No. 40.

Bonaparte

vs.

The Baltimore
Hampden & Lake
Roland R. R. Co
et al.

Order

Filed February 17th 1892.

Charles J. Bonaparte

vs.

The Baltimore, Hampden and Lake Roland Railroad Company and others

Court of Appeals
OF
Maryland.

January Term, 1892

The Appeal *in this case standing ready for hearing, was argued by Counsel for the respective parties, and the proceedings have since been considered by the Court.*

It is thereupon, this seventeenth *day of* February 1892, *by the* **Court of Appeals of Maryland**, *and by authority thereof, adjudged and ordered that the* Order of the Circuit Court for Baltimore County, in Equity, dated the 16th day of October, 1891, from which this appeal was taken, be and the same is hereby reversed, with costs, and the cause remanded that an injunction may issue as prayed

A
Md
Jr
M S
Bros

A. W. Bloxy.
Oliver Miller.
Lewis T. H. Brown
Wm Wirt Henry
John P. Briscoe

E. Remanded

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No 40

Charles J. Bonaparte

vs.

The Baltimore Hampden & Lake Roland Railroad Company et al

Judge sitting - Alle.

Opinion by Irving J.

Interrupted.

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Judge Robinson, Bryan & Fowler dissent.

Filed February 17th 1892

By chapter 284 of the acts of the General Assembly of 1872 was passed the act entitled "An act to incorporate the Baltimore, Hampden and Lake Roland Rail Road Company."
The first section of the act names certain persons as commissioners to take subscriptions to the Capital Stock of the Company, & in case of the death resignation or refusal to serve of any of the persons named as commissioners, a majority of the remaining commissioners are given authority to appoint others.
By the second section of the act the subscribers to the stock and their successors & assigns are declared incorporated into a company by the name of "Baltimore Hampden & Lake Roland Rail Road Company", with perpetual succession under that name, with power of holding, purchasing & encumbering property for the purposes of the Corporation.
The 3d section makes the capital stock of the Company to consist of shares not exceeding two thousand in number, of the value of fifty dollars per share; five dollars of which was to be paid at the time of subscription & the residue in such installments as the President & Directors should determine.
By the fourth section as soon as five hundred shares

should be said called, the commissioners to take the subscrip-
tions, are authorized by publishing notice as provided
to call a meeting for the election of seven directors, who
so being elected should elect a president from among said
directors the fifth section provides.

The sixth section gives the company the right to
power to construct a railroad with necessary tracks
and necessary sidings for the transportation of freight
or freight by horse power, & gives the company the exclusive
use of any streets or County roads over which they may
wish to lay their track between Bonanza Avenue
and Lake Roland; "provided said track or tracks are con-
structed in such manner as not to interfere with
the travel on said streets or roads."

The seventh section provides for the condemnation of right of way
estimating damages & benefits. The eighth section provides
the rate of fare, not exceeding five cents per mile, or for
a fraction of one.

The ninth section authorizes the borrowing of money to the extent
of twenty five thousand dollars; the tenth authorizes the making

of byelaws rules & regulations & the appointment & employ-
-ment of officers

The fourth section provides that said corporacy shall
"commence said railway within three years from
"the passage of this act, and complete the same in ten years."
By the twelfth & last section the act is made to go into effect
upon its passage & the right to alter amend & repeal is re-
-served to the legislature.

The appellant is a property owner residing on Roland Av-
-enue, which is opened as a public Avenue or highway, for
the width of sixty feet, part his property; and has filed his
bill for an injunction restraining the appellees from
the construction of their road which has been begun. He
charges that the taking up & obstructing of the avenue as is proposed
is without lawful authority and will be an unlawful ob-
-struction of the appellant in going to and from his premises. He
avers that what is being done is not for the purpose of using horse
for the road, but with the design of using Electricity as a motive propul-
-sion. He sets out in his bill and contends in argument, that the
act of Assembly, relied on by the appellees as an act of incorporation,

is void because it is in conflict with the provisions of Art 3 Section 48 of the Constitution, which prohibits the granting of charters to corporations where there is a general law under which they may be formed, as appellant contends that there is.

2. That it was not a certain time to confer on the corporation the powers which are claimed for it, or to create a corporation at all: & 3dly that if originally accepted in time the charter gives no right to the corporation to lay down their tracks in the highway without the consent of the Commissioners, which has not been obtained.

The appellee deny all these several propositions, and the Court below agreed with the appellee in refusing the preliminary injunction which was asked & from that refusal this appeal was taken.

The appellee have moved to dismiss the appeal because it is contended that this particular case does not fall within the provisions of section 29 of Act 5 of the Code. When the bill was filed a preliminary injunction was asked for, instead of granting the injunction at once & until the Judge set a day for hearing, & until that hearing was had & closed the judge passed a restraining order. The contention of the appellee is, that this restraining order was a preliminary injunction & therefore

of the Court passed after the hearing which was appointed, was the dissolution of the injunction already granted. When the Court passed the order setting a day for hearing & meanwhile restraining the appellee till the hearing, it is very evident that the Court was not acting finally on that application for preliminary injunction. The Court wanted opportunity to consider whether a case was made for preliminary injunction, & therefore ordered a hearing, on the application made by the bill. When that hearing was had the preliminary injunction was refused, & the order refusing the same is the subject of the appeal. We think it does fall within the Statute, and that appeal was properly taken and granted. The motion to dismiss must be overruled.

For the purpose of deciding this case we need not consider the question whether the Act of Assembly, under which the appellee claims corporate powers was constitutionally enacted. We may assume, without so deciding, that it was; for conceding that it was lawfully passed, we are of opinion that the appellee never acquired lawful corporate existence under it. If it did not acquire corporate life under that act, the injunction should have gone.

The statute appointed commissioners to take subscriptions for the stock of the road it authorized to be built upon specified conditions and within certain limitations as to time. Those commissioners were not declared to be incorporated. They were the mere agents of the State to offer the charter to subscribers willing to accept it as offered. State v. Bell 26. Conn. 179. Those who should become subscribers for stock of the corporation intended to be formed were by the second section of the act declared incorporators. The act went into effect on the day of its passage, & made a corporation possible, but the stock had to be taken as prescribed before there would be incorporators to accept the charter offered to them. Subscribers to the extent of twenty five thousand dollars per share actually paid in were necessary to justify an organization as a corporation. Before this could be an acceptance of the charter and its conditions & limitations, subscribers to the extent mentioned were necessary. They were incorporated, & not the commissioners. The latter being the States agents to make the offer, could not accept it. They need not be stockholders & might never be such; & until they should become subscribers for stock they could have no voice in the matter. Confessedly no stock subscriptions were made till Sept. 1891; which was more than nineteen years after the passage of the act tendering the charter upon the terms and limitations mentioned in it. Construing the act, as is our first duty,

and more than nine years after the time limited for completing the road.

we think it intended to offer the Capacity existence and corporate powers mentioned in the act to such stock subscribers as owned & accepted the offer on the conditions annexed. The commissioners named were charged with a specific duty. They could do nothing which the act did not authorize them to do. They owed offer nothing to subscribers but what was given them to do; & it was their duty to so discharge their functions that the conditions of the offer might, by possibility, be complied with. Certain limitations were imposed in the act. The road was to be commenced within three years, and was to be completed within ten years from the passage of the act.

The commissioners to take subscriptions must act therefore within such time that subscribers to the stock, who owned both the Corporation, owned accept the conditions annexed and cared make the effort, at least, to do what was authorized. When therefore the commissioners elected action until the limitations imposed by the act had fully attached, & the time limited for beginning & finishing the road had long passed, it would seem to be clear that the powers of the State agents were at an end; & their powers must be revived by legislative action to justify their doing any thing under the

act. They had no right to offer to subscribers any thing but the Charter with its conditions; & when the conditions became impossible of compliance on, before the States agents offered it to any body, it is clear that they were functus officio; & the act itself was no longer operative. It perished under its own limitations, & required legislative action to again vitalize it. ~~It was impossible to accept the limitations.~~ The legislature was influenced by what was supposed to be the public interest, no doubt, at the time when the act was passed. Such a mode of conveyance for passengers and freight was deemed necessary for the public good at that time, & authority was given to form a Corporation to meet the existing Exigency. As was said in the case of the State vs. Bell 26 Conn. 179, "We can not suppose it was creating a supernumerary Charter to be laid away among the State records to become convenient a necessity of future time". In the case of the State vs. Bell the charter was not forfeited. That was not a case of forfeiture. The corporation was ordered never to have come into legal existence; that the commissioners, acting as States agents, had not acted within a reasonable time, & had surrendered their authority by their delay. They had once offer

-ed the charter for subscriptions of stock, & the requisite stock was not taken. Ten years afterward, the commissioners again took subscriptions & the amount of stock, which the law had required should be taken before organization, was taken & the company proceeded to organize: but the court said the commissioners on the part of the State to take subscriptions had no longer any authority to act, & that the charter was therefore not accepted in time. It is true that this decision was made in a proceeding on the part of the State; but the grounds of the decision are such as show that like objections ought to be entertained as to the validity any body inferred by the deeds of a corporation claiming existence thereby void proceedings.

The acceptance must not only be within reasonable time but it must be of that which is offered. Morawetz on Corporations p. 22. State vs. Bell 26 Conn. 179. Hammond vs Straus 52 Md. 12. In the last cited case this court said acceptance is essential to the existence of a corporation and whether there was an acceptance was a question for a jury upon the direction of the court as to what will amount to an acceptance. The case in which this Court said that, was one at law, where the existence of the Corporation was in issue. Here the case is in Equity & the whole

matter is for the Court. The legal existence of a corporation is always open for inquiry. Hammond vs. Straus 53 Md. 12. Smith vs. Silver Valley Mining Co. et al 64 Md 85. Lyon vs. Orange R.R. Co. 32 Md. 18. Acceptance being essential, it becomes a condition precedent to corporate life. Whether that has been done within a reasonable time is a question of law for the Court on the facts before it; for decision by the Court, when acting as Equity, or for instruction to a jury when the facts are to be found by it: Loring vs. City of Boston 7 Mete. (Mass) 409; Chicago & Great Eastern R.R. Co. vs. Dane 43 Ill 240. Kell vs. Bennett 4 Jones (N.C.) 429. Hammond vs. Straus 53 Md 12.

The time for finishing the road under the Law expired in 1882, and no effort to get subscriptions appears to have been made up to that time; or if there was such effort, nothing was accomplished until Sept 1891, when subscriptions were made & organization was effected. This was nearly ten years after the expiration of the ten years limited for completing the road. Was this an acceptance of the Charter as offered? It is admitted that acceptance was necessary, but the appellee claims this was all the acceptance which was required. The terms of the offer could not then be accepted or complied with. They were impossible. Being impossible of accomplishment or of execution, Counsel for the appellant most pertinently and

formally

suggests how much an acceptance differs from one made ~~during~~ before any limitation had attached, within indubitably a small time, but with express repetition of the time limit? If that had been done, with the bypassed Branch rail road case already cited staring at them, it would not have been contended that it could have been a valid acceptance. If not, why should it be a valid one, when parties wait till it is unnecessary to make the Exception in relation to the time limit, because that has by the delay been rendered an impossible condition? We can see no escape from the conclusion that this is no difference, & that counsel's ingenious can only be exercised. But the appellees counsel contend that this objection & no objection to the valid existence of this corporation can be made at this time, & in this way; and that it could only be made by the State on scire facias, or by quo warranto. It is unquestionably the law that a forfeiture for non user or misuser, or for non compliance with any of the conditions of the Charter, after the corporation has once been legally created & invested with franchises, can only be availed of and declared at the suit of the State. The case of Canal Company vs. Railroad Company 4 G. & J. 1 is undoubted authority for this statement of the law, & we do not question it; but we do not think that case, nor any that has followed it, apply to the case we are in.

This case is not one where forfeiture is asked to be declared. It is a question of legal birth. If the corporation had been legally born its life could only be forfeited, and it be death declared at the instance of the State; but whether it ever had a legal life, or in other words ever was born, seems to us, upon both reason & authority, open to inquiry & contest at the instance of any one differing from its unauthorized acts. If within a reasonable time after the passage of the Act, for example, if before the time limit had attached in either of its aspects, the commissioners had taken enough subscriptions to enable the Company to organize, & it had organized in accordance of the Charter, & thereafter in the construction of the road had succeeded, while it was impossible to comply with the requirements of the act respecting the completion of the road, then we do not think any one could complain but the State, & it could waive the conditions and limitations annexed to the charter. Had such a state of facts existed the Canal case 4 G. & J. 1, ~~& the other case~~ and the case of Hodges et al. vs Balto. Passenger Railway Co. et al. 58 Md. 620 & the other cases of like character cited by appellees would have applied, & this appellant could not have sustained in his application for injunction became of such failure, & for the reason that the corporation was only thereby in existence de facto made; & the State

only cond complain & ask a forfeiture. This was so in the Canal case. It had been fully invested with franchises, & made a corporation by the express language of the act of Assembly. In that case & the others cited as there are no questions of legal Existence in the State. In Hammond vs. Stearns 53 Md. 1, already cited, the corporators were named, & ordered a corporation; but it was held to be a legislative inquiry whether the corporators had accepted the terms of a certain Charter; & that inquiry was made in a case where the State was not party to the proceeding. A corporation as plaintiff asserting rights must establish its corporate Existence to maintain its suit. That is the first step, if its existence be denied shut it upon issue. If it has committed a wrong & pretends because of corporate authority to do what is complained of, it must establish that authority. It will not do to say that because it claims to be a de facto corporation it must be assumed to be a legal corporation like the State claims the enjoyment of its rights. The common rights of men to protection in their rights forbids such assumption. A corporation can not gain right by recognition of such simply by claiming it & such holdings dissolve as much Boyce vs. Trustees of the M.E. Church 46 Md 372. Agnew vs. Bank of Gettysburg 2 H & G. 493. In the last cited case Judge Archer said "Upon authority it is clear

that the plaintiff to maintain his case, must have by law
he has been effectually created a corporation". Manchin Fire Insu-
and Manassas Railroad Co.
-rance Co. v. Hart 31 Md 57; Lyons vs. Orem & Shipandrick
and Smith vs.
32 Md 18; The Silver Valley Mining Co. et al case 64 Md 85. establish the same rule, viz
that whenever any act is essentially necessary to be done before a
corporation can be regarded as in esse, that must be established or
the corporation can not be held to be a legal entity. Fire Department of New York
vs. Kirk 10 Peaslee 266.

The act of 1872 chapter 284 did not create a corporation eo instante.
It names as corporators future subscribers. It does use the term "hereby
created", but that means that when there are subscribers such
as the act calls for, they are hereby created a corporation. It
provides for the formation of a corporation; but before there could be
We have already said that
one in esse there must be the requisite subscribers to the stock. Such
subscribers were not only necessary but they must accept the charter
as offered - this became a cardinal precedent - that they must be legal
subscribers capable of accepting, & must accept within a reasonable
time. We have seen that, according to our construction of the
statute, the powers of the commissioners, the State's agents, expired when
they ceased no longer upon the charter as framed by the legislature.

and that this act in taking subscriptions was void; & if so, there were no legal subscribers. But if that were not so, there subscribers did not accept within a reasonable time. It is not necessary for us to establish by any decision what is any given case is reasonable time; but we may safely say, that when nothing is done towards an organization and acceptance by subscribers within the full lapse of time within which they were to conduct the road contemplated by the legislature, that such acceptance was not within reasonable time. The offer was not accepted, & it could not be performed. It was impossible to do the thing which was required. We cannot say a corporation has been brought into legal existence, which does not even apparent existence like the thing it was to do can not be done; or that if it was intended as an acceptance it was within reasonable time. The offer as made was not accepted. If it accepted at all, it accepted without limitation whatever as within, as fully as if it had said in so many that condition. To allow the commissioners the right to take subscriptions for stock & then to recognize such subscribers as competent to organize after such a lapse of time, when they could not execute the terms of the contract would be violating the principles, spirit and terms of the act of

Assembly. It would be allowing the commissioners to do what the legislature did not authorize them to do. It would be according to them the power to change the offer, which the legislature never designed. It would be allowing practically a fraud to be perpetrated on the State, the appellant, & all in communi casu; as this court said would be the case against the corporation under the circumstances alleged in the bill in the case of Campbell and Voss vs. Poultney et al. 6 G. & J. 94, if permitted, & where the court said a bill for injunction on the behalf of a stockholder was a proper remedy.

It was certainly not the intention of the legislature to allow the commissioners appointed under this statute to perpetuate their existence indefinitely by filling vacancies from time as mentioned in the act, so as to enable them at any distant period, after the lapse of time prescribed by the legislature for doing the work, until such time as they or their successors thought advisable, to bring by their acts a corporation into existence, at will, which act of theirs no body could gainsay but the State. If the State did not intend by this act to give such wonderful powers, then the attempted exercise of such powers was without warrant of law, and accomplished nothing - was void, & any one interested may contest it.

If that organization under that act can not be questioned in this way at the instance of this appellant, then if the taking of said sidewalks & organization had been delayed a hundred years and then that way done, which has now been done, no body, no matter how much injured by its doings, could complain & the court in this County; and if the State did not indemnify unassembled & injured loss might be wrought without redress. Although other agencies for making the public convenience might, in the meantime, have been devised & adopted, & sanctioned, if the position of the appellee be sound, a hundred years hence it would be possible for the stock to be taken, the charter to be accepted, & the work might proceed to the infinite damage of those who had a right to rely on the acts of assembly as read. We can not give our assent to any proposition involving such consequences. Even in the shape of ninety years such changes may occur in the progress of a great city. People lose a right to assume that this project are abandoned. They lose a right to suppose the authority to bind the road no longer exists, and to improve, bind tract accordingly. They had a right to look to only authorizations in the act of assembly. For

illustration suppose after the lapse of fifty or a hundred years and the improvement of properties as suggested, commissioners had taken the title aud claims & the tribunal claiming corporate powers had organized, & proceeded to exercise the power of Eminent Domain given them in the seventh section of the act, and to condemn the right of way through such improved property. Can it be possible that upon such state of facts the owners would not be allowed on application for injunction to question the rightful existence of such corporation? The mind instinctively shrinks from giving a negative answer. If, upon such state of facts, the existence of the corporation could be questioned, and the owner could get relief, as in our opinion there can be no doubt, it must be competent in this case & any similar case to inquire into the question whether a corporation has ever had legal existence. We have already cited numerous authorities in support of this view showing, as we think this is the clearly accepted law in this state; and as we understand it, the law in other states also.

After careful examination of the cases to which we have been cited and many more, we have been able to find (where the law is, as in Maryland), a case, which really sustains the position of the appellee. Reliance has been placed on the case of County of Macon vs. Shores 97 U.S. 272 and we have examined it with great care & can not see that it touches the question which is engaging us. That was a suit by a holder of certain County bonds, against the County for overdue interest coupons. The County Court of Macon County had, in pursuance of legislative authority, ordered the county's subscription to the Missouri & Mississippi R.R.; and the county had issued the bonds, and this was a suit by a bona fide holder of some of those bonds for interest due. The county in defence did raise the question, amongst others, that the said road, to which the subscription was made, had, at the time of the subscription, no corporate name, not having been organized within one year as required by law. The Court only held that the plaintiff being a bona fide holder of the bonds without actual notice of alleged invalidity, the question could be raised as to the regularity of issuing the bonds by the county, which could not affect his rights: and that the

Company being a de facto corporation when the subscription was made, it was not competent to question the regularity of its existence in that collateral way, in a case where the question at issue in fact was whether the town of Macon was responsible to plaintiff for interest on bonds it had issued although issued in aid of the rail road. But the Court went further & said that advantage could only be taken of forfeiture by non user or misuser by quo warranto, and that individuals could not avail themselves of it in collateral suits until it was judicially declared. Being a Missouri case the Court said that the decisions of that State on the subject were con-trolling, & cited Kayser vs. Trustees of ~~Bre~~ men 16 Mo. 88, & Smith et al vs. County of Clark 54 Mo 58. In the statement of the law applicable to the case of County of Macon vs Shores as laid down by the Supreme Court we entirely agree. It is in entire har-mony with the law as we understand ~~it~~ to be in such case. The question being ~~collaterally~~ collaterally raised was not cogni-zable in a case where the gist of the suit was the liability of a county to a bona fide holder of bonds it had issued although issued in aid of such rail road. Besides the Rail road Company had been made a corporation by the act of Assembly & non user or misuser in such case could only

be availed of at the suit of the State. Resorting to the Missouri decisions which the Supreme Court refers to as embodying its decision we find they have no application to the case as we have it presented to us. In Kayser vs Trustees of Brennan (16 Mo. 88), it was an application for an injunction to restrain the trustees of the town from collecting certain taxes. The Court held that the County Court of St Louis county, upon a state of facts which gave it jurisdiction, had incorporated the town, & that the fact being a corporation created by legal authority, proceedings had to be instituted by the State to avoid it for fraud or other justifiable reason; & that the corporate authority thus acquired could not be assailed by a private individual. We have already in this opinion asserted the same doctrine. The case of Smith, Ld. vs County of Clarke 54 Missouri 58, presents substantially the same question as was presented in the Macon case 99 U.S. & is precisely the same way. The question was as to the liability of Clarke County as endorser by the County to the Alexandria & Bloomfield R.R. Co for subscriptions to its stock, to a bona fide holder. On a rehearing of that case, after decision, the point was made

that the charter of the rail road company had ceased before the company was organized. The Court only said that this question could not be inquired into in a collateral proceeding: that the company did exist as a matter of fact in the exercise of all its chartered franchises, whether lawfully or otherwise such was made by the county authorities. The county had issued the bonds and bona fide holders owned them & of course they could not be denied payment for the reason attempted to be set up. None of these cases apply in any appreciable to this case. The attack here is directly made against the subscription itself, & that too against one which was not made one of the signing parties of those cases and the case, but only provision was made by which one could come into existence, & which, in our opinion, never did legally acquire life. The order refusing the injunction must be reversed & the cause must be remanded that injunction may issue as prayed.

Reversed & remanded.

(Decided 17th February 1892)

& No. 40

Charles J. Bonaparte

vs

Baltimore, Hampden & C Rail Road Co and others -

All the Judges

Dissenting opinion by Bryan J -

To be reported -

Judges Robinson and Fowler concur in this opinion

Filed February 17th 1892

Opinion

I maintain that the Appellee is validly invested with Corporate power. And I shall briefly state the reasons for my opinion.

The Statute of 1872 Chapter 284 is entitled "An Act to incorporate the Baltimore, Hampden and Lake Roland Railroad Company." In September 1871 the first subscriptions to the stock of the Corporation were made; it was then organized, and is now regularly conducting its business under its claim of Chartered right. The question affecting its Corporate existence arises under the Seventh Section of the Act of Assembly which is in these words: "And be it enacted, That said Company shall commence said

railway within three years from the passage of this Act and complete the same in ten years." The Appellant contends that inasmuch as the Railway was not commenced within three years, and not completed within ten, the Act lost all its efficacy; that it was not competent for the Subscribers to the stock to organize and to exercise the franchises offered by the Act; but that they were entirely lost by reason of the long delay in making use of them. We cannot correctly estimate the force of this objection without an accurate view of the rights conferred by the Act of Assembly, and the mutual relations of the State and the Subscribers to the stock. The Act of incorporation is an offer on the part of the State to give cer-

form Privileges to those persons named in the Act as Incorporators; When this Offer is accepted, the grant of Privileges from the State is complete, and full Corporate Power is Conferred. All the authorities without Exception Consider the State and the Incorporators as occupying the same position as Private persons Contracting, or Proposing to Contract with Each other. It is on this Conceded Principle that their respective rights and duties are Ascertained and determined. Another important Consequence also follows, and that is, that third persons are not interested in this Contract, and are not authorized to interfere between the parties to it. Their relation has been likened to the case of Landlord and tenant, where there is a Clause of

forfeiture for non payment of rent. For however long a period the rent may be in arrear, no one can take advantage of the clause of forfeiture but the landlord, and he only by entry for condition broken. No reference is now made to those cases in which by the terms of the lease the estate becomes ipso facto void when the rent is not paid by the appointed day. They are like the provisions in some acts of incorporation which declare that on failure to do certain acts "the corporate existence and powers shall cease". In such cases it has been sometimes held that there is no cause of forfeiture to be enforced, and the franchises are lost without any act or proceeding on the part of the State; as in the analogous

Case of Landlord and Tenant the Lease absolutely determines without Entry. In Canal Company vs. Rail Road Company, 4 Gill and Johnson 124, the Case before the Court is compared to a grant of Land. The Court say; "And it is like the grant of an estate in Land, defeasible on the non-performance of a Condition subsequent strictly speaking, as if an estate be granted expressly upon Condition to be void on the happening of a certain event. In such Case it is perfectly clear that the estate is not defeated by the mere happening of the event, but that the law permits it to continue beyond the time when such contingency happens unless the grantor or his heirs, take advantage of the breach of Condition by Entry, &c. which cannot be done

by a Stranger. The proceeding, by the Government (the grantor,) for the breach of a condition subsequent, contained in a charter of incorporation, is by scire facias, or quo warranto; by an individual grantor (or his heirs) of land, by entry." There can be no valid distinction between the different kinds of forfeitures which the State has power to enforce. It may enforce all or any; and it may waive all or any; and no private individual is authorized to interfere either with enforcement or waiver. No distinction has been suggested in any text book, or in any decided case between forfeitures of rights before the organization of a corporation, and those which occur afterwards. Certainly the power of the State is the same

in each case; and the general principle must apply to each case that a right subject to forfeiture continues to exist until the forfeiture is enforced by the party who has a right to enforce it. In the County of Macon vs Shores 97 United States 272 one of the defences to an action by a corporation was that it had no corporate power or existence, that it did not organize, or accept the Act of incorporation within one year as required by law, and that it did not commence the transaction of business within the time prescribed by law for that purpose. The Court said: "The objection that the corporation was not organized within the time limited by the charter is unavailing. It is in effect a plea of nul tiel corporation. In Hayser vs Trustees of Bremen (16 Mo. 88) the Supreme

Court of the State said: "It cannot be shown in defence to a suit of a Corporation that the Charter was obtained by fraud; neither can it be shown that the Charter has been forfeited by misuser or non-user. Advantage can only be taken of such forfeiture by Process on behalf of the State instituted directly against the Corporation for the purpose of avoiding its Charter, and individuals cannot avail themselves of it in collateral suits, until it is judicially declared."
I quote this Passage to show that the Supreme Court of the United States considered that there was no difference between a forfeiture committed before a Corporation is organized, and one which occurs afterwards. In State v. Bell, 16 Connecticut 179. an information at the suit of the State, the franchises granted

by an Act of Incorporation were declared to have been forfeited and lost because of unreasonable delay on the part of the Corporators in accepting the Charter. But it was not suggested in the argument or decision of the case that there was any difference between forfeiture of this kind and any other, so far as its effects were concerned, or the mode of proceeding to take advantage of it. It was not suggested that it was in the power of any one but the State to implead the Corporators for such defaults. And as it has never been questioned that the State can at its own will and pleasure waive these forfeitures, it must follow that a private individual cannot enforce them; because if he could do it the State's sole and exclusive prerogative of waiver would be defeated. The pro-

ceeding on the part of the Appellant would virtually annul the Charter, and consequently the right of the State to continue it in force by which would be taken away.

I cannot see how the completion of the railway within ten years after the passage of the Act of incorporation can be regarded as a condition precedent to the existence of the Corporation; as one of those indispensable preliminaries which must be performed before the Corporation can have an existence. It was impossible that the railway could be constructed before the Corporation was organized; its construction was the principal result to be accomplished by the Corporation after it should be invested with its franchises. So to me as this Corporation was organized after the effi-

=ration of the ten years, it had become an impossibility to complete the road within the prescribed time. But the State has as much right to waive a condition which it has become impossible to perform, as one which, being possible, the Corporation refuses or neglects to perform. In what respect is the State's power limited on this subject? By what authority has the limitation been declared? On what principle of reason can a distinction be maintained between the power to waive the possible, and the power to waive the impossible. Finally, in what treatise, or in what judicial decision, has the distinction been intimated? In Hodges Case, 5 Maryland 613 it appeared that a Railway Company had been authorized by a City

Ordinance to lay railroad tracks in certain streets in Baltimore. The ordinance enacted that the work was to be commenced within six months from its approval, and to be completed within two; and that "otherwise the rights and privileges herein granted shall be null and void." It was attempted by private persons on many grounds to enjoin the Railway Co. & City from laying its tracks; and among others, for the reason that the work had not been commenced within the appointed time. This Court did not trouble itself with any attempted distinctions between conditions which had become impossible from lapse of time, and other conditions; but decided that the condition was intended for the benefit of the City, and that the City

might repair it at pleasure, and it de-
nied the right of interference by third per-
sons. I will quote a passage from the
Court's opinion: "This is a provision, known
intended for the benefit of the city, and one
which its authorities may waive at pleasure.
No principle is better settled than that a cause
of forfeiture cannot be taken advantage of or
enforced against a corporation collaterally or
incidentally, or in any other mode than by
a direct proceeding for that purpose against
the corporation." Now on the mere point of
waiver, it is impossible to draw a distinction
between this case and the one at bar. If
the corporation has forfeited its right to
become incorporated, it must be that the
State has the power to waive it, and it is

a question exclusively between the State and the Corporation. The Appellant in this case has no more right to take advantage of it than the Complainants possessed in Hodges' Case.

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