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N. J. Court of Errors & Appeals.

THE NATIONAL STATE BANK OF NEWARK.
Plaintiff in Error,
v
THE TRUSTEES OF THE FIRST PRESBYTERIAN CHURCH IN NEWARK,
Defendants in Error,
} *In Error.*

BRIEF OF GEORGE W. HUBBELL, Attorney and Counsel for Plaintiff in Error.

Second Plea.

The second plea is based upon the legal proposition, that the owner of a building with windows overlooking an adjoining vacant lot of another owner, has the legal right to enjoy light entering his windows over said lot, so long as the owner thereof does not obstruct the light. It is an enjoyment incident to the situation and condition of the two tracts of land, and continues so long as the conditions remain unchanged. For this enjoyment of light the owner of the vacant lot can claim no compensation, nor does he suffer any injury; for no easement in light and air can be gained by adverse user. *Hayden* v. *Dutcher*, 31 N. J. Eq. 317.

What, therefore, is the consideration for the agreement set forth in the declaration?

The defendants in error had, it must be inferred, extended their lecture-room building eight feet to the west when the agreement was made, and the

condition of the plaintiff's and defendants' properties remained unchanged after the agreement was executed. If, then, the plaintiff in error had a legal right to enjoy the light entering its windows over the land of the defendants in error, so long as the said light was unobstructed, without paying or rendering any compensation therefor, how can it be said that the refraining from obstructing said light furnishes any consideration for the agreement? This refraining is simply allowing the conditions to remain unchanged ; in other words, the plaintiff in error agreed to pay seven hundred dollars ($700) per year for the privilege which it had a perfect right to enjoy for nothing, on precisely the same conditions contained in the agreement.

The defendants in error did not agree, for a single day, to refrain from extending their lecture-room building, or obstructing the light of plaintiff's windows. They did not restrict themselves in any way, and did not even sign the agreement ; while, on the other hand, the plaintiff acquired nothing which it did not have before. *Conover* v. *Stillwell*, 5 Vr. 54.

Neither of the legal requirements of a consideration are present. This is mere forbearance. Mere actual forbearance, without the promise to give it, is not a consideration.

Manter v. *Churchill*, 127 Mass. 31.
Mecorney v. *Stanley*, 5 Cush. 85.
Robinson v. *Gould*, 11 Cush. 55.
Boyd v. *Frieze*, 5 Gray, 553.
Bishop on Contracts, Sec. 63.

The engagement to forbear must grant a substantial extension.

King v. *Upton*, 4 Me. 387.
Elting v. *Vandelyn*, 4 Johns. 237.
Rood v. *Jones*, 1 Douglass, (Mich.) 188.
Giles v. *Ackles*, 9 Pa. St. 147.
McKling v. *Wilson*, 9 Pa. St. 183.
Knapp v. *Mills*, 20 Texas, 123.

And the forbearance must have been induced by the promise. If no term is fixed the forbearance must be perpetual.

Hamaker v. *Eberly*, 2 Binn. 506; 4 A. M. Dec. 447.

Bishop on Contracts, Sec. 63.

This case is clearly distinguishable from that class of cases which hold that subsequent performances of services or acts—although the party was under no obligation or promise to perform them—form a good consideration. This is the principle in support of which the defendants' counsel has cited *Addison on Contracts*, and *Lanning* v. *Cole*, 3 G. R. Chan. 229. This doctrine is amply sustained by the authorities quoted, but it is not brought in question in this case.

These cases, cited by the defendants in error, deal with the effect of the performance of some act, the payment of money, or something of value, or the rendering of services; thus, either conferring a benefit upon the party offering the inducement, or an injury to the party performing the act. None of the cases cited by the defendants' counsel hold that the mere forbearance to exercise a legal right without any promise to forbear forms a good consideration.

The law of New Jersey is to the effect that there must be an agreement to forbear in order to form a good consideration. In the case *Chaddock* v. *Vanness*, 6 Vroom, 517, decided by the Court of Errors, on the last page, Justice DEPUE, who rendered the opinion of the Court, said: "Forbearance is a sufficient consideration to support a contract. In *Ullen* v. *Kittridge*, (7 Mass. 233); *Patch* v. *Washburn*, (16 Gray, 82); *Watkins* v. *Kirkpatrick*, (2 Dutcher, 84,) the consideration was forbearance extending the credit on a precedent debt of the principal debtor." An examination of the case of

Chaddock v. *Vanness* will show that a three months' note was given to pay the debt then due, and the endorser of the note was held, because by taking the note the creditor agreed to forbear the collection of his debt for three months. In the case *Ulen* v. *Kittridge*, which was quoted by Justice DEPUE, there was an agreement to forbear the collection of a note until Ulen returned, who was then at sea. In the case *Patch* v. *Washburn* there was a promise and agreement to forbear in the acceptance of a note due at a future date, endorsed by the defendant as surety for the payment of a debt then due. In the case *Watkins* v. *Kirkpatrick*, there was a promise to forbear in the acceptance of a two months' note indorsed by the defendant and given in payment of a lumber bill then due. It thus appears that, according to the laws of New Jersey, a promise to forbear is essential to form a consideration.

It is respectfully submitted that the Second Plea is good, as the agreement shows no consideration. The agreement to pay seven hundred dollars ($700) amounts to nothing more than an inducement to the defendants in error not to obstruct the light, but gives them no right to collect the seven hundred dollars ($700.)

THIRD PLEA.

If we assume that the agreement is valid, there being no term fixed in the instrument, the question arises, "Is the agreement perpetual or is it terminable?" The agreement deals with an interest in land which, although an incorporeal hereditament, is nevertheless the subject matter of a lease, and of contracts having more or less the character of a

lease of real property. (*Washburn on Real Property*, 5th Ed. page 493.) Suppose the act had been one in reference to land (owned by the church) which happened to be in possession of the bank, and had provided that so long as the church refrained from interfering with such possession, the bank would pay the quarterly installments stipulated for by the agreement; could it be contended that the bank would be bound by this to pay perpetually whether it gave up the possession or not? And would it not have the right, on reasonable notice, to terminate the tenancy and stop the payments?

FOURTH PLEA.

This plea is based upon the proposition, that the agreement being without consideration and void, it was *ultra vires* of the plaintiff in error to agree to pay, and did pay the sum of seven hundred dollars ($700,) to the defendants in error as a gift or bribe to induce them not build upon their land.

FIFTH PLEA.

The plaintiff in error was incorporated as a National bank August 1st, 1865, and by its charter was to continue for twenty years. When, therefore, this agreement was made, it had already enjoyed seven years of its corporate existence, and had thirteen years still to live. It must be admitted, therefore, that the parties contracted with reference to the corporate life of the plaintiff in error, and the agreement must be construed as a contract for

thirteen years expiring, and expired August 1st, 1885. Since that time, though payments have been made, they have been made under a misconception and are purely voluntary. They cannot, in the nature of things, create a new contract, much less a perpetual one.

The cases cited by the counsel for defendants in error consider the question whether a grantee is to continue after a corporation's existence has been extended; but none of the cases cited raise the precise point as to the effect of a positive limitation of the corporate existence of a corporation upon a contract where no term or time, during which it shall continue, has been expressed. In such a case, I respectfully submit that the length of time which a corporation through its charter has yet to live, must be considered the term of the contract.

Respectfully submitted,

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Court of Errors and Appeals.

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THE TRUSTEES OF THE FIRST PRESBYTERIAN CHURCH IN NEWARK,
Defendant in Error.

On Contract.

POINTS FOR PLAINTIFF IN ERROR.

On June 12, 1872, the defendant bank delivered to the plaintiffs, the Trustees of the First Presbyterian Church, an agreement under its corporate seal, by which, in consideration of one dollar, it agreed "That so long as they (the trustees) shall refrain from extending their present lecture-room building westward more than eight feet and from erecting any building on their lot adjoining * * * the bank and from obstructing the light * * * we (the bank) will pay to them (the trustees) the yearly sum of $700, in equal quarter-yearly payments."

The agreement, if for want of a better designation it may be called such, is executed by the bank only, and does not bind or purport to bind the trustees to do or to refrain from doing anything whatever.

The plaintiff has declared on this agreement, and

alleges by way of breach, the non-payment of two quarterly installments of $175 each, which, it says, became due on the first day of April and July, 1892, respectively.

The defendant pleaded, first, *non est factum;* second, that the agreement was without consideration; third, that on September 1, 1891, the bank gave due notice of the termination of the agreement from and after January 1, 1892; fourth, that it was *ultra vires* of the bank to agree to make the payments in question, they being no more than a gift to the church of so much money; fifth, that the bank was organized on August 1, 1865, to continue for twenty years—the extreme limit of its duration under the act of Congress; that it had no power to enter into any continuing agreement by which it became bound to make quarterly payments after August 1, 1885, and that consequently its agreement to do so (if the agreement should be construed as a continuing undertaking, extending beyond the period of twenty years), was *ultra vires* on that ground.

To the last four pleas the plaintiff demurred. The first plea has been withdrawn. The demurrer raises the following questions:

First. Is the agreement supported by any consideration other than that presumed from the presence of a seal.

Second. If not, what is the effect of the act of 1875 (*Rev. St., 387, Sec. 52*), upon the agreement; this act allowing the presumption of sufficient consideration, afforded by the presence of a seal, to be rebutted.

Third. Is the agreement *ultra vires?*

Fourth. Is the agreement unlimited in duration?

First. Is the agreement supported by any consideration in fact? That it is not, is almost too clear for argument. "A promise," says Prof. Parsons (*Parsons on Contracts, Vol. 1, p. 449, 5th ed.*), "is not a good consideration for a promise, unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement." Here there is not even a promise. The trustees agree to nothing; they do not stipulate that they *will* refrain from building either indefinitely or for a given period. The agreement is only that the bank will pay the money installments, *so long as they do refrain*, thus leaving them entirely free to refrain or not, as interest or caprice may dictate. This is substantially admitted by plaintiff's counsel in his brief. He suggests, however, another ground. He says that the trustees have, in fact, refrained; that they have deprived themselves for the time being of the full use of their land and so waived the enjoyment of it. The fallacy of this proposition consists in this: They have not done so *in consequence of any legal undertaking* on their part not to use the land. The abstention has been purely voluntary. Nothing is better settled by the cases than that forbearance without any agreement to forbear is not a good consideration for a promise. (*McCorney v. Stanley, 8 Cush., 85.*) Not only must there be an agreement to forbear, but the agreement must be for a definite or reasonable time. (*Par. Con., Vol. 1, p. 440, title "Forbearance."*) This is elementary law. Here there is no agreement to forbear—not the least vestige of it. On the contrary, the paper is so drawn as to indicate, in the clearest manner possible, that it was the intention of the parties to leave the trustees of the church free to build whenever they saw fit. They might have built the instant after the agreement was delivered and in perfect harmony with its terms. If, therefore, they have in fact

refrained, it is not because of any *agreement* on their part to do so, but because they chose to do so. The opinion delivered in the court below appears to overlook this distinction.

But there is another infirmity in the supposed consideration. To refrain from building, is to let things remain *in statu quo*. Now, could that, of itself, be a consideration? The consideration adequate to support a promise must be either a benefit to the promisor or a detriment to the promisee.

Conover v. Stillwell, 5 Vr., 56.

Indeed, in the final analysis, "Consideration means not so much that one party is profited, as that the other abandons some legal right in the present or limits his legal freedom of action in the future, as an inducement for the act or promise of the first"

Pollock on Contracts, 157, and see *Chicago & G. E. R. R. Co. v. Dane, 43 N. Y., 240.*

Now, it might or might not have been, a detriment to the church to refrain from building. It might have been a positive advantage. We know nothing about this. It certainly will not be presumed as a matter of law, that, if I, being entirely free to do as I choose, allow the house and lot I live in to remain as it is, I am suffering a legal detriment, nor that if my neighbor does the same, he confers upon me a legal benefit.

This is the exact situation of the case in hand. The church suffered no legal detriment by the agreement, for the agreement bound it to nothing. It suffered no detriment after the agreement was made, for it did nothing; it parted with nothing; it simply preserved the *status quo*. On the other hand, the bank got nothing of legal value,

for it acquired no right from the church, either by the agreement or subsequently. How, then, does the inaction of the church itself raise up a legal consideration?

But, suppose it is conceded that the abstention from building constituted a consideration for the payment of the money accruing during the period of abstention; it certainly could not, after that time; as to future payments, it is impossible to regard the agreement in any other light than as an offer. If you will refrain, I will pay. Now an offer may always be withdrawn before actual acceptance. *Parsons Con., Vol. 1, p. 451, title "Consideration," sub title, "A Promise for a Promise,"* for the obvious reason that the other party, not having acted upon it, it has not as yet acquired the binding force of an agreement. *Chicago & G. E. R. R. Co. v. Dane, 43 N. Y., 240.*

Says Pollock, in his work on *Contracts, *175,* "It has been suggested * * * the consideration for a promise may be contingent, that is, it may consist in the doing of something by the promisor which he need not do, unless he chooses, but which being done by him, the contract is complete and the promise binding. But no such doctrine is necessary. If a tradesman agrees to supply, on certain terms, such goods as a customer may order during a future period, the better opinion is *that this is not a promise but an offer.* He cannot sue the customer for not ordering any goods, but if the customer does order any, the condition of the offer is fulfilled, and the offer being thus accepted, there is a complete contract which the seller is bound to perform."

If this is the correct doctrine, then the agreement of the bank is a continuing offer—whether under seal or not is perfectly immaterial. I will pay so long as you refrain—revocable, of course, as to the future, on notice.

In this respect it is like the contract of guaranty, which, says Mr. Parsons (*Par. on Con., Vol. 2, p. 30, title "Of Revocation of Guaranty,"*) "is always revocable at the pleasure of the guarantor by sufficient notice, unless it be made to cover some specific transaction which is not yet exhausted, or unless it be founded upon a continuing consideration, the benefit of which the guarantor cannot or does not renounce," exceptions which are inapplicable to the present case, the quarterly payments being obviously applicable to the quarter-yearly periods which they cover, and to nothing else. (See also *Coulthart v. Clementson, 5 Q. B. Div., 46; Offord v. Davies, 12 C. B., N. S., 748.*

No valid reason, I affirm with confidence, can be given why the court should give to this undertaking of the bank, based as it is on no legal consideration whatever, outside of the mere technicality of a seal, any greater force than the contract of a guarantor.

If, then, the agreement ever had any force, it ceased to have it after the notice set up in the third plea took effect.

Second. But it will be said, admitting the agreement to be without consideration in fact, it is *sealed*, and the law will, therefore, conclusively presume it to have been founded on consideration. This, perhaps, would have been so as to *past* abstentions, before the passage of the act of 1875. (*Rev. St., title "Evidence," 387, Sec. 52.*) That act, however, provides "That in every action upon a sealed instrument * * * the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted, as if such instrument was not sealed." It was held in *Aller v. Aller, 11 Vr., 446*, that it is not a good defense to a promise in writing under seal to pay a sum of money for value received, and that it was volun-

tary. The note in question in that case was the note of a natural person, who could elect to contract either under seal or not under seal. As to such a person the reasoning of the court is forcible, but it does not seem applicable to the case of a corporation, which can only contract by seal, if it contracts in person. As to it, there is no necessity for putting upon the language of the act, the very forced construction given to it in the case mentioned. The officers of a corporation have no such moral or legal right, as an individual has, to give money without consideration, and the language of the statute ought not to be distorted from its natural meaning in order to protect them in so doing. (See as to this, *Morawetz on Cor.*, § *340.*)

But, aside from this, the court admits that where the consideration fails, that may be shown, notwithstanding the seal. Here, admitting the legal efficacy of the seal in the first instance, all that can be asserted of the agreement is, as I have already shown, that it is a sealed *offer*—valid in so far as accepted; terminable upon notice. After notice given, the agreement ceased to operate.

Third. The fourth and fifth pleas set up the independent defense of *ultra vires.* In the first place, we say that it was *ultra vires* of the bank to make the agreement in question, because it amounted to nothing more than the gift to plaintiff of a perpetual annuity, and it is not one of the functions of a bank to give money to the support of churches. In the second place, even conceding that it is, the bank could not bind itself to pay this annuity beyond the period of its corporate existence.

There are two cases which seem to me to be directly in point. The first is *Davis v. Old Colony R. R., 131 Mass., 258*—a leading case on the subject of *ultra vires.* It decides that it is beyond the powers of a railroad company or of a company organized for the manufacture and sale

of musical instruments, to guarantee the payment of the expenses of a musical festival, and that no action can be maintained against such corporations upon such guaranty, although it was made with the reasonable belief that the holding of the proposed festival would be of great pecuniary benefit to the corporations by increasing their proper business; and the festival has been held and expense incurred in reliance upon the guaranty.

Tomkinson v. Southeastern Railway Company, 35 Ch. Div., 675, was a very similar case. At a meeting of the stockholders of the railway company a resolution was passed authorizing the directors to subscribe a sum out of the company's funds toward the erection of the Imperial Institute. It was held that the proposed subscription was not prevented from being *ultra vires* by the fact that the establishment of the institute might benefit the company by causing an increase of passenger traffic over their line.

I have already demonstrated that the agreement declared on was in fact without legal consideration. The directors, when they entered into it, no doubt argued thus: If we agree to pay this money, that will be a strong inducement to the church not to build, and so our light will be preserved to us, and the bank will receive a benefit. That was precisely the way in which the directors of the Old Colony Railroad and the Southeastern Railroad Company justified their agreement. They argued if we make the donation it will tend to increase our passenger traffic, and so we will make more money for our stockholders. But the court held that the anticipated benefit did not justify the gift.

The principle of these cases is this: That a company cannot part with its funds, except in the regular course of its business for a consideration germane to its objects,

let the probability of its deriving a benefit from so doing be never so great.

Tomkinson v. Southeastern R. R. Co., a line of cases is alluded to in which it was held that a company might make some kinds of voluntary payments which the courts would not enjoin, *e. g.*, an insurance company might pay policies of insurance not legally enforceable; a manufacturing company might give extra wages to workmen out of undivided profits. But these exceptions to the rule were expressly rested upon the ground that payments like these were matters of universal practice; that they were such as were made by all companies in the regular course of their business, and were among the recognized methods of prosecuting such business with success. But they were said to go to the very verge of the law, and reference was made to *Hutton v. West Cork R. R. Co., 23 Ch. Div., 654*, to show that gratuitous payments made to officers of the company for past and meritorious service, if not voted in the regular prosecution of the ordinary business of the company, and as a method of carrying it on, were not allowed. In the case in hand, it would be absurd to contend that this agreement is to be supported on the doctrine of the exception I have mentioned, viz.: that it was an agreement made every day by other similar institutions, in the ordinary conduct of their business. In this respect, not as much can be said in its favor, as in favor of the agreements I have mentioned, denounced by the Massachusetts and English courts. Of course, had the agreement *bound* the church to refrain from building, a very different question would have been presented, for the bank would have secured a *quid pro quo*.

The court below says that because the plaintiff in error is by act of Congress empowered to provide the real

estate necessary for its accommodation in the transaction of its business, therefore it has the right to contract to secure the free entrance of light into its banking house. This I do not deny, my contention is that it has not so contracted. It has got absolutely nothing. It never had and has not now the *right* to any light whatever. The church may now build upon its grounds and so exclude the light, just as it might have done before the paper was executed.

How careful the New Jersey courts have been to keep corporations within the exact limits of their powers appears from the following cases, which, however, I only cite as illustrations of the general principle involved:

Trenton Mut. L. & Fire Ins. Co. v. McKelway, 1 Beas., 133;

National Trust Co. v. Miller, 6 Stew., 155;

Black v. Del. & Rar. Canal, 9 C. E. Gr., 455;

Elkins v. C. & A. R. R., 9 Stew., 5;

State v. Elizabeth, 4 Dut., 103;

Wilson v. Water Co., 7 Vr., 195;

Morris Canal & Banking Co. v Cleaver, 17 Vr., 467.

But the agreement, if it is to be construed as being a promise to pay the annuity for all time, is *ultra vires* for another reason. By the banking act, the corporate existence of the bank was limited to twenty years from August 1st, 1865 (p. 10 of Case.) The agreement was made in 1872. The act of Congress, authorizing the bank to extend its period of succession, was not passed until 1882 (p. 12). Now, under these circumstances, is it possible to assert that the bank had in the year 1872 the power to contract to pay an annuity after August 1, 1885? The bank could not possibly have performed such an undertaking without disobeying the law of its creation. At the time the agreement was made, the act provided that

at the end of twenty years it *must* terminate its corporate existence; that it must *not* thereafter perform any corporate act except the act of winding itself up. In the face of this absolute prohibition, how can it be argued that it had the power to contract to do a series of acts for an indefinite period after this time. There is a complete incompatibility between its chartered powers and the agreement as construed by the plaintiff, and the agreement is, therefore, so far as it is a promise to pay after the expiration of its charter, *ultra vires* and void.

The cases cited by counsel on page 6 of his brief are beside the mark—they are cases of guaranty by a natural person *to* a bank. There the question was one only of *intention*. It was perfectly competent for a *natural* person to agree in advance that, if the bank were by law allowed to perpetuate its existence, he would stand security for advances to be made by it as so perpetuated. The question was, had he done so, and the court held he had. The question here presented, is one of *power*.

No reported case has gone as far as the court is asked to go in this case.

There is a class of cases in which it is held that when a State bank is reorganized under the act of Congress of 1863 as a National bank, the change is a transition and not a new creation, and that consequently the bank in its new form is liable for debts and obligations contracted by the former organization. *Coffey v. Nat. Bank, 46 Mo., 140; Kelsey v. National Bank of Crawford Co., 69 Pa. State, 426. City Nat. Bank v. Phelps, 86 N. Y., 484.* This must obviously be so if the National bank is, as it is held to be by the Supreme Court of the United States (*Metropolitan Bank v. Claggett, 141 U. S., 520*), no more than a continuation of the State bank under a slightly changed name. So, if a National bank becomes changed

into a State bank (*Evans v. Exchange Bank, 79 Mo., 184*), it is obvious that this class of cases has no application to the precise question at issue in this case.

On very much the same principle it was held that a guaranty given to a State bank would hold good and could be enforced by the bank after it had become changed into a National bank—still on the theory, however, that the corporation remained the same. *City National Bank v. Phelps, 97 N. Y., 44.*

There is another class of cases which goes further, and, as it seems to me, to the extreme verge of the law. It is held in the two other cases cited in the opinion below (*Nat. Exchange Bank v. Gay, 57 Conn, 224; People v. Backus, 117 N. Y., 196*), that the guaranty of individuals to a National bank before it had extended its existence under the act of Congress of 1882, holds good and can be enforced by it after its extension.

In both these cases, however, the guarantors had, by the terms of their contracts, the right to terminate their guaranty on notice. They did not do so. In the Connecticut case the guarantors were the same persons who composed the corporation on whose behalf credit was sought from the bank. These guarantors had the *right* to extend their guaranty as far as they saw fit. The question before the court was whether, giving to the language of their guaranty a reasonable construction, they had in fact intended to extend it beyond the then limit of the bank's charter. The court said they did. Obviously the fact that they had a right by notice to terminate their guaranty at any time was a strong reason why this intention might reasonably be imputed to them, and why not, having given the notice, the court should have held them liable. Yet, notwithstanding this, it seems to be going pretty far to hold that the guarantors

intended that their continuing contract should extend beyond the then life of the bank. With the very strict rule applied by this court to contracts of guaranty, I doubt whether the law would so be held in this State. *Citizens' Loan Asso. v. Nugent, 11 Vr., 215; Manufacturers' Bank v. Dickirson, 12 Vr., 448.*

But in the case in hand the court is asked to go one step further. It is asked to hold that notwithstanding that the life of the bank was to terminate in August, 1885, and had no power to stipulate to do any continuing acts after that time—no power to do anything but to wind itself up and to do only what was necessary for that purpose, yet that if it did stipulate to pay quarter yearly for an indefinite time after August, 1885, the yearly sum of $700, such stipulation would be perfectly good. In other words the proposition is that it had the power to do and that it did effectually do, what it was prohibited from doing by the act of Congress which gave it being. Would not this be holding that a corporation may repudiate and disregard the limitations put upon it by its creator? If the agreement to make this quarter-yearly payment is to be construed as a stipulation intended at the time it was made to cover an indefinite period beyond August, 1885, then it seems to follow inevitably that if the bank had at the end of its first period of existence wound itself up, as it had the right to do, it would have been liable to the church for a principal sum which would have produced this annuity forever. I cannot think the court will commit themselves to any such doctrine.

The argument is the stronger, because at the time this covenant was entered into *there was no act of Congress allowing any extention whatever.* "A surety," said the Court of Errors, in *Van Valkenberg v. Paterson, 18 Vr., 146,* "must be held to have contracted with reference to the

obligations devolved upon his principal *by law.*" Must not this bank be held to have so contracted? Why is not the remark of Judge Story, in *U. S. v. Kirkpatrick, 9 Wheat., 733*, applicable? "We do not feel ourselves at liberty to give to contracts of this sort (bonds given by collectors of internal revenue) further efficacy than the laws that the parties must have had in their contemplation."

4. Again, has not the fact that the bank *must*, at the time the contract was entered into, have terminated its existence in August, 1885, and could not have extended its existence beyond that time, a very strong bearing upon the question of the presumed intent of the parties. Both sides knew the law. Both sides knew that it would be unlawful and impossible for the bank after August, 1885, to continue, year by year to make these quarterly payments. How then can they be presumed on a reasonable construction of their language to have intended to make them. Must they not rather have intended to do that which was lawful and practicable than that which was unlawful and impracticable?

There is but one case that I have been able to find which is directly in point and that is in my favor. It is the case of the *Union Bank v. Ridgeley, 1 Harr. & Gill, page 434.* The court there say: "We cannot presume that any extension of the charter was in contemplation of the parties, but that the contract was made with a view to a law which by its own limitation was to expire on the sixth of February, 1817, and we must expound the contract by the law as it then was, and not by the continuing act of 1815 which did not enter into the contract and did not enlarge it.

The New York and Connecticut cases, referred to in the opinion below, are variance with the following cases which

I submit are founded on better reason: *Thompson v. Young, 2 Ohio, 334; Bank of Washington v. Barrington, 2 Pa., 27; Brown v. Lattimore, 17 Cal., 93.* But even those cases are no authority for the decision below. They go much further.

I cannot believe that this court will rest the decision on the ground of acquiescence. There is manifestly no reason for any estoppel, or for denying to the bank the vindication of a legal right.

FREDERIC W. STEVENS.

March Term, 1895.