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THE CLAIM OF WEST VIRGINIA AGAINST THE FEDERAL GOVERNMENT ON ACCOUNT OF THE NORTHWEST TERRITORY†

By WILLIAM E. CHILTON*

THE English settlements on the Atlantic Coast of America were made, of course, under charters from the British Crown. Copies of these charters are contained in "Poore's Charters and Constitutions of the United States." The charters of the thirteen original American colonies may be found in Dr. B. A. Hinsdale's "The Old Northwest." It is no wonder that the efforts to fix accurate boundaries on this continent which, at the time the charters or grants were made, was almost unknown, led to disputes and controversies. Any lawyer who has studied the grants made by the State of Virginia west of the Alleghany Mountains and especially anyone who has tried ejectment cases involving disputed boundaries in that section, has a fair idea of the difficulty in locating with justice to all parties boundary lines made by a surveyor who was not actually on the ground. It should, therefore, have been expected that when the King made grants to Virginia, Maryland, Connecticut, Massachusetts and other colonies and persons, each running from a more or less known point or base on the coast back into the interior, there would be controversies concerning both the

†This article was prepared by Senator Chilton at the request of the Board of Editors in order that a much-misunderstood subject might be made clear.—Ed.
*Of the Charleston Bar; United States Senator from West Virginia, 1911-17.
western limits of the grant and the lines running east and west between the grants.

King James granted his first charter to Virginia in 1606, and under this grant the settlement at Jamestown was made in 1607. The grant, however, did not prove satisfactory, and the King in 1609 made a second charter to the London Company, in which charter or grant the territory conveyed was described or located in this language:

"... Situate, lying and being in that part of America called Virginia, from the point of land called Cape or Point Comfort, all along the seacoast to the northward 200 miles, and from the said point of Cape Comfort all along the seacoast to the southward 200 miles, and all that space and circuit of land lying from the seacoast of the precinct aforesaid up into the land throughout from sea to sea. And also, all the islands lying within 100 miles along the coast of both seas of the precinct aforesaid ... ."

Virginia reaffirmed her charter right to this territory by Section 21 of her constitution adopted June 29, 1776. This section reads as follows:

"The territories contained within the charters erecting the colonies Maryland, Pennsylvania, North and South Carolina are hereby ceded, released, and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction, and government, and all other rights whatsoever which might at any time heretofore have been claimed by Virginia, except the free navigation and use of the rivers Potowmack and Pohomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon. The western and northern extent of Virginia shall in all other respects stand as fixed by the charter of king James the first, in the year 1609, and by the publick treaty of peace between the courts of Great Britain and France in the year one thousand seven hundred and sixty three; unless, by act of legislature, one or more territories shall hereafter be laid off, and governments established westward of the Allegheny mountains. And no purchase of lands shall be made of the Indian natives but on behalf of the publick, by authority of the general assembly."

Virginia, at this time and during all the intervening time from

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1 HINSDALE, THE OLD NORTHWEST, 73.
2 HENING, STATUTES AT LARGE, 118-119.
1609 to 1776, having been a part of Great Britain, was bound by the Treaty of Peace between Great Britain and France made in 1763. This treaty of peace fixed the boundaries between the two countries, on a line drawn through the Mississippi from its source to its mouth, except that the town and island of New Orleans were not to be included in the cession to Great Britain.

The claim of Virginia based upon her original charter of 1609 to all the land "lying from the seacoast of the precincts aforesaid up into the land throughout from sea to sea," was of course modified by the treaty of 1763 which fixed the western boundary of Great Britain at the Mississippi River. Virginia recognized the obligation of the treaty and her claim was never asserted thereafter beyond the Mississippi River.

On January 2, 1778, George Rogers Clarke was instructed by the Governor and council of Virginia, to assert the claim of Virginia over this territory lying west of the Ohio River, and in the year 1778-1779 he captured all the British posts in that territory with the exception of those on the Great Lakes, and he held the territory and claimed it from the Ohio to the Lakes in the name of Virginia. As Hinsdale says in "The Old Northwest," "the Northwest had been won by a Virginia force, commanded by a Virginia officer put in the field at Virginia's expense." Therefore, it cannot be doubted that after the campaign of George Rogers Clarke, Virginia had a paper title to what is now West Virginia and Kentucky, on the east of the Ohio River, and to what is now Ohio, Indiana, Illinois, Wisconsin, Michigan and that part of Minnesota east of the Mississippi River, and had actual possession of practically all of it. At this point it may be admitted that New York and Connecticut made claims to part of this territory. It will serve no useful purpose to inquire into the extent of these claims for various reasons, the paramount one being that the claims of these states were based upon grants subsequent to those of Virginia. Another reason is that the New York and Connecticut grants covered but a part of the territory; so that at the worst and at the most, the present contention of Virginia and West Virginia cannot be assailed by the claim of adverse title outside of what we will term the overlap. Being certain of our ground as to part, why lengthen the discussion by going into the details of title to all the lands covered by the grant. But after a careful study of the claims of those other states the writer feels sure that

*p. 158.
neither New York nor Connecticut can assert any claim outside of their proportionate part in the trust created by the Virginia cession. Their original grants cannot, in his opinion, be successfully asserted against the Virginia grant.

In the Articles of Confederation of October 27, 1777, there was a clause inserted as follows:

"No state shall be deprived of territory for the benefit of the United States."

The smaller states which held no western lands insisted that the states which did have western lands should not be allowed to hold them for their exclusive use, and there was undoubtedly a controversy and a sharp debate between the seven states which claimed western lands and the six smaller states which had no such claims.

The Articles of Confederation were signed by twelve of the original states, but Maryland refused to sign. She paid her proportionate part of carrying on the Revolutionary War and the expenses of the national establishment and sent her delegates to the Continental Congress, but she declined to sign the Articles of Confederation. On the 21st day of May 1779, the delegates from Maryland laid before the Continental Congress the instructions received by them from the General Assembly of Maryland. These delegates from Maryland were George Plater, William Paca, William Carmichael, John Henry, James Forbes and Daniel of St. Thomas Jenifer. This paper is an important link in the study of this question, and is quoted in full.

"GENTLEMEN: Having conferred upon you a trust of the highest nature, it is evident we place great confidence in your integrity, abilities, and zeal to promote the general welfare of the United States, and the particular interest of this State where the latter is not incompatible with the former; but to add greater weight to your proceedings in Congress and take away all suspicion that the opinions you there deliver, and the votes you give, may be the mere opinions of individuals and not resulting from your knowledge of the sense and deliberate judgment of the State you represent, we think it our duty to instruct as followeth on the subject of the Confederation—a subject in which, unfortunately, a supposed difference of interest has produced an almost equal division of sentiments

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*See Secret Journal of Congress, October 27, 1777*

among the several States composing the Union. We say a sup-
posed difference of interests; for if local attachments and pre-
judices and the avarice and ambition of individuals would
give way to the dictates of a sound policy, founded on the
principles of justice—and no other policy but what is founded
on these immutable principles deserves to be called sound—
we flatter ourselves this apparent diversity of interests would
soon vanish, and all the States would confederate on terms
mutually advantageous to all, for they would then perceive
that no other confederation than one so formed can be lasting.
Although the pressure of immediate calamities, the dread of
their continuance from the appearance of disunion, and some
other peculiar circumstances may have induced some States
to accede to the present Confederation, contrary to their own
interests and judgments, it requires no great share of foresight
to predict that when those causes cease to operate the States
which have thus acceded to the Confederation will consider it
as no longer binding and will eagerly embrace the first occasion
of asserting their just rights and securing their independence.
Is it possible that those States who are ambitiously grasping
at territories to which, in our judgment, they have not the
least shadow of exclusive right, will use with greater moder-
atation the increase of wealth and power derived from those
territories, when acquired, than what they have displayed in
their endeavors to acquire them? We think not. We are con-
vinced the same spirit which hath prompted them to insist
on a claim so extravagant, so repugnant to every principle of
justice, so incompatible with the general welfare of all the
States, will urge them on to add oppression to injustice. If
they should not be incited by a superiority of wealth and
strength to oppress by open force their less wealthy and less
powerful neighbors, yet depopulation, and consequently the
impoverishment of those States, will necessarily follow, which,
by an unfair construction of the Confederation, may be
stripped of a common interest and the common benefits de-
rivable from the western country. Suppose, for instance,
Virginia indisputably possessed of the extensive and fertile
country to which she has set up claim. What would be the
probable consequences to Maryland of such an undisturbed and
 undisputed possession? They can not escape the least dis-
cerning.

"Virginia, by selling on the most moderate terms a small
proportion of the lands in question, would draw into her
treasury vast sums of money, and, in proportion to the same
arising from such sales, would be enabled to lessen her taxes.
Lands comparatively cheap and taxes comparatively low with
the lands and taxes of an adjacent State would quickly drain
the State thus disadvantageously circumstanced of its most
useful inhabitants. Its wealth and its consequence in the
scale of the confederated States would sink, of course. A claim so injurious to more than one-half if not the whole of the United States ought to be supported by the clearest evidence of the right. Yet what evidences of that right have been produced? What arguments alleged in support either of the evidence or the right? None that we have heard of deserving a serious refutation.

"It has been said that some of the delegates of a neighboring State have declared their opinion of the impracticability of governing the extensive domain claimed by that State. Hence also the necessity was admitted of dividing its territory and erecting a new State under the auspices and direction of the elder, from whom, no doubt, it would receive its form of government, to whom it would be bound by some alliance or confederacy, and by whose councils it would be influenced. Such a measure, if ever attempted, would certainly be opposed by the other States as inconsistent with the letter and spirit of the proposed confederation. Should it take place by establishing a subconfederacy, imperium in imperio, the State possessed of this extensive dominion must then either submit to all the inconveniences of an overgrown and unwieldy government or suffer the authority of Congress to interpose at a future time and to lop off a part of its territory, to be erected into a new and free State and admitted into a confederation on such conditions as shall be settled by nine States. If it is necessary for the happiness and tranquility of a State thus overgrown that Congress should hereafter interfere and divide its territory, why is the claim to that territory now made and so pertinaciously insisted on? We can suggest to ourselves but two motives—either the declaration of relinquishing at some future period a proportion of the country now contended for was made to lull suspicion asleep and to cover the designs of a secret ambition, or, if the thought was seriously entertained, the lands are now claimed to reap an immediate profit from the sale. We are convinced policy and justice require that a country unsettled at the commencement of this war, claimed by the British Crown, and ceded to it by the treaty of Paris, if wrested from the common enemy by the blood and the treasure of the 13 States, should be considered as a common property, subject to be parceled out by Congress into free, convenient, and independent governments, in such manner and at such times as the wisdom of that assembly shall hereafter direct.

"Thus convinced, we should betray the trust reposed in us by our constituents were we to authorize you to ratify on their behalf the Confederation, unless it be further explained. We have coolly and dispassionately considered the subject; we have weighed probable inconveniences and hardships against the sacrifice of just and essential rights; and do instruct you not
to agree to the Confederation unless an article or articles be added thereto in conformity with our declaration. Should we succeed in obtaining such article or articles, then you are hereby fully empowered to accede to the Confederation.

"That these, our sentiments respecting our Confederation, may be more publicly known and more explicitly and concisely declared, we have drawn up the annexed declaration, which we instruct you to lay before Congress, to have printed, and to deliver to each of the Delegates of the other States in Congress assembled copies thereof signed by yourselves or by such of you as may be present at the time of delivery, to the intent and purpose that the copies aforesaid may be communicated to our brethren of the United States and the contents of the said declaration taken into their serious and candid consideration.

"Also we desire and instruct you to move at the proper time that these instructions be read to Congress by their Secretary and entered on the Journals of Congress.

"We have spoken with freedom, as becomes freemen, and we sincerely wish that these, our representations, may make such an impression on that assembly as to induce them to make such addition to the Articles of Confederation as may bring about a permanent Union.

"A true copy from the proceedings of December 15, 1778.

"Test:

T. Duckett,
Clerk of the House of Delegates."

The Continental Congress referred these instructions to a Committee and on September 6, 1780, the following proceedings took place:

"In Congress of the Confederation,
Wednesday September 6, 1780.

"Congress took into consideration the report of the committee to whom were referred the instructions of the General Assembly of Maryland to their delegates in Congress respecting the Articles of Confederation and the declaration therein referred to, the act of the Legislature of New York on the same subject, and the remonstrance of the General Assembly of Virginia, which report was agreed to and is in the words following:

"That, having duly considered the several matters to them submitted, they consider it unnecessary to examine into the merits or policy of the instructions or declarations of the General Assembly of Maryland or of the remonstrance of the General Assembly of Virginia, as they involve questions, a discussion of which was declined, on mature consideration, when the Articles of Confederation were debated; nor, in the
opinion of the committee, can such questions be now revived with any prospect of conciliation; that it appears more advisable to press upon those States which can remove the embarrassments respecting the western country a liberal surrender of a portion of their territorial claims, since they cannot be preserved entire without endangering the stability of the general Confederacy; to remind them how indispensably necessary it is to establish the Federal Union on a fixed and permanent basis and on principles acceptable to all its members; how essential to public credit and confidence, to the support of our Army, to the vigor of our councils and success of our measures, to our tranquility at home, our reputation abroad, to our very existence as a free, sovereign, and independent people; that they are fully persuaded the wisdom of the respective legislatures will lead them to a full and impartial consideration of a subject so interesting to the United States and so necessary to the happy establishment of the Federal Union; that they are confirmed in these expectations by a review of the before-mentioned act of the Legislature of New York, submitted to their consideration; that this act is expressly calculated to accelerate the Federal alliance, by removing as far as depends on that State, the impediment arising from the western country, and for that purpose to yield up a portion of territorial claim for the general benefit: Whereupon

"Resolved, That copies of the several papers referred to the committee be transmitted, with a copy of the report, to the legislatures of the several States, and that it be earnestly recommended to those States who have claims to the western country to pass such laws and give their Delegates in Congress such powers as may effectually remove the only obstacle to a final ratification of the Articles of Confederation; and that the Legislature of Maryland be earnestly requested to authorize the Delegates in Congress to subscribe the said article."

On October 10, 1780, the Continental Congress passed the following resolutions:

**TUESDAY, October 10, 1780.**

Resolved, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular State, pursuant to the recommendation of Congress of the 6th day of September last, shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican States, which shall become members of the Union, and have the same rights of sovereignty, freedom, and independence as the other States; that each State which shall be so formed shall contain a suitable extent of territory, not less than 100 nor more than 150 miles square, or as near thereto
as circumstances will admit; that the necessary and reasonable expenses which any particular State shall have incurred since the commencement of the present war in subduing any British posts, or in maintaining forts or garrisons within and for the defense, or in acquiring any part of the territory that may be ceded or relinquished to the United States shall be reimbursed.

That the said lands shall be granted or settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled, or any nine or more of them.

This latter resolution may be termed a case of counting one's chickens before they are hatched. At no time did the Continental Congress have any power to hold lands, if indeed it had any implied power to form states, and it need not be argued that if any of the states after October 10, 1780, conveyed or granted lands to the United States as then organized, the latter would take such lands subject to the terms of the grant, and not subject to the terms of the resolution of October 10, 1780.

Let us consider at this point the Articles of Confederation, the powers of the Continental Congress, and what relation each of the states bore thereto.

The Articles of Confederation left to each state complete control of its western lands. The Continental Congress was granted the power, in Article 9, to settle disputed boundaries between the states, but beyond that particular grant of power the states were supreme as to their western land holdings. Therefore, in 1781, we find that twelve states had signed the Articles of Confederation; one state, Maryland, had declined to sign for the reasons set forth in the memorial of May 21, 1779, quoted above; and the Continental Congress had by resolution requested the states to take into consideration the protest of Maryland, and had requested those states owning western land "to pass such laws and give their delegates in Congress such powers, as may effectually remove the only obstacle to a final ratification of the Articles of Confederation." In other words, it is clear from the history of the times and from the action of Maryland and the Continental Congress, that all the states and the Continental Congress regarded it as most desirable that Maryland, the thirteenth state, should sign the Articles of Confederation, and that Maryland was holding out and refusing to do so on the ground that some of the states, including Virginia, made claim to these western lands.
It cannot be doubted that "the only obstacle to a final ratification of the Articles of Confederation" set forth in the resolutions of the Continental Congress of September 6, 1780, was the failure to come to an understanding about the western land claims of some of the states, the position of Virginia being the insurmountable obstacle, and Maryland being the state whose ratification would make the Articles of Confederation final. With this understanding of the situation let us now consider what took place. In January 1781, the General Assembly of Virginia passed a resolution which suggested a plan under which that state would convey to that organization then called the United States, the northwest domain.

On the 20th day of October, 1783, Virginia, through her legislative branch, authorized the cession of the Northwest Territory to be made, by the following act:

"Whereas the Congress of the United States did, by their act of the 6th day of September, in the year 1780, recommend to the several States in the Union having claims to waste and unappropriated lands in the western country a liberal cession to the United States of a portion of their respective claims for the common benefit of the Union; and

"Whereas this Commonwealth did, on the 2d day of January, in the year 1781, yield to the Congress of the United States, for the benefit of said States, all right, title, and claim which the said Commonwealth had to the territory northwest of the River Ohio, subject to the conditions annexed to the said act of cession.

"And whereas the United States in Congress assembled have, by their act of the 13th of September last, stipulated the terms on which they agree to accept the cession of this State, should the legislature approve thereof, which terms, although they do not come fully up to the propositions of this Commonwealth, are conceived, on the whole, to approach so nearly to them as to induce this State to accept thereof, in full confidence, that Congress will, in justice to this State for the liberal cession she has made, earnestly press upon the other States claiming large tracts of waste and uncultivated territory the propriety of making cessions equally liberal for the common benefit and support of the Union:

"Be it enacted by the general assembly, That it shall and may be lawful for the delegates of this State to the Congress of the United States, or such of them as shall be assembled in Congress, and the said delegates or such of them so assembled are hereby fully authorized and empowered, for and on behalf of this State, by proper deeds or instrument in writing, under their hands and seals, to convey, transfer, assign, and make
THE NORTHWEST TERRITORY CLAIM

over unto the United States in Congress assembled, for the
benefit of said States, all right, title, and claim, as well of
soil as jurisdiction, which this Commonwealth hath to the ter-
ritory or tract of country within the limits of the Virginia
charter; situate, lying, and being to the northwest of the River
Ohio, subject to the terms and conditions contained in the
before-recited act of Congress of the 13th day of September
last; that is to say, upon condition that the territory so ceded
shall be laid out and formed into States, containing a suitable
extent of territory, not less than 100 nor more than 150 miles
square, or as near thereto as circumstances will admit; and
that the States so formed shall be distinct republican States
and admitted members of the Federal Union, having the same
rights of sovereignty, freedom, and independence as the other
States.

"That the necessary and reasonable expenses incurred by
this State in subduing any British posts or in maintaining forts
and garrisons within and for the defense, or in acquiring any
part of, the territory so ceded or relinquished shall be fully
reimbursed by the United States; and that one commissioner
shall be appointed by Congress, one by this Commonwealth,
and another by those two commissioners, who, or a majority
of them, shall be authorized and empowered to adjust and
liquidate the account of the necessary and reasonable ex-
penses incurred by this State which they shall judge to be
comprised within the intent and meaning of the act of Con-
gress of the 10th of October, 1780, respecting such expenses.
That the French and Canadian inhabitants and other settlers
of the Kaskaskies, St. Vincents, and the neighboring villages
who have professed themselves citizens of Virginia shall have
their possessions and titles confirmed to them and be protected
in the enjoyment of their rights and liberties. That a quantity
not exceeding 150,000 acres of land, promised by this State,
shall be allowed and granted to the then colonel, now General
George Rogers Clarke, and to the officers and soldiers of his
regiment who marched with him when the post of Kaskaskies
and St. Vincents were reduced, and to the officers and soldiers
that have been since incorporated into the said regiment, to be
laid off in one tract, the length of which not to exceed double
the breadth, in such place on the northwest side of the Ohio,
as a majority of the officers shall choose, and to be afterwards
divided among the said officers and soldiers in due proportion
according to the laws of Virginia. That in case the quantity
of good land on the southeast side of the Ohio, upon the waters
of Cumberland River and between the Green River and Ten-
nesse River, which have been reserved by law for the Vir-
ginia troops, upon continental establishment, should, from the
North Carolina line bearing in farther upon the Cumberland
lands than was expected, prove insufficient for their legal
bounties, the deficiencies should be made up to the said troops in good lands; to be laid off between the rivers Scioto and Little Miami, on the northwest side of the river Ohio, in such proportion as have been engaged to them by the laws of Virginia. That all the lands within the territory so ceded to the United States and not reserved for or appropriated to any of the before-mentioned purposes or disposed of in bounties to the officers and soldiers of the American Army shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose and for no other use or purpose whatsoever: Provided, That the trust hereby reposed in the delegates of this State shall not be executed unless three of them, at least, are present in Congress."

The "conditions" set forth in the resolutions of 1781 are identical with those in the act of 1783.

Maryland did not wait for the grant, nor indeed for the Act of 1783, but in two months after the resolution of January, 1781 was passed she ratified the Federal compact and became a part of the first Federal government formed upon this Continent, and thus the organization was made which finally ripened into the present Constitution of the United States.

Acting under the Act of 1783, Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, delegates from Virginia to the Continental Congress, on March 1, 1784, presented the deed of cession to the Congress, in which deed the resolutions of the General Assembly of Virginia of January 2, 1781, and the Act of October 20, 1783, were referred to, and the latter quoted, and the resolutions of the Congress of the 6th of September, 1780, were set forth. Thereupon a motion was made to accept the deed without the conditions named by Virginia, which motion was laid upon the table. Thereupon Mr. Howell of Rhode Island presented a series of resolutions, which resolutions recited the Act of the General Assembly of Virginia of October 20, 1783, the presentation of the deed proposed to be executed "pursuant to the said Act", and then follows the deed of cession in full, and thereupon the following resolution was presented and passed, to-wit:

"Resolved that the United States in Congress assembled
are ready to receive this deed whenever the delegates of the State of Virginia are ready to execute the same."

Thereupon the delegates of Virginia signed, sealed and delivered the said deed, whereupon Congress passed the following resolution:

"Resolved that the same be recorded and enrolled among the Acts of the United States, in Congress assembled."

The following facts should be noted in their chronological order:

First. Virginia set forth in her resolutions of 1781 and 1783 the exact terms upon which she would convey the land to the Federal Government, and these terms were set out at length in the deed of cession.

Second. A motion was made in Congress that the deed be accepted without the "conditions," but this motion was laid upon the table, which, in parliamentary proceedings, means that it did not meet with the approval of the Congress.

Third. After the effort to dispense with Virginia’s conditions had proved unsuccessful and the resolution accepting the deed as it was written and presented had been passed, the delegates from Virginia signed the deed.

Fourth. Thereupon the deed was ordered to be recorded and enrolled "among the Acts of the United States in Congress assembled."

If these circumstances did not make a definite, clear, agreement between the State of Virginia and the Continental Congress, then it would be difficult to conceive how such an agreement could be made. It was Virginia’s land, and she had the right to name the conditions upon which she would part with it. The proceedings of Congress show that the latter understood that the deed contained "conditions," and an unsuccessful effort was made to dispense with those conditions. In short, Virginia and the Continental Congress thoroughly understood that there were conditions which were vital to Virginia, and which the Continental Congress would probably have desired stricken out, but the delegates of Virginia had no power except to sign the deed as it was written. With its eyes open, and all the facts clearly understood, the Continental Congress accepted the deed with the "conditions and stipulations" insisted upon by Virginia. Whether we shall call it a treaty between sovereigns or a contract, or an agreement; or shall call this
trust clause a condition precedent or subsequent, ought not and will not matter when this subject shall come before a fair tribunal, seeking to do exact justice.

Now let us inquire into the conditions and stipulations set forth in the Acts of the General Assembly of Virginia, and in the deed of cession.

The deed of cession granted the fee of the land, as well as political jurisdiction. The political jurisdiction was limited only by the provision that each state formed from the territory should be not less than one hundred nor more than one hundred and fifty miles square, and the expenses incurred by the State of Virginia in subduing the British posts and maintaining forts and garrisons, etc., should be fully reimbursed, and a commission was provided to adjust this account. There was then a provision about the French and Canadian claims to certain territory. These exhausted the conditions as to political jurisdiction. The holding of the fee of the land or the property right by the Federal authority was limited as follows: Not exceeding 150,000 acres of land was allowed to General George Rogers Clarke, and to the officers in his regiment, and the manner of selecting this land was fixed. Then the deed proceeds as follows:

"That all land within the territory so ceded to the United States and not reserved or appropriated to any of the before-mentioned purposes, or disposed of in bounties to the officers and soldiers of the American Army, shall be considered as a common fund for the use and benefit of such of the United States as have become or shall become members of the Confederation, or Federal Alliance, of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose and for no other use or purpose whatsoever."

There is no difficulty whatever in construing the above quoted language. It embraces all the land within the territory so ceded, except such as had been reserved or appropriated or disposed of in bounties. Therefore, the subject-matter is easily identified. The trust created is for the benefit of such of the United States as "have become, or shall become, members of the Confederation." That included the thirteen original states, and in order that there might be no doubt as to whether or not the grantor would be included as a beneficiary in the trust, in describing those who should
be beneficiaries we find the language, "Virginia inclusive"; showing that our statesmen-like ancestors understood that in any controversy between sovereigns, as in the case of the canal tolls regarding the Panama Canal, between the United States and Great Britain, it might be sometimes contended that the grantor or owner is not included in a benefit conveyed or bestowed unless that grantor be specifically named as a beneficiary. In other words, Virginia had good lawyers in those days, and we may rely upon it that a delegation which included Thomas Jefferson and James Monroe would not overlook any point necessary to protect the rights of Virginia.

If there were any doubt as to who were the beneficiaries under this clause of the deed, that doubt could be settled by the subject-matter of the contract, the situation of the parties to it, and all the facts which were before Congress and the State of Virginia at the time this important step was taken. It must be remembered that there were then only thirteen states, and that all of them had signed the Federal compact. The words that each should share in the trust "according to their usual respective proportions in the general charge and expenditure," are important, when it is recalled that there was a provision in the Articles of Confederation that each state would pay towards the general expenses of the Federation such a proportion of all those expenses as the land values in each state were to the whole of the land values in all the states. To carry out this provision of the Articles of Confederation the lands in each state were valued, and the value of the land in each state was the enumerator and the total value of the lands in all the states was the denominator of the fractional part of the whole expenses paid by each state. This consideration makes the clause under discussion most lucid. What, for instance, did California, Utah, Arkansas, Texas, North Dakota, Montana, or any other state, other than the thirteen original states, ever pay of "the usual respective portions in the general charge and expenditure" contemplated by the Act of Virginia of 1783, the Congress of 1784 and the deed under discussion? Absolutely nothing. Take the clause that the trust should apply to those states which "have become or shall become members of the Federation." The reason why Virginia used this language was that Maryland had not at the time the original resolution of 1781 was passed, become a member of the Confederation. Of course that state was in the mind of
Congress and Virginia at the time these proceedings took place. But the Articles of Confederation begin as follows:

"Articles of Confederation and perpetual union between the states of Newhampshire, Massachusetts-bay, Rhode-island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia."

In other words it was originally intended that these thirteen states should sign the compact and form the union, and that is why the Continental Congress was very anxious to have Maryland sign the Articles. That is also the reason why it was provided in the Articles that certain things should not be done without the vote of at least nine states. It is suggested at this point that the minimum of nine states to authorize the act would have little significance if the right of unlimited state admission had been in contemplation. It was provided in the Articles that by the vote of nine states letters of marque and reprisal could be granted. Evidently that instrument did not contemplate that nine states could grant letters of marque and reprisal for forty-eight states. Article 11 of the Articles of Confederation provided for admitting Canada, and then proceeds:

"But no other colony shall be admitted into the same unless such admission be agreed to by nine states."

Maryland, of course, could sign at any time, because she is mentioned in the caption, and she was in contemplation when the Articles were written, and proposed. All that Maryland had to do was to sign the compact, but it would require the vote of nine states to admit any other colony than Canada. Virginia could protect herself under the Confederation because she and her twelve sister states could prevent the admission of other states to share this trust subject. There is no construction of this trust agreement by which it can be inferred that Virginia or the Continental Congress intended that any other state could share in this trust subject, save and except the thirteen original states and Canada, if the latter should be admitted under the terms of the Articles; and it is absolutely clear that there would be no way to figure out the amount of the interest of any state except on the basis of their "usual respective proportions in the general charge and expenditure," and no state but the thirteen original states ever paid one
copper of the "general charge and expenditure." Therefore, it is not hasty to assert that the Northwest Territory was conveyed to the Federal Government upon the express trust that the thirteen original states, including Virginia, should have the use and benefit of that territory, each to share according to the amount paid upon the general charge and expenditure, and that, as before said, was definitely understood, the proportion of each being fixed all during the Revolutionary War. In other words, the trust subject is identified; the beneficiaries and the interest of each are specifically set forth, and then the clause provides that this land "shall be faithfully and bona fide disposed of for that purpose and for no other use or purpose whatsoever."

It is indeed difficult to understand how language could be clearer to create a specific trust in which the beneficiaries and the interest of each are unmistakably set forth. But we have some other contemporaneous history which shows the understanding of the Congress and the State of Virginia. A few years after the deed was accepted by the Congress the latter decided to make five states in this territory, but it recognized that the original grant provided that each of these states should be not less than one hundred nor more than one hundred and fifty miles square, and thereupon the Congress applied to the General Assembly of the State of Virginia to make the modifications necessary to have five states.6

The General Assembly of the State of Virginia made the modification requested by Congress, but no other.7

If the deed had been absolute what had Virginia to do with the situation afterwards? Congress recognized that the deed contained political conditions and stipulations, as well as property conditions and stipulations. If the one clause was void or swallowed up in some mystery of sovereignty, then so were the others; but Congress admitted that it held the land subject to the conditions of the deed of cession, and it proceeded in an orderly way to have Virginia change the conditions before acting to make five states.

In 1789 the present Constitution of the United States was ratified. That is, it received the ratification of the nine states, which according to its provisions, was a prerequisite to its adoption. Would it not have been a most awkward situation if nine states other than Virginia had adopted the Constitution and then pro-

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6See Journal of Congress, July 7, 1788.
712 Hening, Statutes at Large, 780.
ceeded to appropriate the lands and exercise political jurisdiction
regardless of the rights of Virginia? The Constitution provides
that when nine states shall ratify it it should be binding upon those
nine states so ratifying it. Thus, it would have been possible for
the twelve states other than Virginia to have ratified it, and under
the construction of the paper and the contention now made ad-
verse to West Virginia, Virginia would have been left out in the
cold and there would have been no obligation upon the part of the
twelve states or the government which they formed, to render an
accounting to Virginia for this empire of political power and
wealth. But Virginia and her statesmen thoroughly understood
the Federal constitution and what they were doing when they
ratified it.

Section 3, Article 4, of the Constitution provides that:

"The Congress shall have power to dispose of and make all
needful rules and regulations respecting the territory or other
property belonging to the United States; and nothing in this
Constitution shall be so construed as to prejudice any claims
of the United States, or of any particular state."

It must be remembered that the deed of cession gave power to
the Continental Congress to dispose of the land. It may be doubt-
ed, as will be seen later, whether the Continental Congress had
any legal power to hold the land or to dispose of it. Its powers
were very limited and if the question of its right to dis-
pose of land had ever been raised it is to be doubted whether or
not that power could be sustained upon any ground other than
common consent, the agreement of all the parties, and the neces-
sities of the situation. But, seeing that here was a domain which
would in a way go to the new government to be formed by the
Constitution and that other western lands might be acquired by
conquest or treaty, and that the United States would be com-
pelled to own real estate and other property, it was eminently
proper to have a provision in the Constitution respecting terrri-
tory and property of the United States. But why was a provision
inserted that the right of the United States to dispose of its pro-
erty should not "prejudice any claim of any particular state?"
The reason is to be found in the fact that Virginia took a prom-
inent part in framing the Constitution. George Washington was
President of the Convention and one of its most active members
was James Madison. They knew all about the grant of the North-
west Territory and the conditions of that grant, and the claim of Virginia was a claim of a "particular state," and therefore there was inserted in the Constitution immediately after the power granted to Congress to dispose of the property of the United States, the clause that that power should "not prejudice the claim of any particular state."

The records can be searched in vain for a good reason for inserting this modification of a general power to dispose of the public domain, beyond the claim of some "particular state" under the northwest cession. Article 6 of the Constitution also provides as follows:

"All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation."

It may well be doubted whether the acceptance of the trust created by the deed of cession made a legal contract between the Confederation and the State of Virginia. There is no doubt that such was intended, but in order to have a legal contract there must have been power in the Confederation to make a contract, and that power is at least doubtful; but there is no doubt in the world that the Confederation had engaged to accept the trust and had made an engagement to act as trustee. Therefore, the wise Virginia statesmen used the broad language that all "engagements" entered into by the Confederation should be valid against the United States under the new Constitution. Thus we have two provisions of the Federal Constitution protecting the claim of Virginia that the present Federal Government holds this Northwest Territory exactly as the old Confederation agreed to hold it, and whether the old Confederation had contracted to act as trustee or had engaged to do so makes no difference. The power of the present Federal government is clear. It has the right to hold lands and to dispose of the same, but that power cannot "prejudice the claim of any particular state," and the new government must pay all debts contracted and keep all engagements entered into by the Confederation.

It has always seemed to the writer that he could see from these various resolutions and acts of the Assembly of Virginia, and these provisions of the Constitution, a very precise, and clear understanding of the situation by the framers of the Constitution and the mem-
bers of Congress and the General Assembly of Virginia, and also a determined purpose upon the part of the statesmen of Virginia to see to it that the formation of the new government by the adoption of the Constitution of the United States would not in any way change the conditions and stipulations contained in the original act of cession, and would not prejudice the rights of Virginia or any of the thirteen original states under that grant. In the case of *Graham v. McIntosh*, Chief Justice Marshall recognized that this deed of cession was made upon "certain stipulations and conditions," and it cannot be doubted that he was quite familiar with the Northwest Territory, its history and the Acts of Virginia and the Continental Congress in relation thereto. Another significant fact of contemporaneous history confirming the contention of Virginia and West Virginia, may be found in the Acts of Congress providing for the disposition of the public domain. On the 20th of May, 1785, Congress passed an ordinance for ascertaining the mode of disposing of lands within the western territory and providing the first plan of survey of the public lands. Under one provision of that Act the Secretary of War was to draw by lot certain townships for land bounties for the Continental Army and the board of the Treasury was to draw the remainder by lot in the name of the thirteen original states, respectively, and the latter were to advertise them and sell them at public sale for not less than one dollar per acre. This betrays an understanding upon the part of the Congress that the "use and benefit of this land" belonged to the thirteen original states.

It is not doubted that those who dispute the claim of Virginia and West Virginia will contend:

First. That the language used in the deed of cession was meant to give title to the property to the United States, as constituted in 1784, and to its successor, the present United States, and that there was never intended to be any accounting between the United States and any of the thirteen original states. In other words, that the title to all of the property was in the first United States and its successor; and that states admitted since the adoption of the Constitution are entitled to participate in the trust.

Second. That it is a stale claim to which the doctrine of laches applies.

Third. That because history stated it to be a fact that Virginia had given this property to the Federal Government and neither-

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*Johnson v. McIntosh, 8 Wheat. 543.*
the representatives of Virginia nor any other of the thirteen original states had ever made a claim contrary to the accepted historical view, and on account of the long acquiescence in the theory that the property belonged unconditionally to the Federal government, it would be unfair and unwise to disturb this status.

The first of these contentions we have shown, can be disposed of by the history of the transaction, the conditions of the grant and the contemporaneous construction of the instrument conveying the property. It is further answered by the fact that the trust has never been settled, that there was no forum in which to sue, and that the conduct of Congressmen and Senators cannot bind a State nor affect its legal rights. Indeed, if both branches of Congress had passed an act declaring that Virginia and the other thirteen original states had no rights in the premises, that could not bind Virginia nor affect her rights. The foundation of the claim is the reservation in the deed of cession, and the rights of Virginia and the other twelve states attached when that deed was made and accepted by the Continental Congress, and the duties of the present United States attached under and by virtue of the provisions of the Constitution above cited. The second and third can be as easily answered.

In the case of Oregon & California Railroad Co. v. United States, a principle is laid down which will completely meet the defense of laches. In that case a land grant made by the government was involved and there was a provision in the grant that certain lands should be sold only to actual settlers in quantities not exceeding one hundred and sixty acres, and at prices not exceeding $2.50 per acre. As to this clause of the Act the court said (p. 427):

"We may observe again that the acts of Congress are laws as well as grants and have the constancy of laws as well as their command and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence and estoppel and even to the defenses of laches and the statute of limitations."

So we may contend here that the acts of the Legislature of Virginia concerning this matter are laws as well as grants, and they have the constancy of laws. The acts of Congress accepting

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9238 U. S. 393.
the grant, and the Constitutional provisions above quoted, are
laws, and they are commands, and operative and obligatory until
repealed. The above case also holds that the provision in the
grant referred to is a binding covenant upon the railroad, the
grantee, just as the clause in the deed of cession is a binding
covenant upon the United States.

There are many reasons why the statute of limitations and the
doctrine of laches would not apply to this controversy.

First. The United States cannot be sued, without its consent.
Until that consent shall be given no state can be charged with
neglect for failure to sue.

Second. This is a trust subject in which the United States is
the trustee, and a trustee cannot plead the statute of limitations
while he has any of the trust subject in his hands, and assuredly
not till he gives notice of a disavowal of the trust.

Third. As a matter of fact the trust has never been wound up.
The United States still holds some of the lands, part of the unsold
land being in Wisconsin and part in Minnesota.

Fourth. This is a controversy between sovereigns. Neither the
statute of limitations of Virginia will bind the United States nor
will such statutes of the United States bind Virginia. At the time
the contract was made the two parties to it were sovereigns. In all
courts of law and conscience one of the parties to the contract
which creates a trust cannot, by its act, without the consent of the
other, change the terms of the contract or absolve itself from the
position of trustee without settling up the trust and paying over
the money in its hands. Since both parties to the contract are
sovereigns, why has it not the force and effect of a treaty? Can
the United States stand under the suspicion of treating this con-
tract as a mere "scrap of paper"?

The claim that history has declared the deed of cession absolute
is unworthy of the United States Government, and we doubt that
it would ever be willing to interpose such a defense to the plain
written terms of its solemn covenant. But when this case shall be
tried, and any court or other tribunal shall be asked to read a
statement from a writer of history for the purpose of contradicting
the terms of Virginia’s grant and the government’s acceptance
thereof, it will then be a fit occasion to inquire into the sources
of information of the writer quoted. True, the generosity of Vir-
ginia in granting this vast domain to the Federal government at
a time when the latter was in sore need and pressed by creditors,
has been the subject of many a fourth of July oration and historical allusion. But was it not generous of Virginia to invite her twelve sister states to share with her the Northwest Territory after she had reduced it to physical possession? Was it not patriotic in her to put this immense territory into the hands of the national government as trustee and permit Maryland to share in proportion to her stake in the public expenditure so that the latter, by signing the deed, would complete the Federal compact? Is it not consistent with history to extol the largess and bounty of Virginia because she gave to her sister states a share in all of the land west of the Ohio and east of the Mississippi river to the Lakes, and thereby, in the language of the appeal of the Continental Congress "removed the only obstacle to a final ratification of the Articles of Confederation?"

The essence of the historical argument is the universal assertion of Virginia's great generosity and bounty. We can go further and admit that this bounty was to the Federal government, because it so happened that at the time the grant was made the Federal government consisted of Virginia and her twelve sister states; but she so limited the grant that the "use and benefit" of the property was specifically to the thirteen original states, they being the only ones that will answer the descriptive words used in 1783-4, to-wit: "Such of the United States as have become, or shall become, members of the Confederation." And further each to share "according to their usual respective proportion in the general charge and expenditure."

Some of the opposition to any act of Congress intended to settle this matter is based upon the mistaken idea that Virginia and West Virginia are seeking to disturb land titles in the states embraced within the Northwest Territory. Such a thing would be absolutely impossible, and nothing of the kind has ever been intended. There is no sort of doubt of the right and power of the Federal government to "dispose of these lands". The original grant provided that the land "shall be faithfully and bona fide disposed of for that purpose and for no other purpose whatsoever."

Titles conveyed by the United States in the states of Ohio, Indiana, Illinois, Wisconsin, Michigan, and Minnesota, can never be disturbed because there was unquestioned power in the Federal government to dispose of this land and to issue grants.

It has been asserted in some places as we said above that the title of Virginia to the Northwest Territory was not clear, and that
New York, Connecticut and probably Massachusetts had claims to part of that territory, and that it was intended by the political arrangement made in the early history of this government that all of these should be merged and that the United States should hold the land absolutely. The trouble with this contention is that it is met by the conduct of the parties and the public acts of Congress, and of the General Assembly of Virginia, which show that neither could do anything except exactly what was done. The contention just mentioned may be a good theory, but that theory did not suit Virginia, and the United States decided to take what Virginia would give,—not what she possibly ought to have given. But it must be remembered that Virginia, unlike New York, Connecticut and Massachusetts, sent her armies to the disputed territory and took actual physical possession of it, and was in possession of it when she made her agreement with the Federal government and turned the property over to the latter.

Again, the United States took possession of this land under Virginia's title, and she has sold and conveyed it under that title, and there is not an instance cited in which that title has ever been successfully contested.

The writer takes it that no authority will be necessary to sustain the position, that where a trustee takes a title under an express trust and reduces the property to possession and sells it, it is too late for him to contest the title of the grantor when called upon to make settlement of the proceeds.

What then, is the contention of Virginia and West Virginia? It is that instead of preserving the fund arising from these lands for the use and benefit of the thirteen original states, each to share in proportion to its contribution to the running expenses of the Confederation, the United States has sold the land and put the money into the treasury and used it for the general expenses of running the government; in other words, has violated the terms of an express trust. In addition to that, it has donated land to each of the states within the Northwest Territory in large quantities and has given it to railroads, schools and other institutions, not regarding the rights of the beneficiaries under the trust. The whole acreage of this land was in excess of 170,000,000 acres. About one third of all the land in the State of Minnesota was given for local and other public uses, besides the proceeds of other lands sold. It

208 Wheat. 543.
would be beyond the purview of this paper to go further into detail. The receipts of the Federal government for these lands sold run into the hundred millions, and the area of land given away is vast. Virginia, at the time this cession was made, was composed of the territory constituting the present states of Virginia, West Virginia and Kentucky, and under the principle announced in the case of the state of Virginia v. West Virginia, both Kentucky and West Virginia would be entitled to their proportionate part of the interest which the original state of Virginia had in the trust subject.

There is no doubt that a State can sue the United States in the Court of Claims.\(^1\)

Whether or not West Virginia, having been formed from the territory of the State of Virginia and not being an original party to the contract could sue in that court is a matter of some doubt. Whether or not that court has jurisdiction of this kind of a case is likewise a controverted question. It is useless to discuss these questions here because the judgments of that court must be paid by an act of Congress, and Congressional action at some step is inevitable.

The writer introduced bills in the 62nd, 63rd and 64th Congresses covering this subject. The bills did not ask for any money settlements by the Federal government now. The purpose of the bills was merely to get the consent of the Federal government to a suit, so that the State of West Virginia could have a status in court, and the question, from a legal standpoint, could be settled. If the Federal government's consent to a suit could be obtained, then the court could pass upon the original deed of cession, could determine the rights of all the parties thereunder, and could settle all questions of the statute of limitations and laches. The bill was passed by the Senate in the 64th Congress, after having been reported favorably from the Judiciary Committee. After its passage by the Senate it went to the House and was referred to the Judiciary Committee of that body which finally reported it favorably, but it never was reached on the calendar, and the effort to have it considered out of its order on the calendar failed. Congressman Neely's strong presentation of the subject to the Judiciary Committee of the House and his indefatigable efforts before that committee, of which he is a leading and useful member, were

\(^{1}\text{United States v. Louisiana, 123 U.S . 32.}\)
most potent factors in securing a favorable report. It can be seen that West Virginia has made substantial progress. A bill recognizing her right to sue, and giving the consent of the Federal government to the suit has been favorably passed upon by the Judiciary Committee of both the Senate and the House and has been passed by the Senate. This is distinctly encouraging and is some answer to those, even in our own state, who may have been disposed to look upon this effort to secure justice for West Virginia, as based upon an old and not very clear political understanding.

The writer indulges the view that the United States cannot afford to occupy its present position.

At the time the grant was made she was understood to be a trustee. All of the parties to the contract acted upon that theory for many years. It would be a perversion of plain English words to contend that the language used did not create a trust in favor of the thirteen original states. The United States has been greatly benefited by the deed of cession. It resulted in adding to her political domain five states and a part of another, and these are now states with immense cities, towns and villages, great railroads, and rich farming areas which constitute a large part of the wealth of the Union. The amount which would be required to settle this claim with the original thirteen states is insignificant when compared with the benefits derived by the United States and the actual money these states have paid into the the national treasury. But Virginia and West Virginia are not asking the United States to pay over anything except the actual receipts of the United States from the sale of these trust lands. They do seek an accounting for those lands given away but at the price they were worth when granted. Then, as to the lands remaining unsold, certainly the United States should hold them for the benefit of the beneficiaries and if they are sold hereafter the proceeds should be paid to the beneficiaries. This is no raid upon the national treasury. It is an appeal to the national government to live up to its covenant, to treat the thirteen original states fairly and honestly. Indeed, it is an appeal to the United States not to occupy the position of a derelict trustee. What private citizen would be willing to admit that land and money had come into his hands as a trustee, and yet would refuse to make an accounting or would avoid going into a court of equity where a settlement could be made?

The amount which could be recovered if the claim of the thirteen
original states should be successful, is not important here. The
writer’s calculation convinces him that West Virginia’s part would
be from ten to twenty millions of dollars. Need we be squeamish
about asserting such a claim? Our creditors sue us. We must
pay when we promise to pay; and because we were once a part of
the State of Virginia, the latter has sued us and has secured a
decree against us in the Supreme Court of the United States. The
people of the United States, when they understand this question,
will demand that their representatives in Congress shall do justice
and settle this matter. Who shall say that the Supreme Court of
the United States cannot hear all of these matters and reach a
just conclusion? If this be a trust and the thirteen original states
have rights, and the United States has large sums of money in her
Treasury derived from the sale of lands belonging to these states,
why should not the United States pay it to the states entitled
thereto? Can anyone be injured by having the Supreme Court of
the United States pass upon this question? Congress owes it as a
duty to the people of the United States to appoint some kind of a
commission to take this great matter into consideration and settle
it. It is a shame that a matter of this importance should be per-
mitted to insult the claimant states and shame the Federal govern-
ment. Virginia made a great sacrifice when she parted with title
to this property and thereby gave credit to the struggling Federal
government which enabled it to finance its obligations. This ex-
pression of a people’s patriotism and a state’s generosity was
enough to ask.

The only trouble, it seems, is a lack of information and a failure
to study this question. The writer cannot doubt that if West
Virginia will get behind the effort to have this matter settled and
will get all the facts before Congress, the latter will be forced by
the power of public opinion and the dynamic force of a just cause,
either to appoint a commission to settle the question or else submit
it to the Supreme Court of the United States for adjudication.