Virginia? Can we not give to that clause an interpretation, that will accomplish every purpose intended by its framers, and at the same time preserve the proper dignity of the States? Certain it is that this court has never yet decided, that compacts made between two States may not for many purposes be obligatory between them before their approval by Congress, and in reaching a conclusion so confidently expressed, the counsel is more indebted to the rich resources of his own fertile intellect than to any adjudication rendered by this court.

The construction which, in opposition to that annouced by the counsel of Virginia, I give to this clause of the Constitution is, that the consent of Congress is simply a *condition* annexed to every such compact for the protection of the general interests of the Union, and, like every other contract made between parties *subject to a condition*, the contract subsists, and is irrevocable, as between those parties, up to the period of the performance of the condition, when it becomes *absolute;* or the non-perform-

ance of the the condition, when the contract is released and discharged.

In this opinion I find that I am sustained by very eminent judicial authority. Judge Baldwin, in an opinion prepared in the case of Poole vs. Fleeger, but which does not appear in the reports, as there was no dissent to the opinion of the court in that case, says:

"Where the assent of Congress is made necessary to validate any law of a State, Congress can only assent or dissent therefrom, but can exercise no legislative power over the subject-matter, without some express authority to *revise* and *control* such State law by regulations of its own. In the absence of any power in Congress to do more than simply assent or dissent, *the assent is a* CONDITION, and when once given to an act of the State, it has the same validity as if no prohibition had been made. The assent of Congress is made an exception to the prohibition, and when given, takes the case out of the prohibition, and leaves the power of the State uncontrolled, on the common law rule, that 'an exception out of an exception leaves the thing unexcepted.'"—(4 D. C. D., 290; Bald. Const. Views, p. 172.)

Again:

"By the Constitution, agreements and compacts between the States and foreign powers are put on the same footing, being prohibited, if Congress does not consent, and valid if consent is given, thus leaving the power of the States subject to the CONDITION of consent."—(Bald. Const. Views, p. 174.)

If I am, therefore, justified by this authority in treating the consent of Congress to a compact made between the States, as simply a *condition* annexed to the compact, to be performed before it becomes absolute, what are the well established doctrines of the common law, that apply to all such conditional compacts? It is that rights *vest* under such a conditional compact; that neither party is at liberty to withdraw from it; and that it subsists as a compact up to the performance, or non-performance, of the condition, when, in the first case, it becomes absolute, and in the other case it is nullified or discharged.

I cannot better illustrate my views than by reference to the familiar common law doctrines of an *escrow*, to which these compacts between States, subject to their conditional aproval by Congress, bears some analogy. The most usual condition annexed to such instruments is, that it is to be their deed, when approved and executed by some third party. What is the legal effect of such a contract up to the period of its approval and signature by the third party?

"While the writing remains in the hands of the obligors, or either of them, it imposes upon them no obligation whatever, and cannot have even the effect of an *escrow*. They have complete power over it, and in legal contemplation it is neither a contract nor the evidence of a contract. Not so, however, with respect to an *escrow*. It cannot be *revoked* by the party who makes it, and he, in whose favor it is made, is *entitled to it* whenever

the condition is complied with by which it becomes absolute."—(Millette vs. Parker, 2 Metcalf Rep., 616, Chief Justice Simpson delivering the unanimous opinion of the court.)

"Delivery of a deed as an escrow *vests* the right to the deed in the party for whose benefit it is delivered, subject to the performance of the condition on which it is delivered."—(6 Taunton, p. 12.)

"It may be made a question whether the *deed be perfect* before he hath delivered it over to the party according to the authority given to him. Howbeit it seems the delivery is good, for it is said in this case that if either of the parties to the deed dies before *the condition be performed*, and the conditions be after performed, that the deed is good; for there was *traditio inchoata* in the lifetime of the parties, and *postea consummata existens* by the performance of the conditions, it taketh effect by the *first delivery* without any new or second delivery, and the second delivery is but the execution and consummation of the first delivery."—(Shepherd's Touchstone, p. 59.)

But it is said these principles of municipal law cannot apply to international compacts between the States, and the Attorney-General of Virginia has assimilated this case to a treaty between two sovereign and independent nations, and the doctrine is sought to be applied to it that no treaty is complete and binding until *after ratification.* The ratification here spoken of by writers on international law is the approval by the respective governments of the acts of their own diplomatic agents. It bears no analogy to compacts agreed upon by the legislatures of two States, which are the highest authority in the State, and themselves constitute *its government.* Neither can the consent of Congress, in the sense of international law, be called a *ratification,* because it is not one of the original contracting parties. Its consent may be a *condition* to the validity of the contract. With that consent thé contract may become absolute, but the consent of a *third* party cannot, in the sense of international law, be called a ratification. Upon the binding effect of treaties before ratification there has been much diversity of opinion among learned publicists. *Vattel* and *Kluber* consider the acts of a minister, within the limits of his credentials, binding, unless the power of ratifying be *expressly reserved;* and so unsettled was the doctrine on this subject that we are informed by *Wildman,* one of the oldest writers on international law, that there has hardly been a treaty in modern times that does not contain upon the face of it *a stipulation* that it is not to be regarded as binding until ratified by their respective governments.

In this country I believe we have had but one instance in which this doctrine has been brought under examination with a view to its practical application. I allude to the *disavowal* by the British Government of the agreement made between Mr. Erskine, the British Minister, and Mr. Smith, our Secretary of State, for the withdrawal of the British orders in council, in consideration of the renewal of commercial intercourse with

that country. This act of disavowal upon the part of the British Government was one of the causes which led to the war of 1812.

The doctrines of international law applicable to that state of facts are thus announced by President Madison in his message to Congress, of the 29th of November, 1809:

"Whatever pleas may be urged for a disavowal of engagements formed by diplomatic functionaries in cases where, *by the terms of the agreement, a mutual ratification is reserved*, a disavowal could not have been apprehended where *no such ratification was reserved*, and more especially where an engagement to be executed without such ratification was contemplated by the instructions given, and where it had with *good faith* been carried into immediate *execution* by the United States."

The views of President Madison on this interesting question of international law, and which precisely describe the transaction between Virginia and West Virginia, were sustained by resolutions adopted by the Senate and House of Representatives of the United States.

The theory of the counsel of Virginia is, that in every compact between two States there are *three* contracting parties—the two States and Congress—and that the compact is necessarily inchoate and without obligation until the consent or signature of *all three parties* is given to the agreement. This, I respectfully submit, is not the true character of this arrangement. The only two *contracting* parties to the agreement are the *States*. Congress can in no proper sense be termed one of the *contracting* parties. It simply assents or dissents from the agreement made by the States, as it believes that agreement may or may not be prejudicial to the general interests of the Union. Like the President in regard to the legislation of Congress, it exercises a *veto power* over compacts made between the States, but the veto prerogative of the President does not, under our Constitution, make him any part of the *legislative* power.

I now come to the main question involved in the demurrer to the bill, and I object to the relief prayed for, because it asks this court to transcend its constitutional limits, to entertain a question not *judicial* in its character, but one which has been expressly and exclusively referred to another department of the Government. This is not a question of disputed or controverted boundary in any fair meaning of that term, or within the spirit of any of the numerous adjudications of this court. It is a question of a cession of territory with well-established, thoroughly recognized, and accurately defined boundaries. It is true, boundary may be an *incident* in this case, resulting from the decision of other and far different principles, just as jurisdiction and sovereignty are incidents resulting from the ascertainment of a disputed line of territory between two States. But the real and controlling question here is, *Was there, or was there not, a compact existing between the States of Virginia and West Virginia on the*

10th of March, 1866, when Congress, in the exercise of its constitutional functions, acted upon the subject and gave its formal and specific consent to the transfer of these two counties to West Virginia?

If there existed a compact on that day between these two States, and if Congress is the only tribunal authorized by the Constitution to decide whether such a compact then existed or not, this would seem to me necessarily to terminate this controversy.

Every compact between two States, before it becomes absolute, must be submitted to the approval of Congress. It is true, all that Congress can do, is to assent or dissent from the compact. It can neither alter nor amend it. But this assent or dissent involves the exercise of an intelligent political judgment, and a careful consideration of all the facts upon which that judgment is to be rendered. In deciding whether that compact is to be approved or not, Congress must determine—

1. That there are proper *parties* to the compact; in other words, that they are States of the Union. If a compact had been made between Virginia and West Virginia in 1866 or 1867, or on the 5th of December, 1865, would Congress have ratified such a compact? It would not, for it did not then recognize Virginia as one of the States of the Union.

2. The next inquiry would be, Has there been a compact in fact made between the two States? If made, has it been revoked by one of the parties? Has such a party the power, under the circumstances, to withdraw its consent? Has that consent been withdrawn by a political body legally entitled to speak on behalf of the State? All these inquiries must necessarily enter into the judgment of Congress.

Lastly. Congress must determine whether, if made, and if made by proper parties, it is consistent with the rights of the other States, and with the general interests of the Union.

Now we have the fact before us that all these inquiries *did* enter into the judgment and decision of Congress; that there is not a single issue presented by this bill, which was not discussed, considered, and adjudicated by that department of the Government, when it gave its consent to the compact between these two States for the transfer of these counties.

I propose now to read a brief extract from the Congressional proceedings of that day. It is from the remarks of Mr. Lawrence, of Ohio, the chairman of the committee who reported the resolution to the House. I do not quote it as authority, nor as evidence of the facts which it asserts, but simply to show the issues then pending and determined by Congress.

"Mr. Lawrence. Besides, she cannot withdraw her consent by the act which her so-called legislature assumed to pass since the commencement of this Congress, for the reason that this Congress has refused to recognize the existing government of Virginia *as a lawful government.* At the commencement of this session we refused to admit gentlemen

claiming seats as representatives from that district of country called the State of Virginia. We have uniformly refused to recognize the existence of any valid legislative body, or any existing State government in Virginia. It is a matter of historical notoriety that her present legislature is assembled in direct violation of her own constitution; that its members have failed to take the oath prescribed by her own laws; that the existing body, called the Legislature of Virginia, is not a legal body at all; and Virginia, having a State government *de facto*, is without any valid or constitutional State government to-day. Therefore that legislature could not, by any act, withdraw the *assent of the State of Virginia* previously given by a legislative body which was recognized as a lawful body."—(Cong. Globe, part 1, 1st session, 39th Cong., 1865–'66, February 6, 1866, p. 695.)

Congress acted upon these views, and decided that there existed in Virginia, in December, 1865, no legislative body with power to withdraw the consent of Virginia from the compact made with West Virginia in 1863.

Here we are, then, confronted with this enquiry: Have two separate and distinct departments of this Government each the power to act upon a subject like this, and to render adverse judgments upon it? It cannot be so. This would be repugnant to the whole character of our system. If it were so, instead of that beautiful order and harmony which now pervades its operations, we should have nothing but anarchy and confusion. This court has itself announced that the legislative, executive, and judicial departments are co-ordinate in degree, to the extent of the powers delegated to each of them; each in the exercise of its powers is independent of the other, but all rightfully done by either is *binding upon the others.*—(Dodge vs. Woolsey, 18 How., 347.)

So in the case of Luther vs. Borden, 7 How., p. 42.

The court says:

"When Senators and Representatives of a State are admitted into the councils of the Union, the authorty of the (State) government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. *And its decision is binding on every other department of the Government, and could not be questioned in a judicial tribunal.*"

It was eminently a *political enquiry* for Congress to determine whether the body professing to be the Legislature of Virginia, and which assumed to withdraw the consent of Virginia to the compact, was an authorized representative of the legislative power of that State? It was peculiarly its function to determine whether that was a self-constituted body, convened without authority and in direct violation of its constitution, or whether it was a political organization elected in pursuance of the constitution, and reflecting the legally expressed popular will.

I will suppose that Congress had before it the Alexandria Constitution

of 1864, containing this provision in its 3d article: "No person shall hold office under *this constitution* who has held office under the Confederate Government, or under any rebellious State Government, or who has been a member of the Confederate Congress, &c." I will suppose it also to have had before it the Journal of the Senate and House of Delegates for the years 1865–66. Could they have failed to see that the distinguished Speaker of the House of Delegates had been a leading and distinguished member of the Confederate Congress? Could they have failed to see that the oath prescribed by that constitution had not been taken by its members, and would have been scornfully rejected by them if such a requirement had been insisted upon? I find no fault with Virginia for throwing off this narrow and impracticable constitution. If ever a peaceful *revolution* against constitutional stupidity and impracticability was justified for *political* reasons, it was in her case. Yet this does not obviate in a legal view, the objection to the validity of those proceedings, and certainly all will admit that Congress, whether its decision was well founded or not, had absolute authority under the Constitution to determine *in that particular case* whether it would regard the repeal by that body of the consent of Virginia, as a valid expression of the legislative power of that State.

But not to pursue this train of remarks further, the proposition which I now desire to impress upon the court is this: that whatever relates to the *existence, validity,* and *execution* of compacts between the States has, by the Constitution, been referred to Congress, and is exclusively a *political result* which this court must accept as it receives it from that department of the Government; while all questions touching the *construction* of such compacts are *judicial* questions, exclusively referred to the courts.

Such I understand to be the doctrine distinctly announced by this court in the great case of The State of Rhode Island vs. Massachusetts, for great I may call it, whether we look to the principles involved, the eminent character of the counsel engaged, or the profound research and great ability of the opinion pronounced. In that case the court says:

> In the *Colonies* there was no judicial tribunal which could settle boundaries between them. The only power to do it remained in the king, where there was no agreement, and *in chancery where was one* and the parties appeared. When the States became independent they reserved to themselves the power of settling their own boundaries, which was necessarily a purely political matter, and so continued until 1781. Then the States delegated the whole power over controverted boundaries to Congress to appoint, and its court to decide as judges, &c.
>
> Then came the CONSTITUTION, which divided the power between the *political* and *judicial* departments, after incapacitating the States from settling their controversies upon any subject by treaty, compact, or agreement, and completely *reversed the long established course of the laws of*

England. COMPACTS and AGREEMENTS were referred to the *political*, controversies to the *judicial* power.

Again. Under our Constitution, say the court, the States can enter into no compact without the consent of Congress, *in the exercise of its political power*, thus making an amicable adjustment (that is a compact) a *political matter* for the concurring determination of the States and Congress, and *its construction* a matter of judicial cognizance by any court to which the appropriate resort may be had by the judiciary act."—(Page 729.)

Again, in the same case:

"If Congress consented, then the States were in this respect restored to their original inherent sovereignty, such consent being the sole limitation imposed by the Constitution. The *construction* of such compact is a JUDICIAL question, as was considered by this court in the Lessee of Sims vs. Irvine, &c., &c."—(p. 724.)

Judge Baldwin, in the opinion before referred to, in the case of Poole vs. Fleeger, says:

"The consent of Congress has been given to this compact," (compact between Kentucky and Tennessee.) "There can be, then, no doubt that the compact *must be taken as made by competent authority*, and as prescribing the rules by which the rights of the contending parties must be ascertained."—(Baldwin's Const. Views, p. 175.)

In the present case no *construction* of this compact is asked of the court, but the prayer of the bill substantially is, that this court will determine, in opposition to the decision of Congress, that no compact whatever *existed* between these two States at the time that Congress declared there was such a compact, and gave it its approval.

In the case of The State of Rhode Island vs. The State of Massachusetts, 12 Peters, the defendant relied upon an *agreement* or compact as to boundary between the parties *while colonies*, which the plaintiff asked to have declared *void* on grounds of appropriate cognizance in equity. The court held that this compact might be declared null and void, if the objections to it were sustained by the evidence. But the jurisdiction of the court on that point was based upon the fact, that the compact or agreement referred to, was made between the parties BEFORE the adoption of our present Constitution, and upon that principle of the English law that where there was an *agreement* between the parties as to boundary, a court of chancery had jurisdiction to enforce or cancel the agreement; a doctrine which the court say in this case, however long established in England, has been reversed since the adoption of that feature of our Constitution referring such compacts to *Congress* and withdrawing their *existence* and *validity* from the jurisdiction of this court.

The counsel of Virginia (Mr. Curtis) refers with evident complacency, in his printed argument, to the Virginia constitution of 1864, and to the

fact that it expressly included the counties of Berkeley and Jefferson as parts of the Commonwealth of Virginia, and extends to them its political and judicial organization. Let this be so, it can have no other weight than the simple declaration of a party in interest made in her own favor. That constitution has been *abrogated* by the popular voice of Virginia. It is among the abandoned relics of the past. But what has the learned counsel to say to the present constitution of Virginia? Does that assert any claim to the counties of Berkeley and Jefferson? Does that constitution, directly or indirectly, in the present or prospectively, extend to them its political and judicial organization? So far from it, that whilst it enumerates every acre of its territory, and arranges its political and judicial districts all around them, it ignores the existence of the counties of Berkeley and Jefferson, and virtually disclaims all political relationship with them.

[Mr. Faulkner was at this point arrested in his remarks by an animated colloquy amongst all the members of the court.] After a short pause—

JUSTICE MILLER.—When was that constitution to which you refer adopted?

Mr. FAULKNER.—It was adopted by the Convention in 1867.

JUSTICE MILLER.—When by the people?

Mr. FAULKNER.—I think sometime in 1868.

JUSTICE BRADLEY.—Do you say it enumerates all the territory claimed by Virginia?

Mr. FAULKNER.—It sets forth in the constitution by name every county and city claimed by Virginia as a part of her territory, and includes them in designated political and judicial districts.

JUSTICE BRADLEY.—And do you say that Berkeley and Jefferson are nowhere named and claimed in that constitution?

Mr. FAULKNER.—Berkeley and Jefferson are not named in the instrument, nor claimed in it, as a part of the territory of Virginia.

But further: Virginia was admitted to representation in the Union on the 26th of January, 1870, presenting this as the constitution under which she asked and obtained admission to the privileges of a State. This was the territory as described and set forth in that instrument by herself and made the basis of her admission as a State. Can she now claim territory which she virtually disclaimed on that solemn occasion? If additional territory, not then claimed in her constitution, is now to be added to Virginia, can it be done without the consent of Congress? Suppose Virginia, in her constitution of 1867, instead of *disclaiming*, had claimed the counties of Berkeley and Jefferson, would not such a pretension have arrested the attention of Congress? Would not Congress have then said to her,—The question as to those two counties has already been settled by the deliberate judgment of this body, and we cannot consent to see re-

vived, by your admission into the Union, a controversy which we have already adjudicated? You withdrew your protection and jurisdiction from those counties when they were exposed to all the assaults and devastations of the war; you left them to take care of themselves or to find protection from West Virginia or from the United States. With what justice can you now revoke your cession and claim jurisdiction over them? Can we, in the honest execution of our reconstruction policy, receive you again into our sisterhood of States with sword in hand to pierce the heart of one of the youngest, feeblest, and yet, most loyal States of the Union? If such a claim had then been asserted by Virginia in her State constitution, it would *then* have been ended by the action of Congress.

But again: Can this court render *a decree* giving to Virginia, territory to which she asserts no claim in her organic law, and to which she asserted no claim when admitted as a State into the Union?

I might well inquire under what authority does the Attorney-General of Virginia, elected under the constitution, stand up before this court and ask, in the name of Virginia, for territory which the people of that State, in this solemn manner, have disclaimed? The law under which he professes to act, and which originated this suit, was passed under the constitution of 1864, now no longer in force. There is nothing in the present constitution of Virginia which gives authority to this proceeding. The verdict of the people, adopting the present constitution, may be regarded as a virtual order for the *dismission* of this suit.

I think I am justified in the conclusion that no case seeking the relief prayed for in this bill, and involving the doctrines maintained by the complainant in this argument, has ever yet received the sanction of this court.

The counsel of Virginia, driven, as I humbly conceive, from every other position in this cause, still clings to the idea that this case involves a question of disputed boundary between the two States, and as such gives jurisdiction to this court.

He (Mr. Curtis) says: "Boundary involves not merely a disputed line depending upon surveys, monuments, and title-deeds, but any subject-matter, be it what it may, that may result in changing the territorial limits of a State."

This is not the view heretofore acted upon by this court in determining its jurisdiction in such cases. In all the precedents in which this jurisdiction has been sustained heretofore by this court, there have been real *bona fide* disputes as to the true line of boundary between the States, depending for their ascertainment, upon charters, compacts, lines of latitude, monuments, and surveys.

None has ever *yet* been sustained upon the new definition of boundary

now for the first time advanced by the learned counsel. In the first case, of The State of Rhode Island vs. State of Massachusetts, 12 Peters, 657, Judge Baldwin says:

"As it is viewed by the court in the bill alone, had it been demurred to, it presents a controversy as to the locality of a point three miles south of the southermost point of Charles river;" and in the second case, of Rhode Island vs. Massachusetts, 4 Howard, Judge McLean, in delivering the opinion of the court upon the merits, says: "The question here involved is simple, differing little, if any, in principle from a disputed line between individuals. It involves neither a *cession of territory* nor the exercise of a *political jurisdiction.*"

This, I repeat, has been the character of all the cases heretofore acted upon by this court, where it has assumed jurisdiction upon the ground of a contest about boundary.

In the case now under consideration there are no disputed lines to be ascertained by survey. The Blue Ridge mountain on the east, the Potomac on the north, the Sleepy Creek mountain and Cherry's Run on the west, and the well defined line on the south, from Ashby's Gap on the Blue Ridge to Mitchell's Rock on the Potomac, have for near a century been the accurately ascertained limits of the territory now in controversy.

It is true that the determination of some of the questions here involved may *in their results* affect the boundaries between these two States, but boundary is not the *gravamen* of the complaint, but is simply an incident resulting from the decision of more controlling issues in the cause, and can no more give jurisdiction to this court than the allegation of certain real estate, buildings, &c., embraced in the bill of The State of Georgia against Stanton, 6 Wallace, 77, could give jurisdiction to the court in that case. "It is apparent," says the court, "that this reference to *property* is only by way of showing one of the grievances resulting from the threatened destruction of the State, not as a *specific ground of relief.*"

In the bill now under consideration, it sets forth that a controversy has arisen between the Commonwealth of Virginia and the State of West Virginia "*whether the counties of Berkeley and Jefferson have been lawfully annexed to the State of West Virginia;*" and proceeding upon the hypothesis that this court will declare that annexation *unlawful*, it prays that the boundaries between the two States may be ascertained and declared by this court.

It is apparent, therefore, that the real question in this case is not one of disputed boundary, nor of the construction of a compact, but is whether the two counties *have been lawfully annexed*, and whether the compact declared by Congress to have been made between those two

States *was in existence* as a valid cession of territory, when Congress acted upon the subject.

This, I submit, is essentially *a political inquiry*, and as such has been repeatedly declared by this court not to be within the scope of its judicial powers.

In the case of Georgia vs. Stanton, 6 Wallace, 73, the court says: "In order to entitle the party to a remedy a case must be presented appropriate for the exercise of judicial power; the rights in danger must be the rights of persons or of property, not mere political rights, which do not belong to the jurisdiction of a court either in law or in equity."

Mr. Justice Woodbury, in the very able opinion which he pronounced in the case of Luther vs. Borden, 7 How., 54, in referring to the political character of the issues then before the court, with classic elegance said:

"NON NOSTRUM TANTAS COMPONERE LITES. It does not fall within our province to adjust controversies such as these.

"If the people, in the distribution of powers under the Constitution, should ever think of making judges supreme arbiters in *political controversies*, when not selected by nor frequently amenable to them, nor *at liberty to follow such considerations as belong to mere political questions*, they will dethrone themselves and lose one of their invaluable birthrights, building up in this way, slowly but surely, a new sovereign power in the republic in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy, in the worst of times."—(p. 52.)

Nothing has so much contributed—not even the great ability of this bench—to that profound submission which is everywhere throughout this vast empire extended to the authority of this august tribunal, as its rigid adherence to those limits of JUDICIAL POWER which the Constitution has assigned to it. And so long as this court shall continue to adhere to those wise limitations upon its powers, we need not indulge in those speculative inquiries which my associate (Mr. Stanton) and the Attorney-General of Virginia have so freely discussed in this argument—How? and by what kind of final process its decrees shall be enforced? Like those judgments in England which affect the royal demesnes, "*they will execute themselves*" without the necessity of any final process. A cheerful and willing obedience will everywhere, and at all times, be given to its authority.

Permit me, in conclusion, to say that we are content with the political association into which the fortunes of war have cast us.

Our border position ever has, and probably ever will, prevent us from having our just weight and influence in the councils of either State. But so long as they are destined to remain separate and distinct organizations,

there are many weighty considerations which lead us to the conclusion that our interests will be best promoted by remaining where we are.

It is true, it was not without pain, that we separated from a State, around whose name so many rich and imperishable historical recollections cluster; but even in these we claim to have a lawful inheritance.

It grated somewhat upon our habits to abolish the old county court system, with which we had become familiar from infancy.

We did not at first relish being taxed for the common education of persons of all classes, sexes, color, and condition, but our school-houses have now been built; the free-school system is in successful operation; the schoolmaster is abroad through our mountains and valleys; and we have become more than satisfied with its results.

We have adapted ourselves to the young and vigorous institutions of the new State.

We have enjoyed a large measure of material and financial prosperity strikingly in contrast with those counties in Virginia lying immediately south of us, possessing equal fertility of soil, and equal advantages of physical advancement and improvement. But I would not, if I could, say one word in depreciation of the State of Virginia. I feel for her that veneration and respect which a child should bear to its mother. I deeply sympathize with her in her present afflictions. But the great law of self-preservation demands that we shall resist, so far as we may legitimately do so, a return to her jurisdiction; and yet, if this court, in the due administration of its high powers, shall decide, that the law is for the complainant, and shall, by its stern decree, remand us to the sovereignty of VIRGINIA, we shall bow with respectful submission to the judgment of this court.