

SUPREME COURT OF UNITED STATES

State of Maryland, for The Use of Washington
County

Vs.

Baltimore and Ohio Railroad Company,

January Term, 1845

THIS case was brought up by writ of error, under the 25th section of the Judiciary Act, from the Court of Appeals for the Western Shore of Maryland.

The facts were these:—

On the 4th of June, 1836, (Laws of Maryland, 1835, chap. 395,) the legislature of Maryland passed an act entitled 'An act for the promotion of internal improvement,' by which subscriptions were directed to be made, on certain terms, to the capital stock of the Chesapeake and Ohio Canal Company, and Baltimore and Ohio Railroad Company, to the amount of \$3,000,000 to each company. The conduct of the canal company having no bearing upon the question involved in the present suit, it is not necessary to notice any further the parts of the law which related to it.

A part of the 5th section of the act was as follows:

'And the said treasurer shall not make any payment aforesaid for subscription to the stock of the Baltimore and Ohio Railroad Company, until after a majority of the directors appointed therein on behalf of this state shall have certified to the treasurer in writing, supported by the oath or affirmation of a majority of said directors, that they sincerely believe in their certificate and statement, that, with the subscription by this act authorized to be made to said company's stock, and with the subscription which the city of Baltimore may have made by virtue of an act, passed at December session of the year eighteen hundred and thirty-five of this Assembly, or that independently of any subscription by any other public authority than the city of Baltimore, as aforesaid, and of the cities of Pittsburg and Wheeling, and exclusive of any loan secured to it, exclusive of all future profits and debts due by the company on interest, the said railroad company in their opinion have funds sufficient to complete the said railroad from the Ohio river, by way of and through Cumberland, Hagerstown, and Boonsborough, to its present track near to Harper's Ferry; and it is hereby declared to be and made the duty of the said company to, and they shall so locate and construct the said road as to pass through each of said places; which certificate of said directors shall be accompanied by an estimate or estimates of one or more skillful and competent engineers, made out after a particular and minute survey of the route of said road by him or them, and verified by his or their affidavit, showing that the whole cost of said work will not be greater than the amount of funds the said directors shall certify to have been received by said company, and

applicable to the construction of the said road: Provided, That if the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in this act, then, and in that case they shall forfeit one million of dollars to the state of Maryland for the use of Washington county.'

This act was accepted by the railroad company, in a general meeting of stockholders, and information thereof communicated to the governor, on the 26th of July, 1836.

On the 24th of September, 1836, the treasurer made his subscription of \$3,000,000 to the capital stock of the company.

On the 1st of October, 1838, a majority of directors on behalf of the state gave the certificate and statement required by the act.

The railroad company having finally located, and being in the act of constructing their road, without the limits of Washington county, within which Hagerstown and Boonsborough are situated, a suit was brought in Frederick county, Maryland, in February, 1841, in the name of the state of Maryland, for the use of Washington county against the railroad company in an action of debt to recover \$1,000,000.

In March, 1841, the legislature of Maryland passed an act in which they say, 'that so much of the 5th section of the act of 1835 as makes it the duty of the Baltimore and Ohio Railroad Company to construct the said road so as to pass through Hagerstown and Boonsborough, be and the same is hereby repealed; and that the forfeiture of one million of dollars reserved to the state of Maryland as a penalty, in case the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in that act, be and the same is hereby remitted and released and any suit instituted to recover the same sum of one million of dollars, or any part thereof, be and the same is hereby declared to be discontinued and of no effect.'

In October, 1841, the defendant pleaded the general issue, and set forth the above act.

In February, 1842, the case came on for trial, upon the following agreed statement of facts:

'It is admitted in this case, that the commissioners of Washington county, the parties at whose instance this action was instituted for the use of Washington county, were at the time of institution of this suit, and still are a body corporate, duly elected and organized, under and by virtue of the act of Assembly of Maryland of 1829, chap. 21, and its supplementary acts. It is also admitted that the defendants are, and were at the institution of this suit, a body corporate, duly existing under and by virtue of the act of Assembly of Maryland of 1826, chap. 123, and its supplementary acts. It is also admitted that this suit is brought at the instance of said commissioners of Washington county to recover, for the use of said county, the \$1,000,000 which they allege to be forfeited to the said state, for the use of said county, under the provisions of the 5th section of the act of 1835, chap. 395; and it is admitted that the said defendants have not, and had not at the institution of this suit, constructed or located their road from the Ohio river, by way of and through Hagerstown and Boonsborough, to the track of said road at Harper's Ferry, as the same existed at the time of the passage of the said act of 1835, chap. 395; but, on the contrary, had at the institution of this suit finally located, and are, were then, and are now constructing their said road by a different route, and without the limits of Washington county, within which the said Hagerstown and Boonsborough are situated. It is admitted

that the said Baltimore and Ohio Railroad Company, in general meeting of the said corporation, did accept, assent, and agree to the several provisions of the said act of 1835, chap. 395, and did duly communicate their said approval, assent, and agreement, under their corporate seal and the signature of their president, to the governor of this state, in the manner and within the time prescribed by the said act; which approval, assent, and agreement, together with the report of the engineer of the said railroad company, which was required by the said act to accompany the same, were as follows, viz.:'

(The statement then set out all these documents *in extenso*. The engineer framed his estimates for a road to Pittsburg which would cost \$6,681,468. That part of it passing through Washington county is thus described. 'The route departs from the Baltimore and Ohio Railroad at the mouth of the Little Catocin, ascends that stream to the eastern base of the Blue Ridge or South mountain, and thence continues to ascend along its slope to a depression in its crest, called 'Crampton's Gap;' thence passing through the mountain by a tunnel of 1500 feet in length, it descends into 'Pleasant Valley,' lying between the South mountain and the Elk mountain, and proceeds along the western base of the former, to and through the town of Boonsborough; thence to a point near the village of Funkstown; and thence across the Antietam creek, above the Turnpike bridge, to the borough of Hagerstown; thence through the streets of that town, and over Salesbury ridge, to and across the Conococheague creek, about two miles north of Williamsport; thence' &c., &c.)

'It is also admitted, that after this suit was instituted for the purpose of recovering the said forfeiture of million of dollars, the legislature of Maryland, on the 10th day of March, 1841, passed the act of December session 1840, chap. 260, repealing the said 5th section of the said act of 1835, chap. 395, as far as relates to the said forfeiture of a million of dollars, and releasing the said defendants from the said forfeiture, and every part thereof, and directing any suit instituted to recover the same to be discontinued, and to have no effect. It is also admitted, that the said repealing act of 1840, chap. 260, was passed upon the following memorial of the said defendants to the legislature, and that at the time of passing the same there was then before the legislature a countermemorial upon the said subject from the said commissioners of Washington county, which memorial and counter-memorial, it is agreed, were as follows, to wit:'

(These documents are too long to be inserted.)

'It is further admitted and agreed, that the several acts of Assembly herein particularly referred to, as well as any other acts or resolutions of the General Assembly of Maryland, that either party may deem applicable in the argument of this case, either in the County Court, or Court of Appeals, or Supreme Court of the United States, should the case be hereafter carried by either party to said courts, or either of them, shall be read from the printed statute-books, and have the same effect and operation in the case, as if duly authenticated copies thereof were made a part of these statements.

'It is further agreed that all errors of pleading and of form in any part of the proceedings of either party in this case are waived; it being the object and understanding of the parties that the matters of right in controversy between them shall be fairly and fully presented to all or either of the said courts, in which the same may be pending, and that either of the said parties shall have his pleading and proceedings considered as being as perfect as they could be made to give him the benefit of the case here stated. It is admitted that this suit was the only suit ever brought by the said commissioners, or at their instance, to recover the said forfeiture of a million of dollars, and was pending when the said act of 1835, chap. 395, was passed. Upon this statement it is further agreed that, if the court shall be of opinion that this action could not be maintained if the said repealing act

of 1840, chap. 260, had not been passed, or that the operation and effect of that repealing act is to release the said forfeiture of \$1,000,000, and to discontinue and put an end to this suit, then judgment to be entered for the defendants, otherwise such judgment is to be entered for the plaintiffs as the court may think right and proper. It is further agreed that the county court shall enter judgment *pro forma* for the defendants. The plaintiff to have the same right to take up the case by appeal or writ of error, to the Court of Appeals, or ultimately to the Supreme Court of the United States, as if the judgment in the county court had been rendered upon demurrer, or upon a bill of exceptions taken in due and legal form upon the facts hereinbefore agreed upon.'

Upon this statement of facts the court of Frederick county gave judgment for the defendant, and the case being carried to the Court of Appeals, the judgment below was affirmed.

The writ of error was brought to review this judgment.

Jervis Spencer and *Sergeant*, for the plaintiff in error.

Nelson (attorney-general) and *Johnson*, for defendants.

Spencer, for the plaintiff in error, made the following points:

1. That the act of 1835 is a contract.
2. That Washington county is a party to that contract.
3. That the forfeiture is in no sense a penalty.
 - 1st. It is not for any criminal or prohibited act amounting to a public offence.
 - 2d. It is not introduced *in terror em*, but is a sum to be paid for using the license given by the act as a compensation to the injured party.
4. That, by the use of the license by the company, Washington county acquired a vested right in the sum stipulated to be paid.
5. That to take away this right from Washington county would be inequitable, unjust, and contrary to the first principles of the social compact; and therefore the act ought to be so construed, if possible, as to avoid that result; and it may be so construed by confining its operation to whatever right the state had, if any. The state might release her own power over the matter, leaving in force the right of the county.
6. If otherwise construed, it is repugnant to the state constitution, and void.
7. In the same view, it is repugnant to the Constitution of the United States, and void.

And then said——

This suit is brought in the name of the state of Maryland, to recover \$1,000,000, which is claimed by the county, under the provisions of the 5th section of the act of the legislature of Maryland, at the

session of 1835, chap. 395, which are substantially set forth in the declaration.

It is maintained, to support the claim of the plaintiff, that the whole act constituted a contract between the state and company; and the 5th section a part of said contract, in which the county is a party beneficially interested.

The provisions of the 1st section of the act are in the very terms of contract, and embrace the 5th section as well as the rest of the law: 'If the railroad company shall approve, assent, and agree to the several provisions of this act so far as they are applicable to said corporation,' &c. The approval, assent, and agreement of the company were given as provided for by the act, and that agreement gave vitality to the whole law. The state offered, and the company accepted the offer, on mutual considerations. It was the *congregatio mentium*, which is of the very essence of contract.

The case stated shows that at the time of commencing this suit, the road had been located out of the limits of Washington county, and that, under the law, the company was liable to pay the money.

But the defence relies on the act of 1840, chap. 260, which undertakes to repeal the provision of the act of 1835, chap. 395, under which the claim is asserted; and the question is, whether that act of 1840 violates the 10th section of the Constitution of the United States.

The first aspect in which the question is to be examined is, whether the 5th section is part of a contract at all, or only criminal penalty, which it is maintained to be by the defendant. We maintain that it is not only contract, but that it could have no operation as criminal penalty.

What is a contract? Chitty on Contracts, 1, &c.; *Canal Company v. Railroad Company*, 4 Gill & J. (Md.), 128, &c.

The Court of Appeals say, we must look to concurrent legislation to find the meaning of the 5th section; and refer to the act of 1840, chap. 260, which uses the term 'penalty.' But could the act of 1840, after the suit was brought, alter the character of the thing? If it was contract when the suit was brought, the act of 1840 could not make it criminal penalty. The legislature could not stretch the shoe or contract it, and make the previous law mean one thing or another, as they might choose to call it, and when they had a manifest motive in endeavoring to alter its character.

Concurrent legislation, prior to the act of 1840, proves that the legislature understood it as contract, and nothing else. The act of 1826, chap. 123, § 14, which was the original charter, authorized the company to enter upon any lands for a location. Afterwards, by the act of 1827, chap. 104, § 3, the legislature thought proper to restrict the company to a location within Frederick and Washington counties, but did they do it by a criminal enactment? No. They knew they could not do that, and they entered into a distinct contract for the purpose. Stress is laid by the other side on the fact that the terms of contract are used in the same section of the act of 1827, which makes the restriction; and the inference is deduced that if the 5th section of the act of 1835 were intended to be contract, the terms of contract would have been used in that section also. But the important fact is entirely overlooked, that the words of contract, in the first section of the act of 1835, embrace the whole act; whereas, in the act of 1827, there were no such general words of assent and agreement to the whole

act, but they applied only to the respective sections.

The Court of Appeals refer to the 9th section of the act of 1835, and say that, inasmuch as a special contract was required to be made by that section, therefore the legislature could not have intended to make the 5th section contract. This construction cannot be justified. It would involve the construction that many of the most essential stipulations of the company are not its contract, because the particular sections in which they occur do not require other special contracts with reference to the same. The 9th section required a distinct contract, in order that if the state should ever have occasion to sue on it, the suit should not be embarrassed by all the various matter embraced by the law. It was an arrangement of convenience. When the company agreed to the law, and accepted the same, it was under contract to fulfil the 9th section by an additional contract. That section was a contract, to be performed by entering into another contract; and it was as much a contract as the subsequent contract would be such, after it should be entered into.

There are thousands of instances of this, where contracts are in part, or the whole, to be performed by entering into other contracts.

The right to choose a location was a vested franchise of the company, its property, which the legislature of Maryland had no right to interfere with by a criminal enactment. *Canal Company v. Railroad Company*, 4 Gill & J. (Md.), 144. The obligation to go through Frederick and Washington counties, under the act of 1827, was released by the act of 1831, chap. 251; and the company stood untrammelled, without any power of control by the legislature. Their contract or agreement was absolutely essential to bind them down to any particular location. The 5th section, in any other sense but contract, is a dead letter.

It has been asked, suppose the act had said that the company should be liable to Washington county in damages, would that be contract? And again, that if the road should leave the prescribed points it should be a misdemeanor, would that be contract? It is submitted, that it would be, in both cases. The courts have said, in the authorities I have read, that the right to choose a location is the property of the company, and it could be liable neither for damages nor a misdemeanor, for using properly its own property. It might contract to use its property in a certain way, and if nothing be said about damages for the breach, a liability for such damages is implied in every contract. To declare, in express terms, what is implied in every contract, certainly would not vitiate it. Private individuals could not contract that the act of one should be a misdemeanor, but a misdemeanor is an offence against the state, and surely a party who has an absolute right to do a thing independent of legislative control, may contract with the state that he will not do it, and if he does, it shall be a misdemeanor. A state may do many things, in the way of contract, that an individual cannot do, for there is no public policy to restrain her, nothing but the written Constitution.

There is another kind of penalty which is the penalty of a contract. This is not such a case, but it is the actual contract of the party to pay the million, in the event which has happened. 2 Pothier on Obligations, 86, &c., 93, 94, 95, 96; 7 Wheat., 18.

Washington county had a good subsisting interest in the contract. If any consideration were necessary to sustain the use, it amply exists in the moral obligation which the state owes to the people to protect their interest and nourish their prosperity. The Court of Appeals say, that, 'as a county, she stands to the state in the relation of a child to a parent;' and this would furnish consideration enough. *Green v. Biddle*, 8 Wheat., 151; *Lloyd v. Spillet*, 2 Atk., 149.

But no question of consideration can arise here, as the acceptance and contract of the company is under the solemnities of a seal, which implies a consideration.

No consideration is necessary. *Dartmouth College* case, 4 Wheat., 698; 3 Story Const., 257, 258; *Carnigan v. Morrison*, 2 Metc. (Mass.), 396; *Willis Trustees*, 216; *Cooker v. Child*, 2 Lev., 74; 4 Kent Com., 307, and cases there referred to.

The sovereignty of a state is above the restrictions of the common law and the statutory law. They must all yield to the sovereign will; and what would be necessary to the contract or grant of an individual would by no means be necessary to the same things of a state.

Even though Washington county had been ignorant of the provision in the law, made for her benefit at the time of its passage, she could have availed herself of it; and she did affirm it when she instituted the suit, if not before. 4 Kent. Com., 307, &c.

The use declared in the act of 1835 ought to be as sacred as any other right of property. It is property to the county. It is vested under the law of the state. It vests under the same sanction which secures to a citizen his estate. It is an interest in a contract, vested under the sacred sanction of the law, and is inviolate under the Constitution.

The county enjoyed great advantages before the construction of this road. One of the greatest thoroughfares in the country (the great national road) passed for fifty miles through her territory. Twenty four-horse stage-coaches, filled with passengers, daily passed over the road, and it was constantly lined with immense wagon-teams, travelling to and from the great west. All these people and horses had to be fed. It made a most profitable market for our farmers. Houses were built all along the road, to accommodate the custom. It is now all gone. The farmers lose the profits of their provender and marketing; the whole country feels the depression; and the houses which were a few years ago comfortable inns, and profitable to their proprietors, are going to decay, a dead loss. The million we seek to recover can never indemnify the county for the injury she has sustained.

Maryland was about to apply large sums to the construction of this great work, (the Baltimore and Ohio Railroad;) the means were to be obtained in part from Washington county; and could any more cruel injustice be conceived than for the state to appropriate the money of the people, and pledge the property of Washington county, for the construction of a work which would take from the county all the benefits it enjoyed? Surely every principle of justice and moral duty required that the state should protect the county; and the stipulations of the 5th section were no doubt intended for that.

The state was a mere trustee after the contract was made, and could not deny to the county the right to use her name in bringing the suit. *Payne v. Rogers*, 1 Doug., 407; *Carter & Moore v. Insurance Company*, 1 Johns. (N. Y.) Ch. R., 463; *Green v. Biddle*, 8 Wheat., 89; *Kierstead v. The State*, 1 Gill & J. (Md.), 246.

It has been argued, by the other side, that the state has entire control over the corporation of Washington county, and can destroy it at her pleasure. We admit that the legislature has absolute control of the political powers of a political corporation, to amend, or modify, or repeal them. But as long as the corporate organization continues, the county is as capable of taking as a natural person, and its contracts are equally protected. The act of 1829, chap. 21, sect. 3, incorporates the

commissioners of Washington county, and enables them to hold all kinds of estate. The Constitution made no distinction in the classes of contracts whose obligation was forbidden to be impaired, but protects those made by corporations equally with those made by individuals. *Green v. Biddle*, 5 Pet. Cond. Rep., 390.

The right of a legislature over charters does not imply a right to the property held under those charters. 9 Cranch, 335; 16 Mass., 84, 85, 86; 2 Kent Com., 275, 3d ed.

Nelson, attorney-general, for defendants in error, referred to and commented on the various laws of Maryland respecting the railroad company, and said, that the only question in the case was, whether the act of 1840 was valid and legitimate. Upon this point three propositions could be stated——

1. The proviso in the preceding act, which declares a forfeiture, imposes it as a penalty.
2. If it be a penalty, the legislature had a right to remit it, and did remit it.
3. If the stipulation in the 5th section of the act of 1835 be a contract in its nature, the legislature was competent to release it, and did so.

1. Is the proviso a contract or mere penalty? This must be answered by a reference to the terms of the act, to the circumstances under which it was passed, and to acts *in pari materia*. Let us examine each. The 5th section prescribes a duty to be performed by the railroad company. It says, 'It shall be the duty of the company,' and the performance of it is sanctioned by a forfeiture. The language is not that they shall pay if they fail to comply, but that they shall forfeit \$1,000,000. What is a forfeiture? It is a penalty imposed by a superior power for an omission to perform a duty. The terms of the act, therefore, mean a penalty by denouncing forfeiture as a punishment. The act of 1837, 4th section, contained an offer to the company, which was not accepted; but its language is, that it shall 'not be construed to repeal the forfeiture to Washington county.' The act of 1840 contains the same idea; it remits a forfeiture. In the act of 1835, different expressions are used in the 7th and 9th sections, where it is declared that 'the company shall bind itself by an instrument to pay,' &c.; and in the 14th section, where the duty of providing transportation is imposed upon the company, they are made liable to an action by any party aggrieved. In the 5th section, it is not the less a penalty because the amount is ascertained. If the legislature meant the obligation in the 5th section to rest on contract, can it be accounted for that they did not use the appropriate terms, when they did so in the 7th and 9th sections? It has been said, that the railroad company assented to the act, and that it thus became a contract. But the assent was given to the act as it stood, with the penalty in it. Assent to it did not change a penalty into a contract. The act of Virginia contained penalties for wronging persons, but by accepting this the company left it optional with the proper authorities of Virginia whether to enforce the penalties or not.

2. If it be a penalty, has the legislature the power to release it? Whether injustice was or was not done to Washington county, was a question for the legislature to decide, but not for this court, which must *jus dicere* and not *jus dare*. In England, the king cannot remit a penalty where private rights are involved, but parliament can. 2 Bl. Com., 437, 446; 1 W. Bl., 451.

Where a forfeiture is imposed by act of Congress, and the law expires, the forfeiture cannot be enforced, although there was a judgment below. 1 Cranch, 104; 5 Id., 281; 6 Id., 203, 329.

Decisions in the different states are uniform on this point. 2 McCord (S. C.), 1; 2 Bail. (S. C.), 584; 1 Mo., 169; Breese (Ill.), 115; 1 Murphy (S. C.), 465; 1 Stew. (Ala.), 346; Allen (N. H.), 61; 4 Yeates (Pa.), 392.

It is clear, therefore, that if this provision is in the nature of a penalty, the law of 1840 is valid.

3. Suppose, however, that the stipulation is in the nature of a contract, had the legislature power to release it? The act of 1840 professes to release it, whether it be contract or penalty. It is not denied that a state may make a contract, and if she does, that she cannot break it. The Constitution intended to protect private property, whether of corporations or individuals. Is Washington county such a person? We say, that she can have no interest separate from the state. She is a component part of Maryland, and is separate only for the purpose of executing the sovereign will of the state. The distinction between public and private corporations must exist in such a case, if it exists at all. In 1804 the Levy Court was incorporated, the justices of which were appointed by the state, but they had no power to levy taxes, nor any other power, except that which was conferred upon them by law. In 1839, commissioners were authorized by law to supersede the Levy Court, with the same powers. They cannot be the *cestui que use* of the state, for they had no authority to accept such a use, and could not appropriate the money, if it were given to them. The state could pass a law, directing the purpose for which it should be expended, and even order it to be paid over to the railroad company. Maryland can abolish Washington county. Suppose that on the day after the forfeiture the county were to be annihilated or broken up, and partitioned amongst the adjacent counties, what would be done with the funds on hand? It would be for the state to prescribe their direction. [1817] USSC 19; 9 Cranch, 43, 52, 292.

If the distinction between public and private corporations be that interests are protected, all are protected, because there can be no litigation without interests. 4 Wheat., 629, 630, 659, 660, 693, 694; 13 Wend. (N. Y.), 325, 334, 337.

Was a right of action such a property as is protected? The penalty was never reduced into possession, and the state had a right to defeat the remedy when it was sought by a suit in its own name. All the points in this case are covered by 1 Mo., 169. Counties are public corporations, and can be changed or modified at the pleasure of the state. Breese (Ill.), 115.

In the case of the town of Pawlet private interests were involved; it was not intended to throw the shield of protection over public property. The public may do what they please with their own. A legislature cannot repeal a charter, and take the property of individuals; but if you refuse to it the power to control public funds, you strip it of a useful and legal authority.

R. Johnson argued upon the same side, but of his argument the Reporter has no notes.

Sergeant, for plaintiff in error, in conclusion, stated the facts in the ease, referred to the acts of Assembly, and then argued that the proviso in the act of 1835 was not a penalty. There was an alternative, an option given to the railroad company, either to make the road as directed, or to pay the money. The nature of the proviso was perfectly understood by the legislature. The previous part of the law enacted, that the company should pass through three towns. Had the law stopped there, the obligation would have been complete, under the penalty, as it is said by the other side, of forfeiting their charter. But the proviso makes a difference. If the company choose to pay the money, they may decline to obey the enacting clause. The difference between a law and an

agreement is, that the one is binding absolutely, and the other not without an assent. But here the company were required to signify their assent to the law, which shows that the legislature thought they were making a contract. When a state becomes a contracting party, she acts with no higher power than an individual, except that sometimes persons are made able to contract who would be unable, without the assistance of legislation. A confusion arises in some cases from the same power making laws and contracts; and the different mode of action must be steadily kept in view. A treaty is binding, and yet there is no exercise of a legislative power. In the case before us, the company were not bound to adopt any certain route. All that the legislature said was, that if they did not agree to pass through the three towns, they should not have the subscription of \$3,000,000. It makes no difference, in a legal point of view, whether it was or was not difficult to construct the road along that route. This circumstance did not alter the contract. If they had agreed to pay the \$1,000,000, the legislature could not have compelled them to pass through the towns.

The act of 1840 does not declare what that of 1835 was, but professes to annihilate it. But the legislature cannot do this. They cannot even construe the law, which is the peculiar province of a court. There is nothing in this disability derogatory to the dignity of Maryland, because it is common to all the states. Courts may look at acts which are *in pari materia*, but the examination is only to guide their judgment, and not because the legislature has a right to constitute a contract already made. When the Constitution of the United States protects contracts, it means that they shall be defined and construed according to received and settled principles; there is no exception of implied contracts or those made by states or corporations, public or private. Public corporations have a right to make contracts and to sue, and there is no exception of a penalty by contract, such, for example, as a bond. This court has always acted up to the letter and spirit of the Constitution, and it is a subject of rejoicing that its opinions have found their way into the hearts of the people, and become guides of action. In a convention of the people of Pennsylvania, which met not long since, an argument addressed to that body, founded on the decisions of this court, settled a question which had been much debated. It is a principle that contracts must be interpreted by the judiciary, and this is equally true of contracts made by individuals or states. All the incidents of contracts are protected also, and no equivocation or subterfuge will be allowed. The only distinction which can be made amongst penalties, is regarding crimes and contracts. No one can contract to commit a crime; it would be void. If the act of 1840 impairs the obligation of a contract, it is nugatory. Between individuals, this would be considered a case of contract, and there is in the law no exercise of the legislative power, which would have been the case if Washington county, by it, had been empowered to make a contract. But this was not necessary. The state could contract, undoubtedly, and so could the railroad company, and a third party is introduced with the consent of both. A charter is a contract; but provisions are sometimes introduced into it which are not matters of contract. [1819] USSC 21; 4 Wheat., 235. In the present case, the acceptance completed the contract. If you strike out of the law the words, 'for the use of Washington county,' there is nothing to show what was to be done with the money. But when these were inserted, it prevented the state from claiming it for herself; if she had done so, the railroad company would have been justified in refusing to pay. Here then were two parties, each capable of contracting; and as to the capacity of Washington county so to do, it was held, in the case of *Terrett and Taylor*, that the recognition of a power to contract is equivalent to a fresh grant of power. A bond between A. and B., for the use of C., admits C.'s interest, and suit must be brought in the name of the obligee. When a bond is assigned, there is an implied engagement that the assignor will do nothing to impair the interest of the other party. A *cestui que trust* has, in equity, a control of the fund. *Black v. Zacharie*, decided at this term.

The act of 1835 is, in fact, a stipulation for a license to depart from a prescribed route. It has been said, by the other side, that it is a penalty, that the legislature can release it, and that if it is a contract, the legislature can annul it. If it is a penalty, and the state has released it, the question cannot come up here. We have no desire to say anything as to the power of a state over criminal penalties, such as that in *10 Wheat*. It is said that Washington county was not a party to the contract. But it seems to be conceded that if it were not for the act of 1840, there would be no opposition to the claim. There was a time then, when Washington county had an interest, and this remained at the institution of the suit. If the state of Maryland were to receive the money as the plaintiff in the cause, perhaps we could not legally coerce her to pay it to Washington county. But she would be morally bound to do so. The moment that the railroad company determined not to pass through the three towns, Washington county acquired a right. The trustee and the party bound have concurred to destroy the contract, and it is only in consequence of this, that Washington county does not stand as it did at first. It has been said that the legislature could take away the remedy by which the contract was to be enforced. But the decisions of this court are uniform, that a legislature cannot take away a right, under pretence of affecting the remedy. The last case upon this point is *Bronson v. Kenzie*, 1 How., 311.

If the law impairs a remedy, or varies a contract a hair's breadth, it is void; and it makes no difference whether it is a general or a special law. In the case before us, the plaintiffs are put in a worse situation than they were before, and the same thing is intended to be accomplished as if a law had been passed forbidding them to bring a suit.

It is said that Washington county is a public municipal corporation, and therefore within the control of the legislature. But in the act of 1835, there was no reservation of power upon this ground. It may be that the votes of some few persons were required to pass the law, who would not have voted for it if any such reservation had been made. Men cannot be such general philanthropists as to give up the interests of their own immediate neighborhood. Suppose Washington county to have said, if you take away the road from us, you must make compensation. In such case, the law would not have been passed with a reservation in it like the one just spoken of. And if it be a contract, it is violated for the benefit of the railroad company. The argument on the other side goes to the extent that every contract, made by a public municipal corporation, is beyond the pale of the Constitution. There is no decision of this court that such a charter and property can be taken away. One of the complaints in the Declaration of Independence is, that charters were taken away; and this practice, in part, produced a revolution in England. By this argument, they may all be swept off; and such corporations may, moreover, be asked what they are going to do with their property. It has been said, that supposing it to be a contract, it cannot inure to the benefit of Washington county. But an implication cannot be made contrary to what is expressed, or what is just and right. What Washington county is going to do with the money is of no concern to the railroad company, the true defendant in this case. It may educate the poor with it; it may pay debts, or it may erect a monument to that glorious clause in the Constitution which enables it to assert its rights in this court.

Mr. Chief Justice TANEY delivered the opinion of the court.

The question brought before the court by this writ of error depends upon the construction and effect of an act of the General Assembly of Maryland, passed at December session, 1835, entitled 'An act for the promotion of internal improvement.'

The original charter of the Baltimore and Ohio Railroad Company authorized it to construct a

railroad from Baltimore to some suitable point on the Ohio river, without prescribing any particular route over which the road was to pass; leaving the whole line to the judgment and discretion of the company. But by the act above mentioned the state proposed to subscribe \$3,000,000 to its capital stock, provided the company assented to the provisions of that law; and, among other provisions, this act of Assembly required the road to pass through Cumberland, Hagerstown, and Boonsborough; and provided also that, if the road was not located in the manner therein pointed out, the company 'should forfeit \$1,000,000 to the state for the use of Washington county.'

The towns of Cumberland, Hagerstown, and Boonsborough, are all situated in Maryland; the first in Alleghany county and the two latter in Washington.

This law was assented to by the company, and became obligatory upon it, and the sum proposed was subscribed by the state; but for reasons which it is not necessary here to mention, the company did not locate the road through Hagerstown or Boonsborough, nor pass through any part of Washington, on its way from Harper's Ferry to Cumberland, to which point the road has been made; and this suit was thereupon brought, at the instance of the commissioners of Washington county, in the name of the state, for the use of the county, to recover the \$1,000,000 above mentioned. After the suit had been instituted, the state, at December session, 1840, passed a law repealing so much of the act of 1835 as required the company to locate the road through Hagerstown and Boonsborough, and remitting the forfeiture of the \$1,000,000, and directing any suit instituted to recover it to be discontinued.

The commissioners of Washington county, however, at whose instance the action was brought, insisted that the money was due to the county by contract, and that it was not in the power of the state to release it; and upon that ground continued to prosecute the suit; and the Court of Appeals of the state, having decided against the claim, the case is brought here by writ of error.

Undoubtedly, if the money was due to Washington county by contract, the act of 1840, which altogether takes away the remedy, would be inoperative and void. But even if the provisions upon this subject in the act of 1835 could be regarded as a contract with the railroad company, it would be difficult to maintain that the county was a party to the agreement or that it acquired any private or separate interest under it, distinct from that of the state. It was certainly at that time the policy of the state to require the road to pass through the places mentioned in the law, and if it failed to do so, to appropriate the forfeiture to the use of the county. But it cannot be presumed that in making this appropriation the legislature was governed merely by a desire to advance the interest of a single county, without any reference to the interests of the rest of the state. On the contrary, the whole scope of the law shows that it was legislating for state purposes, making large appropriations for improvements in different places; and if the policy which at that time induced it to prescribe a particular course for the road, and in case it was not followed to exact from the company \$1,000,000 and devote it to the use of Washington county, was afterwards discovered to be a mistaken one, and likely to prove highly injurious to the rest of the state, it had unquestionably the power to change its policy, and allow the company to pursue a different course, and to release it from its obligations both as to the direction of the road and the payment of the money. For, in doing this, it was dealing altogether with matters of public concern, and interfered with no private right; for neither the commissioners, nor the county, nor any one of its citizens, had acquired any separate or private interests which could be maintained in a court of justice.

As relates to the commissioners, they are not named in the law, nor were they in any shape parties to

the contract supposed to have been made, nor is the money declared to be for their use. They are a corporate body, it is true, and the members who compose it are chosen by the people of the county. But like similar corporations in every other county in the state, it is created for the purposes of government, and clothed with certain defined and limited powers to enable it to perform those public duties which, according to the laws and usages of the state, are always intrusted to local county tribunals. Formerly they were appointed in all of the counties annually, by the executive department of the government, and were then denominated the Levy Court of the county; and in some of the counties they are still constituted in that manner, the legislature commonly retaining the old mode of appointment, or directing an election by the people, as the citizens of any particular county may prefer. But, however chosen, their powers and duties depend upon the will of the legislature, and are modified and changed, and the manner of their appointment regulated at the pleasure of the state. And if this money had been received from the railroad company, the commissioners, in their corporate capacity, would not have been entitled to it, and could neither have received nor disbursed it, nor have directed the uses to which it should be applied, unless the state had seen fit to enlarge their powers and commit the money to their care. If it was applied to the use of the county, it did not by any means follow that it was to pass through their hands, and the mode of application would have depended altogether upon the will of the state. This corporation, therefore, certainly had no private corporate interest in the money, and indeed the suit is not entered for their use, but for the use of the county. The claim for the county is equally untenable with that of the commissioners. The several counties are nothing more than certain portions of territory into which the state is divided for the more convenient exercise of the powers of government. They form together one political body in which the sovereignty resides. And in passing the law of 1835, the people of Washington county did not and could not act as a community having separate and distinct interests of their own, but as a portion of the sovereignty; their delegates to the General Assembly acting in conjunction with the delegates from every other part of the state, and legislating for public and state purposes, and the validity of the law did not depend upon their assent to its provisions, as it would have been equally obligatory upon them, if every one of their delegates had voted against it, provided it was passed by a constitutional majority of the General Assembly. And whether the money was due by contract or otherwise, it must, if received and applied to the use of the county, have yet been received and applied by the state to public purposes in the county. For the county has no separate and corporate organization by which it could receive the money or designate agents to receive it or give an acquittance to the railroad company, or determine upon the uses to which it should be appropriated. We have already seen that the corporation of commissioners of the county had no such power; and certainly no citizen of the county had any private and individual property in it. It must have rested with the state so to dispose of it as to promote the general interest of the whole community, by the advantages it bestowed upon this particular portion of it.

Indeed, if this money is to be considered as due, either to the commissioners or to the county, by contract with the railroad company, so that it may be recovered in this suit, in opposition to the will and policy of the state, it would follow necessarily that it might have been released by the party entitled, even if the state had desired to enforce it. And if the state had adhered to the policy of the act in question, and supposed it to be for the public interest to insist that the road should pass along the line prescribed in that law, or the company be compelled to pay the million of dollars, according to the construction now contended for, the commissioners or the county might have counteracted the wishes of the state, and, by releasing the company from the obligation to pay this money, allowed them to locate the road upon any other line. And if the construction of the plaintiff in error be right, the legislature of Maryland, in a case where the whole people of the state had become so deeply concerned by the large amount subscribed to the capital stock of the road, that its success or failure

must seriously affect the interests of every part of the state; and where the improvement was regarded as of the highest importance to its general commercial prosperity; it deliberately deprived itself of the power of exercising any future control over it, and left it to a single county or county corporation to decide upon the course of the road, and either to insist on the line prescribed by the legislature, or to release the company from the obligation to pursue it, without regard to the wishes or interest of the rest of the state. Whether the million of dollars was reserved by contract, or inflicted as a penalty, such a construction of the law cannot be maintained.

But we think it very clear that this was a penalty, to be inflicted if the railroad company did not follow the line pointed out in the law. It is true, that the act of 1835, which changed in some important particulars the obligations imposed by the original charter, would not have been binding on the company without its consent; and the 1st section, therefore, contains a provision requiring the consent of the company in order to give it validity. And when the company assented to the proposed alterations in their charter, and agreed to accept the law, it undoubtedly became a contract between it and the state; but it was a contract in no other sense than every charter, whether original or supplementary, is a contract, where rights of private property are acquired under it. Yet, although this supplementary charter was a contract in this sense of the term, it does not by any means follow that the legislature might not, in the charter, impose duties and obligations upon the company, and inflict penalties and forfeitures as a punishment for its disobedience, which might be enforced against it in the form of criminal proceedings, and as the punishment of an offence against the law. Such penal provisions are to be found in many charters, and we are not aware of any case in which they have been held to be mere matters of contract. And in the case before the court, the language of the law requiring the company to locate the road so as to pass through the places therein mentioned, is certainly not the language of contract, but is evidently mandatory, and in the exercise of legislative power; and it is made the duty of the company, in case they assent to the provisions of that law, to pass through Cumberland, Hagerstown, and Boonsborough; and if they fail to do so, the fine of \$1,000,000 is imposed as a punishment for the offence. And a provision, as in this case, that the party shall forfeit a particular sum, in case he does not perform an act required by law, has always, in the construction of statutes, been regarded not as a contract with the delinquent party, but as the punishment for an offence. Undoubtedly, in the case of individuals, the word forfeit is construed to be the language of contract, because contract is the only mode in which one person can become liable to pay a penalty to another for a breach of duty, or the failure to perform an obligation. In legislative proceedings, however, the construction is otherwise, and a forfeiture is always to be regarded as a punishment inflicted for a violation of some duty enjoined upon the party by law; and such, very clearly, is the meaning of the word in the act in question.

In this aspect of the case, and upon this construction of the act of Assembly, we do not understand that the right of the state to release it is disputed. Certainly the power to do so is too well settled to admit of controversy. The repeal of the law imposing the penalty, is of itself a remission. 1 Cranch, 104; 5 Id., 281; 6 Id., 203, 329. And in the case of the *United States v. Morris*, 10 Wheat., 287, this court held, that Congress had clearly the power to authorize the Secretary of the Treasury to remit any penalty or forfeiture incurred by the breach of the revenue laws, either before or after judgment; and if remitted before the money was actually paid, it embraced the shares given by law in such cases to the officers of the customs, as well as the share of the United States. The right to remit a penalty like this stands upon the same principles.

We are, therefore, of opinion, that the law of 1840, hereinbefore mentioned, did not impair the obligation of a contract, and that the judgment of the Court of Appeals of Maryland must be

affirmed.