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viously sanctioned in numerous cases,* and was expressly laid down by the chancellor in the case of *Kelley v. Israel*,† which is one of the latest cases upon the subject.

But the record shows, in this case, that the bid of the appellant was never accepted, and that the adjournments were made by the direction of the solicitors of the complainants to enable the respondents to pay the mortgage debt and save the mortgaged property from sacrifice. Negotiations to that effect were opened between the parties to the suit on the day the first bid of the appellant was made, and they were completed within two days, so that all concerned knew, or might have known, that a sale had become unnecessary. Subsequent postponement took place to enable the respondents to carry the arrangements into effect. They paid the debt, and the complainants executed a discharge for the same. Justice has been done, and all are satisfied except the appellant, and he has no just ground of complaint.

DECREE AFFIRMED WITH COSTS.

TURNPIKE COMPANY *v.* THE STATE.

1. If a State grant no exclusive privileges to one company which it has incorporated, it impairs no contract by incorporating a second one which itself largely manages and profits by to the injury of the first.
2. In such a case it is no defence to a *scire facias* against the first for non-user or abuser of its franchises, that the State had incorporated the second, was in part managing it, and largely profiting by it; and in consequence of all this, that the revenues of the first company were so far lessened that it could observe its charter no better than it did.
3. If a State injure one incorporated company by the unlawful grant of a charter to another and rival one, the remedy of the first company is by proper proceedings to restrain the second from getting into operation, and not by neglecting its own duties.

IN 1812 the State of Maryland incorporated a company to

* *Tinkham v. Purdy*, 5 Johnson, 345; *McDonald v. Neilson*, 2 Id. 190; *Keightly v. Birch*, 3 Campbell, 321; *Leader v. Denney*, 1 Bosanquet & Puller, 359.

† 11 Paige, 154.

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build a *turnpike* road between Baltimore and Washington. The company by its charter had power to take tolls and was bound to erect bridges and keep them and the road in good repair. *In regard to its privileges generally, there was nothing special about it.*

In 1831 the same State granted a charter to a railroad company to make a railroad between the same cities, the line of which ran near to and parallel with the track of the turnpike.

The turnpike company not having kept its road and bridges in repair, while it *yet demanded tolls*, the legislature of the State in 1860 directed their attorney-general to issue a *scire facias* against it, to forfeit its charter; which writ was issued accordingly.

It was set up as a defence to the *sci. fa.* that the State had, in disregard of the Constitution of the United States, passed laws "impairing the obligation of contracts," in that with the grant of a charter to the turnpike company in force, it had incorporated a company to make a railroad right alongside of it, which second road had every year been transporting great numbers of persons and large amounts of property that but for *it* would have been carried on the turnpike, and had now by statute directed the *sci. fa.*; that the turnpike company being by the charter to the railroad corporation deprived of much of the income which but for this they would have received, it had become "impracticable for them, with all the income that they received from such persons and property as pass upon the turnpike road, to maintain and keep it in any better order and repair than it was kept in."

The turnpike company further set up that the railroad had been made not only under the authority of the State but to a considerable extent with the State's own money; the State, in addition, managing it largely, and getting from it one-fifth of the whole amount received for the transportation of passengers.

The Court of Appeals of Maryland, where the case finally got, considered the defence insufficient, and gave judgment

Argument for the plaintiffs in error.

of ouster of the franchise. The charter of the turnpike company was thus annulled. The case was now here on error.*

Messrs. Dobbin and Robinson, for the turnpike company, plaintiffs in error, contended that the charter of 1812 made a contract, persons having parted with their property on the faith of it;† that under this charter the turnpike company had a right to take and enjoy the tolls and other privileges and immunities granted by it, and for which the original cost of constructing the road and the obligation, by continuing outlays to keep it in order, was a consideration. That the State, by authorizing a rival road, had violated that contract; and by diverting and carrying away the tolls from the turnpike company—as owing to the new road being a railroad and having greater facilities for carrying passengers and freight it did—it had, *itself*, disabled the turnpike company from keeping its road in repair. That the State having thus prevented the turnpike company from performing its duty, and still furthering a prevention—being itself a gainer moreover by what it did and was still doing—it could not take advantage of the resulting incapacity of the turnpike company to keep its road in order.

The case was argued with profound reference to the books; and the learned counsel cited very numerous authorities, beginning with the Year Books, Keilwey, Sir Francis Moore, Bulstrode, Godbolt, and other early reporters,‡ and coming down to the latest of the modern,§ to show a universal con-

* Under the 25th section, of course, of the Judiciary Act of 1789. See *supra*, p. 57.

† *Hathorne v. Calef*, 2 Wallace, 21; approving *Curran v. State of Arkansas*, 15 Howard, 313.

‡ Among the early cases were: *Joan, Queen of England, widow of Henry IV, v. Lyle*, 9 Henry VI, Year Book of Henry VI, folio 44; *Placitum 25*, another case in the Year Book of 6 Edward IV, folio 1-2; *Placitum 4*: both explained in *West v. Blakeway*, 2 Manning & Granger, 745, notes *c* and *b*; *Keilwey*, 34 *b*, a case in 13 Henry VII; *Bedels' Case*, 2 Leonard, 115; *Carrell v. Read*, Owen, 65; *S. C., Moore*, 402; *Slade v. Thompson*, *Cro. Jac.* 374, *S. C., Rolle*, 136; *City of London v. Greyme*, *Cro. Jac.* 181; *S. C., Moore*, 877; *Quick v. Ludborrow*, 3 *Bulstrode*, 30.

§ Among the later cases, *People v. Bartlett*, 3 *Hill*, 570; *Cort v. Amber-*

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urrence of the courts on the subject; and that it was an ancient, settled, and most just rule of law and morals, that a covenantor was discharged from his obligation when the party for whose benefit it is made has performed an act by which such covenantor is incapacitated to observe his contract; and that where forfeiture was the penalty provided for breach, the other party was not permitted to take advantage of it.

Messrs. Randall and Poe, contra, citing among other cases, Charles River Bridge v. Warren Bridge; Richmond Railroad Co. v. Louisa Railroad Co.;† Washington and Baltimore Turnpike Company v. Baltimore and Ohio Railroad Co.‡*

Mr. Justice NELSON delivered the opinion of the court.

The difficulty of the argument in behalf of the turnpike company, and which lies at the foundation of the defence is, that there is no contract in the charter of the turnpike company that prohibited the legislature from authorizing the construction of the rival railroad. No exclusive privileges had been conferred upon it, either in express terms, or by necessary implication; and hence whatever may have been the general injurious effects and consequences to the company, from the construction and operation of the rival road, they are simply misfortunes which may excite our sympathies, but are not the subject of legal redress.

It might have been very proper for the State, when chartering the railroad, to have provided for compensation for the prospective loss to the turnpike company, as has frequently been done in other States, under similar circumstances; but this was a question resting entirely with the legislature of the State, and their action is conclusive on the subject.

There is another answer to the defence in this case, even assuming that the charter of the turnpike company contained exclusive privileges that forbade the legislature of the State incorporating the railroad company.

gate Railway, 17 Adolphus & Ellis, New Series (79 English Common Law), 146; Pole *v.* Cetchovitch, 9 Common Bench, New Series (99 E. C. L.), 438.

* 11 Peters, 536-553. † 13 Howard, 81. ‡ 10 Gill & Johnson, 392.

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The remedy was not in neglecting to repair the road, and at the same time collect the tolls. It was in restraining, by the proper proceedings, the railroad company from constructing their road. The breach of the contract on the part of the State furnished no excuse for the turnpike company in disregarding their part of it which was a burden, to wit, the repairs, while, at the same time, insisting upon the observance of the part beneficial, to wit, the collection of the tolls.

JUDGMENT AFFIRMED.

[See *supra*, p. 51; The Binghamton Bridge.]

THE CORNELIUS.

1. Presumption of an intent to run a blockade by a vessel bound apparently to a lawful port, may be inferred from a combination of circumstances, as *ex. gr.* the suspicious character of the supercargo; the suspicious character of the master, left unexplained, though the case was open for further proof; the fact that the vessel, on her outward voyage, was in the neighborhood of the blockaded place, and within the line of the blockading vessels, by *night*, and that her return voyage was apparently timed so as to be there by night again; that the vessel (though in a leaking condition, that condition having been known to the master before he set sail), paid no attention to guns fired to bring her to, but, on the contrary, crowded on more sail and ran for the blockaded shore; and that one witness testified *in preparatorio* that the master, just before the capture, told him that he intended to run the blockade from the first.
2. Although in such cases it is a possible thing that the intention of the master may have been innocent, the court is under the necessity of acting on the presumption which arises from such conduct, and of inferring a criminal intent.

THE schooner Cornelius and her cargo were captured by the government vessel Restless, and condemned as prize of war by the District Court for the Eastern District of Pennsylvania for an attempt to run the blockade established by