No. 2.

Virginia vs. West Virginia.

ARGUMENT

OF

HON. REVERDY JOHNSON,

IN

THE SUPREME COURT OF THE UNITED STATES,

DELIVERED

IN BEHALF OF THE DEFENDANT,

WEDNESDAY, MAY 8, 1867.

(THE CHARACTER OF THE CASE, AND THE QUESTIONS PRESENTED BY IT IT IS BELIEVED ARE SUFFICIENTLY STATED BY MR. JOHNSON.)

THE COMPLAINANT'S COUNSEL WERE MESSRS. CURTIS AND HUNTER.
THE DEFENDANT'S MESSRS. STANTON, LEE, AND JOHNSON.

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VIRGINIA vs. WEST VIRGINIA.

May it please your Honors:

If the complainant's bill does not present a case entitling her to the relief asked, or if it does, and she has no right to file a bill in this court because she is not a State in the sense in which that word is used in the judicial clause of the Constitution of the United States which confers original jurisdiction upon this tribunal, the demurrer must be sustained.

The rule upon the subject is well settled:

I. If the bill without any extrinsic evidence is fatally defective the respondent may avail himself of the defect by a demurrer. Whatever averments it may contain, if there be one conclusive against the complainant, he fails as effectually as if that was the only averment. Whatever rights the others might give standing alone, their being associated with one that is fatal renders them of no avail. The admission, therefore, of their truth by the demurrer is immaterial if there be a fact averred which proves that notwithstanding such truth the complainant is not entitled to relief.

II. Or if the complainant is entitled to sue only because of her character as a State, and it appears to the Court that she has not that character, whatever her case in other respects may be the demurrer must be sustained; and in a case like the present, whether a party who invokes the aid of your original jurisdiction is a State within the meaning of the third article of the Constitution, the Court is bound to notice. In such a case it is not necessary to plead it in abatement as it is in the case of a corporation. In the latter the Court can have no knowledge whether the complainant is a corporation or not until it be brought specially to its notice by plea; in the former it is supposed to know it, for whether a State or not is a political question which the public records and history of the country settle, which

records and history it is its duty to recognize. These two questions I propose to consider in their order.

First. Does the case stated in the bill entitle the complainant to the relief asked?

It is this: On the 13th of May, 1862, Virginia passed an act giving her consent to the "formation and erection of a new State called West Virginia within her then limits, to include certain specified counties, and according to certain boundaries, designated in the constitution of the new State, proposed by a convention which assembled at Wheeling on the 26th of November, 1861. The counties of Berkeley and Jefferson and Frederick were not among the counties named nor within the boundaries described. The second section of the act stated that Virginia would consent that they should become a part whenever the voters of such counties ratified and assented to its constitution at an election to be held for the purpose on a designated day. Nothing was done under this section. On the 20th of April, 1862, by virtue of an act of Congress, the President of the United States, by proclamation, declared that in sixty days from that date West Virginia would be admitted into the Union. Neither at that time nor at the expiration of the sixty days were the counties now in dispute a part of the new State. On the 31st of January, 1863, she passed another act providing that an election should be held on the fourth Thursday of May following, at the places for holding elections in the county of Berkeley, to ascertain the sense of its qualified voters on the question of including it within the new State. On the 4th of February, in the same year, she passed another act for the like purpose in regard to the county of Jefferson. By both acts, if a majority of the votes cast were in favor of annexation, Virginia consented to such annexation. Each act provided that "if the Governor of this State shall be of opinion that the said polls cannot be safely and properly opened and held on the day named, the fourth Thursday of May," "he may by proclamation postpone the same and appoint another day for opening and holding" the election. By the third section of the act of January the commissioners who were to superintend the election were "within six days from the commencement of the vote to 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." They were then to ascertain, declare, and certify the result in a prescribed form, showing the number voting for annexation and

against it. One of these returns they were to file in the clerk's office of the county, and to send one to be presented to the Governor. And then the law provided that the Governor, "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." The returns were made by the commissioners, and on the 14th of September, 1863, the Governor did certify the result to the Governor of West Virginia, and, to quote the bill, "thereupon" that State "did proceed to extend its jurisdiction over the said counties of Berkeley and Jefferson, and over their inhabitants, as if the same had fully and lawfully become a part of its territory, and still maintains the same."

If the bill contained no other facts it would be very obvious that there would be no ground for the relief prayed; for in that case it would appear that Virginia had consented to the counties becoming a part of the new State upon terms which had been fulfilled. It would appear that the elections at which the people were to decide upon the question of annexation had been properly held and the result properly certified by the Governor to the Governor of the new State, and that that State had accepted the transfer. The complainant, therefore, as she was compelled to do, seeks to avoid the legal consequence of the facts stated upon several grounds.

I. That the elections in point of fact were not held.

II. That a majority of the voters of the counties were at that time, and have ever since, been opposed to the transfer.

III. That the proper notices of the election were not given.

IV. That in consequence of the omission and the then existing war the voters could not attend.

V. That the Governor's certificate had been obtained by means of false and fraudulent suggestions, that the polls had been opened, and that a very large majority of the votes were in favor of annexation.

VI. That the new State assumed jurisdiction over the counties without the consent of Congress, and therefore without any lawful compact between Virginia and herself.

And lastly, because Virginia, on the 5th of December, 1865, withdrew her offer of compact.

I proceed to consider these several grounds under two or three general heads:

First. Whether the polls could have been "safely and properly

opened and held" on the designated day by the fourth section of the act of the 31st of January, 1863, (the third of that of the 4th of February is the same,) was a question submitted to the exclusive decision of the Governor. The language of the law is, "if the Governor of the State shall be of opinion that the said polls cannot be safely and properly held," &c., "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." The Governor did not issue any such proclamation. It is therefore to be assumed that he was of opinion that the polls could be safely and properly held on the day designated. That question, then, is not an open one. The authority to pass upon it was conferred upon the Governor alone. No other tribunal could legally decide it, consequently the averment that the civil war prevented the voters from attending cannot be made.

Second. Whether the elections were properly held, and a majority of the votes were in favor of annexation, are also closed questions. The bill alleges that the Governor, on 14th September, 1863, gave a certificate that such was the result. Upon that point also he was made the exclusive judge. The provision of the third section of the act of January (that of February is to the same effect) is that the commissioners of elections are to ascertain, declare, and certify the result of the vote, and make two returns of it. One of these is to be presented to the Governor within ten days from the time of the voting, and (to quote the law) the Governor, "*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 the State, to the Governor of the said State of West Virginia.*" In regard to these facts the laws contained no other provision. They are therefore left to the ultimate decision of the Governor. He is to certify them to the Governor of the new State. That State can have no other evidence upon the subject. The elections in question were held, and could only be held, under the authority of Virginia. She was consequently in her own way to inform West Virginia of what had been done. That State was bound to rely upon such information. She had no right to go behind it and inquire into the facts. To have done so would have been merely impertinent. It would have been to call in doubt the conduct of the Governor of Virginia; to have suggested that his official information was false.

Such a suggestion would have been not less insulting than illegal.

These remarks would be well-founded if the laws under examination contained no other provisions than those referred to. But they have one which makes them yet more obviously correct. The fifth section of the act of January (the corresponding section in that of February is the same) declares that "if a majority of the votes given at the polls opened and held pursuant to the act be in favor of" annexation "then shall the said county become a part of the State of West Virginia when admitted into the same with the consent of the Legislature thereof." As I have already said, whether this contingency had occurred or not, as far as it depended on Virginia, West Virginia could only know through the official certificate of the Governor of Virginia. Her own consent to the admission of the counties was to be given upon the authority of that certificate, and could not be given upon any other authority. Acting as she was compelled to do upon this hypothesis, she consented to the admission, extended her laws over the counties and their inhabitants, and has done so ever since. Under these circumstances to permit Virginia to regain them upon the allegation that the elections were not properly held, and that the certificate of her Governor was untrue from any cause, (especially in the absence of any pretense that West Virginia had committed or been privy to any fraud in obtaining the certificate,) would be to suffer Virginia to perpetrate a fraud upon the new State. As far as that State is concerned she is to be considered innocent of any wrong or unfair dealing in the matter, as she not only had a right but was bound to do what she did upon the official information transmitted to her. It would therefore be most unjust to visit upon her any loss upon the grounds stated in the bill. When she extended her laws over the counties, and assumed jurisdiction over them and their inhabitants, the compact between herself and Virginia was an executed one, which neither had the right to annul or modify without the consent of the other.

In illustration of this let me reverse the controversy. Suppose West Virginia was seeking to avoid the compact upon the ground that the certificate of the Governor of Virginia was false, that the elections were not in fact held, or that, if held, a majority of the votes given were adverse to annexation, and Virginia was denying the charges and relying upon her Governor's certificate as conclusive evidence upon the subject: would the court hesitate in denying relief? Would they not say to the new State, You acted upon the faith of the Governor's certificate; the laws made that certificate the evidence upon which you could alone act; Virginia never meant that you should be per-

mitted at any time after acting upon the faith of it to inquire into the elections, pass upon her laws, supervise the official conduct of her officers, and decide whether her statutes had been complied with or not. She would be told that these were questions which it was for Virginia to pass upon. If that State was willing to abide by the result, ascertained in a way which her laws provided, it was not for you to question it. I submit, then, may it please your honors, upon the points I have so far examined, that upon principle independent of judicial authority the complainant has no right to the relief she is soliciting.

But this is also established by the authority of several decisions of this court. In the case of the commissioners of Knox county (Indiana) *vs.* Aspinwall *et al.* (21 How., 539) the question arose. By a statute of that State the commissioners were authorized to subscribe to certain railroad stock and to issue bonds in payment in case a majority of the voters of the county, after a prescribed notice was given of the time and place of the election, should so determine. The commissioners did afterward subscribe and issue bonds, which upon their face purported to have been issued in compliance with the law. The suit was to recover the amount of coupons attached to some of the bonds. At the trial below the defendants among other defenses pleaded that the notice of the election had not been given, and that the bonds on that account had been illegally issued, and were void. The plea was demurred to, and the demurrer sustained by the court below. In giving the opinion of this court Mr. Justice said that "the main ground of the defense set up and relied on to defeat the recovery is that the defendant, the board of commissioners, was possessed of no authority to execute, or to authorize to be executed, the bonds or coupons in question." He then added that the main question in the case was whether they had been issued "by competent and legal authority." "The alleged omission to comply with the requisitions of the statutes" as to the notices of the elections was the ground upon which the validity of the defense was placed. If the prescribed notice had not been given, or a majority of the votes had not been cast in favor of the subscription, the court held that the subscription and the bonds would have been void. They added, however, that there was "a question that underlies" that inquiry, "and that is, who is to determine whether or not the election has been properly held and a majority of the votes cast in favor of the subscription. Is it to be determined by the court in this collateral way in any suit on the bond or coupon attached, or by the board of

commissioners as a duty imposed upon it before making the subscription."

The court was of opinion, and so decided, that it was the exclusive duty of the board. They said that "the act makes it the duty of the sheriff to give the notices of elections for the day mentioned, and then declares if a majority of the votes given shall be in favor of the subscription" the board shall subscribe the stock. The right to do so being thus placed upon the fact that a majority of the votes were in favor of the subscription, it was the duty of the board to have ascertained the fact before subscribing. And as the law provided no other tribunal for that purpose the board itself was to ascertain it. The judgment below was consequently affirmed. For the point for which I cite it, the case was not as strong as the present one. In the former the authority of the board to adjudge whether the election had been legally conducted and what was its result was implied only, because their authority to subscribe, &c., was dependent on such facts. In this case the elections and their result were in plain words, to be passed upon first by the commissioners who superintended the elections, and then by the Governor. That officer was directed to see whether the vote had been opened and held, in that way to ascertain its result, and then to certify it officially to the Governor of West Virginia. In this instance, therefore, it may be even more properly said than in that case that "no other tribunal (than the Governor) was provided for the purpose." The same doctrine was held in the cases of Bissell *vs.* City of Jeffersonville (24 How., 287) and Moran *vs.* Commissioners of Miami county, (2 Black., 722.)

And it would be, as I think, extraordinary if the law was otherwise, particularly as regards this high tribunal. The questions which you are asked to investigate are not suited to your jurisdiction. They are whether the elections in question could with safety have been holden on the prescribed day in consequence of the then condition of the country? Whether they were, in fact, so held? How many votes were given? Whether legal or illegal votes? Whether any legal votes were rejected? Whether the judges of the elections properly discharged their duty? And lastly, whether the Governor of the State certified truly or falsely in consequence of fraudulent misrepresentations made to him by others? Are inquiries of this kind proper for this tribunal? Are you to assume the functions of judges of election, pass upon the qualification of voters, purge the ballot-box by rejecting votes which should not have been received, or supply votes

which were illegally rejected? Solve questions of residence, of age, of character, &c. And then how are you to investigate them? Are you to take testimony under a commission, or to summon a jury and have the witnesses examined at your bar, thus converting yourselves into a court of nisi prius? I submit that such investigations are very unsuited to the elevated duties of this tribunal. They can only be decided by the authorities of the State, upon whom the power to decide is conferred by the laws under which they arise. These authorities, in the words of Mr. Justice Nelson, in the case of 21 How., are alone, as I think, "fit and competent to be the depository of such a trust."

In respect to the allegation in the bill, that the civil war prevented the obtaining a full and free expression of the wish of the people on the day designated for the election, in addition to what I have before said upon that point, these further considerations seem to me to be conclusive. When the acts in question were passed, in January and February, 1863, the war was being waged, and the confederate government no doubt anticipated a successful result. It is said that most of the voters of the two counties, particularly those of Jefferson, were in the confederate military or civil service. Their object was to separate Virginia from the Union. To that they were pledged, and were risking their property and lives to accomplish it. The Legislature of the State which passed the laws was, however, loyal. It never, therefore, could have been their purpose to make their consent to the cession depend upon the votes of that portion of their people who were seeking to destroy the Government. They must, on the contrary, have designed to submit it only to the votes of the loyal. The provision consequently, that the Governor should appoint some other day for the election than the one named, if in his opinion it could not then be safely and properly held, you are bound to suppose was intended for the benefit of the loyal; to construe it otherwise would be to infer that the loyal authorities of the State intended to leave it to the disloyal of their people to defeat their object and the wishes of the loyal portion. Such a supposition seems to me to be so unjust to such authorities as almost to be absurd.

Second. It is contended that there was no valid compact between the two States because of the want of the consent of Congress. It is not denied that Congress consented to the admission of the new State into the Union. This was done by their act of the 31st of December, 1862, (12 Statutes, 633.) West Virginia is, then, a State of the Union by the joint consent of herself, Virginia, and Congress. The

objection, therefore, I am considering is not that she is not a State, but that Congress has not assented to the compact proposed to her by Virginia, that Berkeley and Jefferson should, upon the contingency stated, become a part of her territory. That the proposition was accepted by West Virginia appears by the complainant's bill. Her statutes, which you are bound to notice, of the 5th of August and 2d of November, 1863, in words admit the two counties, and they have ever since been under her jurisdiction, (Statutes of West Virginia, 34–103.) Her constitution provided that additional territory "might be admitted into and become part of this State with the consent of the Legislature." When, therefore, she became a State of the Union by the act of Congress of 1862, with this provision in her constitution, that body gave its consent in advance that she might acquire additional territory. I do not contend that before any such acquisition Congress might not have withdrawn or modified such consent. But this they did not do. On the contrary, as far as the counties in question are concerned, they expressly consented to their being a part of the State by the resolution of the 10th of March, 1866. As between Congress, then, and West Virginia it is clear that they are a part of that State. Has Virginia a right to contest it? It is said that she has. First, because the compact proposed by her to West Virginia, by her acts of January and February, 1863, was not consented to by Congress in passing their act of December, 1862; and second, that she had withdrawn her offer by her subsequent act of the 5th of December, 1865. These propositions involve the meaning of a part of the tenth section of the first article of the Constitution of the United States. The words are, "No State shall, without the consent of Congress," "enter into any agreement or compact with another State." The mode in which this consent is to be given or when it is to be given, whether before or simultaneously with or subsequent to the compact, is not stated. All that is required to render the compact valid between all the parties is that Congress shall in fact consent.

It would seem to follow that if the consent be given before the validity of the compact comes into question it will be sufficient. This is clear, if the compact binds the States the parties to it before such consent is given. I maintain that it does. It cannot be necessary to cite authorities to prove that the States as between themselves may enter into compacts. That is a right incident to their sovereignty. In the cases of Poole *vs.* Fleeger, (11 Pet., 209,) and of Rhode Island and Massachusetts, (12 Pet., 725,) it was held

that before the adoption of the Constitution by virtue of their sovereignty the States could have entered into such compacts, and that the single limitation upon the power is that the consent of Congress is now required. In the prior case of Green and Biddle, (5 Wh., 85,) the court, in referring to the clause, said that "the mode or form in which the consent of Congress is to be signified" is not pointed out, the Constitution "very properly leaving that matter to the wisdom of that body to be decided upon according to the ordinary rules of law and of right reason." They further said that the only question in such a case was, "Has Congress, by some positive act in relation to such agreement, signified the consent of that body to its validity." In neither of the cases was it even intimated that the agreement was not binding between the States until Congress should consent to it.

I submit, therefore, that until a reasonable period shall have elapsed to enable Congress to consider and pass upon the subject the agreement is binding on the parties to it—the States. This would seem to follow from the admitted right of the States to contract with each other. But as such contracts might injuriously affect the other States the Constitution properly gives to Congress, the representative of all the States, the right to decide whether they should be executed or not. The States however entering into them were not in the interval to be permitted to violate them. Congress might be of opinion that it would be for the good of the whole that such agreements should be fulfilled. The authority to decide that they should not necessarily involves the authority to decide that they should. To enable Congress to perform this duty understandingly it is necessary that the States should be bound as between themselves until that body shall have a reasonable time to perform it. The case cited by my brother Curtis, of Florida *vs.* Georgia, (17 How., 494,) is perfectly consistent with this view. The Chief Justice, in giving the opinion, is evidently considering the rights of the States who were not parties to the compact in that case, and not the rights or obligations of the two States.

Speaking of the purpose of the provision, he said it was "to guard the rights and interests of other States and to prevent any compact or agreement between any two States which affect injuriously the interest of the others." When, therefore, he added that the compact there in question "would have been null and void without the assent of Congress," he clearly did not mean to say that such compact as between the parties to it was from the moment it was entered into

null and void, or that it could have been withdrawn or changed by either without the assent of the other at any time before Congress could have an opportunity of passing upon it. Such a doctrine would enable a party to a compact entered into for a valuable consideration to violate it with impunity; a proposition which is, I submit, not less morally than legally unsound. And yet that is the very doctrine upon which, as I understand it, the complainant in this part of her case relies; for it is here assumed that the provision of her laws of January and February, 1863, proposing the compact, were fully and fairly complied with; that the elections they provided for were properly held and conducted, and that her Governor truly and legally certified the result to West Virginia.

And it is also assumed that that State in good faith acted upon this official information, and at once admitted the counties into her limits and has ever since extended her laws over them and their inhabitants; taxing the people, establishing local courts, granting them representatives in her Legislature, and exercising over them the same jurisdiction in all respects as over any other part of the State. Under these circumstances it seems to me to be perfectly evident that to permit Virginia in December, 1865, more than two years afterward, to regain them, would as against West Virginia be a gross wrong. Nor is the doctrine in conflict with the authority of Wheaton, (Lawrence's edition, 453,) referred to in complainant's brief. That author does not maintain, as he is supposed to do, that one of the parties to a treaty between States *fully concluded* can annul it upon discovering a mistake as to fundamental facts. So far from it he says that it can only be done when the discovery is made *previous to ratification*. And a treaty is never *fully concluded* until it is ratified. If, therefore, as I have endeavored to show, the compact in the present case was as between the parties fully executed, if, as far as they are concerned, nothing further was to be done to give it validity, it is as binding on both as a treaty is binding after ratification.

But upon another ground the complainant is not entitled to the relief sought. The certificate of the Governor of September, 1863, was given in due form. The effort to avoid it is upon the ground that it was obtained through fraudulent misrepresentations. It is not stated when these were discovered, or that the defendant was advised of them just before the filing of the bill in December, 1866. No reason is assigned for the delay. The defendant, therefore, for three years had a right to believe that the counties belonged to her. Under that

impression, and without objection on the part of the complainant, she exercised entire jurisdiction over them and their inhabitants. Whatever relief, therefore, the complainant might at one time have been entitled to she has lost by laches.

Second. If the court shall be against us upon the first question, then the second must be decided: Is Virginia a State competent to sue? The original jurisdiction of the Court can be invoked by a State. The State meant in this part of the Constitution evidently is a State of the Union possessing all the rights which belong to any other State. The Union consists of States equal in all respects in dignity, and possessing the same rights. The most important of these rights, the one upon which all its other rights and interests depend for protection and enjoyment, is the right of representation in Congress. This is given to secure the State and its people against unjust and oppressive legislation, especially against that particular oppression to resist which our fathers separated from England—the being taxed without being represented in Parliament. If, therefore, Virginia is now not entitled to representation in Congress she is not a State within the meaning of the Constitution. Is she so entitled? This is a grave question, and has agitated the country ever since the close of the late war. My own opinion has been that that war was, in the sense of the Constitution, an insurrection, and not a war; that the power conferred upon Congress to declare war referred exclusively to an international conflict.

Considering the nature of the General Government, that it is formed of States, that the legislative department is elected by the people of the States, and in the popular branch that the number of representatives is regulated by the number of the inhabitants of each State, and that in the other branch each State is secured in the right to have two Senators, and cannot be deprived of it, it seemed to me impossible that the Constitution could have been intended to authorize Congress, through the war or any other power, to conquer a State, annihilate and govern it as a territory, and its citizens as enemies. The framers of the Constitution looked to the happening of two events—one a war with a foreign nation; the other an insurrection among the people of one or more States. For the first they vested Congress with the war power; for the second with the power to call out the militia. The fact that the last was provided demonstrates, as I think, that the first was not intended to meet the emergency of an insurrection. And this view is confirmed by the opinion of this court

in the prize cases, (2 Black., 668,) where Mr. Justice Grier, as the organ of the court, declares that Congress "cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution." If the decision of this tribunal is conclusive upon the question, this decision must be held to settle it; for if Congress cannot use the war power against a State it cannot, by means of that power, subdue its people and extinguish the State.

Whether, therefore, the late insurrection assumed in its progress such a magnitude as rendered it necessary to apply to it the laws of war cannot give Congress the authority to annihilate the States in which it prevailed. The duty of Congress is to preserve the Government, and as that is constituted of States it involves the duty to preserve the States. The power to suppress insurrections was given to preserve and not to destroy the States. If, as this court has held, war cannot be declared against a State, it would seem to follow that Congress could not use that or any other power with which it is vested to annihilate a State and subjugate its citizens as enemies, which they could do through the war power, if they were not prohibited the use of that power for such ends. Congress, however, since the termination of the insurrection has taken a different view, and in support of it has mainly relied upon other parts of the opinion referred to. The court there ruled that the insurrection having become a war the incidents of war belong to it; that the parties were to be considered as belligerents; that the laws of war in relation to the paroling and exchange of prisoners were applicable to it, as in the case of an international war; that the insurrectionists during the continuance of the war were to be dealt with as enemies, and not as traitors. On this authority Congress maintains that the right of conquest is also incident to such a war. It is not to be denied that there is some plausibility in this view. My impression is that the decision in this respect has been misunderstood. I understand the court as holding that if the war terminated in the success of the Government that the parties engaged in it, although to be treated as enemies during the conflict in order to mitigate its horrors, might then be treated as traitors. If I am right in this then it cannot be true that at the termination of the war the people of the South who engaged in it remained enemies; for if that character continued they cannot be traitors. All, I suppose, that the court meant, was that upon grounds of humanity during the progress of the war the insurgents were to be considered

as enemies, but that when defeated by the total suppression of the rebellion they became subject to the laws of the country, and might be punished under them.

But is the decision of this court of such a question conclusive upon Congress? This is a proposition upon which different opinions have prevailed among statesmen and jurists ever since the adoption of the Constitution. There is no positive provision in that instrument upon the subject. All that the judicial clause does is to vest in the courts of the Union jurisdiction over "all cases in law and equity arising under" the Constitution, &c., &c. Their judgments are of course conclusive of the controversy as between the parties; but what effect they are to have upon other parties or upon the other departments of the Government the Constitution does not state. Nor is it true (as has been proved in many cases in this court) that a decision upon a question of constitutional law is conclusive even upon the court itself in subsequent cases. They have often reversed them. This being so, it would seem that such decisions cannot be binding either upon Congress or the Executive. That the court should be at liberty to reëxamine and decide them differently if satisfied of their error, and that the other departments of the Government should be absolutely bound by them would be most unreasonable. It is certainly true that the three departments of the Government in respect to their several powers were intended to be independent of each other. This is not the case if the judicial department can control the others in the discharge of their respective duties. The President and each member of Congress is required to take an oath to support the Constitution, and many of their powers necessarily involve its meaning. Is not, then, each of them to construe it as he thinks right after consulting every source of information, or is he bound to construe it as the judicial department shall have done in any case before it? The question is discussed with great ability in the Bank veto message of General Jackson of July 10, 1832; and the doctrine I have stated is in terms conceded to be correct by Mr. Webster in his speech on the message, delivered in the Senate on the 11th of that month. In referring to it, he said:

"It is true that each branch of the Legislature has an undoubted right, in the exercise of its functions, to consider the constitutionality of a law proposed to be passed." "The President has the same right when a bill is presented for his approval, for he is doubtless bound to consider in all cases whether such bill is compatible with the Consti-

tution, and whether he can approve it consistently with his oath of office." (Vol. 3 Webster's Works, 433.)

I content myself upon this point by referring to both authorities.

But whatever may be the opinion of this court upon the question one thing I submit is clear, that each House of Congress has the exclusive power to decide whether a State is entitled to representation or not, or, to state it more correctly, whether a community is a State for that purpose within the meaning of the Constitution. They may decide wrong ; but is not the decision conclusive upon the other departments? How is it to be revised and reversed? The Constitution authorizes no appeal, and there is no way to bring it before this court. If the denial of the right is placed upon the ground (as we know it is and as it is conclusively by their legislation of March last) that the southern States are not States entitled to representation, it would seem to follow that the ground of the denial is as conclusively settled as the denial itself. If this view be correct then the complainant is not a State competent to sue in this court. For such a purpose she must be a State for every other under the Constitution, and therefore if the congressional decision settles the question that she is not for that of being represented she has no right to sue. With these observations I leave this question.

It has been said by the counsel who spoke first on the other side, and who is one of the most cherished sons of Virginia, that the people of the counties in question, or at least a large majority of them, have been cruelly wounded in being transferred from the jurisdiction of the Old Dominion to that of West Virginia; that their intense love of the former makes the separation most afflicting. It must, in some degree at least, I think, alleviate their suffering that they are still within her original limits. It is not for me, upon this occasion or upon any other, to censure or taunt her sons, now that the war is over, by referring unkindly to their recent error. I know well how sincere and deep was the affection they bore their State. Their mistake has been that in indulging it they forgot what they owed to the Government of the Union. In the blindness of their State love they did not see it was their duty also to love the Union. Great as Virginia has been in the past, proud as her sons have a right to be of her history, of the great men she has contributed to the service of her country in the field and the council chamber, of the commanding part which, by reason of their enlarged patriotism and unsurpassed ability, they took in framing the Constitution of the United States, they ought to have remembered that

without the continuance of the Government constituted by that Constitution these would all soon become but sad remembrances of the past. That destroyed there would soon follow all the evils which their patriotic wisdom foresaw and dreaded, and which they supposed they had guarded themselves and their posterity against by the Union. To the efficiency of such protection it is absolutely necessary that the powers delegated to the Government should be paramount to State powers. This necessity creates an allegiance to which State allegiance must be subordinate. The South forgot or denied this. They acted upon a different theory. They maintained that the allegiance of the citizen was first due to his State, and the late war was the consequence. The result of that war I hope has convinced them that their theory is unsound, or at least that it can never be successfully vindicated in practice. Secession, therefore, as a State right, is at an end—lost, never to be revived. The dangers consequent upon it are therefore not again to be apprehended. And Virginia and her erring sisters will, I believe, soon attain even more than their former prosperity, and share with renewed and equal pride in the great future of wealth and power and fame which awaits our common country.