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CHESAPEAKE & O. CANAL CO. v.
WESTERN MARYLAND R. CO.
Md. 1904.

Court of Appeals of Maryland.
CHESAPEAKE & O. CANAL CO.
v.
WESTERN MARYLAND R. CO.
June 8, 1904.

Appeal from Circuit Court, Washington County, in Equity; Wm. J. Witzenbacher, Judge.

Petition by the Western Maryland Railroad Company against the Chesapeake & Ohio Canal Company. From a decree in favor of the plaintiff, the defendant appeals. Affirmed.

West Headnotes

Appeal and Error 30 ↪ **840(1)**

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k840 Review of Specific Questions and Particular Decisions

30k840(1) k. In General.

Most Cited Cases

Where an order of court granted a railroad company consent to erect and maintain bridges and structures across a canal under the control of the circuit court according to plans and specifications approved by the Board of Public Works, the effect of the order being merely to relieve the railroad company from the contempt of court which would have been involved in the institution of condemnation proceedings without such permission, the trustees of the canal were not entitled, on appeal therefrom, to raise the question that the plans adopted for the

crossings would, if carried out, result in the construction of crossings hindering the operation of the canal, contrary to the contract entered into between the state and Congress at the time of the creation of the canal company.

Appeal and Error 30 ↪ **1107**

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(A) Decision in General

30k1107 k. Effect of Change in Law. **Most Cited Cases**

On appeal from an order granting a railroad company right to construct bridges over a canal under the control and jurisdiction of the circuit court, the rights of the parties must be determined according to the law as it stands at the time of the filing of the opinion of the appellate court.

Eminent Domain 148 ↪ **168(1)**

148 Eminent Domain

148III Proceedings to Take Property and Assess Compensation

148k168 Right to Institute Proceedings

148k168(1) k. In General. **Most Cited Cases**

As Acts 1904, c. 56, empowering the Western Maryland Railroad Company to construct bridges across the Chesapeake & Ohio Canal, and providing for condemnation of property of canal company, authorizes the railroad company "to condemn all such easements of crossings," it should be permitted to institute appropriate condemnation proceedings, without interference from the trustees appointed by the circuit court having control of said canal.

Evidence 157 ↪ **29**

157 Evidence

157I Judicial Notice

157k27 Laws of the State

157k29 k. Public Statutes. **Most****Cited Cases**

Act 1904, c. 56, empowering the Western Maryland Railroad Company to construct bridges across the Chesapeake & Ohio Canal, in which the state is financially interested, in pursuance of plans approved by the Board of Public Works, and authorizing a condemnation of property of the canal company, and requiring a plat of said railroad to be filed with the Secretary of State, is so far a public act that the court should take judicial notice of it.

***34** Argued before McSHERRY, C.J., and FOWLER, BOYD, PEACE, SCHMAKER, and JONES, JJ.

Hugh L. Bond, Jr., for appellant.

Wm. Kealhofer and Benjamin F. Richmond, for appellee.

SCHMUCKER, J.

This is an appeal from an order of the circuit court for Washington county, in equity, passed on the petition of the Western Maryland Railroad Company granting it permission to construct certain bridges across the Chesapeake & Ohio Canal.

The railroad company was not only duly authorized, but was required, by Act 1902, p. 197, c. 129, amending its charter, to extend its railroad facilities to the coal fields of Western Maryland. In the discharge of this obligation it proceeded to locate an extension of the line of its road from the terminus at Big Pool, in Washington county, to the city of Cumberland, in Allegany county. Its engineers found that the most available location for the proposed extension was, owing to the physical conformation of the territory to be traversed by it, along the valley of the Potomac river. The new portion of the road as thus located

crosses the line of the canal at seven places, which are specified in the proceedings in this case.

The railroad company, having determined upon the places of crossing the canal, might at once have proceeded, under the provisions of section 177 of article 23 of the Code of Public General Laws, to submit the plans of its proposed bridges, etc., to the Board of Public Works for approval, had it not been for the legal status of the canal company and its works. It is unnecessary for the determination of its present status to review the history of that somewhat famous waterway, or the litigation of which its career has been so fruitful. That has already been done in the [Canal Co. Cases in 4 Gill & J. 1; State v. Brown, 73 Md. 484, 21 Atl. 374; State v. Cowen, 83 Md. 551, 35 Atl. 161, 354, 581; and State v. Cowen, 94 Md. 487, 51 Atl. 171.](#) It is sufficient for our purposes to say, in the language of the opinion of this court in the case of [Brady v. Johnston, 75 Md. 456, 26 Atl. 53, 20 L.R.A. 737](#): "All of the property of the canal company in this state has been brought under the control and jurisdiction of the court (the circuit court for Washington county), and the trustees hold possession under its authority, and are obligated to account to it for the faithful discharge of the duties imposed upon them by the decree of the 2d of October, 1890. And, such being the case, it is well settled, both in the English and American chancery practice, that, when the proceedings are of a nature to draw to the court the control and possession of the property, the subject-matter of the litigation, whether the property be real or personal, such possession and control of the court will not be allowed to be displaced or disturbed without the consent of the court, even though it be attempted under a paramount claim of right."

The railroad company, recognizing the

court's control over the canal, filed on June 13, 1903, an ex parte petition in the pending case, in which the affairs of the canal company were being administered, setting forth in detail that, in pursuance of its legal power and duty, it had located and was about to construct the extension of its line to Cumberland, and that in so doing it found it necessary to cross the line of the canal by bridges at seven specified places, and had prepared plans and specifications for each bridge and *35 crossing, of which copies were filed as exhibits. The petition averred that all of the proposed bridges were more than 12 feet in the clear above the top of the water line of the canal, and that none of the crossings would in any wise interfere with traffic or transportation on the canal. It then prayed for the court's leave to submit the plans and specifications to the Board of Public Works for approval, as required by section 177 of article 23 of the Code of Public General Laws. The leave thus prayed for was granted by an order of court which required the railroad company, after having obtained the approval by the Board of Public Works of the plans for the proposed bridges and fixtures, to report to the court for its further order before proceeding to erect the bridges, in order that the court might fix the terms and conditions upon which the bridges, piers, and crossings might be erected. The plans and specifications for the bridges and crossings having been submitted by the railroad company for approval to the Board of Public Works, the latter, after having notified the canal trustees, and having heard them through their counsel and superintendent, selected Arthur C. Dennis, a reputable and disinterested engineer, who went upon the ground at the seven proposed crossings, and met the respective engineers of the railroad company and the canal trustees and heard their suggestions, and thereafter recommended certain changes in the

plans as originally submitted. The Board of Public Works, on the 9th of September, 1903, unanimously approved the proposed plans as revised by Mr. Dennis, the engineer of their selection.

On October 5, 1903, the railroad company filed in the circuit court a second ex parte petition, setting out the filing of their former one, the submission of the plans and specifications to the Board of Public Works, the proceedings of the board thereon, and the approval by them of the revised plans, and praying for the necessary permission to erect and maintain the piers, bridges, and crossings over the canal at the seven places mentioned, in conformity with the approved plans. To this petition the trustees of the canal company filed an answer, denying many of its allegations, and insisting that the railroad company was not entitled to the relief prayed for.

The grounds of the opposition set up in the answer of the canal trustees were mainly that the plans and specifications of the proposed crossings were inadequate to disclose the true character of the structures proposed to be erected by the railroad company, that the Board of Public Works had not given the trustees notice or a fair opportunity to be heard in respect to the crossings, and that the plans, even in the form in which they then were, showed that the proposed bridges, if erected, would obstruct, endanger, and interfere with the maintenance and operation of the works of the canal company, in violation of its rights as determined and declared by the decision of this court in the case of [Canal Company v. The B. & O. Railroad Co.](#), 4 Gill & J. 1. The circuit court, on October 20, 1903, after hearing counsel for both the railroad company and the canal trustees, but without taking testimony or inquiring into the facts set up by the petition and denied by the answer, passed the order from which

the present appeal was taken. That order granted the railroad company the consent and leave of the court to erect and maintain for railroad purposes, over the canal company's line and property, the piers, bridges, structures, and crossings in conformity with the plans and specifications approved by the Board of Public Works, subject, however, to the payment into court by the railroad company of such damages (when duly ascertained) as the canal company or its property may sustain by reason of the construction and maintenance of the proposed crossings.

The rights of the parties to this appeal must be determined according to the law as it stands at the time of filing this opinion. [Montague v. State](#), 54 Md. 481; [Hess v. Muir](#), 65 Md. 605, 5 Atl. 540, 6 Atl. 673; [Meloy v. Scott](#), 83 Md. 375, 35 Atl. 20. We must, therefore, in arriving at our conclusion, take into consideration the act of 1904 (chapter 56), which relates to the rights now under review, even though it was enacted since the date of the decree appealed from. This act is in so far a public one, in authorizing a condemnation of property of the canal company in which the state is financially interested as mortgagee or otherwise, and in referring to the action of the Board of Public Works, and requiring a plat of the railroad to be filed with the Secretary of State, that it is our duty to take judicial notice of it. [Brady v. State](#), 26 Md. 290; [Day v. Day](#), 22 Md. 530; [Towson v. The Bank](#), 6 H. & J. 47, 14 Am. Dec. 254. The act recites that “whereas in the said location of its [appellee's] said line of railroad, it has been necessary for said railroad company to cross said canal and river going into and returning from the state of West Virginia, and said company has located seven places in Allegany county where it is necessary to cross said canal with its railroad; and in pursuance of section 177 of article 23 of the Code of Public

General Laws of Maryland, said railroad company did make application to the Board of Public Works of Maryland for its approval of the plans of the bridges and other fixtures designed by said railroad company for effecting said crossings at said places, which plans, after amendment by the Board of Public Works, were approved on the 9th day of September, 1903, by it.” The act, then, after approving the route selected for appellee's railroad, further provides: “That the said Western Maryland Railroad Company be and it is hereby expressly authorized to cross, recross and bridge with its railroad the Chesapeake and Ohio *36 Canal and the Potomac river at the places where its said railroad line has been now located and laid down upon the ground, or at such other places as shall be found to be necessary and proper for the said railroad company, and to condemn all such easements of crossings, if necessary, and that the aforesaid action of the Board of Public Works of Maryland, in approving the said plans and fixtures of said railroad company for crossing the canal, be and the same is hereby ratified and approved.” The appellee being now equipped with legislative authority to construct the line of road in question and to cross the canal at designated places, and also with the approval of its plans for the crossings by the Board of Public Works, ratified by the Legislature, it should be permitted to institute appropriate proceedings to condemn the crossings over the canal property which is under the jurisdiction and control of the court.

The trustees contended in this court that it was the duty of the circuit court, before acting upon the petition of June 13, 1903, to inquire into the facts and ascertain whether the proposed crossings, if made in conformity to the approved plans, would obstruct or interfere with the operation of the canal. They also contended that, under the compact entered into between the states

of Maryland and Virginia and Congress at the time of the creation of the canal company, as interpreted by this court in 4 Gill & J. 1, it is beyond the power of the state of Maryland, either directly or by any of its agencies, to authorize the construction of any bridges or crossings over the canal which will impair or injuriously affect the system of inland water transportation which was thereby put in operation. The trustees admitted the right of railroads and highways to cross the canal property under conditions which would not hinder or obstruct the full and proper operation of the canal, but they insisted that the plans adopted for the crossings in the present case would in fact, if carried out, produce such hindrance and obstruction. The questions thus attempted to be raised by the trustees do not come up for decision upon this appeal. The order appealed from was merely modal in its nature, and did not affect any substantial rights. Its only operation was to relieve the appellee from the contempt of court which would have been involved in the institution by it, without judicial leave, of proceedings to condemn the right to cross, and for that purpose construct bridges over, the canal property which was in custodia legis. Such orders are common, and the leave of court which they afford is ordinarily granted as a matter of course, unless it be clear that the application for it rests upon no meritorious ground. Phelps' Jur.Eq. § 89; Gaither v. Stockbridge, 67 Md. 226, 9 Atl. 632, 10 Atl. 309; Hills v. Parker, 111 Mass. 508, 15 Am.Rep. 63. The railroad company is now entitled to proceed to condemn the right to cross the canal at the designated places. If, in the condemnation proceedings, it be made to appear that the proposed bridges, if located and constructed upon the plans recognized by the condemnation, will constitute such an obstruction and hindrance to the operation of the canal as to conflict with the

compact between the states already referred to, and the condemnation be ratified by the circuit court, a question of jurisdiction will be presented which can be brought to this court by an appeal. Hopkins v. P.W. & B.R.R. Co., 94 Md. 257, 51 Atl. 404; Geo. Creek C. & I. Co. v. New Cent. Coal Co., 40 Md. 425; B. & O.R.R. Co. v. Waltemyer, 47 Md. 331.

The circuit court, in our opinion, committed no error in passing the order appealed from, which will be affirmed. Order affirmed, with costs.

Md. 1904.

Chesapeake & O. Canal Co. v. Western Maryland R. Co.
99 Md. 570, 58 A. 34

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