

Statement of the case.

MARYLAND *v.* RAILROAD COMPANY.

1. Although since the legal tender acts, an undertaking to pay in gold may be *implied*, and be as obligatory as if made in express words, yet the implication must be found in the language of the contract, and cannot be gathered from the mere *expectations* of the parties.
2. A reference to what are called "surrounding circumstances," is allowed for the purpose of ascertaining the subject-matter of a contract, or for an explanation of the terms used, not for the purpose of adding a new and distinct undertaking.
3. An implication that a railroad company having an unfinished road in which the State was largely interested should pay gold instead of currency to the State which has lent to the company sterling bonds of the State, of which the interest was payable abroad, and, of course, in coin, is not inferable from the fact that unless the contract between the company and the State be so interpreted, the State has not exacted from the company all that was necessary to its own complete indemnification; this being especially true in the case of a contract, where, in other parts, a complete indemnification was specifically and carefully provided for, and in one where at the time it was made there was no difference, existing or anticipated, in the value of currency and coin, and the difference having been brought about by events supervening long afterwards.

ERROR to the Supreme Court of Maryland; the case being thus:

In the year 1826 the State of Maryland incorporated the company now well known as the Baltimore and Ohio Railroad Company, for the purpose of making a railroad from Baltimore to the Ohio River. The capital was \$3,000,000; and the State took one-sixth of it, or \$500,000. The company was, however, not able to make the road with the \$3,000,000 capital thus originally subscribed; and in 1836 the legislature of the State passed an act "for the promotion of internal improvements, &c.," meant to assist the completion of the road.

By the first section the State authorized its treasurer to subscribe \$3,000,000, in instalments, to the capital of the road, on certain conditions.

Its ninth section was as follows:

"Before any subscriptions shall be made by virtue of this act,

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the stockholders of the said company shall stipulate, agree, and bind the company . . . to guarantee to the State of Maryland, *after* the expiration of three years from the payment by the State of each of the instalments on the stock hereby authorized, the payment from that time, *out of the profits of the work*, of six per centum per annum, payable *semi-annually*, on the amount of money which shall be paid to the said company by virtue of this act, *until* the clear annual profits of the said railroad shall be more than sufficient to discharge the *interest* which it shall be liable so to pay to the State of Maryland, and shall be adequate to a dividend of six per centum per annum among its stockholders, and *thereafter* the State shall, in reference to the stock so subscribed for, and on so much thereof as the State may hold, be entitled to have and receive a *perpetual dividend of six per centum per annum, out of the profits of the work* as declared from time to time, and no more, and all and so much of such annual profits as shall exceed six per centum, shall be distributed to the other stockholders according to their several interest in said company."

The guarantee required by this section was given by the company, and accepted by the State.

The act further provided for the appointment of commissioners to proceed to Europe to negotiate loans, and for the issue of the bonds to raise money on behalf of the State to satisfy the purposes of the act. The bonds were to be issued, redeemable, at the pleasure of the State, after the expiration of *fifty years from their date*, and to bear interest at the rate of six per centum per annum, payable *quarterly*, *either at the loan office in the city of Baltimore, or at some place in Europe*, as might be arranged by contract. They were not, however, to be sold at any rate which would yield to the State less than twenty per cent. net, above par. Of this premium, whatever part of it was not required to pay the interest on the loan for three years after its negotiation, was, with its increment, directed to be invested, in order to constitute a sinking fund for the ultimate redemption of the debt incurred.

The bonds were issued by the State, but the commissioner sent to Europe was unable to negotiate them on the terms

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prescribed by the act. The State then sold the bonds to the company itself; but rated, as they had been by the State, at \$120, they proved to be unsalable by the company.

In this state of things the State passed, in 1838, an act providing that upon the surrender of the bonds, the commissioner of loans should deliver to the company "*an amount of sterling bonds or certificates of stock to be redeemable in London, at the pleasure of the State, at any time after fifty years from the date thereof, and to bear an interest of five per cent. per annum, payable semi-annually in London, on the 1st day of January and July in each and every year, equivalent to the amount of bonds delivered up by the company.*" The act continued :

"And in thus changing the bonds already issued under the act aforesaid for the bonds hereby created, the said commissioner of loans shall give to the said company in the proportion of \$3200 of the bonds or certificates of stock hereby created for every \$3000 of the bonds so to be delivered up.

"*Provided*, however, that the said company shall secure by mortgage on all the property and revenues of said company to the satisfaction of the treasurer, the payment of the interest at the rate of five per centum per annum on the stock created by this act, semi-annually, at least ninety days before the first day of January and July, in every year, **FOR THE TERM OF THREE YEARS** from the date of the bonds, *together with the cost of transmitting said interest to London to be there paid, and also the difference in the exchange of currency between London and the city of Baltimore.*"

The bonds that were issued to the company by the State, under this act of 1838, owing to difficulties in disposing of them to advantage, were not appropriated by the company until about the year 1849, when they were placed on the market in Europe, and sold. As they were disposed of, the railroad company paid the interest on them as it accrued, and all costs and difference in exchange, for the term of three years; and after the expiration of that term it continued to pay such interest, cost, and exchange, by applying directly the State's guaranteed dividend of six per cent. on

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the stock subscribed under the act of 1836, instead of paying it over to the treasury. The company rendered no account, but treated the six per cent. dividend as equivalent to the five per cent. sterling interest, with the costs and exchange; and this continued to be its course of conduct to the 1st of July, 1865, from which time it ceased to apply the six per cent. dividend as formerly, but paid it directly into the State treasury in currency notes. The State had been, therefore, required, from the 1st of July, 1865, to the present time to provide for the payment of the sterling interest in London, together with all costs and difference in exchange; which, of course, had to be adjusted to a gold standard, while it had been in the receipt of the six per cent. dividend in currency.

At the time that the company accepted the provisions of the act, June 4th, 1836, and indeed up to the year 1861, the matter was not one of practical importance. Coin (or paper convertible on demand into it) was the currency of the country. The law recognized no tender as valid but one in coin; and in the case of this contract, as in all others made at the time that it was (A.D. 1836), the expectation of the parties, it was not denied, was that the contract would be discharged in coin.

But in the year 1861, already named, a general suspension of payments in coin took place throughout the country, and in 1862 and 1863, Congress authorized the issue of many millions of notes of the United States, which by the acts authorizing them were declared to be a tender in payment of debts. This act, this court held to be constitutional;* but the court also decided that a debtor could pay his debt with legal tender notes only when his contract did not specify that payment should be made with coin;† in other words that a debtor might have defined the medium of payment as well as have promised to pay. So that after the passage of these acts there were two kinds of money or rep-

* Legal Tender Cases, 12 Wallace, 457.

† Trebilcock *v.* Wilson, 12 Wallace, 687; Bronson *v.* Rodes, 7 Id. 229.

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resentatives of values with which debts might be paid, coin and legal tender notes; an ordinary debtor being at liberty to pay in currency, though a debtor who had undertaken to discharge his obligation by payment in gold or silver would be held to his contract as specifically made.

Immediately on the issue of the sort of notes above mentioned they fell in value as compared with gold, and at many times since had been greatly below it. At one time during the summer of 1864 it required \$285 in them to buy \$100 in gold. The difference thus became vast, and it so happened that the payment, in gold, of five per cent., was the payment of a much greater sum than would have been the payment of six per cent. in the "legal tender notes" of the United States; otherwise called "currency." And as the State had paid the five per cent. interest on its sterling bonds in gold—the only way in which it could pay interest abroad—it now, in the suit below, asserted that it was entitled to be fully indemnified by the company, and to be repaid in gold and not in currency. This the company denied, and the question therefore was whether by the contract between the parties, the State was entitled to demand in gold what was payable to her, or whether it might be satisfied in legal tender notes. The court below was of the opinion that it might be satisfied in legal tender notes, and gave judgment against the State. To that judgment the present writ was taken.

Messrs. S. T. Wallis, I. N. Steele, and P. F. Thomas, for the plaintiff in error:

A contract to pay in gold is here implied, and the case falls within *Trebilcock v. Wilson*,* which obliges the debtor in such case to pay in gold.

The State had subscribed \$500,000 to the road, which was yet unfinished, and desired to have the road finished; but it desired also not to really increase its own debt, and not to have to raise interest by taxation. If the road could only be finished, it could pay the interest, and, when it came

* 12 Wallace, 687.

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due, the principal of what the State might bind itself in form to pay. The proper interpretation of the acts of the legislature *construed together and in the light of surrounding circumstances*, an interpretation which must have been given at the time by both parties, therefore is:

1st. That in practical effect the State only lent its *credit* to the company to enable the latter to borrow money in Europe; the cost of the transaction to be altogether borne by the railroad company, and the State being the mere conduit through which that cost was to be conveyed from the company to the European lender.

2d. That the transaction, though in the form of stock, paying a fixed and preferred dividend, was, in effect, a loan bearing the legal rate of interest of the State, six per cent.; the form of stock being adopted to make the loan irredeemable by the company at any fixed period, but at the same time placing in the hands of the State a source from which it could at any time after the success of the work became assured, realize the means of paying its own bonds in Europe, and terminate the transaction.

3d. That this interest was payable in gold, not only because at the date of the transaction all legal demands were solvable in gold only, but because, from the nature of the transaction, gold only must have been in the contemplation of the parties to it, as gold was the only medium within the fixed rate of the contract which would keep the State harmless.

That this was all so, stands to reason. The State was bound to protect her own interest and that of her people, and it must be inferred that she did not contract in a way so loose as to expose herself and them to pay \$2.85, and more, when she got but \$1 in return. Undoubtedly both parties thought that what the company agreed to pay would be enough to pay the interest on the State bonds; which on the construction given to the contract in the court below it never could do.

The case of *Lane County v. Oregon*,* involved the proper

* 7 Wallace, 71.

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construction of the statutes of the State of Oregon, and this court decided that when the statutes of the State required the collecting officer to pay over the taxes to the State treasurer in gold, it was required by legitimate, if not necessary consequence, that the taxes should be collected in gold, though the statute imposing the taxes made no mention of the medium in which they should be payable. We refer to that case as an authority in point upon the implication of an obligation from the nature of the transaction. Now, in the case we are considering, it was well known and understood between the contracting parties that the State was to oblige itself by the tenor of its bonds, negotiable in Europe, to pay the principal and interest of the debt thus contracted in gold, and the only sourcee provided by the same contract for such payment was a stipulated amount to be paid by the company to the State, and intended to be the equivalent of the interest payable by the State. In order to make it equivalent it is necessary to make it payable by the company in gold; and is not the implication as logically necessary in this case as it was in the Oregon case?

Messrs. J. H. B. Latrobe, Reverdy Johnson, and C. J. M. Gwinn, contra.

Mr. Justice STRONG delivered the opinion of the court.

It is not contended in this case that the contract between the parties contains any express undertaking to pay what the company assumed to pay, either in coin or in any specified kind of money, or with anything other than that which might be a legal tender for the payment of debts, when the time for payment should arrive. But the argument on behalf of the State is, that the language used implies an undertaking to pay in coin, and that the case is therefore within the principle laid down in *Trebilcock v. Wilson*. Conceding that such an undertaking may be implied, when there is no express promise to pay in gold, still the implication must be found in the language of the contract. It is not to be gathered from the presumed or the real expectations of the par-

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ties. As was said in *Knox v. Lee*,* “the expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined money, but neither the expectation of one party nor the anticipation of the other constitutes the obligation of the contract. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it. Were it not so, the expectation of results would always be equivalent to a binding engagement that they should follow.” There is sound reason in what was said by Lord Denman in the Queen’s Bench, in *Aspdin v. Austin*,† which was an action upon a covenant. “Where parties,” said his lordship, “have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications. The presumption is that, having expressed some, they expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument,” said he, “may have contracted on the supposition that the business would in fact be carried on and the service in fact be continued during three years, and yet neither party be willing to bind themselves to that effect; and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have even imperfectly expressed themselves, and another to add to the instruments all such covenants as upon a full consideration the court may deem fitting for completing the intention of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligation by which the parties have bound themselves, and is of course quite unauthorized, as well as liable to great practical injustice in the application.” Applying these principles, and looking to the contract, we discover no basis for such an implication as the plaintiff in error asserts.

We are asked to consider the circumstances which at-

* One of the Legal Tender Cases, 12 Wallace, 457.

† 5 Adolphus & Ellis (new series), 671.

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tended the legislative enactments, and induced them. The State was then in part the owner of an unfinished railroad. It was important to the interests of the people of the State, as well as to the State as a stockholder, that the road should be finished, and to accomplish its completion pecuniary assistance by the State was needed. For this purpose the State lent her credit. This was the object she had primarily in view. It is said she had also in view her own protection and that of her citizens against loss in so doing, and that it must be presumed the legislature discharged its duty, and made effectual provision for such protection. This is assuming what cannot be conceded. It assumes that it was the duty of the legislature to exact from the company all that could be exacted, and this though the company was in great need of assistance, and though it was the interest of the State that such assistance should be furnished. But if the assumption might be made, it would still be inadmissible to deduce an implication of a promise, not from the contract itself, but from the extraneous fact that such a promise ought to have been exacted. Ordinarily a reference to what are called "surrounding circumstances" is allowed for the purpose of ascertaining the subject-matter of a contract, or for an explanation of the terms used, not for the purpose of adding a new and distinct undertaking.

The plaintiff in error further insists that the contract, as exhibited in the acts of the legislature, amounts to an engagement on the part of the company to indemnify the State for the payments she was under obligation to make in discharge of the interest upon her bonds, by means of which the money was raised to pay her subscription to the company's stock; and as that interest could only be discharged by gold, it is argued the company must be held to have undertaken to pay in gold, since payment by legal tender notes would not amount to indemnity. But we see nothing in the contract which justifies its being construed as a contract of indemnity. It may be conceded, and it probably was the fact, that both parties thought what the company undertook to pay would suffice to pay the interest upon the State bonds

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from time to time as it should fall due. But nothing in the statutes, read as a whole or read with reference to the required guarantee, or read in the light of the circumstances then existing, exhibits any undertaking that the company's stipulated payments should suffice to discharge the liabilities of the State. On the contrary there is much in the statutes to repel any possible implication of an engagement to indemnify, and to make it apparent that such an obligation was not intended to be imposed or assumed. As has been noticed, the company was required by the act of 1836 to pay, after the first three years, six per cent. interest out of the profits of the work, and pay it *semi-annually*, until the net profits should be adequate to pay a six per cent. dividend, and thereafter pay a perpetual dividend of six per cent *annually*. But the bonds first authorized to be issued by the State to pay her subscription were bonds bearing six per cent. interest payable *quarterly*, and running not less than fifty years. The commissioners for their sale were also authorized to make the interest on the bonds payable at the loan office of the State, in the city of Baltimore, or at some place or places in Europe, should they find it advantageous so to contract. It is manifest, therefore, that if the bonds had been made payable in Baltimore, principal and interest, the semi-annual payment required of the company would not have met the obligations of the State, which were to pay quarterly her interest. And if the bonds had been made payable in Europe, still less would the six per cent. due from the company, though paid in gold, have enabled the State to pay her interest abroad. In addition she must have paid exchange and the cost of transmission. This seems to indicate clearly that the act of 1836 not only was not, but that it was not intended to create an obligation to indemnify the State. And this is not all. The bonds first issued were exchanged under the act of 1839, and sterling bonds bearing five per cent. interest payable semi-annually in London were given to the company in their place. This act required the company to secure the payment of the interest at the rate of five per centum per annum on the stock (the sterling

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bonds) created by the act, semi-annually, at least ninety days before the first day of January and July in every year for the term of three years from the date of the bonds or certificates of stock, together with the cost of transmitting the interest to London to be there paid, and also the difference in exchange of currency between London and Baltimore. This was a stipulation for indemnity. It covered all that the State was required to pay as interest on her sterling bonds. But it was expressly limited to the interest for the first three years, and hence it excluded any implication of an obligation to indemnify against all liability of the State to pay the subsequently accruing interest. Unless this is true the limitation to three years is unmeaning. After the expiration of that period, nothing more was required than the semi-annual payment of six per cent. as stipulated by the act of 1836.

It is, we think, also a matter of some significance that by the contract the payments to the State were required to be made at first out of the profits, the gross receipts of the company. No distinction was made between the kind of money the company might be compelled to receive and that required to be paid to the State. Nor was any distinction attempted to be made between the kind of money with which the dividends to the State and other stockholders could be paid.

For these reasons, we think, the contract between the parties exhibits no just ground for an implication that the company assumed an obligation to pay its dues to the State in gold, or in any other manner than in money generally, and the fact that the company did pay the State's interest in sterling funds in London down to 1865, cannot change the construction of the contract.

We do not perceive that the case of *Lane County v. Oregon* has any bearing upon the present controversy.

JUDGMENT AFFIRMED.

Dissenting, Justices CLIFFORD and FIELD.