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Virginia Vs. West Virginia

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Appellant : Virginia

Respondent : West Virginia

Judgement :

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Virginia v. West Virginia

78 U.S. (11 Wall.) 39

ON ORIGINAL BILL TO SETTLE BOUNDARY LINE BETWEEN

THE STATES OF VIRGINIA AND WEST VIRGINIA

SYLLABUS

1. This Court has original jurisdiction under the Constitution of controversies between states of the Union concerning their boundaries.

2. This jurisdiction is not defeated because, in deciding the question of boundary, it is necessary to consider and construe contracts and agreements between the states, nor because the judgment or decree of the Court may affect the territorial limits of the jurisdiction of the states that are parties to the suit.

3. The ordinance of the organic convention of the Commonwealth of Virginia, under which the State of West Virginia was organized, and the Act of May 13, 1863, of the said Commonwealth, constitute a proposition of the former state that the Counties of Jefferson and Berkeley and others might, on certain conditions, become part of the new state, and the provisions of the constitution of the new state concerning those counties are an acceptance of that proposition.

4. The act of Congress admitting the State of West Virginia into the Union at the request of the Commonwealth of Virginia, with the provisions for the transfer of those counties in the constitution of the new state and in the acts of the Virginia Legislature is an implied consent to the agreement of those states on that subject.

5. The consent required by the Constitution to make valid agreements between the states need not necessarily be by an express assent to every proposition of the agreement. In the present case, the assent is an irresistible inference from the legislation of Congress on the subject.

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6. The condition of the agreement on which the transfer of these two counties was to be made was that a majority of the votes cast on that question in the counties should be found in favor of the proposition.

7. The statutes of the Virginia Legislature having authorized the governor of that state to certify the result of the voting on that proposition to the State of West Virginia if, in his opinion, the vote was favorable, and he having certified the fact that it was so, under the seal of the state to the Governor of West Virginia, and the latter state having accepted and exercised jurisdiction over those counties for several years, the State of Virginia is bound by her acts in the premises.

8. The State of Virginia cannot under such circumstances be permitted to set aside the whole transaction in a court of equity on the ground that no fair vote was taken, that her own governor was deceived and misled by the election officers, with no charge of fraud or improper conduct on the part of West Virginia, nor can she withdraw her consent two years after the vote was taken and the transfer of the counties accomplished.

On original bill to settle the boundary line between the States of Virginia and West Virginia, the case as existing in well known public history and from the record being thus:

A convention professing to represent the State of Virginia which assembled in Richmond in February, 1861, attempted by a so-called "ordinance of secession" to separate that state from the Union, and, combined with certain other Southern states, to accomplish that separation by arms. The people of the northwestern part of the state, who were separated from the eastern part by a succession of mountain ranges and had never received the heresy of secession, refused to acquiesce in what had been thus done, and organized themselves to defend and maintain the federal Union. The idea of a separate state government soon developed itself, and an organic convention of the State of Virginia, which in June, 1861, organized the state on loyal principles -- "the Pierpont government" -- and which new organization was acknowledged by the President and Congress of the United States as the true state government of Virginia -- passed August 20, 1861, an ordinance by which they ordained that a new state be formed and erected out of the territory included within certain boundaries (set forth) including within those boundaries of the proposed new state

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the counties of &c.; [thirty-nine counties being named]. These counties did not include as within the proposed state the Counties of either Greenbrier, Pocahontas, Hampshire, Hardy, Morgan, Berkeley, or Jefferson, but the third section of the ordinance enacted that the convention might change the boundaries described in the first section of the ordinance so as to include within the proposed

state the Counties of Greenbrier and Pocahontas, or either of them, and also the other counties just above named, or either of them, "and also all such other counties as lie contiguous to the said boundaries or to the counties named," if the said counties to be added, or either of them, by a majority of the votes given &c.;, should declare their wish to form part of the proposed state and should elect delegates to the said convention &c.; The name of the new state as ordained by the ordinance was Kanawha.

The convention provided for by the ordinance met in Wheeling, November 26, 1861, and made a "Constitution of West Virginia." Certain counties named, forty-four in number, "formerly part of the State of Virginia," it was ordained should be "included in and form part of the State of West Virginia." No one of the Counties of Pendleton, Hardy, Hampshire, Morgan, Berkeley, or Jefferson was among these forty-four. The constitution proceeded, in a second section:

"And if a majority of the votes cast at the election or elections held as provided in the schedule hereof, in the district composed of the Counties of Pendleton, Hardy, Hampshire, and Morgan, shall be in favor of the adoption of this constitution, the said four counties shall be included in and form part of the State of West Virginia, and if the same shall be so included, and a majority of the votes cast at the said election or elections, in the district composed of *Berkeley, Jefferson,* and Frederick, shall be in favor of the adoption of this constitution, then the three last-named counties shall also be included in and form part of the State of West Virginia."

All through the constitution, as, *ex. gr.,* in the fixing of

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senatorial and representative districts, and of judicial circuits, provision was made for the case of these two sets of counties coming in, or of one set coming in without the other. A separate section ordained that:

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

And it provided for the representation in the senate and house of delegates of such new territory.

By the terms of this constitution, it was to be submitted to a vote of the people on the first Thursday in April, 1862, and on a vote then taken it was ratified by the people of the forty-four counties first named, and by those of Pendleton, Hardy, Hampshire, and Morgan. But no one of the Counties of Berkeley, Jefferson, or Frederick apparently voted on the matter, owing, as was said by the defendant's counsel at the bar 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, and that an attempt to hold meetings in them to promote the formation of the new state would have been followed by immediate arrest and imprisonment."

All this being done, the Legislature of Virginia, as reorganized, passed, on the 13th May, 1862, an act, in title and body, thus:

" *An Act giving the consent of the Legislature of Virginia to the* "

" *formation and erection of a new state within the jurisdiction of* "

" *this state* "

" 1. *Be it enacted by the General Assembly* that the consent of the Legislature of Virginia be, and the same is hereby, given to the formation and erection of the State of West Virginia, within the jurisdiction of this state, to include the Counties of Hancock &c.; [forty-eight counties being named (being the forty-four first mentioned, with Pendleton, Hardy, Hampshire, and Morgan), but the Counties of Berkeley, Jefferson, or Frederick, not being included], *according to the boundaries and under the provisions set*

forth in the constitution for the said State of West Virginia and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the 26th day of November, 1861. "

" 2. 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 the purpose, at such time and under such regulations as the commissioners named in the said schedule may prescribe."

" 3. That this act shall be transmitted by the Executive to the senators and representatives of this Commonwealth in Congress, together with a certified original of the said constitution and schedule, and the said senators and representatives are hereby requested to use their endeavors to obtain the consent of Congress to the admission of the State of West Virginia into the Union."

" 4. This act shall be in force from and after its passage."

Under this act, no elections apparently were held, and on the 31st December, 1862, [Footnote 1] Congress passed

" *An Act for the admission of the State of "West Virginia"* "

" *into the Union, and for other purposes* "

" *Whereas* the people inhabiting that portion of Virginia known as West Virginia did by a convention assembled in the City of Wheeling, on the 26th November, 1861, frame for themselves a constitution with a view of becoming a separate and independent state; *and whereas,* at a general election held in the counties composing the territory aforesaid on the 3d of May last, the said constitution was approved and adopted by the qualified voters of the proposed state; and whereas, the Legislature of Virginia, by an act passed on the 13th day of May, 1862, did give its consent to the formation of a new state within the jurisdiction of the said State of Virginia, to be known by the name of West Virginia and to embrace the

following named counties, to-wit [the forty-eight counties mentioned in the above-quoted Virginia Act of May 13, 1862, were here set forth by name, and not including Berkeley or Jefferson]; *and whereas,* both the convention

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and the legislature aforesaid have requested that the new state should be admitted into the Union, and the constitution aforesaid being republican in form, Congress doth hereby consent that the *said forty-eight counties* may be formed into a separate and independent state; therefore,"

Be it enacted &c.;, that the State of West Virginia be, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatsoever &c.;

The act contained a proviso that it should not take effect until after the proclamation of the President of the United States hereinafter provided for. It then proceeded to recite that it was represented to Congress that since the convention of 26th November, 1861, which framed and proposed the constitution for the said State of West Virginia, the people thereof had expressed a wish to change the 7th section of the 11th article of said constitution by striking out the same and inserting the following in its place. The article [on the subject of slavery] was then set forth. It was therefore further enacted that whenever the people of West Virginia should, through their said convention and by a vote to be taken &c.;, make and ratify the change aforesaid and properly certify the same under the hand of the president of the convention, it should be lawful for the President of the United States to issue his proclamation stating the fact, and that thereupon this act should take effect and be in force from and after sixty days from the date of the proclamation.

This proclamation President Lincoln did issue on the 20th April, 1863, [Footnote 2] reciting the act, with, however, a condition annexed reciting that proof of compliance with the condition, as required by the second section of the act, had been submitted to him, and in pursuance of the act declaring and proclaiming that the act should take effect, and be in force from and after sixty days from his

proclamation.

Next in the history came certain acts of the State of Virginia,

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among them one passed January 31, 1863, and which, with its title, ran thus:

" *An Act giving the consent of the State of Virginia to the* "

" *County of Berkeley's being admitted into, and becoming part of* "

" *the State of West Virginia* "

" *Whereas,* by the Constitution for the State of West Virginia, ratified by the people thereof, it is provided that additional territory may be admitted into and become part of said state with the consent of the legislature thereof, and it is represented to the General Assembly that the people of the County of Berkeley are desirous that said county should be admitted into and become part of the said State of West Virginia, now, therefore,"

"1. *Be it enacted by the General Assembly* that polls shall be opened and held on the fourth Thursday of May next, at the several places for holding elections in the County of Berkeley for the purpose of taking the sense of the qualified voters of said county on the question of including said county in the State of West Virginia."

"2. The poll books shall be headed as follows, *viz.:* 'Shall the County of Berkeley become a part of the State of West Virginia?' and shall contain two columns, one headed 'Aye' and the other 'No,' and the names of those who vote in favor of said county becoming a part of the State of West Virginia shall be entered in the first column, and the names of those who vote against it shall be entered in the second column."

"3. The said polls shall be superintended and conducted according to the laws regulating general elections, and the commissioners superintending the same at the courthouse of the said county shall, within six days from the commencement of

the said vote, examine and compare the several polls taken in the county, strike therefrom any votes which are by law directed to be stricken from the same, and attach to the polls a list of the votes stricken therefrom, and the reasons for so doing. The result of the polls shall then be ascertained, declared, and certified as follows: the said commissioners shall make out two returns in the following form, or to the following effect:"

" We, commissioners for taking the vote of the qualified voters of Berkeley County on the question of including the said county in the State of West Virginia, do hereby certify that polls for that purpose were opened and held the fourth Thursday of May, in the year 1863, within said county, pursuant

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to law, and that the following is a true statement of the result as exhibited by the poll books, *viz.,* for the County of Berkeley becoming part of the State of West Virginia, _____ votes; and against it _____ votes. Given under our hands this ___ day of _____, 1863;"

" *which returns, written in words, not in figures, shall be signed by the commissioners; one of the said returns shall be filed in the clerk's office of the said county, and the other shall be sent, under the seal of the secretary of this commonwealth, within ten days from the commencement of the said vote,* and the governor of this state, if of opinion that the said vote has been opened and held, and the result ascertained and certified pursuant to law, *shall certify the result of the same under the seal of this state, to the governor of the said State of West Virginia.* "

"4. If the governor of this state shall be of opinion that the said polls cannot be safely and properly opened and held in the said County of Berkeley, on the fourth Thursday of May next, he may by proclamation postpone the same, and appoint in the same proclamation, or by one to be hereafter issued, another day for opening and holding the same."

"5. If a majority of the votes given at the polls opened and held pursuant to this act be in favor of the said County of Berkeley's becoming part of the State of West Virginia, then shall the said county become part of the State of West Virginia when admitted into the same with the consent of the legislature thereof."

"6. This act shall be in force from its passage."

Then followed, four days later, on the 4th of February of the same year, 1863, an act relating to the admission of several other counties, including Jefferson, thus:

" *An Act giving consent to the admission of certain counties into the* "

" *new State of West Virginia upon certain conditions* "

" *1. Be it enacted by the General Assembly of Virginia* that at the general election on the fourth Thursday of May, 1863, it shall be lawful for the voters of the district composed of the Counties of Tazewell, Bland Giles, and Craig to declare by their votes whether said counties shall be annexed to and become a part of the new State of West Virginia; also, at the same time, the district composed of the Counties of Buchanan, Wise, Russell, Scott, and Lee, to declare, by their votes, whether the counties

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of the said last-named district shall be annexed to and become a part of the State of West Virginia; also, at the same time, the district composed of the Counties of Alleghany, Bath, and Highland to declare by their votes whether the counties of such last-named district shall be annexed to and become a part of the State of West Virginia; also, at the same time, the district composed of the Counties of Frederick and *Jefferson,* or *either* of them, to declare by their votes whether the Counties of the said last-named district shall be annexed to and become a part of the State of West Virginia; also, at the same time, the district composed of the Counties of Clarke, Loudoun, Fairfax, Alexandria, and Prince William, to declare by their votes whether the Counties of the said last-named district shall be annexed to and become a part of the State of West Virginia; also, at the same

time, the district composed of the Counties of Shenandoah, Warren, Page, and Rockingham to declare by their votes whether the Counties of the said last-named district shall be annexed to and become a part of the State of West Virginia; and for that purpose, there shall be a poll opened at each place of voting in each of said districts headed *'For annexation'* and *'Against annexation.'* And the consent of this General Assembly is hereby given for the annexation to the said State of West Virginia of such of said districts, or of either of them, as a majority of the votes so polled in each district may determine, provided that the Legislature of the State of West Virginia shall also consent and agree to the said annexation, after which all jurisdiction of the State of Virginia over the districts so annexed shall cease."

"2. It shall be the duty of the *governor of the Commonwealth to ascertain and certify the result as other elections are certified.* "

"3. In the event the state of the country will not permit or from any cause said election for annexation cannot be fairly held on the day aforesaid, it shall be the duty of the governor of this Commonwealth, as soon as such election can be safely and fairly held and a full and free expression of the opinion of the people had thereon, to issue his proclamation ordering such election for the purpose aforesaid, and certify the result as aforesaid."

"4. This act shall be in force from its passage."

Under these two acts, elections of some sort were held

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and the governor certified the same to the State of West Virginia, and that state thereupon extended her jurisdiction over the Counties of Berkeley and Jefferson, and still maintained it.

Next came an Act of the State of Virginia passed December 5, 1865:

"An Act to repeal the second section of an Act passed on the 13th day of May, 1862, entitled 'An act giving the consent of the Legislature of Virginia to the

formation and erection of a new state within the jurisdiction of this state;' also repealing the Act passed on the 31st day of January, 1863, entitled 'An Act giving the consent of the State of Virginia to the County of Berkeley being admitted into, and becoming part of, the State of West Virginia;' also repealing the Act passed on the 4th day of February, 1863, entitled 'An act giving consent to the admission of certain counties into the new State of West Virginia, upon certain conditions and withdrawing consent to the transfer of jurisdiction over the several counties in each of said acts mentioned.'"

" *Whereas* it sufficiently appears that the conditions prescribed in the several acts of the General Assembly of the restored government of Virginia intended to give consent to the transfer from this state to the State of West Virginia of jurisdiction over the Counties of *Jefferson* and *Berkeley,* and the several other counties mentioned in the Act of February 4, 1863, hereinafter recited, have not been complied with, and the consent of Congress, as required by the Constitution of the United States, not having been obtained in order to give effect to such transfer, so that the proceedings heretofore had on this subject are simply inchoate, and said consent may properly be withdrawn; and this General Assembly, regarding the contemplated disintegration of the Commonwealth, even if within its constitutional competency, as liable to many objections of the gravest character, not only in respect to the Counties of Jefferson and Berkeley, over which the State of West Virginia has prematurely attempted to exercise jurisdiction, but also as to the several other counties above referred to,"

"1. *Be it therefore enacted by the General Assembly of Virginia* that the second section of the act passed on the 13th day of May, 1862, entitled 'An act giving the consent of the Legislature of Virginia to the formation and erection of a new state within the jurisdiction of this state' be, and the same is hereby, repealed. "

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"2. That the act passed on the 31st day of January, 1863, entitled An act giving the consent of the State of Virginia to the County of Berkeley's being admitted into and becoming part of the State of West Virginia be, and the same is, in like manner,

hereby repealed."

"3. That the Act passed February 4, 1863, entitled 'An act giving consent to the admission of certain counties into the new State of West Virginia upon certain conditions,' be and the same is in like manner hereby repealed."

"4. That all consent in any manner heretofore given or intended to be given by the General Assembly of Virginia to the transfer, from its jurisdiction to the jurisdiction of the State of West Virginia, of any of the counties mentioned in either of the above-recited acts be and the same is hereby withdrawn, and all acts, ordinances, and resolutions heretofore passed purporting to give such consent are hereby repealed."

"5. This act shall be in force from and after the passage thereof."

On the 10th of March, 1866, [Footnote 3] Congress passed a

" *Joint Resolution giving the consent of Congress to the transfer of the* "

" *Counties of Berkeley and Jefferson to the State of West Virginia* "

" *Be it resolved &c.;,* that Congress hereby recognizes the transfer of the Counties of Berkeley and Jefferson from the State of Virginia to West Virginia and consents thereto."

In this state of things, the Commonwealth of Virginia brought her bill in equity against the State of West Virginia in this Court on the ground of its original jurisdiction of controversies between states under the Constitution, in which it was alleged that such a controversy had arisen between those states in regard to their boundary, and especially as to the question whether the Counties of Berkeley and Jefferson had become part of the State of West Virginia or were part of and within the jurisdiction of the Commonwealth of Virginia, and the prayer of the bill was that it might be established by the decree of this Court that those

counties were part of the Commonwealth of Virginia, and that the boundary line between the two states should be ascertained, established, and made certain, so as to include the counties mentioned as part of the territory and within the jurisdiction of the State of Virginia.

The stating part of the bill was largely composed of the substance of four acts of the General Assembly of the Commonwealth, already presented at large in the statement, copies of them being made exhibits and filed with the bill.

The bill, in addition to the substance of these statutes, alleged that no action whatever was had or taken under the second section of the act of 1862, [Footnote 4] but that afterwards the State of West Virginia was admitted into the Union under an act of Congress and proclamation of the President, without including either the Counties of Berkeley, Jefferson, or Frederick.

It further alleged that an attempt was made to take the vote in the Counties of Jefferson and Berkeley at the time mentioned in the Acts of January 31 and February 4, 1863, [Footnote 5] but that, owing to the state of the country at that time, no fair vote could be taken; that no polls were opened at any considerable number of the voting places; *that the vote taken was not a fair and full expression* -- all of which was well known to the persons who procured the certificate of such election. It also alleged that it having been *falsely and fraudulently suggested, and falsely and untruly made to appear to the governor of the Commonwealth* that a large majority of the votes was given in favor of annexation, he certified the same to the State of West Virginia, and that thereupon, without the consent of Congress, that state extended her jurisdiction over the said Counties of Berkeley and Jefferson, and over the inhabitants thereof, and still maintained the same.

The State of Virginia, of course, in coming before this Court with this case, relied upon that clause of the federal Constitution which ordains that "no state shall, *without the assent of Congress,* enter into any agreement or compact with

any other state," and that one also which ordains that "the judicial power shall extend . . . to controversies between two or more states."

To the bill thus filed, the State of West Virginia appeared and put in a general demurrer. It was not denied that West Virginia had from the beginning continued her assent to receive these two counties.

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MR. JUSTICE MILLER delivered the opinion of the Court.

The first proposition on which counsel insist in support of the demurrer is that this Court has no jurisdiction of the case because it involves the consideration of questions purely political -- that is to say, that the main question to be decided is the conflicting claims of the two states to the exercise of political jurisdiction and sovereignty over the territory and inhabitants of the two counties which are the subject of dispute.

This proposition cannot be sustained without reversing the settled course of decision in this Court and overturning the principles on which reversal well considered cases have been decided. Without entering into the argument by which those decisions are supported, we shall content ourselves with showing what is the established doctrine of the Court.

In the case of *Rhode Island v. Massachusetts,* [Footnote 6] this question was raised, and Chief Justice Taney dissented from the judgment of the Court by which the jurisdiction was affirmed on the precise ground taken here. The subject is elaborately discussed in the opinion of the Court, delivered

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by Mr. Justice Baldwin and the jurisdiction, we think, satisfactorily sustained. That case in all important features was like this. It involved a question of boundary and of the jurisdiction of the states over the territory and people of the disputed region. The bill of Rhode Island denied that she had ever consented to a line run by

certain commissioners. The plea of Massachusetts averred that she had consented. A question of fraudulent representation in obtaining certain action of the State of Rhode Island was also made in the pleadings.

It is said in that opinion that,

"Title, jurisdiction, sovereignty, are [therefore] dependent questions, necessarily settled when boundary is ascertained, which being the line of territory, is the line of power over it, so that great as questions of jurisdiction and sovereignty may be, they depend on facts."

And it is held that, as the Court has jurisdiction of the question of boundary, the fact that its decision on that subject settles the territorial limits of the jurisdiction of the states does not defeat the jurisdiction of the Court.

The next reported case is that of *Missouri v. Iowa,* [Footnote 7] in which the complaint is that the State of Missouri is unjustly ousted of her jurisdiction and obstructed from governing a part of her territory on her northern boundary, about ten miles wide, by the State of Iowa, which exercises such jurisdiction, contrary to the rights of the State of Missouri and in defiance of her authority. Although the jurisdictional question is thus broadly stated, no objection on this point was raised, and the opinion which settled the line in dispute, delivered by Judge Catron, declares that it was the unanimous opinion of all the judges of the Court. The Chief Justice must therefore have abandoned his dissenting doctrine in the previous case.

That this is so is made still more clear by the opinion of the Court delivered by himself in the case of *Florida v. Georgia,* [Footnote 8] in which he says that

"It is settled by repeated decisions that a question of boundary between states, is

within the jurisdiction conferred by the Constitution on this Court."

A subsequent expression in that opinion shows that he understood this as including the political question, for he says

"that a question of boundary between states is necessarily a political question to be settled by compact made by the political departments of the government. . . . But under our form of government, a boundary between two states may become a judicial question to be decided by this Court."

In the subsequent case of *Alabama v. Georgia,* [Footnote 9] all the judges concurred, and no question of the jurisdiction was raised.

We consider, therefore, the established doctrine of this Court to be that it has jurisdiction of questions of boundary between two states of this Union, and that this jurisdiction is not defeated because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those states, or because the decree which the Court may render affects the territorial limits of the political jurisdiction and sovereignty of the states which are parties to the proceeding.

In the further consideration of the question raised by the demurrer, we shall proceed upon the ground, which we shall not stop to defend, that the right of West Virginia to jurisdiction over the counties in question can only be maintained by a valid agreement between the two states on that subject, and that to the validity of such an agreement the consent of Congress is essential. And we do not deem it necessary in this discussion to inquire whether such an agreement may possess a certain binding force between the states that are parties to it, for any purpose, before such consent is obtained.

As there seems to be no question, then, that the State of West Virginia, from the time she first proposed, in the constitution under which she became a state, to receive these

counties, has ever since adhered to, and continued her assent to that proposition, three questions remain to be considered.

1. Did the State of Virginia ever give a consent to this proposition which became obligatory on her?

2. Did the Congress give such consent as rendered the agreement valid?

3. If both these are answered affirmatively, it may be necessary to inquire whether the circumstances alleged in this bill, authorized Virginia to withdraw her consent and justify us in setting aside the contract and restoring the two counties to that state.

To determine these questions, it will be necessary to examine into the history of the creation of the State of West Virginia so far as this is to be learned from legislation of which we can take judicial notice.

The first step in this matter was taken by the organic convention of the State of Virginia, which in 1861 reorganized that state and formed for it what was known as the Pierpont government -- an organization which was recognized by the President and by Congress as the State of Virginia, and which passed the four statutes set forth as exhibits in the bill of complainant. This convention passed an ordinance, August 30, 1861, calling a convention of delegates from certain designated Counties of the State of Virginia to form a constitution for a new state to be called Kanawha.

The third section of that ordinance provides that the convention when assembled may change the boundaries of the new state as described in the first section, so as to include the "Counties of Greenbrier and Pocahontas, or either of them, and also the Counties of Hampshire, Hardy, Morgan, Berkeley, and Jefferson, or either of them," if the said counties or either of them shall declare their wish by a majority of votes given and shall elect delegates to the said convention.

It is thus seen that in the very first step to organize the new state, the old State of Virginia recognized the peculiar condition of the two counties now in question, and

provided that either of them should become part of the new state upon the

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majority of the votes polled being found to be in favor of that proposition.

The convention authorized by this ordinance assembled in Wheeling November 26, 1861. It does not appear that either Berkeley or Jefferson was represented, but it framed a constitution which, after naming the counties composing the new state in the first section of the first article, provided, by the second section, that if a majority of the votes cast at an election to be held for that purpose in the district composed of the Counties of Berkeley, Jefferson, and Frederick, should be in favor of adopting the constitution, they should form a part of the State of West Virginia. That constitution also provided for representation of these counties in the Senate and House of Delegates if they elected to become a part of the new state, and that they should in that event constitute the Eleventh Judicial District. A distinct section also declares in general terms that additional territory may be admitted into and become part of the state with the consent of the legislature.

The schedule of this constitution arranged for its submission to a vote of the people on the first Thursday in April, 1862.

This vote was taken, and the constitution ratified by the people; but it does not appear that either of the three Counties of Jefferson, Berkeley, and Frederick took any vote at that time.

Next in order of this legislative history is the Act of the Virginia Legislature of May 13, 1862, passed shortly after the vote above mentioned had been taken. [Footnote 10] This act gives the consent of the State of Virginia to the formation of the State of West Virginia out of certain counties named under the provisions set forth in its constitution, and by its second section it is declared that the consent of the Legislature of Virginia is also given that the Counties of Berkeley, Jefferson, and Frederick shall be included in said state

"whenever the voters of said counties shall ratify and assent to said constitution,

at an election held for that purpose, at such time and under such regulations as the commissioners named in the said schedule may prescribe."

This act was directed to be sent to the senators and representatives of Virginia in Congress, with instructions to obtain the consent of Congress to the admission of the State of West Virginia into the Union.

Accordingly on the 31st of December, 1862, Congress acted on these matters, and reciting the proceedings of the Convention of West Virginia, and that both that convention and the Legislature of the State of Virginia had requested that the new state should be admitted into the Union, it passed an act for the admission of said state, with certain provisions not material to our purpose.

Let us pause a moment and consider what is the fair and reasonable inference to be drawn from the actions of the State of Virginia, the Convention of West Virginia, and the Congress of the United States in regard to these counties.

The State of Virginia, in the ordinance which originated the formation of the new state, recognized something peculiar in the condition of these two counties, and some others. It gave them the option of sending delegates to the constitutional convention, and gave that convention the option to receive them. For some reason not developed in the legislative history of the matter, these counties took no action on the subject. The convention, willing to accept them, and hoping they might still express their wish to come in, made provision in the new constitution that they might do so and for their place in the legislative bodies and in the judicial system, and inserted a general proposition for accession of territory to the new state. The State of Virginia, in expressing her satisfaction with the new state and its constitution and her consent to its formation, by a special section refers again to the Counties of Berkeley, Jefferson, and Frederick and enacts that whenever they shall, by a majority vote, assent to the constitution of the new state, they may become part thereof; and the legislature sends this statute to Congress with a request that it will admit the new

state into the Union. Now we have here, on two different occasions, the emphatic legislative proposition of Virginia that these counties might become part of West Virginia, and we have the Constitution of West Virginia agreeing to accept them and providing for their place in the newborn state. There was one condition, however, imposed by Virginia to her parting with them and one condition made by West Virginia to her receiving them, and that was the same -- namely the assent of the majority of the votes of the counties to the transfer.

It seems to us that here was an agreement between the old state and the new that these counties should become part of the latter, subject to that condition alone. Up to this time, no vote had been taken in these counties; probably none could be taken under any but a hostile government. At all events, the bill alleges that none was taken on the proposition of May, 1862, of the Virginia Legislature. If an agreement means the mutual consent of the parties to a given proposition, this was an agreement between these states for the transfer of these counties on the condition named. The condition was one which could be ascertained or carried out at any time, and this was clearly the idea of Virginia when she declared that *whenever* the voters of said counties should ratify and consent to the constitution, they should become part of the state; and her subsequent legislation making special provision for taking the vote on this subject, as shown by the acts of January 31 and February 4, 1863, is in perfect accord with this idea and shows her good faith in carrying into effect the agreement.

2. But did Congress consent to this agreement?

Unless it can be shown that the consent of Congress, under that clause of the Constitution which forbids agreements between states without it, can only be given in the form of an express and formal statement of every proposition of the agreement and of its consent thereto, we must hold that the consent of that body was given to this agreement.

The attention of Congress was called to the subject by the very short statute of the State of Virginia requesting the admission of the new state into the Union, consisting of but three sections, [Footnote 11] one of which was entirely devoted to giving consent that these two counties and the County of Frederick might accompany the others if they desired to do so. The Constitution of the new state was literally cumbered with the various provisions for receiving these counties if they chose to come, and in two or three forms express consent is there given to this addition to the state. The subject of the relation of these counties to the others, as set forth in the ordinance for calling the convention, in the constitution framed by that convention, and in the act of the Virginia Legislature, must have received the attentive consideration of Congress. To hold otherwise is to suppose that the act for the admission of the new state passed without any due or serious consideration. But the substance of this act clearly repels any such inference, for it is seen that the Constitution of the new state was, in one particular at least, unacceptable to Congress, and the act only admits the state into the Union when that feature shall be changed by the popular vote. If any other part of the constitution had failed to meet the approbation of Congress, especially so important a part as the proposition for a future change of boundary between the new and the old state, it is reasonable to suppose that its dissent would have been expressed in some shape, especially as the refusal to permit those counties to attach themselves to the new state would not have endangered its formation and admission without them.

It is therefore an inference clear and satisfactory that Congress by that statute intended to consent to the admission of the state with the contingent boundaries provided for in its constitution and in the statute of Virginia, which prayed for its admission on those terms, and that in so doing, it necessarily consented to the agreement of those states on that subject.

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There was then a valid agreement between the two states consented to by Congress, which agreement made the accession of these counties dependent on

the result of a popular vote in favor of that proposition.

3. But the Commonwealth of Virginia insists that no such vote was ever given, and we must inquire whether the facts alleged in the bill are such as to require an issue to be made on that question by the answer of the defendant.

The bill alleges the failure of the counties to take any action under the act of May, 1862, and that on the 31st of January and the 4th of February thereafter the two other acts we have mentioned were passed to enable such vote to be taken. These statutes provide very minutely for the taking of this vote under the authority of the State of Virginia, and, among other things, it is enacted that the governor shall ascertain the result, and if he shall be of opinion that said vote has been opened and held and the result ascertained and certified pursuant to law, he shall certify that result under the seal of the state to the Governor of West Virginia; and if a majority of the votes given at the polls were in favor of the proposition, then the counties became part of said state. He was also authorized to postpone the time of voting if he should be of opinion that a fair vote could not be taken on the day mentioned in these acts.

Though this language is taken mainly from the statute which refers to Berkeley County, we consider the legal effect of the other statute to be the same.

These statutes were in no way essential to evidence the consent of Virginia to the original agreement, but were intended by her legislature to provide the means of ascertaining the wishes of the voters of these counties, that being the condition of the agreement on which the transfer of the counties depended.

The state thus showed her good faith to that agreement, and undertook in her own way and by her own officers to ascertain the fact in question.

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The legislature might have required the vote to have been reported to it, and assumed the duty of ascertaining and making known the result to West Virginia, but it delegated that power to the governor. It invested him with full discretion as to

the time when the vote should be taken, and made his opinion and his decision conclusive as to the result. The vote was taken under these statutes, and certified to the governor. He was of opinion that the result was in favor of the transfer. He certified this fact under the seal of the state to the State of West Virginia, and the legislature of that state immediately assumed jurisdiction over the two counties, provided for their admission, and they have been a part of that state ever since.

Do the allegations of the bill authorize us to go behind all this and inquire as to what took place at this voting? To inquire how many votes were actually cast? How many of the men who had once been voters in these counties were then in the rebel army? Or had been there and were thus disfranchised? For all these and many more embarrassing questions must arise if the defendant is required to take issue on the allegations of the bill on this subject.

These allegations are indefinite and vague in this regard. It is charged that no fair vote was taken, but no act of unfairness is alleged. That no opportunity was afforded for a fair vote. That the governor was misled and deceived by the fraud of those who made him believe so. This is the substance of what is alleged. No one is charged specifically with the fraud. No particular act of fraud is stated. The governor is impliedly said to have acted in good faith. No charge of any kind of moral or legal wrong is made against the defendant, the State of West Virginia.

But, waiving these defects in the bill, we are of opinion that the action of the governor is conclusive of the vote as between the States of Virginia and West Virginia. He was, in legal effect, the State of Virginia in this matter. In addition to his position as executive head of the state, the legislature delegated to him all its own power in the premises. It vested him with large control as to the time of taking the

vote, and it made his opinion of the result the condition of final action. It rested of its own accord the whole question on his judgment and in his hands. In a matter where that action was to be the foundation on which another sovereign state was

to act -- a matter which involved the delicate question of permanent boundary between the states and jurisdiction over a large population -- a matter in which she took into her own hands the ascertainment of the fact on which these important propositions were by contract made to depend, she must be bound by what she had done. She can have no right, years after all this has been settled, to come into a court of chancery to charge that her own conduct has been a wrong and a fraud, that her own subordinate agents have misled her governor, and that her solemn act transferring these counties shall be set aside, against the will of the State of West Virginia, and without consulting the wishes of the people of those counties.

This view of the subject renders it unnecessary to inquire into the effect of the act of 1865 withdrawing the consent of the State of Virginia, or the act of Congress of 1866 giving consent, after the attempt of that state to withdraw hers.

The demurrer to the bill is therefore sustained, and the

Bill must be dismissed.

[Footnote 1]

12 Stat. at Large 633.

[Footnote 2]

13 Stat. at Large 731.

[Footnote 3]

14 Stat. at Large 350.

[Footnote 4]

Supra, p. 78 U. S. 43 .

[Footnote 5]

Supra, pp. 78 U. S. 45 , 47.

[Footnote 6]

37 U. S. 12 Pet. 724.

[Footnote 7]

48 U. S. 7 How. 660.

[Footnote 8]

58 U. S. 17 How. 478.

[Footnote 9]

64 U. S. 23 How. 505.

[Footnote 10]

Supra, p. 78 U. S. 42 .

[Footnote 11]

Supra, p. 78 U. S. 42 .

MR. JUSTICE DAVIS, with whom concurred CLIFFORD and FIELD, JJ., dissenting.

Being unable to agree with the majority of the Court in its judgment in this case, I will briefly state the grounds of my dissent.

There is no difference of opinion between us in relation to the construction of the provision of the Constitution which affects the question at issue. We all agree that until the consent of Congress is given, there can be no valid compact or agreement between states. And that although the point of time when Congress may give its consent is not material, yet when it is given, there must be a reciprocal and concurrent consent of the three parties to the contract. Without

this, it is not a completed compact. If, therefore, Virginia withdrew its assent before the consent of Congress was given, there was no compact within the meaning of the Constitution.

To my mind, nothing is clearer than that Congress never did undertake to give its consent to the transfer of Berkeley and Jefferson Counties to the State of West Virginia until March 2, 1866. If so, the consent came too late, because the Legislature of Virginia had, on the fifth day of December, 1865, withdrawn its assent to the proposed cession of these two counties. This withdrawal was in ample time, as it was before the proposal of the state had become operative as a concluded compact, and the bill (in my judgment) shows that Virginia had sufficient reasons for recalling its proposition to part with the territory embraced within these counties.

But, it is maintained in the opinion of the Court that Congress did give its consent to the transfer of these counties by Virginia to West Virginia when it admitted West Virginia into the Union. The argument of the opinion is that Congress, by admitting the new state, gave its assent to that provision of the new constitution which looked to the acquisition of these counties, and that if the people of these counties have since voted to become part of the State of West Virginia, this action is within the consent of Congress. I most respectfully submit that the facts of the case (about which there is no dispute) do not justify the argument which is attempted to be drawn from them.

The second section of the first article of the Constitution of West Virginia was merely a proposal addressed to the people of two distinct districts, on which they were invited to act. The people of one district (Pendleton, Hardy, Hampshire, and Morgan) accepted the proposal. The people of the other district (Jefferson, Berkeley, and Frederick) rejected it.

In this state of things, the first district became a part of the new state so far as its constitution could make it so, and the Legislature of Virginia included it in its assent, and

Congress included it in its admission to the Union. But neither the Constitution of West Virginia nor the assent of the Legislature of Virginia nor the consent of Congress had any application whatever to the second district. For though the second section of the first article of the new constitution had proposed to include it, the proposal was accompanied with conditions which were not complied with, and when that constitution was presented to Congress for approval, the proposal had already been rejected, and had no significance or effect whatever.

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