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117 Md. 237, 83 A. 151

Court of Appeals of Maryland.
BLAKISTONE et al.
v.
STATE et al.
Jan. 11, 1912.

Appeal from Circuit Court of Baltimore City; Chas. W. Henisler, Judge.

Consolidated actions by the Union Trust Company against the Belvedere Hotel of Baltimore, and by Lawrence Perin, a stockholder, in which George Blakistone and another were appointed receivers, and in which the State and the Mayor and City Council of Baltimore filed a petition for the payment of taxes. From an order fixing the liability of the receivers, they appeal. Reversed, and petition dismissed.

West Headnotes

Equity 150 ⚿339
150k339 Most Cited Cases
The court, in a proceeding for the recovery of delinquency tax penalties, where case is heard on petition and answer, must consider the allegations of the answer as true.

Judgment 228 ⚿720
228k720 Most Cited Cases
In a suit to foreclose a mortgage, an auditor having filed an account in which taxes, without penalties, were apportioned between receivers and purchasers of the property, and the city and state having been parties to the action, held, that they were bound by an order ratifying the account, and could not thereafter recover delinquency tax penalties.

Receivers 323 ⚿153
323k153 Most Cited Cases
Where land or other property is under the control of a court of equity in receivership proceedings, the payment of taxes must be secured through the authority of the court.

Receivers 323 ⚿153
323k153 Most Cited Cases
Delinquency tax penalties held not recoverable against receivers in receivership proceedings.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, and STOCKBRIDGE, JJ.

J. Southgate Lemmon and J. Wallace Bryan, for appellants. Allan C. Girdwood and S. S. Field, for appellees.

PEARCE, J.
The Belvedere Hotel of Baltimore, owned and operated by the Belvedere Building Company, a corporation, was, on February 10, 1906, decreed by the circuit court of Baltimore city to be sold to satisfy a first mortgage thereon, held by the Union Trust Company, trustee; and by the same decree George Blakistone and Edgar G. Miller were appointed receivers to take charge of the property until sold. A second bill was filed by the same plaintiff, as trustee under a second mortgage, on February 14, 1906, on this hotel, its furniture, and equipment, and a decree was passed on the same day for the sale of the furniture and equipment. These two cases were consolidated, and on March 10, 1906, Lawrence Perin, a stockholder of the defendant corporation, filed a bill in the same court, under Code Pub. Gen. Laws 1888, art. 23, § 264, and section 264a, as added by Laws 1896, c. 349 (being the insolvent law of Maryland), alleging the insolvency of the corporation, and that it owed about $24,000 for overdue state and city taxes, which it was unable to pay, praying that it be adjudged insolvent, and that it be dissolved and its assets be distributed to those entitled. On March 21, 1906, these two consolidated cases were consolidated with the last-mentioned case of Lawrence Perin against the same defendant, and the same receivers were

appointed in the three consolidated cases with all their previous powers and all such additional powers as could be conferred on receivers of a corporation under the insolvent law, but without prejudice to the rights of the Union Trust Company under the two cases first consolidated.

The hotel was subsequently sold July 2, 1907, and this sale was ratified August 20, 1907, and possession delivered to the purchasers September 1, 1907. This sale was not made by the receivers; the decree, above mentioned, authorizing them to sell subject to the mortgage of the Union Trust Company, having been reversed in Union Trust Company v. Belvedere Building Co., 105 Md. 507, 66 Atl. 450, and the sale was made under another proceeding for foreclosure of that mortgage. The receivers' possession of the property therefore began March 21, 1906, and terminated September 1, 1907. The taxes for 1906 were paid by the receivers under an order of court, and on January 1, 1907, the state and city taxes for 1907 became due and payable.

On December 20, 1910, the state of Maryland and the city of Baltimore filed a petition in these consolidated cases, alleging that the taxes for 1907 had not been entirely paid; that on December 16, 1910, $22,499.23 was paid on account thereof, the total being ***152** $23,176.90, leaving still due and unpaid $677.57, which balance represented penalties and other charges made against said receivers on account of their failure to pay said taxes within the time prescribed by law; and that said receivers refused to pay the same, on the ground that said charges could not be lawfully made against them as receivers, and the petitioners prayed an order directing the receivers to pay said balance. An order nisi was passed on this petition, and the receivers filed their answer January 7, 1911, alleging that at no time between January 1, 1907, and August 20, 1907 (the date of ratification of said sale), had they in their possession, as receivers, sufficient funds of the defendant corporation to pay taxes for 1907 levied upon the property, and they were never ordered or directed to pay the same, and no application for payment was ever made until December 20, 1910; that some time subsequent to August 1, 1907, they offered to pay the taxes levied for 1907, with accrued interest thereon, but the city collector demanded the further sum of $677.57, alleged to be for penalties for nonpayment of said taxes on or before May 1 and July 1, 1907, respectively, and, being advised that said penalties were not legally chargeable, they refused to pay them, or the bills of which they were part, and that the said taxes for 1907 were not paid until December 16, 1910, on which day, by an agreement with the city collector, they paid said taxes in full, with interest, reserving, however, the right to *the petitioners* to submit the liability of the receivers for these penalties to the court for its determination, further alleging the sale of the property and assets of the defendant corporation by the Union Trust Company, above mentioned, and its ratification August 20, 1907, and further alleging that on December 24, 1907, the auditor filed in said court "the receiver's third account, prepared as of July 1, 1907, showing a net balance in their hands of $8,169.45," credited therein to the Union Trust Company to be applied to the 1907 taxes on the hotel property, the receivers being chargeable with the taxes from January 1, 1907, to July 1, 1907, the date of the sale of the hotel under foreclosure proceedings; "that on the same day the auditor filed an account in said foreclosure proceedings, crediting the Union Trust Company with $9,104.14" as the proportion of state and city taxes for 1907 allowed the purchaser to July 2, 1907, and charging it with $8,169.45, to be credited on account of 1907 state and city taxes, contra, accrued to July 2, 1907, "both of which accounts having been ratified and distribution made thereunder, by reason of which distribution the receivers have not in their hands any funds belonging to the defendant wherewith to pay said penalties." The matter was heard on this petition

and answer under an agreement of counsel, filed December 17, 1910, that the liability of the receivers for said sum of $677.57 should be submitted to the circuit court of Baltimore city for its determination, and on August 1, 1911, a decree was passed, requiring said receivers to pay the same, and this appeal is from that order.

The appellants contend that this case is governed by the Casualty Company's Case, 82 Md. 535, 34 Atl. 778, in which this court held that no interest should be allowed on the claim for taxes, or on any of the other claims filed against the insolvent company. The question was disposed of in a very few words; the court saying: "It is not easy, if, indeed, it be possible, to place upon a consistent basis many of the decisions in which interest has been allowed or disallowed. Perhaps some of the numerous claims might, in strictness, be entitled to an allowance of interest under ordinary circumstances; but it does not appear that the amounts asserted to be due have been wrongfully withheld by the Casualty Company. The failure to pay, as far as we can see, has been the result of the company's insolvency. A penalty or damages in the way of interest ought not, therefore, to be added to the sums actually due."

It does not appear from the opinion in that case whether there was any claim made for a statutory penalty, as well as for interest on the taxes; but there is a natural inference from the fact that no mention is made of *such a penalty*, as well as from the whole tenor of the language we have quoted, that there was no claim made for any statutory penalty. We think it quite clear that the court, in using that language, had not in mind any such penalty.

In the paragraph of the opinion immediately preceding that part we have quoted, the court said: "We think no *interest* should be allowed on the claim for taxes, or on any other claims filed against the insolvent company. Whilst not precisely analogous, the case of Hutchinson v. Liverpool, London, & Globe Ins. Co., 153 Mass. 143 [26 N. E. 439, 10 L. R. A. 558], supports this conclusion."

In the Casualty Company's Case, all the claims are grouped together and considered upon the same basis as to the allowance of interest, indicating that the court had in mind only the allowance of interest, as a matter within the discretion of the tribunal deciding the whole matter in issue, a question which Chief Judge Buchanan said, in Newson v. Douglass, 7 Har. & J. 433, 16 Am. Dec. 317, "has been found to be a subject not susceptible of the application of any fixed and general rule of law; each case depending upon its own peculiar circumstances."

We have carefully examined the case in 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558, supra, and cannot perceive that it is, in any respect, analogous to the case now before us. That was an action brought by a policy holder against the defendant corporation, upon a ***153** policy insuring the plaintiff against loss by fire. The headnote of that case relating to interest is as follows: "Interest is not allowable on a partial loss under an insurance policy, where the loss is not liquidated, until demand has been made for its payment, although arbitration and limitation clauses, and proofs of loss have been waived, and a builder's certificate of the amount of loss presented." The court, in its opinion said: "We think the ruling in relation to *interest* was correct. It is not easy to place upon a consistent basis many of the decisions in which interest has been allowed or disallowed. But in this case it does not appear that the amount to which the plaintiff became entitled under the policy was payable at a fixed time after the loss occurred, or upon a certain event which had to take place, or that the amount has been wrongfully withheld by the defendant, or that the sum due was liquidated, or that until the bringing of the action a demand had been made for its payment." From the above

citation, it is quite clear that the Supreme Judicial Court of Massachusetts was not dealing with interest in any other light than as discretionary with the court, and that that case was cited in the Casualty Company's Case only with reference to such interest, and not to a statutory penalty.

Again, in the closing sentence of the passage we have quoted from the opinion in the Casualty Company's Case, we think it is equally clear that the court merely intended to characterize the claim for interest as *in the nature* of a penalty for mere detention of money due, and that it had no reference to a statutory penalty for delinquency in payment after a date fixed for the incurring of such penalty upon taxes already overdue. Consequently we do not think that case governs the present. It does appear, moreover, from the opinion in that case (82 Md. 565, 34 Atl. 778) that the taxes were overdue when the company's assets passed into the hands of the receivers, a circumstance which materially discriminates that case from the present, and which affords a further reason for not accepting that as satisfactory authority for this contention of the appellants. The appellants also contend, earnestly and ably contend, that our statutes imposing penalties upon delinquent taxpayers were never designed by the lawmakers to apply to receivers of insolvent corporations in process of dissolution, and for this they cite Central Trust Co. v. New York City & Northern R. Co., 110 N. Y. 256, 18 N. E. 94, 1 L. R. A. 260, where, in the course of the opinion, the court said: “An insolvent corporation in the hands of and operated by a receiver was not in the minds of the framers of the statute when providing for the enforcement of taxes from what may be termed a going corporation.”

In that case, that was no penalty sought to be enforced, so far as the report discloses. The railroad corporation was insolvent, and had been operated for several years by a receiver, appointed in proceedings for foreclosure of certain mortgages. He had in his possession funds derived from the operation of the railroad sufficient to pay certain corporation taxes due, and the Attorney General filed a petition in the receivership case for an order directing their payment by the receiver. The receiver contended that the corporation alone was answerable for these taxes, or at least that only such funds as should remain in his hands after payment of the mortgages could be applied to those taxes. His argument was that, as proceedings to enforce payment of those taxes were provided by the act which imposed them, all other remedies were excluded, and the Supreme Court so held; but the Court of Appeals reversed this decision, and ordered payment by the receiver, holding that, while those taxes, in a strict technical sense, were not liens on the property in the receiver's hands when first levied, yet, under the circumstances of insolvency, etc., the state had a permanent right to collect them from earnings of the property in the receiver's hands. It will thus be seen that the language cited by the appellant from the opinion in that case was used, not to restrict, but to enlarge and extend, the application of the ordinary methods for enforcing the payment of taxes due by insolvent corporations in the hands of receivers. We do not think, however, that it is necessary to express any opinion upon this contention of the appellants.

[1] [2] The appellants further contend that, as the collector did not at any time during the receivership make application to the court to order payment of these taxes, and took no steps to secure payment thereof, or of the penalty now claimed, until long after the receivership terminated and the disbursement, under the order of the court, of all money in their hands, the state and city must be taken to have acquiesced in the situation, and cannot now claim these delinquency penalties. We think this is sound, and that upon that principle this case should be determined.

When land or other property is under the control

of a court of equity, it has long been settled that the ordinary statutory remedies for the enforcement of taxes levied upon, or payable in respect of, such property are suspended, and payment must be secured through the power and authority of the equity court. In such cases, while there is no statute declaring what is the duty of the collector, our decisions do plainly declare that there is a duty imposed upon him in the premises; and in County Com'rs v. Clarke, 36 Md. 219, that duty is stated as follows: "His plain and obvious duty was to apply to the court for the payment of the taxes due, and, as they had full power, the presumption is ***154** that they would have directed their payment through their agents, the trustees, in a manner that would have occasioned no unnecessary delay, while at the same time the rights of all parties interested would have been properly protected."

If the collector in the case before us, or the state and city, had, in 1907, upon the refusal of the receivers to pay these penalties, *then* filed the petition which they waited to file until December 17, 1910, not only would this question of penalties have been then decided, but the state and city would have received whatever amount was determined to be due three years earlier than they did receive the taxes and interest which have been paid. The receivers recognized the duty imposed upon them by law when they offered to pay the amount *they were advised by counsel to be* due; but the state and city failed to discharge, through their agent, the collector, the duty which the court said, in 36 Md. 219, supra, rested upon him to apply to the court for the payment of the penalties claimed, as well as the principal and interest offered, and they should abide by the consequences of their own conduct.

[3] [4] But there is another ground which supports this conclusion. This case being heard on petition and answer, the allegations of fact contained in the answer must be taken as admitted, and among these allegations are the following: That on December 24, 1907, two accounts were filed by the auditor, one in the receivership case, and one in the foreclosure proceedings by the Union Trust Company, in which two accounts these taxes for 1907, *without including these penalties now claimed*, were apportioned between the receivers and the purchasers of the property under the foreclosure proceedings, as of the day of sale, July 2, 1907, both of which accounts have been ratified in due course, without exception being filed thereto by either the state or the city; and that complete distribution has been made thereunder, without objection on the part of any party whatever.

In Marine Bank v. Heller, 94 Md. 213, 50 Atl. 521, under an auditor's account distributing certain funds derived from various sources, and in the hands of receivers of an insolvent corporation, a certain sum was allowed for taxes upon the real estate of said corporation, which account was ratified, without exception being taken to the allowance of these taxes from that fund. Subsequently the real estate of the corporation was sold, and an account was stated, distributing the proceeds thereof among the preferred stockholders of the company; that stock being a statutory lien on the real estate and certain other property. The general creditors excepted to this account, alleging that the taxes had been erroneously allowed in the first account, and should now be deducted from the proceeds of the sale of the real estate and be distributed among the general creditors. But it was held that the order ratifying the first account, from which no appeal was taken, constituted an adjudication of all the questions that might have been raised thereunder; and that the general creditors could not claim that the taxes were not properly payable from the fund distributed in that account.

The court cited in support of that conclusion Beloit v. Morgan, 7 Wall. 619, 19 L. Ed. 205,

State v. Brown, 64 Md. 199, 1 Atl. 54, 6 Atl. 172, Trayhern v. Colburn, 66 Md. 278, 7 Atl. 459, Albert v. Hamilton, 76 Md. 309, 25 Atl. 341, Barrick v. Horner, 78 Md. 258, 27 Atl. 1111, 44 Am. St. Rep. 283, and Rogers, Brown & Co. v. Citizens' Nat. Bank, 93 Md. 613, 49 Atl. 843, and said: "It was certainly within the power of the appellees to file objections to the allowance of these taxes in account A upon the grounds now urged. If they had done so, and the decision had been in their favor, it would have protected them, unless reversed on appeal. If adverse to them, they could have brought it here for review. They have had their day in court." We think that principle is conclusive in this case, and requires the reversal of the order appealed from.

Order reversed, and petition dismissed; the appellees to pay the costs above and below.

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