

LEXSEE

**THE STATE OF MARYLAND vs. GEORGE S. BROWN, JAMES SLOAN, JR.,
LLOYD LOWNDES, JR., Trustees, and others.**

[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF MARYLAND

73 Md. 484; 21 A. 374; 1891 Md. LEXIS 24

February 20, 1891, Decided

PRIOR HISTORY: [***1] APPEAL from the Circuit Court for Washington County, in Equity.

On the 31st of December, 1889, George S. Brown, Charles M. Mathews, John S. Gittings, Frederick M. Colston, and Bradley S. Johnson, trustees of the holders of the Preferred Construction Bonds of the Chesapeake & Ohio Canal Company, issued under the Act of 1844, ch. 281, filed their bill in the Court below against the canal company, alleging the utter insolvency of the company; its long-continued failure to pay the coupons on their bonds; the maturity and non-payment of the principal of the bonds; its entire loss of credit, and consequent inability to borrow money for the most urgent necessities of repair, and to preserve its existence; the entire destruction and total wreck of the canal by the great storm of May, 1889, and the complete suspension of business along its whole line; and asking for the appointment of receivers to take possession of and operate the canal, and to pay over the net revenues to the plaintiffs, until their bonds and interest were fully paid. Subsequently, on the 16th of January, 1890, the plaintiffs filed an amended bill, reiterating the averments of their original bill, but alleging in addition, [***2] the execution and delivery of the mortgage by the canal company, of the 15th of May, 1878, in pursuance of chapter 58 of the Acts of 1878, to George S. Brown, James Sloan, Jr., and Lloyd Lowndes, Jr., trustees of the holders of the Repair Bonds authorized to be issued by that Act, and making said Brown, Sloan and Lowndes as trustees, defendants. On the 29th of January Messrs. Brown, Sloan, and Lowndes, as trustees, filed their answer to the amended bill, insisting upon the validity of said mortgage to them of the 15th of May, 1878, and its absolute priority as a paramount lien upon both the

corpus of the canal and its tolls and revenues, distinctly denying the right of the plaintiffs to the appointment of receivers, and showing that upon a bill filed by said Brown, Sloan, and Lowndes, in the Supreme Court of the District of Columbia, against the canal company and the plaintiffs, as trustees for the bondholders of 1844, that Court, on the 28th of January, 1890, had appointed receivers. On the 31st of January, 1890, the Chesapeake and Ohio Canal Company filed its answer to the bill and amended bill, denying that the plaintiffs were entitled to the appointment of receivers, and stating [***3] its reasons for such denial; and in its answer it urged and insisted upon a sale of the entire work and all the property of the company. On the same day, Attorney-General White, in obedience to instructions from the General Assembly, applied to the Court for an order admitting the State of Maryland as a party defendant. An order was passed as prayed, and on the same day he filed an answer on behalf of the State, resisting the appointment of receivers, and thereby prayed and insisted upon a sale of the canal and all the property of the company. On the same day, upon petition, Bernard Carter, executor of Charles H. Carter, and trustee under his will, was also made a party defendant, as one of the bondholders. In the meantime, viz., on the 15th of January, 1890, the said George S. Brown, James Sloan, Jr., and Lloyd Lowndes, Jr., trustees under the mortgage of the 15th of May, 1878, from the canal company to them, as trustees of the holders of the Repair Bonds authorized to be issued and actually issued under the Act of 1878, ch. 58, filed their bill against the canal company and the trustees of the bondholders of 1844, claiming that their mortgage was the first and paramount lien upon [***4] the canal and its revenues, and alleging that a default had occurred such as, by the terms of the Act of

1878, ch. 58, and of their mortgage thereunder, entitled them to a receiver and foreclosure, and accordingly praying for the appointment of receivers, and for a sale of the mortgaged property. The mortgage of the 15th of May, 1878, was filed as an exhibit. An application in writing to these trustees, signed by the holders of \$ 330,500 of the \$ 500,000 of Repair Bonds issued under the Act of 1878, ch. 58, and secured by the mortgage, was also filed as an exhibit to the bill, requesting the trustees to take proceedings for the foreclosure of the mortgage.

Answers were filed to this bill by the trustees of the bondholders of 1844, denying the validity and priority of the mortgage of the 15th of May, 1878, but uniting in the prayer for the appointment of receivers. The canal company answered, denying that a proper case was made for receivers, but submitting to the Court the prayer for a sale. Upon petition by the Attorney-General, the State of Maryland was admitted as a defendant in this case also, and filed its answer, resisting the appointment of receivers, and submitting to [***5] the Court the question as to a sale. And in like manner, upon petition, John A. Hambleton & Co. and Henry G. Davis & Co., minority holders of the Repair Bonds of 1878, were made parties defendants, and answered the bill, resisting the appointment of receivers, but praying for a sale of the canal. Bernard Carter, executor and trustee, and Anna M. Hughes and Thomas Hughes, trustees, were also made parties defendants. These two proceedings, seeking to some extent the same relief, were argued together, and by order of Court passed 3rd of March, 1890, were directed to be consolidated. The Court (ALVEY, C. J.) on the 22nd of February, 1890, filed an opinion, which will be found set out in full in the Appendix to this volume. In accordance with the views expressed in this opinion Chief Judge ALVEY on the 3rd of March, 1890, passed a decree appointing Robert Bridges, Richard D. Johnson and Joseph D. Baker receivers, and they were directed to "proceed at the earliest moment at which the same can be properly and advantageously done, to make full and thorough examination, and collect all such information as they may be able to collect, as to the condition of the canal, the needful repairs thereof, [***6] and the probable cost of repairing it, and the feasibility of operating it when repaired, and shall report the same, with the results of their own observation and their own judgment and opinion in the premises, with the reasons therefor, to this Court, for its information, and such further action as it may deem necessary." The receivers

duly qualified and proceeded to make out and submit to the Court a schedule of the property of the canal company, and also personally to inspect the canal, with a view to ascertain its physical condition, and the practicability of repairing and restoring it in such a way as to make it again a living and going concern. They submitted their first report on the 15th of May, 1890, accompanied by a schedule of the company's property and assets. On the 9th of June, 1890, they filed their second report, accompanying it with a copy of a decree of the Supreme Court of the District of Columbia, dated 1st of May, 1890, giving instructions to the receivers appointed by that Court, with a copy of the second report of those receivers. They filed with it also a statement of their own estimate of the annual cost of operating the canal; also the report to them of their [***7] engineers, Messrs. T. L. Patterson and T. P. Kinsley, showing the physical condition of the canal, and their estimated cost of repairing and restoring it. After the coming in of these reports and accompanying documents, nothing was done in the cause until the 9th of July, 1890, when the canal company filed a petition, alleging that in April, 1890, the Board of Public Works had directed the President, Mr. Gambrell, to make a thorough inspection of the entire line of the canal, and report results; that such examination had been made, and a detailed statement of the result submitted to the stockholders at their annual meeting in June, in connection with the annual report of the president and directors. Copies of these reports were filed with the petition. Referring to these reports, the petition alleged: "These reports fully sustain and confirm the report of the receivers heretofore appointed by this Honorable Court, and filed on the 9th of June, 1890, that it is impracticable to repair and operate the canal with any expectation that it can earn in the future revenue enough to keep itself a living and going concern, and demonstrate that the interests of the creditors of your petitioner [***8] demand that further proceedings shall be had in the above entitled cases, looking to a disposition under the most favorable conditions of the canal and all its works, under the final decree of this Court. Your petitioner therefore, realizing that its continued existence as a revenue earning concern is no longer possible, respectfully prays your Honors, in the interests of its creditors, to set these cases down for final hearing at an early day."

Upon this petition the case was set down for hearing on the 12th of August, 1890. On that day the solicitors for the trustees of the bondholders of 1844, filed the first, third and fourth reports of the District of Columbia

receivers, the second report having been previously filed, together with exhibits of various kinds. On the same day, by leave of the Court, the Attorney-General was permitted to amend the answers originally filed by the State to the two bills in the consolidated cases, on the 31st of January, 1890, by inserting in each of such answers an additional paragraph, as follows: "The State now, by its Attorney-General, prays the Court to pass a decree in this case for the sale of the canal and all the franchises and property [***9] of the canal company, as described in the three mortgages from the Chesapeake and Ohio Canal Company to the State of Maryland, the first bearing date on the 23rd day of April, 1835; the second dated the 15th day of May, 1839, and the third dated the 8th day of January, 1846." Copies of these mortgages were filed. At the hearing a petition was filed on behalf of the trustees of the bondholders under the Act of 1844, alleging that the bonds under said Act were generally held by capitalists, who were willing to furnish the necessary money to repair the canal, upon receivers' certificates, and operate it so as to repay the money borrowed for repairs, pay operating expenses, and yield a net revenue for the bondholders, and praying the Court to appoint as receivers persons nominated or selected by the trustees. The causes were argued, and on the 1st of September, 1890, Chief Judge ALVEY filed a second opinion, which will also be found in the Appendix, wherein he concluded to pass a decree for the sale of the entire work. But on the 18th of September, 1890, and before such decree was actually passed, the trustees of the bondholders under the Act of 1844, ch. 281, filed a petition, the character [***10] of which is sufficiently stated in the third opinion of Chief Judge ALVEY, to be found, with the previous opinions, in the Appendix. The trustees for the bondholders under the Act of 1878, ch. 58, answered the petition, admitting the statements of the petitioners and consenting to the passage of an order as prayed. The State, by its Attorney-General, answered the petition, denying the right of the trustees to redeem the bonds of 1878, and to be subrogated to the rights of the bondholders of 1878, under their mortgage; denying the right of the petitioners to take possession of the canal, and denying also the ability of the trustees to restore the canal as a water-way, and operate the same, so as to derive tolls and revenues sufficient to make the payments referred to in the petition. The matter was heard upon the petition and answers thereto, and on the 2nd of October, 1890, Chief Judge ALVEY filed his third opinion, to be found in the Appendix, accompanying it with the following decree:

These cases, heretofore consolidated, coming on to be heard, on final hearing were argued by counsel for the respective parties, and being submitted for decree, the bills, answers, and other proceedings [***11] were read and considered; and it appearing to the Court from the report of the receivers, filed on the 9th day of June, 1890, and from the other proceedings in the causes, that it is impracticable and inexpedient to direct that the said canal shall be attempted to be repaired and put in condition for transportation by the agency of receivers of this Court, and by the creation of an additional lien upon the corpus of the work for that purpose; and it further appearing to the Court that the said Chesapeake and Ohio Canal Company is largely in default, and is insolvent and wholly unable to earn any tolls and revenues, and to pay any part of the principal or interest due to its bonded creditors, and that a sale of the said Chesapeake and Ohio Canal and all its works, property and franchises is required for the payment of the Repair Bonds issued under the Act of 1878, chapter 58, and to the State of Maryland under the several mortgages held by said State, as shown in these proceedings; and that upon the pleadings and proof, the mortgagees and bondholders are entitled to a decree for such sale, subject to section 5 of the following decree:

Section 1. It is thereupon this second day [***12] of October, 1890, by the Circuit Court for Washington County, sitting as a Court of equity, in said two cases consolidated, adjudged, ordered and decreed, that all the rights, title and interest of the Chesapeake and Ohio Canal Company in and to its entire line of canal extending from the City of Cumberland, in Alleghany County, to and into the City of Georgetown, in the District of Columbia, and all and singular the lands, tenements, and estates, owned or acquired by the said Chesapeake and Ohio Canal Company, for its construction or repair, its works and appurtenances, and the site thereof, embracing the entire undertaking and every part thereof, and all tools, implements and boats, built or purchased by the said company for the use of said canal, and the water rights and franchises of the said Chesapeake and Ohio Canal Company, wheresoever the same or any part thereof may be situated or held--be sold as hereinafter prescribed.

Section 2. And it is further adjudged, ordered and decreed, that Joseph D. Baker, Robert Bridges and Richard D. Johnson, be and they are hereby appointed trustees to make said sale, and that the course and manner

of their proceedings shall be as follows:

[***13] They shall first file with the Clerk of this Court a bond to the State of Maryland, executed by themselves and sureties, to be approved by this Court, or by the Clerk thereof, in the penalty of one million of dollars, conditioned for the faithful performance of the trust reposed in them by this decree, or to be reposed in them by any future decree or order in the premises.

They shall then proceed to make the said sale, in front of the Court House, in Hagerstown, having given at least three months notice, by advertisement, inserted in such daily newspaper or newspapers published in the Cities of Baltimore, Washington, Richmond, Pittsburg and New York, as they shall think proper, of the time, place, manner and terms of sale, which shall be one-third cash, the balance in two equal installments, of one and two years respectively from the day of sale, (or all cash, as the purchaser may elect,) and the credit payments to bear interest from the day of sale, and to be secured by the note or notes of the purchaser or purchasers, indorsed to the satisfaction of the said trustees, and as soon as may be convenient after any such sale, the said trustees shall return to this Court a full [***14] and particular account of their proceedings, relative to such sale, with an affidavit annexed of the truth thereof, and of the fairness of said sale; and on obtaining the Court's ratification of the sale, and on the payment of the whole purchase money, (and not before,) the said trustees shall, by a good and sufficient deed, to be executed, acknowledged and recorded, according to law, convey to the purchaser or purchasers, his, her or their heirs, personal representatives and assigns, the property and estate to him, her or them sold, free, clear and discharged from all claim of the parties hereto, plaintiffs and defendants, and those claiming by, from or under them, or either of them. And the said trustees shall bring into this Court the money arising from said sale, and the bonds or notes that may be taken for the deferred payments, to be distributed under the direction of this Court, and as the rights of the parties may be made to appear, and then to be finally decreed, after deducting the costs of this suit, and such commission to the trustees as this Court shall think proper to allow, in consideration of the skill, attention and fidelity wherewith they shall appear to have discharged [***15] their trust.

Section 3. And it is further adjudged, ordered and decreed that out of the proceeds of the aforesaid sale, the

expenses incurred by the receivers while in charge of the property (which may remain unpaid) shall be paid, the amount whereof to be ascertained by the auditor upon the production of the proper vouchers, and the said receivers shall be allowed by the auditor such sums as this Court shall determine to be fair and just as compensation to them for their services performed under the order of this Court.

Section 4. And it is further adjudged, ordered and decreed, that before said trustees above named shall proceed to the execution of this decree, by advertising the said canal property for sale, under this decree, the parties to these proceedings, or some of them interested therein, shall procure to be passed, by the Supreme Court of the District of Columbia, sitting in equity, on the proceedings now pending therein, a concurrent or ancillary decree, whereby the receivers heretofore appointed by that Court shall be discharged, and the canal, and all the property of the canal company, situate and being within the District of Columbia, shall become subject to [***16] this decree, and the sale hereby authorized to be made.

Section 5. And it is hereby further adjudged, ordered and decreed, upon the petition of the trustees for the bondholders under the Act of 1844, ch. 281, that the foregoing decree of sale shall be stayed and suspended, upon the compliance with and performance of certain requirements, terms and conditions, by the trustees under the mortgage of the 5th of June, 1848, or the survivors or survivor of them, or their successors in office, acting for and in behalf of the holders of the bonds issued under the Act of the General Assembly of 1844, ch. 281, that is to say:

First. That said trustees shall, within sixty days from the date of this decree, take up and bring into this Court, all the bonds issued, and now outstanding, under the Act of the General Assembly of 1878, ch. 58, or such portion of them as may be taken up, and the amount due upon the residue thereof, in legal tender currency, principal, with all interest thereon up to and inclusive of the day of bringing the money into Court, to be paid over to said bondholders under this decree, and shall also bring into this Court, within the time aforesaid, the further sum [***17] of ten thousand dollars with which, or such portion thereof as may be required, to pay the expenses incurred by the receivers while in charge of the canal under previous order, and such compensation to said receivers as may be fixed by this Court.

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And upon the bringing in of said money due on the bonds, as aforesaid, the said trustees so bringing in the money shall forthwith give ten days notice, in one or more daily newspapers, published in the City of Baltimore, of the fact that the money is on deposit in Court to be paid over to the parties entitled thereto, upon presentation and surrender of the bonds held by them.

Second. That upon bringing in the bonds, or the bonds and money as aforesaid, within the time aforesaid, and the giving the bond hereinafter prescribed, and the procuring of a concurrent or ancillary decree from the Supreme Court of the District of Columbia, sitting in equity, on the proceedings now pending in said Court, or procuring the said proceedings to be dismissed, so that this decree may be operative over the entire canal, and all the works and property and franchises of the Canal Company, the said trustees under the mortgage of the 5th of June, 1848, [***18] acting for the holders of the bonds issued under the Act of 1844, ch. 281, shall be subrogated to and stand in the place of the trustees for the holders of the said bonds issued under the Act of 1878, ch. 58, with all the rights and remedies belonging or pertaining to said trustees, under the said Act and the mortgage executed in pursuance of the said last mentioned Act; and to all the rights and remedies of the holders of the bonds issued under the said Act, to the same full extent as if the said bonds were duly assigned to the said trustees, acting under the mortgage of the 5th of June, 1848; and thereupon the receivers appointed by this Court shall surrender to the said trustees, acting under the mortgage of the 5th of June, 1848, possession of the said canal, and all the property of the canal company of which they are now in charge; and the said trustees shall become entitled to the full possession and control of the entire canal from the City of Cumberland to its terminus in Georgetown, in the District of Columbia, together with all the rights and property of the canal company, with power and authority to use and exercise the franchises of said company, in its proper corporate [***19] name, to the same extent and to like purposes, and none other, that said company could or might do, acting by authority of and under the control of a board of directors as provided by its charter.

Third. That the said trustees, acting under the said mortgage of the 5th of June, 1848, shall by the first day of May next, 1891, at their own cost and expense, to be reimbursed to them as hereinafter directed, have put in good repair and condition the entire canal from one

terminus thereof to the other, so that it be fit for and capable of safe transportation thereon, and that upon so restoring said canal to a state of good repair and condition, the said trustees shall proceed to operate the same as a public water-way, with all the rights, and subject to all the conditions and limitations, granted and prescribed by the charter of the said company; and the said trustees shall keep said canal in good repair and condition, and continue to operate the same, save and except when such operation may be suspended by the action of causes against the effect of which prudence and due care in management will not provide.

And the tolls and revenues received or derived from the use and operation [***20] of said canal as a public waterway, and from the property and rights of the canal company, shall be applied by the said trustees as follows:

First, to pay all current and ordinary expenses incurred in operating the said canal, and for keeping the same in good working repair;

Second, to pay and reimburse the said trustees the amount of money brought in by them with which to pay the expenses incurred by the receivers, and their compensation, with interest thereon;

Third, to pay and reimburse to said trustees the amount expended by them in restoring the said canal to good working order from its present waste and broken condition, with interest thereon;

Fourth, to pay and reimburse said trustees any amount that they may be required to pay, as constituting a superior lien on the tolls and revenues of said canal company to that of the bonds issued under said Act of 1844, ch. 281, for labor and supplies furnished to the said canal company while said canal was operated and controlled by said company, with interest on the amount so paid;

Fifth, to pay the interest that has accrued and may accrue due on the bonds issued under the Act of 1878, ch. 58, and then the principal [***21] of said bonds,

And Sixth, to pay the interest that has accrued, and that may accrue due on the bonds issued under the Act of 1844, ch. 281, and then the principal of said bonds. And upon the full payment of these last mentioned bonds, the possession and control of said trustees shall cease and terminate.

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Fourth. That the said trustees shall open an office in Hagerstown, to be known as the canal office, where all books, maps and papers relating to said canal and the affairs thereof, shall be kept and preserved, and which said office shall be open and accessible to all persons having dealings and transactions with the said trustees, their agents and managers; and the said trustees shall keep, or cause to be kept, regular and proper books of account, showing fully and accurately all receipts and expenditures and disbursements, and shall, at the end of each boating or transportation season, make full and accurate reports to the Court, under oath, of all receipts and expenditures, and of the real condition of the canal, and the amount of tonnage thereon, during the preceding year.

And said office and all books and accounts therein shall be open and accessible to the auditor [***22] of this Court, whenever he may be required to examine and state accounts of and concerning the affairs of said trustees, and their accountability under this decree.

Fifth. That the said trustees shall, within sixty days from the date of this decree, make and execute a bond to the State of Maryland, in the penal sum of six hundred thousand dollars, (\$ 600,000,) conditioned that the said trustees will well and faithfully do and perform the several things required of them to be done, and comply with all the terms and conditions in this fifth section of this decree prescribed; which bond shall be with good and sufficient sureties, to be approved by this Court, and shall be filed among the proceedings in this cause, as security for the due performance of the duties and obligations assumed by the said trustees under this decree.

And if the said trustees shall fail or neglect to take up and bring in the bonds, or the money due thereon, and also the money to pay receivers' expenses and compensation, within the time and as required by the first clause of the fifth section of this decree, and to give the bond as hereby required, the several clauses and conditions contained in this [***23] fifth section of this decree shall have no effect or operation whatever, and shall in no way operate to suspend or delay the execution of the decree for sale.

Sixth. That if at the end of four years from the first day of May next, there shall not have been tolls and revenues derived from the said canal, and the property and rights appurtenant thereto, (over and above the

amount necessary to pay current operative expenses, and to keep the canal in repair,) to liquidate and discharge the amount of the cost of repairing and restoring the canal to a working condition from its present broken condition, and the amount of money required to pay expenses and compensation to the receivers, and to pay any amount that may be determined to be a preferred lien on such tolls and revenues for labor and supplies furnished to the canal company, such failure in the tolls and revenues shall be regarded as evidence conclusive, (unless the time be extended by the Court for good and sufficient cause shown) that the said canal cannot be operated so as to produce revenue with which to pay the bonded indebtedness of the said canal company; and further, whenever it shall clearly appear that the said canal [***24] cannot be operated by the said trustees so as to produce revenue with which to pay the bonded indebtedness of said company, the right and power is hereby reserved to this Court to order and direct the execution of the foregoing decree of sale.

Section 6. That in the event of sale of the said canal, the costs of these proceedings, to be taxed by the clerk, shall be paid out of the proceeds of sale; but if the said canal shall pass into the possession of the trustees under the mortgage of the 5th of June, 1848, by virtue of the fifth section of the foregoing decree, the costs shall then be paid by the complainants in this cause.

From the foregoing decree the present appeal was taken.

DISPOSITION: Decree affirmed.

COUNSEL: William Pinkney Whyte, Attorney-General, for the appellant.

Bradley T. Johnson, John K. Cowen, and S. Teackle Wallis, for the appellees.

JUDGES: The cause was argued before MILLER, ROBINSON, IRVING, BRYAN, FOWLER, MCSHERRY, and BRISCOE, J.

OPINION BY: ROBINSON

OPINION

[*503] [**374] ROBINSON, J., delivered the opinion of the Court.

Before proceeding to consider the several questions, which have been argued with so much ability in this case, it is necessary to refer briefly [***25] to certain facts connected with the history of the Chesapeake and Ohio Canal Company, out of which this litigation has arisen, and to refer also to the successive steps which have been taken in the progress of the suit, from the filing of the original bill down to the final decree, from which this appeal was taken.

This company was chartered as far back as 1824, for the purpose of uniting the waters of the Ohio River with the waters of the Chesapeake Bay. It does not appear that any effort was made to build the canal west of Cumberland; but its construction from that point to Georgetown, in the District of Columbia, was deemed of great public importance, especially as affording an outlet for the large and valuable coal fields of Alleghany County. Its estimated cost was about eight millions of dollars, and of this amount the State of Maryland, by loans, and subscriptions to the capital stock, furnished the large sum of seven millions. The work was prosecuted from time to time till the latter part of 1841, when, having exhausted all its available resources, further operations were suspended. The State was unwilling, and was, in fact, it may be said, unable at that time, to furnish any [***26] further pecuniary aid; and the company itself being without credit, all efforts to raise money for the completion of the canal were unsuccessful. Its completion to Cumberland, however, was a matter of vital importance, for upon shipment of coal from that point, the tolls and revenues of the canal mainly depended; so it was in this emergency that the Act of [*504] 1844 was passed, by which the company was authorized to issue bonds to the amount of one million and seven hundred thousand dollars, and in order that these bonds might be negotiated on the best possible terms, the State waived its own liens upon the tolls and revenues of the canal in favor of said bonds, and with the consent of the company pledged the entire net tolls and revenues, for the payment of the interest, and to provide a sinking fund for the redemption of the bonds at their maturity. And the Act further authorized the company to execute "any deed or mortgage necessary to give the fullest effect to the provisions of the Act." It was in pursuance of this Act that the mortgage of 1848 was executed; and with the money arising from the sale of these bonds the canal was finally finished to Cumberland. Now it can [***27] hardly be necessary to say that in this, as in [**375] many other like public

improvements, the hopes and expectations of its promoters have never been realized. With the exception of a brief interval, the revenues of the canal, during the forty years of its operation, have barely been sufficient to meet its current expenses, and the State to-day has never received a dollar, either on its loans, or subscriptions to the capital stock. The bondholders under the Act of 1844 have shared pretty much the same fate, and the company is now indebted to them, interest and principal, exceeding four millions of dollars. While thus burdened with debt, the freshet of 1877 occurred, in consequence of which the canal was badly damaged, and, in order to repair it, the company was obliged to apply to the Legislature for authority to issue bonds to the amount of \$ 500,000, and to mortgage the entire property and revenues of the canal, to secure the payment of the interest and principal of these bonds; and these bonds, known as "*the Repair Bonds*," are the first and paramount lien upon the revenues at least of the canal. And then [*505] again, in the spring of 1889, another and more disastrous [***28] freshet happened, and the company, without money and without credit,—in fact, hopelessly insolvent,—has never been able to repair and restore the canal as a water-way, in consequence of which from that time to the present all business along its entire line has been suspended.

Now, in this state of things, the bill of the trustees of the bondholders of 1844 was filed. The bill alleges the insolvency of the company, its long and continued default in the payment of interest and principal of the bonds now overdue,—its inability to repair the canal, and the entire suspension of business along its whole line; and prays for the appointment of receivers to take possession of, and to repair and operate the canal, and to pay over its net revenues to the complainants, until the interest and principal of their bonds were fully paid.

A few days afterwards a bill was also filed by the trustees of the holders of the Repair bonds of 1878, claiming that their mortgage was the first lien upon the property and revenues of the canal, and alleging that a default had occurred on the part of the company, such as, by the terms of the Act and of their mortgage executed thereunder, entitled them to the [***29] appointment of a receiver and foreclosure, and praying for the appointment of receivers and for a sale of the canal. On the petitions of the Attorney-General and Bernard Carter, trustee and executor, the State and Mr. Carter were made parties defendants. To these bills answers were filed by the State, and by the company, each denying that a case had been

made out for the appointment of receivers, and both submitting the question as to a sale of the canal to the determination of the Court.

Upon the case as thus presented, the learned Judge below decided that the bondholders, under the Act of 1844 were entitled to the appointment of receivers to [*506] take possession of the canal; and, secondly, that, if there could be any question as to their right in this behalf, there could be none as to the right of the holders of the Repair bonds, of 1878, which were the first liens upon the revenues of the canal. Receivers were thereupon appointed, and directed to make a full and thorough examination as to the condition of the canal, to estimate the probable cost of repairing and putting it in good condition, and whether it was feasible to operate it when repaired, and to report the same, [***30] together with the reasons on which their judgment was founded, for such further action in the premises as the Court might deem proper. After an examination in pursuance of this decree, the receivers were of opinion that it was inexpedient to undertake to *repair the canal by issuing receivers' certificates*, and further, that, if repaired and put in proper condition, there was no reasonable prospect of its being able to earn revenue applicable to the payment of the bonds of 1844.

After the report of the receivers was put on record, an amended answer, in the nature of a cross-bill was filed by the State, praying for a sale of the entire property of the canal, under the mortgages held by the State. Upon the case as thus presented, the Court, after full hearing, decided that it was inexpedient to undertake to repair the canal through the agency of receivers, and that the complainants were entitled to a decree for the sale of the property and franchises of the canal, free and clear of all liens and incumbrances. The Court further decided that the lien of the bondholders of 1844 extended *only to the revenues and tolls*, and that in the event of a sale, they stood in the relation of [***31] simple unsecured creditors, merely as to the proceeds of sale.

Before a decree was signed in conformity with the opinion of the Court, a petition was filed by the trustees under the mortgage of 1848, claiming the right to [*507] redeem the Repair bonds of 1878, and the mortgage executed to secure the payment of the same, and which constituted the first lien on the revenues of the canal; and upon the payment of interest and principal to be subrogated to all the rights and remedies of the holders of

said bonds. In answer to this petition, the trustees of the bondholders of 1878 aver their willingness to accept the interest and principal of the bonds held by them, and to transfer the same to the petitioners, so that they may be subrogated to all the rights to which the holders of the bonds are entitled under the Act of 1878.

Upon the filing of this petition a final decree was passed, by which the Court decreed that the entire property and franchises of the canal should be sold at public auction, but at the same time directed a suspension of the sale upon the following, among other, conditions set forth in the decree:

1st. That the trustees of the bondholders under the Act of 1844, [***32] shall within sixty days bring into Court the Repair bonds of 1878, or pay into Court an amount equal to the interest and principal of said bonds.

2nd. Upon a compliance with this condition, the trustees shall be subrogated to all the rights and remedies of the holders of the Repair bonds of 1878, and shall be entitled to the possession of the canal, with full power to operate the same.

3rd. That the trustees shall by the first of May, [**376] 1891, at their own expense, to be reimbursed out of the net revenues of the company, put the canal in good repair and condition.

And after prescribing the manner in which the revenues shall be applied, the decree further provides, that if, at the end of four years, the revenues shall be insufficient to pay the operating expenses, and the cost of restoring it as a water-way, and such liens as may be adjudged preferred liens for labor, then such failure of [*508] tolls and revenues shall be conclusive evidence that the canal cannot be operated, so as to produce revenue with which to pay its funded indebtedness. It is from this decree that this appeal has been taken. Now, it will be observed, that, although the Court had decided that [***33] the lien of the bondholders of 1844 was upon the tolls and revenues, and not upon the *corpus* of the canal, yet this question is by *the decree reserved for final determination*, when the proceeds of sale shall have been brought into Court for distribution. So the real question after all, is whether the Court was right in suspending the sale, and in decreeing that the trustees of the bondholders of 1844 were, upon compliance by them with the terms and conditions of the decree, entitled to the possession of the canal, with authority to repair and

operate it, with the view of ascertaining whether under their management, it could be made to produce any revenue applicable to the payment of its bonded indebtedness. And this depends, first, upon the rights of the trustees under the Act of 1844, and the mortgage of 1848 executed in pursuance thereof; and secondly, upon their rights as purchasers of the Repair bonds of 1878. We have already referred to the circumstances under which the Act of 1844 was passed--to the fact that the canal was finished with the money arising from the sale of the bonds issued under it, and to the further fact, that the value of the large amount of stock held [***34] by the State, and the security of its loans by way of mortgage, absolutely depended upon the canal's being finished to Cumberland. And to induce persons to invest their money in these bonds, the State by this Act waived its own liens, and declared that these bonds should be *preferred liens* on the tolls and revenues of the canal. It was to carry out the provisions of this Act that the mortgage of 1848 was executed, by which the company mortgaged its entire revenues to secure the payment of [*509] the interest, and to provide a sinking fund to pay the principal upon the maturity of the bonds, with power and authority on the part of the grantees, to *enter and take possession of the canal and receive its revenues "upon the default of the company to fulfil its engagements in the premises."*

The right to enter is however subject to the following condition: "That so long as the Canal Company shall comply with its agreement by paying all the interest upon said bonds as the same falls due, and by providing an adequate sinking fund for the redemption of said bonds, it shall retain the management of the canal and its works, and collect and receive the revenues and tolls, but if they [***35] fail to comply with these conditions from any cause except a deficiency of revenue arising from a failure of business, without fault on the part of said company, then the grantees may demand, and shall thereupon receive possession, and shall appropriate all said tolls and revenues in the manner herein before provided."

But for this covenant for possession on the part of the mortgagor, the right of the trustees to enter and take possession of the canal upon "the default of the company to perform its engagements in the premises" could not be questioned. Not only is this right conferred by the terms of the mortgage, but independent altogether of an express grant, it is a right to which they would be entitled by

operation of law. So the inquiry comes to this: In what manner and to what extent is this right qualified by the covenant? The appellant contends, that it is to be construed as an agreement between the parties, that if there shall be a deficiency of revenue, *from any cause whatever, without "the fault of the company,"* using the term "fault" in the sense of *bad faith*, or *mismanagement*, the company shall still be entitled to its control and management. And if the canal [***36] has been damaged by storms and freshets, disasters which its officers [*510] could not foresee or avert, and the company is unable to repair and restore it as a water-way, in consequence of which it is not in a condition to earn revenue, its failure to earn revenue under such circumstances cannot be considered the fault of the company within the meaning of the covenant. On the other hand, it is insisted that the term "fault" as here used is to be understood in its broader sense, as meaning not only mismanagement, but also any *legal default* on the part of the company, in view of its obligations to the public to operate it as a public work. Strictly speaking, the term "fault" may in itself be susceptible of either construction. But when it is considered in the light of the circumstances under which the mortgage was executed, there cannot be, it seems to us, any difficulty as to the real meaning of the parties. Although the company was chartered as a private corporation, the canal itself was in a certain sense a public work, in the construction and operation of which the public had an immediate interest. And, while the State was willing to waive its own liens, and, with the assent [***37] of the company, to pledge its entire tolls and revenues for the payment of the bonds to be issued under the Act of 1844, yet if, from failure of business without the fault of the company, the revenues should be insufficient for this purpose, the State--the owner of the greater part of the capital stock,--was unwilling to surrender the control and management of the canal to the mortgagees or to other parties. No one supposed for a moment, that the canal, under any circumstances, would not yield revenue sufficient to pay its operating expenses and to keep it in proper repair. The Act of 1844, in fact, provided that no bonds should be issued for the completion of the canal, until one or more coal companies or individuals had guaranteed [***37] the transportation of not less than *one hundred and ninety-five thousand tons of coal a year for five years*; and the mortgage [*511] recites that this guarantee had been given in terms satisfactory to the State. The tolls from the transportation of this coal were deemed, no doubt, sufficient at least to pay the interest, and to

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provide a sinking fund, for the redemption of the bonds at maturity. But if this guarantee should fail, if [***38] from failure of business, without fault of the company, the revenues should be insufficient for this purpose, it was still to retain the control of the canal. The parties, however, were dealing with the revenues of a canal in a condition to earn revenue by the transportation of coal and other produce. It was a failure of business in the sense of a depression in or want of business, and not, as the Court below says, an *incapacity to do business by reason of the inability on the part of the company to repair it and put it in a condition to earn revenue*. And when it was agreed that the mortgagor should retain possession of the canal even though its revenues might be insufficient to enable the company "to perform its engagements in the premises," the parties meant "revenues" which the canal was able to earn as a water-way, according to the objects and purposes of its incorporation. By no fair rule of construction, can the "failure of revenue," as used in this covenant for possession, be construed as a failure arising from *an inability* on the part of the company to repair it and put it in a condition to earn revenue. A state of things exists never contemplated by the parties. The [***39] canal, in its present condition, is useless as a water-way; the company is insolvent, and without means to restore it; and under such circumstances the right of the trustees of 1848 to enter and take possession is in no manner restricted or qualified by the covenant relied on by the appellants.

But if there could be any doubt as to this right under the mortgage of 1848, no one, it seems to us, can question their right in this respect as purchasers of the Repair bonds of 1878, and which, according to the decision in [*512] *Commonwealth of Virginia vs. Ches. & Ohio Canal Co., et al.*, 32 Md. 501, constitute the first lien upon the revenues at least of the company. The mortgage to secure the payment of these bonds provides, it is true, that upon the default of the company in the payment of three successive coupons, the trustees may, at the request in writing of a majority of the holders of the bonds, institute proceedings of foreclosure and for the appointment of receivers.

And it further provides, that until such default, no proceedings of any kind, either at law or in equity, shall be instituted, it being the intent, says the mortgage, that until such default, [***40] the company shall retain the control and management of the canal. But if a default has

occurred according to the terms of the mortgage, these covenants cannot be construed as operating to deprive the mortgagees of any remedy to which they are by law entitled. By such default they have the right *to foreclose, to ask for the appointment of receivers*, and to enter and take possession of the mortgaged property. These are remedies to which the mortgagee, in the absence of covenants to the contrary, is entitled upon the default of the mortgagor. *Burnell vs. Martin*, 2 Doug. 417; *Schoole vs. Sall*, 1 Sch. & Lef. 176; *Garforth vs. Bradley*, 2 Ves., Sr. 678.

If, then, the trustees for the holders of the Repair bonds of 1878 would be entitled to enter and take possession upon the default of the company to pay the coupons, and according to the terms of the mortgage, the trustees of the bondholders of 1844, as purchasers of the Repair bonds, are by the well settled principles of subrogation or substitution entitled to the same remedy. 2 *Story's Equity Juris.*, 1023; 4 *Kent's Com.*, 162; *Denman vs. Nelson*, 31 N.J. Eq. 452. [***41]

So in any aspect in which the right of these trustees may be considered, whether under the Act of 1844 and [*513] the mortgage of 1878 executed thereunder; or as purchasers of the Repair bonds of 1878, we are of opinion that by the default of this company to pay its indebtedness according to the terms of these mortgages, they are entitled to take possession of the canal upon the terms prescribed by the decree.

But then it is said whatever may be the rights of the trustees as against the company, the State has the right, under its mortgages, to insist upon the sale of the entire property and franchises of the canal. Now upon what grounds can this right be supported? To induce the bondholders of 1844 to furnish the money necessary to complete the canal, the State not only agreed to waive its own liens upon its revenues, but agreed also that the company should pledge them by mortgage as security for the payment of these bonds. And now, when the State and the company have operated the canal till they are no longer able to operate it, and when the canal itself is no longer in a condition to earn revenue, and the company during all these forty years has been in default in the payment [***42] of its indebtedness according to the terms of the mortgage, and when the bondholders ask to be allowed to take possession of the canal, and to repair and operate it for the purpose of ascertaining whether it can be made to produce any revenue applicable to the

payment of the mortgage, the State interposes and insists that it shall be sold *clear of the liens of these bondholders which the State agreed should be preferred liens* upon its revenues, and when it is sold the State further claims as against them, the entire proceeds of sale because their liens, it is said, extend to the revenues only, and not to the property of the canal. In other words, the State insists that they shall be deprived of the only remedy open to them by which they may have the opportunity, at least, of reimbursing themselves for the money which they, at the instance of the State, furnished to finish the [*514] canal. So it is not the case even of a junior incumbrancer asking for the sale of mortgaged property, and the proceeds of sale to be applied to the payment of the several liens upon it according to their priority; but it is one in which the State, holding liens upon the revenues and property [***43] of an unfinished canal, in order to induce others to furnish the money necessary to finish it, waives its own lien upon the revenues in favor of [**378] such persons, and then insists that the canal shall be sold, whereby these liens are destroyed. We do not see on what ground, legal or equitable, such a contention as this can be supported.

But then again it is said these trustees ought not to be permitted to burden the company with any additional indebtedness by undertaking to repair the canal, because the record shows that if repaired it cannot be made to produce any net revenue. Now, what is the proof upon this point? There is, it is true, the report of the receivers appointed by the Court below; but then against this, is the report of the receivers appointed by the Supreme Court of the District of Columbia, in which they come to a different conclusion. So, after all, it is a question in regard to which fair, impartial and competent persons may honestly differ. There is, too, the report of the company, which shows for the past twelve years, at least, that the revenues have not been sufficient to pay the operating expenses. But then it does not necessarily follow that better [***44] results may not be expected from the management of others more directly interested in developing the earning capacity of the canal to its utmost extent. If it should fail, after a fair trial, to yield any revenue applicable to the payment of the bonds of 1844, the decree below directs it shall be sold at public auction. The fact that it has in the meantime been repaired and put in good order along its entire line ought, it seems, to enhance its [*515] marketable value, whether sold as a water-way, or to be used, as was argued, for the construction of a railroad. If so, and the

State, according to its contention, be entitled to the proceeds of sale, its interests could not be injuriously affected by having it repaired and restored as a water-way. But be this as it may, if the trustees are lawfully entitled to its possession, they ought to be allowed to put it in a condition to produce revenue, otherwise its possession would be without benefit to them. And while a Court of equity will not permit a mortgagee to burden the estate by the expenditure of money for unnecessary and useless repairs, it will authorize him to make such repairs as may be necessary for the preservation and [***45] beneficial occupation of the property. *Sandon vs. Hooper*, 6 *Beavan* 246; *Neesom vs. Clarkson*, 4 *Hare* 97; *Boston Iron Co. vs. King*, 2 *Cush.* 400; 2 *Jones on Mortgages*, secs. 1126-1131.

We have not deemed it necessary to consider whether, in the event of a sale, the lien of the bondholders of 1844 will attach to and follow the proceeds of sale, or whether they are limited to the tolls and revenues. The Court below was of opinion they had a lien upon the revenues only, but this question was by the decree from which this appeal was taken, reserved for final determination, when the proceeds of sale are brought into Court for distribution. This much, however, we may say, it is a question which the parties are entitled as matter of right to have decided before a sale is made. If the bondholders have no lien upon the proceeds of sale, they have practically no interest in the sale; whereas if they have a lien, it will be to their interest to see that the canal brings its fair value. For the same reasons the State is equally interested in having the rights of the respective parties determined.

As to the appeal of Mr. Carter, trustee, and executor, it [***46] is sufficient to say, if there is any difference of opinion [*516] among the bondholders whether their interests will be best subserved by these proceedings, the will of the majority must in this, as in other like cases, govern. The suit was brought by the trustees at the request of a majority of the bondholders, and so long as they *act in good faith, and for the purpose of carrying out the trust reposed in them under the mortgage, a minority bondholder has no right to interfere with them in the discharge of their duty.* *Shaw vs. Railroad Company*, 100 U.S. 605, 25 L. Ed. 757. A good deal was said about the veil which conceals the *real motives* that have prompted this litigation. Whatever they may be, we must deal with the case, as it is presented by the record, and so dealing with it, we are of the opinion that the decree below must

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be affirmed.

Decree affirmed.